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SYMPOSIUM: MANAGING HAWAI'I'S PUBLIC TRUST DOCTRINE

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Water Rights and Responsibilities in the Twenty-first Century: a Foreword to the Proceedings of the 2001 Symposium on Managing Hawai'i's Public Trust Doctrine

Denise E. Antolini*

I. INTRODUCTION

Modern water allocation decisions inevitably involve difficult choices among competing consumptive and natural uses that are highly valued by diverse but equally passionate sectors of the community.[1] Particularly in an island state like Hawai'i, with its limited sources of fresh water, fragile environment, and unique economic challenges, debates over re-allocation of precious water resources and the merits of stream restoration are likely to become only more intense as human needs for economic uses of water increase and as ecological and cultural needs for instream use are more fully recognized.[2]

As indicated by the re-invigoration of the fundamental ancient water rights principle called the "public trust doctrine" in the landmark August 2000 decision of the Hawai'i Supreme Court in the *Waiāhole* case,[3] for users and

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[1] *See* Robbie Dingeman, *Waiāhole Water Allocation Rejected: Ruling Called Windward Victory*, HONOLULU ADVERTISER, Aug. 23, 2000, at A1 (noting the *Waiāhole* water issues raised "complex and emotional questions about choosing between competing uses in an island community").

[2] *See In re* Water Use Permit Applications, Petitions for Interim Instream Flow Standard Amendments, and Petitions for Water Reservations for the *Waiāhole* Ditch Combined Contested Case Hearing, 94 Hawai'i 97, 9 P.3d 409 (2000) [hereinafter "*Waiāhole*"] (noting that experts project a water shortage on O'ahu in 2020, the court emphasized the "urgent need for planning and preparation . . . before more serious complications develop," and the need to insure "judicious planning and regulation, rather than crisis management").

[3] See *infra* notes 69-127 and accompanying text for a summary of the Hawai'i Supreme Court's specific discussion of the public trust doctrine in the *Waiāhole* case.

decision-makers alike, a dramatic paradigm shift in how water allocation decisions are made is required in order to find the wisest long-term course through this legal and policy thicket into the twenty-first century. The public trust doctrine directs us to engage ourselves in a new constructive public-private dialogue about the collective responsibilities that inhere in any water right, instead of engaging in intractable legal warfare over conflicting water "rights."

To facilitate this vital dialogue, this issue of the *Hawai'i Law Review* features the proceedings of the 2001 Symposium on "Managing Hawai'i's Public Trust Doctrine," recently held in a "packed auditorium"[4] on the University of Hawai'i campus. Co-sponsored by eleven Hawai'i governmental agencies and public organizations,[5] the Symposium attracted scholars, policy makers, managers, landowners, and community members from across the State. Their common interest was the quest to learn more about the modern water law public trust doctrine, to understand the contours of the Hawai'i Supreme Court's adaptation of that doctrine to Hawai'i water and natural resources law in the *Waiāhole* decision, and to participate in a constructive dialogue on the real world application of the doctrine.

To provide the historical and national context for Hawai'i's version of the longstanding common law doctrine, the Symposium opened with a keynote address by the leading authority on the doctrine, Professor Joseph Sax of the University of California at Berkeley, Boalt Hall School of Law.[6] To further set the foundation for discussing the practical implications of the doctrine, Jan Stuart Stevens, who counseled the State of California on these issues for four decades, discussed the lessons learned from California public trust cases, particularly the influential *Mono Lake*[7] decision.

The Symposium's two panels—comprised of Hawai'i government managers and leaders, attorneys for private and public water users, and community members—offered a lively and thoughtful discussion of the

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[4] Diana Leone, *Waiāhole Ruling Carries Wide Implications: A UH Gathering Gauges the Landmark Decision on Windward Water*, HONOLULU STAR-BULLETIN, Oct. 15, 2001, http://starbulletin.com/2001/10/15/news/story5.html.

[5] The co-sponsors for the Symposium were: Hawai'i State Department of Heath; Hawai'i State Coastal Zone Management; Hawai'i State Office of Planning; Hawai'i State Office of Environmental Quality Control; Division of Aquatic Resources, Hawai'i State Department of Land and Natural Resources; Hawai'i County Planning Department; Department of Urban and Regional Planning, University of Hawai'i at Manoa; Natural Resources Section, Hawai'i State Bar Association; Native Hawaiian Bar Association; Hawai'i's Thousand Friends; and the Environmental Law Program, William S. Richardson School of Law, University of Hawai'i at Manoa.

[6] Professor Joseph Sax's biography is provided later in this Foreword. *See infra* Part III.

[7] Nat'l Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709 (Cal. 1983) [hereinafter "*Mono Lake*"].

decided and still-open questions surrounding the "Hawai'i water resources trust" articulated in *Waiāhole* and explored the difficult questions of how the trust should be translated into on-the-ground decisions managing Hawai'i's water resources.

This Foreword describes the genesis of this important and timely Symposium, previews the presentations by the speakers, and provides biographies on all the speakers. For those readers less familiar with the public trust discussion in the *Waiāhole* decision, a summary of this aspect of the case is provided later in this Foreword. Readers are also encouraged to review the written essays of the panelists and related supplemental materials posted on the Hawai'i Law Review's web site at www.hawaii.edu/uhreview.

This dialogue on the public trust doctrine is both uniquely Hawaiian and universal. Despite the divergent views on how to prioritize water uses and the high stakes involved, as panelist Ken Kupchak, an attorney for private landowners, commented: "everybody's still trying to see if we can get along with each other and I think that's the Hawaiian way."[8] Perhaps Hawai'i's approach can assist others on the U.S. mainland and around the globe who are also facing the imminent and urgent need to act early rather than react to water conflict. By publishing the transcript of this public forum, we hope to contribute to the efforts of our citizens and state agencies to fulfill the Hawai'i Supreme Court's mandate that future decisions about Hawai'i's water trust resources be "made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state."[9]

II. THE SYMPOSIUM PROCEEDINGS

Although holding a public forum on an arcane legal doctrine is unusual, the Symposium organizers[10] believed that such an event was of vital importance given the prominent and explicit role that the public trust doctrine will play in the future of Hawai'i water allocation decisions. As the cornerstone of the Hawai'i Supreme Court's lengthy August 2000 decision in the *Waiāhole* case —a proceeding of "unprecedented size, duration, and complexity"[11]—the

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[8] Unedited Transcript, Proceedings of the 2001 Symposium on Managing Hawai'i's Public Trust Doctrine 58, www.hawaii.edu/uhreview/publictrust.htm (Oct. 6, 2001).

[9] *Waiāhole*, 94 Hawai'i at 143, 9 P.3d at 455.

[10] The four Symposium Program Co-Chairs were: Jim Paul (Paul Johnson Park & Niles, attorney for Hawai'i's Thousand Friends in the *Waiāhole* case); Bill Tam (Alston Hunt Floyd & Ing; formerly Deputy Attorney General and counsel to the Water Commission (1987-97) in the *Waiāhole* case); Donna Wong (Executive Director, Hawai'i's Thousand Friends); and Denise E. Antolini, author of this Foreword.

[11] *Waiāhole*, 94 Hawai'i at 110, 9 P.3d at 422.

public trust doctrine and its particular implications for governmental agencies as trustees deserved deeper scrutiny under the public spotlight.

In an effort to educate the broader community about the future import of the decision, the Symposium brought together a diverse and distinguished group of scholars, government leaders, managers, private users, and community voices.[12] Equally important to the discussion were the many individuals and organizations in an audience of over 200 people[13] who played large and small roles as decision-makers, management staff, counsel, and clients during the contested *Waiāhole* case.

With the generous support of a grant from the Hawai'i Community Foundation, the Symposium hosted the nation's two leading authorities on the public trust doctrine, Professor Sax and Mr. Stevens, both of whom were cited by the Hawai'i Supreme Court in the *Waiāhole* decision.[14]

In his keynote address, Professor Sax drew on his global experiences with water allocation and emphasized his central theme that "water is first and foremost a community resource whose fate tracks the community's needs as time goes on. Water [law] evolves in the common law tradition. Public trust law is common law founded on community water rights. But public trust law evolves to meet community needs."[15]

Professor Sax noted the convergence of modern efforts for watershed protection and restoration with the old English common law doctrines of riparian rights and natural flow, which presumed that water belonged in the watershed of origin.[16] He contrasted that approach to the western states' prior appropriation doctrine, which permitted water to be moved out of native water basins for industrial and municipal uses.[17] Although conflicting, these approaches responded to "the fundamental needs of the community at the time reflecting natural conditions, such as aridity, or the evolution of social

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[12] Hawai'i's public access television station *'Olelo* taped the proceedings for broadcast. For a copy of the videotape, contact Donna Wong, Hawai'i's Thousand Friends at htf@lava.net.

[13] Although not included in this published version of the proceedings due to space limitations, the prolific written questions from the audience provoked lively and informative discussion among the panelists. The full text of the question and answer portions of the proceedings and the full list of questions are included in the complete transcript of the Symposium posted at: http://www.hawaii.edu/uhreview.

[14] *See Waiāhole*, 94 Hawai'i at 129, 9 P.3d at 441 (citing Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970)); *id.* at 142, 9 P.3d at 455 (citing Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195, 223-25 (1980)).

[15] Proceedings of the 2001 Symposium on Managing Hawai'i's Public Trust Doctrine 24.

[16] *Id.* at 25.

[17] *Id.* at 26.

goals."[18] The role of the public trust doctrine is "the theoretical underpinning of a general legal superstructure that submits water rights and water uses to evolving community needs."[19]

Tracing the American roots of this Roman doctrine to legal decisions in the 1800s, Professor Sax noted "[t]he trust is old, but its applications to water diversions and to environmental protection is often new."[20] In recent decades, many states have placed greater weight on instream flow rights advocated by water resource agencies and federal land management agencies.[21] Professor Sax cautioned, however, that the public trust doctrine "is primarily a water doctrine and only instrumentally a land doctrine."[22] The special importance of the public trust doctrine arises, he stated, because

> [I]t invokes not just authority but a duty on the part of government to protect public rights. Agencies of the state have an affirmative obligation to come forward and to take on the burden of asserting and implementing the public trust. Moreover, the public trust is a continuing obligation. In trust waters there can be no such thing as a permanent, once-and-for-all allocation of trust waters or land. That principle is essential to acknowledge in government responsibilities to respond to changing public needs and changing roles for water in the economy.[23]

According to Professor Sax, the *Waiāhole* decision presented some issues that were distinctive or only incipient in other states—"such as the application of the trust to domestic use, to ground water without explicit reference to navigable waters, and references to native and traditional and customary uses."[24] Moreover, he noted the decision indicated a level of judicial oversight—on such issues as burden of proof and the precautionary principle—not yet seen in other states.[25]

Yet, he concluded, a number of judicial decisions reflected a similar "judicial commitment in the states to protect public trust values," and the Hawai'i Supreme Court's "[a]ctive implementation of the public rights in water reflecting contemporary public values, rather than those of an earlier

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[18] *Id.*

[19] *Id.* at 28.

[20] *Id.*

[21] *Id.* at 27.

[22] *Id.* at 28.

[23] *Id.* at 31.

[24] *Id.* at 33. Sax observed that the growing recognition of indigenous people's water rights, which had been terminated or repudiated in the past, demonstrated that trust rights "do not expire simply because they have been unacknowledged for no matter how long a period of time." *Id.* at 29.

[25] *Id.* at 33.

time, would put Hawai'i squarely in the mainstream of America's evolving water law system."[26]

Following Professor Sax's address, the first Symposium panel, moderated by Hawai'i's leading environmental mediator Peter Adler,[27] brought together five distinguished Hawai'i natural resource attorneys: Jim Paul (Paul Johnson Park & Niles),[28] Ken Kupchak (Damon Key Leong & Kupchak),[29] Tim Johns (Damon Estate),[30] Bill Tam (Alston Hunt Floyd & Ing),[31] and Gil Coloma-Agaran (Director, State of Hawai'i Department of Land and Natural Resources).[32]

Among eight "fundamental principles" of the public trust doctrine in the *Waiāhole* case, Jim Paul emphasized the duties of the State of Hawai'i as the trustee of the Hawai'i Water Resources Trust, the burden of proof now squarely on those seeking water use permits to prove "no significant harm to the public resource," and the similarity between the doctrine and Native Hawaiian and Native American notions of stewardship.[33]

Self-described "devil's advocate" Ken Kupchak raised a series of unresolved questions about the doctrine's application from the perspective of private landowners and offstream permittees, including constitutional concerns about taking without just compensation, the court's overruling of *City Mill*,[34] and the uncertainty for landowners posed by the doctrine's evolutionary nature.[35]

Tim Johns discussed two major themes: first, that public trust was "an intragenerational, as well as intergenerational, equity doctrine," and, second,

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[26] *Id.*

[27] Mr. Adler served as the mediator for the interim stream restoration agreement in the *Waiāhole* case. See *infra* Part III for the biographies of all speakers.

[28] Mr. Paul served as counsel to Hawai'i's Thousand Friends in the *Waiāhole* case, focusing exclusively on the public trust doctrine throughout the contested case hearing and appeal. *See infra* Part III.

[29] *See infra* Part III.

[30] Mr. Johns became Deputy Director to the Hawai'i Commission on Water Resource Management after the Commission issued its decision and while the case was on appeal (May 1998 to January 1999), and then became Director of the Department of Land and Natural Resources ("DLNR"), sitting *ex officio* on the Water Commission, until December 2000.

[31] Mr. Tam served as Deputy Attorney General to the Commission from its inception in 1987 until just after the Commission's proposed decision was issued in September 1997, when he was abruptly dismissed by the Attorney General, the impropriety of which was addressed by the Hawai'i Supreme Court on appeal. *Waiāhole*, 94 Hawai'i at 126, 9 P.3d at 438. *See infra* Part III.

[32] In his capacity as the Director of DLNR, Mr. Coloma-Agaran chairs the Water Commission. *See infra* Part III.

[33] Symposium, *supra* note 15, at 34-35.

[34] City Mill Co. v. Honolulu Sewer & Water Comm'n, 30 Haw. 912 (1929).

[35] Symposium, *supra* note 15, at 35-37.

that the procedural component of *Waiāhole* (in particular, the new burden of proof standards) were as important as the court's substantive rights discussions.[36] He suggested that future applications of the doctine to land and other natural resources in Hawai'i may put Hawai'i on the "cutting edge."[37]

Bill Tam emphasized that Hawai'i's adoption of the public trust doctrine was not a recent innovation, but was adopted into Hawai'i law as early as 1892 when Hawai'i incorporated English common law principles in its state code.[38] Mr. Tam expressed confidence that the doctrine provided a useful way to sort through competing water uses[39] and that the doctrine was "uniquely suited" to Hawai'i's tradition and culture.[40]

Gil Coloma-Agaran discussed the need for state agencies to have additional resources in order to fulfill their trust responsibilities, particularly to gather the best scientific information.[41] He noted the importance of a thorough reading of the court's lengthy decision—especially the statement that "reason and necessity dictate that the public trust may have to accommodate offstream diversions inconsistent with the mandate of protection to the unavoidable impairment of public instream uses and values"[42]—suggesting limits on the scope of the doctrine's preference for public over private uses.

Jan Stevens then addressed the Symposium, likening the dispute over water in the *Waiāhole* case to the long-standing battle on the U.S. mainland between the "water buffaloes" and the "ancient doctrinal beast capable of giving the water buffalo a good fight,"[43] the public trust doctrine. Stevens focused on the lessons for Hawai'i's application of the public trust doctrine that could be drawn from the California Supreme Court's landmark 1983 *Mono Lake* decision,[44] upon which the Hawai'i Supreme Court relied in *Waiāhole*. Stevens gave a compelling account of the legal and social dynamics of *Mono Lake*, which addressed the City of Los Angeles's longstanding diversions of water from the Owens Valley and the Mono Lake basin to provide domestic uses for southern California's rapidly expanding urban center. As a result of the diversions, the level of Mono Lake, once California's largest instate water body, eventually dropped by forty feet and experienced massive ecological changes.[45]

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[36] *Id.* at 38.
[37] *Id.* at 39.
[38] *Id.*
[39] *Id.* at 40.
[40] *Id.* at 41.
[41] *Id.*
[42] *Id.* at 42.
[43] *Id.* at 44.
[44] *Mono Lake*, 658 P.2d 709 (Cal. 1983).
[45] Symposium, *supra* note 15, at 45-46.

Stevens concluded that there are strong similarities between the *Mono Lake* case and the *Waiāhole* decision.

> Both cases involve the reallocation of water from large and costly structures, built around the turn of the century to accommodate growing urban needs. In both cases, the court expressed a much broader view of the powers of the state, under the public trust doctrine, than did the administrative agency charged with administering water rights. And in both cases a number of parties and amici reflected a sort of who's who of all the economic, political and environmental powers of the state.[46]

Stevens suggested that the legal complexities of the public trust doctrine are formidable but not insurmountable, and that California courts and agencies have been able to consider the impacts of water allocation decisions on public trust values. Although not a "cure-all for the resolution of competing water uses,"[47] he concluded that the public trust doctrine provides "some salutary guidelines and protections for resources that were sadly neglected in past allocations of water."[48]

The second Symposium panel, moderated by Kem Lowry, Chair of the University of Hawai'i's Department of Urban and Regional Planning, discussed the challenges for implementing the doctrine "on the ground." Panelists included Chris Yuen (County of Hawai'i Planning Director), State Senator Colleen Hanabusa, Bill Devick (Director, State of Hawai'i, Department of Land and Natural Resources, Division of Aquatic Resources), Charlene Hoe (community water rights advocate from windward O'ahu and member of Hakipu'u 'Ohana), and Colin Kippen (Deputy Administrator, State of Hawai'i Office of Hawaiian Affairs).

Chris Yuen explored the implications of the *Waiāhole* decision for land use and natural resource issues pending before county and state agencies.[49] He noted that, although the Hawai'i State Constitution states that "all public natural resources are a public trust,"[50] the public trust doctrine would not be "imported wholesale into all public natural resources."[51] Nonetheless, the "overall direction" of the *Waiāhole* decision was to direct resource managers to ensure the "long-term health" of these broadly defined resources,[52] including such challenges as protection of *mauka* (upland) forests critical to ground water recharge.[53]

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[46] *Id.* at 49.
[47] *Id.* at 50.
[48] *Id.*
[49] *Id.* at 52.
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*

Department of Land and Natural Resources ("DLNR") administrator Bill Devick characterized the public trust doctrine as both "a tool" and "a philosophy"[54] that can be used "to shift the balance in decision-making towards protection and conservation, thinking about the future, rather than simple immediate, economic advantage."[55] He lamented, however, the lack of good scientific information necessary to make such progress.[56]

State Senator Colleen Hanabusa focused on the challenges facing the shared trustee roles of the Hawai'i State Legislature, Water Commission, and Hawai'i Supreme Court. She emphasized the practical and political pressures on the Legislature in fulfilling its trustee obligations and, sounding a pessimistic note, offered little hope of new funding from the Legislature to address these issues.[57]

Office of Hawaiian Affairs ("OHA") Administrator Colin Kippen addressed the complementary relationship between the public trust doctrine and Native Hawaiian rights and values, calling the *Waiāhole* decision "seminal" and "long overdue."[58] Seizing on the Hawai'i Supreme Court's passive umpire analogy, he stated: "No more are we going to stand for umpires cemented behind home plate. [Agencies] have to get out there, [and] ask the questions . . . ."[59]

Community water advocate Charlene Hoe shared insights from her personal history of grass-roots community involvement in water rights in Hawai'i over the past thirty years.[60] She explained the frustration the community encountered in attempting to reassert appurtenant rights for *lo'i kalo* (taro cultivation), a frustration that led to the successful community effort at the Hawai'i Constitutional Convention in 1978 to add new amendments to protect water and other natural resources, including the mandate to create the State Water Code.[61] Despite the length of time it took to implement the new code, Hoe felt that the need to preserve water resources "in perpetuity" was the common hopeful thread among the competing voices.[62]

Professor Sax concluded the Symposium with some parting wisdom on the application of the public trust doctrine in Hawai'i.[63] Contrary to the view of some critics, he felt that the Hawai'i Supreme Court's decision, viewed

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[54] *Id.* at 53.
[55] *Id.* at 53-54.
[56] *Id.* at 54.
[57] *Id.* at 54-55.
[58] *Id.* at 56.
[59] *Id.*
[60] *Id.* at 57.
[61] *Id.* at 58-59.
[62] *Id.* at 59.
[63] *Id.* at 59-60.

properly as a "strong commitment to such a doctrine and a willingness in an energetic way to see that it's enforced,"[64] could empower, rather than detract from, legislative authority, and "energize administrative agencies" to act and try new approaches.[65] He also addressed the salient takings issue, suggesting the key inquiries of any eventual U.S. Supreme Court review would be the breadth of the state's own view of the doctrine and the historical grounding of that view in the state's unique history.[66] Ending on an optimistic note, Sax wished Symposium participants "good luck," observing that Hawai'i now had some "newly recognized and powerful tools . . . and a lot of knowledgeable and committed people to work on [these issues]."[67]

The Symposium was, indeed, designed to be a beginning, not an end to the dialogue. The vital water allocation issues addressed in the Hawai'i Supreme Court's decision resonate on all of the other major Hawaiian islands and are still far from settled, even in the *Waiāhole* case itself.[68] During the same week as the Symposium, the Water Commission heard arguments on a hearing officer's recommendations in the remanded *Waiāhole* case.[69] Although the Commission decision on remand has not yet been issued, there is little doubt that these important legal and public policy issues will continue to evolve through future decisions by agencies and courts. Intelligent critique and constructive discussion of these decisions must continue, and new efforts must

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[64] *Id.* at 60.

[65] *Id.*

[66] *Id.* at 60-61.

[67] *Id.* at 61.

[68] In his dissent, Justice Ramil predicted that the majority's opinion would "generate litigation by applicants arguing that their particular use of water is a public trust use or value." *Waiāhole*, 94 Hawai'i at 191, 9 P.3d at 503.

[69] The Water Commission appointed former Commission Chair Dr. Lawrence Miike as the hearings officer to address the issues remanded by the Hawai'i Supreme Court. On August 1, 2001, Dr. Miike issued his 159-page Proposed Legal Framework, Findings of Fact, and Decision and Order, *In re Water User Permit Applications, Petitions for Interim Instream Flow Standard Amendments, and Petitions for Water Reservations for the Waiāhole Ditch Combined Contested Case Hearing*, Case No. CCH-0A95-1 (Aug. 1, 2001) (on file with author). Although Dr. Miike's decision only briefly addressed the public trust doctrine, *see id.* at 10-12, disagreed with some of the court's conclusions, *see id.* at 99 (discussing interim instream flow standards), and ruled against the windward parties' interests on several issues, he ultimately concluded that, because of the Commission's duty "as trustee, and in the interest of precaution, . . . the margins of safety" should be adopted by increasing the quantities of water restored to the windward streams. *See id.* at 33. In addition to the six million gallons per day ("mgd") added to Waiāhole and its tributary Waianu Sream by the Commission's 1997 decision, Dr. Miike proposed adding 3.9 more mgd to these streams and Waikāne Stream. *See id.* at 140-41. Dr. Miike's order also reduced offsteam uses (plus system loss) from 14.03 allowed by the Commission to 12.29 mgd. *Id.* at 142.

be made to engage the hearts and minds of all sectors of Hawai'i's diverse community in this vital dialogue.

III. BIOGRAPHIES OF SPEAKERS

PETER ADLER, Ph.D., was the Executive Director of the Hawai'i Justice Foundation for ten years. He led the Alternative Dispute Resolution program for the Hawai'i Supreme Court, founded the Neighborhood Justice Center in Honolulu, and taught at the University of Hawai'i. He consults throughout the United States and the world on mediation, conflict resolution, and training. He is a graduate of Roosevelt University (B.A., History and English); University of Missouri (M.S., Sociology); and Union Institute (Ph.D., Sociology).

GILBERT S. COLOMA-AGARAN is the Chairperson of the Hawai'i Board of Land and Natural Resources and Hawai'i Commission on Water Resource Management. He earlier served as Director of the Hawai'i Department of Labor and Deputy Director of the Department of Commerce and Consumer Affairs. He is a graduate of Yale (B.A., History) and Boalt Hall School of Law, University of California, Berkeley (J.D.; Associate Editor, *California Law Review*).

BILL DEVICK is the Administrator of the Division of Aquatic Resources, Hawai'i Department of Land and Natural Resources, and formerly Program Manager, Division of Aquatic Resources. Mr. Devick has also served as an ecologist and aquatic biologist with the State of Hawai'i. He is a graduate of Augustana College (B.A., Biology); he pursued post graduate work at the University of Colorado, University of Alaska, University of Oregon, Institute of Marine Biology, and Management Development Leadership Academy, State of Hawai'i.

SENATOR COLLEEN HANABUSA is the Hawai'i State Senator for the Twenty-first Senatorial District, Vice-President of the Hawai'i State Senate, and Vice-Chair of the Senate Ways and Means Committee. In the past, she has served as Chair, Senate Committee on Water, Land and Hawaiian Affairs. Senator Hanabusa is a graduate of the University of Hawai'i (B.A., M.A., Sociology) and William S. Richardson School of Law (J.D.).

CHARLENE HOE is the Director, Office of Strategic Planning at Kamehameha Schools. She has been an active leader in windward O'ahu, Waiāhole, and the Hawaiian community for more than twenty-five years. She was a member of the Water and Natural Resources Committee of the 1978 Hawai'i Constitutional Convention that wrote the water amendment to the Hawai'i State Constitution.

TIMOTHY E. JOHNS is the Chief Operating Officer of the Damon Estate. He previously served as Chairperson, Hawai'i Board of Land and Natural

Resources and Hawai'i Commission on Water Resources Management. He has also been counsel to the Nature Conservancy and to AMFAC. He is a graduate of University of California (B.A.) and the University of Southern California Law School (J.D.).

COLIN KIPPEN is the Deputy Administrator for the Office of Hawaiian Affairs ("OHA") and manages OHA's Hawaiian Rights Division. Before returning to Hawai'i several years ago, he was a trial lawyer and a policy analyst in Seattle, and later a trial and appellate judge for Indian tribes in the Pacific Northwest. He graduated from the University of Hawai'i (B.A.) and the University of Iowa (M.S., Planning; and J.D.).

KENNETH R. KUPCHAK is a partner at Damon Key Leong Kupchak & Hastert where he concentrates on commercial and construction litigation. He represented community groups to place Kawainui Marsh (windward O'ahu) in the State Conservation District and in the 1980s litigated on behalf of the Volcano Community Association in the geothermal litigation on the Island of Hawai'i. He is a graduate of Cornell (B.A.), Pennsylvania State University (M.S., Meteorology), and Cornell Law School (J.D.).

KEM LOWRY is the Chairperson, Department of Urban and Regional Studies, University of Hawai'i, a long time mediator, and on the editorial board of the Ocean and Coastal Zone Management Journal. He has written extensively on planning and land management issues. Dr. Lowry graduated from Washburn (B.A., Honors) and the University of Hawai'i (Ph.D., Political Science).

JAMES T. PAUL is a partner of the law firm of Paul, Johnson, Park & Niles specializing in commercial litigation, counseling, and dispute resolution involving real estate, construction, investments and financing, and other business matters. He has been a member of the Hawai'i Supreme Court's Permanent Committee on Civil Rules since 1986 and a member of the Board of Advisors for the Hawai'i Judiciary's Center for Alternative Dispute Resolution since 1989. He is a graduate of Stanford University Law School (J.D.).

JOSEPH L. SAX is the James H. House and Hiram H. Hurd Professor of Environmental Regulation at Boalt Hall Law School, University of California (Berkeley). The recipient of numerous teaching awards, he has taught water law for over thirty years and he currently teaches biodiversity and the law, as well as environment and culture. Professor Sax has taught at University of Michigan, Stanford University, and the University of Utah. He was a fellow at the Center for Advanced Study in the Behavioral Sciences and is currently a fellow of the American Academy of Arts and Sciences. His awards and citations include the Distinguished Faculty Achievement Award from the University of Michigan, the Elizabeth Haub Environmental Prize of the Free University of Brussels, the Audubon Society's Conservationist of the Year

Award, the William O. Douglas Legal Achievement Award from the Sierra Club, and the Environmental Quality Award of the U.S. Environmental Protection Agency. He has published numerous books and over 130 articles. From 1994 to 1996, he was Counselor to Secretary of the Interior Babbitt and Deputy Assistant Secretary for Policy in the Department of the Interior. Professor Sax graduated from Harvard University (A.B.) and the University of Chicago (J.D.).

JAN STUART STEVENS is the Chair of the California Attorney General's Water Advisory Group. Mr. Stevens recently retired as Senior Assistant Attorney General for Land and Natural Resources in the California Attorney General's Office where he began working in 1961. He oversaw major natural resources litigation for California (including U.S. Supreme Court cases) and for more than a decade coordinated the Western Attorney General's Litigation Action Committee. Mr. Stevens served as Chair of the Committee to Review Individual Fishing Quotas (National Academy of Sciences) and has written extensively on the public trust doctrine. He received his B.A. (Phi Beta Kappa) and J.D. (Associate Editor, *California Law Review*) from the University of California (Berkeley), Boalt Hall School of Law where he recently returned to lecture.

WILLIAM M. TAM is of counsel to Alston Hunt Floyd & Ing in Honolulu where he specializes in water, natural resources, land use, Hawaiian rights, and commercial litigation. He was a Deputy Attorney General and counsel to the Hawai'i Board of Land and Natural Resources (1981-97) and the Hawai'i Commission on Water Resources Management (1987-97) (through the administrative phase of the *Waiāhole* contested case hearing). He is the co-author of Hawai'i's Water Code and was co-counsel for the State in the *Robinson v. Ariyoshi*[70] litigation. Mr. Tam graduated from Wesleyan University in Connecticut (B.A., History) and Boston University School of Law (J.D.).

CHRISTOPHER J. YUEN is the Planning Director for the County of Hawai'i. Mr. Yuen was previously in private practice on the Island of Hawai'i for many years and was a member of the Hawai'i Board of Land and Natural Resources. He has served as a Deputy Corporation Counsel (Hawai'i County), an Interpretive Naturalist with the National Park Service, and a Planner for Hawai'i 2000, Inc. He graduated from Stanford University (A.B., Human Biology), State University of New York (M.S., Environmental Science), and the William S. Richardson School of Law (J.D.).

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[70] 65 Haw. 641, 658 P.2d 287 (1982).

IV. SUMMARY OF THE PUBLIC TRUST DOCTRINE DISCUSSION IN THE *WAIĀHOLE* WATER CASE

In the landmark August 2000 *Waiāhole* water case, the Hawai'i Supreme Court expressly relied on a modernized version of the public trust doctrine as its guiding star for interpreting Hawai'i's unique and complex water law.[71] By providing an overarching legal framework that requires protection of natural instream flows before diversionary offstream uses of water are fully considered,[72] the public trust doctrine now provides state courts and agencies a powerful paradigm for reviewing future water rights use conflicts across the State.

In remanding the *Waiāhole* case back to the State Commission on Water Resource Management ("Commission"), the Hawai'i Supreme Court directed the Commission to re-evaluate its voluminous[73] 1997 decision[74] by explicitly viewing the water reallocation issues through the lens of a proactive trustee charged with "considering, protecting, and advancing public rights in the resource at every stage of the planning and decisionmaking process," instead of "relegat[ing] itself to the role of a mere umpire passively calling balls and strikes for adversaries appearing before it."[75]

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[71] Although the philosophical cornerstone of the *Waiāhole* decision, the public trust doctrine issues were only one set of a large number of issues addressed by the court. For a discussion of the important procedural and statutory issues in the case, see, e.g., *Waiāhole*, 94 Hawai'i at 144-73, 9 P.3d at 456-85 (discussing State Water Code interpretation issues, such as instream flow standards). While important, however, these issues are beyond the scope of this Foreword.

[72] *Waiāhole*, 94 Hawai'i at 142, 9 P.3d at 454 (stating that the water resources trust in Hawai'i "demand[s] that any balancing between public and private purposes begin with a presumption in favor of public use, access, and enjoyment"). The Hawai'i Supreme Court expressly rejected the argument of one private landowner, Kamehameha Schools/Bishop Estate, that the Commission's denial of its request for 4.2 mgd of water for a proposed urban housing development was an unconstitutional "taking" of its property without just compensation in violation of the United States and Hawai'i constitutions. *Id.* at 180, 9 P.3d at 492. The court found the taking argument both premature, *id.*, and fundamentally flawed because "the right to absolute ownership of water exclusive of the public trust never accompanied the 'bundle of rights' conferred in the Mahele." *Id.* at 182, 9 P.3d at 494; *see also id.* at 181, 9 P.3d at 493 (citing Joseph L. Sax, *The Constitution, Property Rights, and the Future of Water Law*, 61 U. COLO. L. REV. 257 (1990)).

[73] The Hawai'i Supreme Court called the *Waiāhole* contested case a proceeding of "unprecedented size, duration, and complexity." *Waiāhole*, 94 Hawai'i at 110, 9 P.3d at 422.

[74] Findings of Fact, Conclusions of Law, and Decision and Order, *In re Water Use Permit Applications, Petitions for Interim Instream Flow Standard Amendments, and Petitions for Water Reservations for the Waiāhole Ditch Combined Contested Case Hearing*, Case No. CCH-OA95-1, Commission on Water Resource Management, State of Hawai'i (Dec. 24, 1997) [hereinafter "Water Commission Final Order"] (on file with author).

[75] *Waiāhole*, 94 Hawai'i at 143, 9 P.3d at 455 (quotations omitted).

The underlying water dispute arose over the appropriate allocation of approximately twenty-seven million gallons per day ("mgd") since the 1920s by the Waiāhole Ditch system of high elevation dike water, which fed several windward O'ahu streams.[76] In the early 1990s, O'ahu's sugar industry went out of business, creating a rare opportunity to consider the reallocation of longstanding offstream diversions and the restoration of natural flows to long-diverted streams.

The twenty-five-mile-long Waiāhole tunnel and ditch system diverted fresh surface water and dike-impounded ground water from the natural reservoirs in the windward volcanic Ko'olau mountain range to irrigate sugar plantation lands in the more arid leeward plain of central O'ahu.[77] The ditch system diversions diminished the natural stream flow in several windward streams, including Waiāhole, Waianu, Waikāne, and Kahana "affecting the natural environment and human communities dependent on them."[78]

Two years before sugar operations ceased in 1995, the private owner of the ditch system, Waiāhole Irrigation Company,[79] filed a combined water use permit application seeking to protect its distribution of water to existing users of the system.[80] State agencies, and private and community organizations, subsequently filed to reserve water.[81] Four windward community groups, later joined by the Office of Hawaiian Affairs, then filed petitions to increase the interim instream flow standards for the windward streams affected by the ditch.[82]

In 1994, after windward parties complained about water being wasted by Waiāhole Irrigation Company, the parties reached an interim mediated agreement, which resulted in a historic partial restoration of flows to Waiāhole Stream.[83] The Commission then ordered a combined hearing on all the

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[76] *Id.* at 111, 9 P.3d at 423.

[77] *Id.*

[78] *Id.*

[79] Since the Commission's decision, the State of Hawai'i purchased the ditch system for $9.7 million and placed it in the hands of the State Agribusiness Development Corporation. State of Hawai'i, Office of the Governor News Release, State Purchase of Waiāhole Water System Moves Forward (June 15, 1998), http://gov.state.hi.us/News/98-101.html.

[80] *Waiāhole*, 94 Hawai'i at 111, 9 P.3d at 423. The water use permit application was required because the Commission had designated the five aquifer systems of Windward O'ahu as "ground water management areas" in 1992, as a result of a petition by several windward community organizations, requiring all users to apply for water use permits within one year of designation. *Id.*

[81] *Id.* at 112, 9 P.3d at 424.

[82] *Id.*

[83] The parties reached a mediated agreement to release "surplus" water back into the windward streams after the Commission received complaints that the Waiāhole Irrigation Company was discharging unused ditch water into Central O'ahu gulches. *Id.* The interim restoration, noted the court, "had an immediate apparent positive effect on the stream ecology." *Id.*

petitions, admitting a total of twenty-five parties to the contested case hearing, the longest and most complex administrative proceeding of its kind in the State's history.[84]

The Commission held extensive hearings on existing diversionary uses, which were allowed to continue pending a decision on the merits of the case. The live testimony phase of the case alone lasted six months. Ultimately, the Commission's 257-page final order required the ditch operator to adjust the hand-turned gates deep inside the volcanic water diversion tunnel so that 6.0 mgd of the water spilled back into Waiāhole and Waianu Streams.[85] The Commission allowed a total of 13.51 mgd (of the total 27.0 mgd available) to continue to flow through the tunnel for leeward offstream uses (12.22 mgd for agricultural uses and 1.29 for "other" uses); it also set aside a 1.58 mgd "agricultural reserve" for future permitting; created a "non-permitted ground water buffer" of 5.39 mgd (initially to be released into the windward streams but to be kept available for offstream uses as a secondary source); set up several technical advisory committees to assist in implementing the final decision; and denied several specific applications for water uses (for example, for a golf course and landscaping for a future residential development).[86]

Ten parties appealed to the Hawai'i Supreme Court,[87] generating a host of procedural and substantive issues on appeal that took the court almost three years to resolve.[88] In August 2000, the court issued a 102-page majority decision written by Justice Paula Nakayama.[89] Justice Mario Ramil authored the lone dissent.[90]

The focal point of the Hawai'i Supreme Court's extensive review of the Commission's order was the public trust doctrine.[91] Tracing Hawai'i's adoption of the doctrine to the 1899 *King v. O'ahu Railway & Land Co.* case,[92] through subsequent decisions[93] including Hawai'i's landmark water

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[84] *Id.* at 113, 9 P.3d at 425.

[85] *Waiāhole*, 94 Hawai'i at 116-17, 9 P.3d at 428-29.

[86] *Id.* at 117-18, 9 P.3d at 429-30.

[87] Under the Hawai'i State Water Code, contested case hearings are appealed directly to the Hawai'i Supreme Court. HAW. REV. STAT. § 174C-60 (1997).

[88] The Commission issued its decision on December 24, 1997; the Hawai'i Supreme Court issued its decision on August 22, 2000, denying reconsideration on September 17, 2000.

[89] *Waiāhole*, 94 Hawai'i at 110-90, 9 P.3d at 422-502.

[90] *Id.* at 190-98, 9 P.3d at 502-10.

[91] *Id.* at 127-44, 9 P.3d at 439-56.

[92] 11 Haw. 717 (1899).

[93] Post-*King* cases that confirmed Hawai'i's "embrace of the public trust doctrine," *Waiāhole*, 94 Hawai'i at 128, 9 P.3d at 440, included *County of Hawai'i v. Sotomura*, 55 Haw. 176, 183-84, 517 P.2d 57, 63 (1973), *cert. denied*, 419 U.S. 872 (1974); *In re Sanborn*, 57 Haw. 585, 593-94, 562 P.2d 771, 776 (1977); and *State v. Zimring*, 58 Haw. 106, 121, 566 P.2d 725, 735 (1977).

rights case in the early 1970s, *McBryde Sugar Co. v. Robinson*,[94] the Hawai'i Supreme Court emphasized the ancient and historical reservation of the public's right to water resources in Hawai'i.[95] In *Robinson v. Ariyoshi*,[96] the court expressly recognized that "*a public trust was imposed upon all waters of the kingdom*,"[97] encompassing both the right and duty "to maintain the purity and flow of our waters for future generations and to assure that the waters of our land are put to reasonable and beneficial uses."[98] Citing Professor Sax's seminal 1970 article on the public trust doctrine,[99] the *Robinson* court held that the State's obligation to enforce the water trust "necessarily limited the creation of certain private interests in waters."[100]

The Hawai'i Supreme Court noted that the 1978 Constitutional Convention added several water rights provisions to the Hawai'i Constitution emphasizing the public trust over natural resources. Article XI, Section 1 requires the State to "conserve and protect" Hawai'i's "natural beauty and all natural resources, including . . . water," and states that "[a]ll public natural resources are held in trust by the State for the benefit of the people."[101] Article XI, Section 7 further provides that the State "has an obligation to protect, control, and regulate the use of Hawai'i's water resources for the benefit of its people"[102] and required the Legislature to create a water resources agency. Eleven years later, the Legislature enacted the State Water Code,[103] which "engrafted the [public trust] doctrine wholesale"[104] and created the Water Commission.

The court then addressed the scope and substance of the "State Water Resources Trust."[105] The court clarified that "all water resources without

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[94] 54 Haw. 174, 504 P.2d 1330, *aff'd on reh'g*, 55 Haw. 260, 517 P.2d 26 (1973), *appeal dismissed and cert. denied*, 417 U.S. 962 (1974).

[95] *Waiāhole*, 94 Hawai'i at 129, 9 P.3d at 441.

[96] 65 Haw. 641, 658 P.2d 287 (1982).

[97] *Waiāhole*, 94 Hawai'i at 129, 9 P.3d at 441 (quoting *Robinson*, 65 Haw. at 674, 658 P.2d at 310) (emphasis added by *Waiāhole* court).

[98] *Id.* (quoting *Robinson*, 65 Haw. at 674, 658 P.2d at 310) (emphasis added by *Waiāhole* court).

[99] Sax, *supra* note 14.

[100] *Waiāhole*, 94 Hawai'i at 129, 9 P.3d at 441 (quoting *Robinson*, 65 Haw. at 674 n.31, 658 P.2d at 310 n.31) (citing Professor Sax).

[101] *Id.* at 130, 9 P.3d at 442 (citing HAW. CONST. art. XI, §1).

[102] *Id.*

[103] *Id.* (citing HAW. REV. STAT. Chapter 174C).

[104] *Id.* The court rejected the arguments of several parties that the State Water Code had abolished or subsumed the common law public trust doctrine, which was an "inherent attribute of sovereign authority that the government 'ought not, and ergo, . . . cannot surrender,'" *id.* at 131, 9 P.3d at 443 (quoting *McBryde*, 54 Haw. at 186, 504 P.2d at 1388), and which had been enshrined in Hawai'i's Constitution as a "fundamental principle of constitutional law." *Id.* at 131-32, 9 P.3d at 443-44.

[105] *Id.* at 133-43, 9 P.3d at 445-55.

distinction or exception" were included in the trust.[106] The court rejected the "surface-ground dichotomy" as an "artificial distinction neither recognized by the ancient system nor borne out in the present practical realities of this state."[107] Citing the California Supreme Court's broad interpretation of the public trust doctrine in the *Mono Lake* case[108] with approval,[109] the Hawai'i Supreme Court noted that it "ha[d] likewise acknowledged resource protection, with its numerous derivative public uses, benefits, and values, as an underlying purpose of the reserved water resources trust."[110] The Hawai'i Supreme Court expressly rejected the argument that maintaining waters in their natural state constituted "waste."[111] The court also specifically recognized domestic water use (for example, drinking water) as "among the highest uses of water resources,"[112] reaffirmed "the exercise of Native Hawaiian traditional and customary rights as a public trust purpose,"[113] and rejected the argument that private economic development was a protected trust purpose.[114]

The powers and duties of the State under the trust embodied the "dual mandate of 1) protection and 2) maximum reasonable and beneficial use."[115] The Hawai'i Supreme Court clarified that the meaning of the latter mandate "is not maximum consumptive use, but rather the most equitable, reasonable, and beneficial allocation of state water resources, with full recognition that resource protection also constitutes 'use.'"[116] Accordingly, the State not only could, but must, "revisit prior diversions and allocations"[117] as part of its trust responsibilities. Yet, the court acknowledged that "reason and necessity dictate that the public trust may have to accommodate offstream diversions

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[106] *Id.* at 133, 9 P.3d at 445 (noting the Constitutional Convention's understanding of "water resources" as including "ground water, surface water, and all other water").

[107] *Id.* at 135, 9 P.3d 447.

[108] *Mono Lake*, 658 P.2d 709, 728 (Cal. 1983). For the Hawai'i Supreme Court's extensive discussion of *Mono Lake*, see *Waiāhole*, 94 Hawai'i at 140-41, 9 P.3d at 452-53 (concluding that the distinctions between *Mono Lake* and *Waiāhole* suggest that an even broader interpretation of the trust is warranted under Hawai'i's riparian water rights system and constitutional provisions).

[109] *Waiāhole*, 94 Hawai'i at 136, 9 P.3d at 448.

[110] *Id.*

[111] *Id.* at 136-37, 9 P.3d at 448-49.

[112] *Id.* at 137, 9 P.3d at 449.

[113] *Id.*

[114] *Id.* at 138, 9 P.3d at 450 ("while the state water resources trust acknowledges that private use for 'economic development' may produce important public benefits and that such benefits must figure into any balancing of competing interests in water, it stops short of embracing private commercial use as a protected 'trust purpose.'").

[115] *Id.* at 139, 9 P.3d at 451.

[116] *Id.* at 140, 9 P.3d at 452.

[117] *Id.* at 141, 9 P.3d at 453.

inconsistent with the mandate of protection, to the unavoidable impairment of public instream uses and values,"[118] which the Commission must determine on a "case-by-case basis," rather than using "a categorical imperative" and "formulaic solutions."[119] Nonetheless, the court affirmed the Commission's finding that a "higher level of scrutiny" was required for reviewing private commercial uses and that "the burden ultimately lies with those seeking or approving such uses to justify them in light of the purposes protected by the trust."[120]

In his dissent, Justice Ramil agreed that "water is absolutely essential to the continued existence of this island state."[121] Yet, he vigorously criticized the majority's reliance on the "nebulous common law public trust doctrine"[122] from "foreign jurisdictions"[123] as an improper basis for trumping and rewriting the State's Water Code. In his view, the Code mandated strong protection for private economic offstream uses such as commercial agriculture.[124] Justice Ramil argued that "the Code trumps common law, not the other way around."[125] He concluded that, although he agreed with the majority that the Commission should establish more definitive instream flow standards, he feared that, in the interim, "offstream uses, which, in substantial part, drive the economy and promote the self-sufficiency of the State, may run dry."[126]

In light of Justice Ramil's dire warning, it was not surprising that the Commission's deliberations[127] and the court's decision generated a strong

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[118] *Id.*

[119] *Id.* at 142, 9 P.3d at 454.

[120] *Id.*

[121] *Id.* at 195, 9 P.3d at 507.

[122] *Id.* at 190, 9 P.3d at 502.

[123] *Id.* at 191, 9 P.3d at 503.

[124] *Id.* at 190-91, 194-95, 9 P.3d at 502-03, 506-07.

[125] *Id.* at 196, 9 P.3d at 508. In a lengthy footnote, Justice Nakayama directly addressed the arguments raised by Justice Ramil's dissent. *Id.* at 190, 9 P.3d at 502 n.108. She characterized the dissent's view of the public trust doctrine as "revolutionary," without precedent, "astonishing," encouraging a "free-for-all" in water disputes, and using "straw man" arguments. *Id.* In a pointed parting shot, Justice Nakayama suggested that those "concerned about the proper functioning of our democratic system and the continued vitality of our island environment and community . . . can ill-afford to continue down this garden path [of disregarding public rights in water] this late in the day." *Id.*

[126] *Id.* at 198, 9 P.3d at 510.

[127] *See, e.g.*, Patricia Tummons, ed., *The Great Waiāhole Water Wars*, 7 ENV'T HAW. 1, 1 (Sept. 1996) (discussing, in a series of articles, the Commission's then on-going contested case hearing, noting that "[t]he stakes are as great as the leeward parties are powerful and the windward parties are persistent. The courts should start clearing their calendars now."); Patricia Tummons, ed., *Parting the Waters: The Waiāhole Dispute*, 7 ENV'T HAW. 1, 1 (Aug. 1996) (noting the *Waiāhole* dispute "entered its fourth year" and that the Commission members have "heard hundreds of hours of testimony, have read tens of thousands of pages of briefs, reports, and argument, and now appear poised to enter into the last stages of the *Waiāhole* contested case").

public reaction.[128] The front page of the August 23, 2000 issue of the *Honolulu Advertiser* proclaimed a "[w]indward victory." The lead story immediately focused on the Hawai'i Supreme Court's "reaffirm[ation of] the state's commitment to the public trust doctrine, 'to protect, control, and regulate the use of Hawai'i's water resources for the benefit of its people.'"[129]

This Foreword and the Symposium proceedings suggest that these issues will continue to be of vital importance in Hawai'i, not just to the core of attorneys, landowners, and activists who closely follow water rights issues, but to all citizens who enjoy Hawai'i's environmental, cultural, and economic benefits. We hope this dialogue on implementing the public trust doctrine can enhance Hawaii's ability to rise to the challenge of balancing water rights and responsibilities in the new century.

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[128] Even during the Commission's deliberations, the proceeding was controversial. As the Hawai'i Supreme Court noted, "[w]hile the Commission was considering its final decision, the state governor and attorney general publicly criticized the proposed decision as inadequately providing for leeward interests. At about the same time, the deputy attorney general representing the Commission was summarily dismissed." *Waiāhole*, 94 Hawai'i at 113, 9 P.3d at 425. Although the court rejected the windward parties' claims that these actions amounted to a denial of due process, *id.* at 123-27, 9 P.3d at 435-39, the court expressed "serious misgivings" regarding the "eleventh hour" timing of these actions prior to the Commission's final decision and concluded "it is safe to say that the conduct of the public officials in this case did nothing to improve public confidence in government and the administration of justice in this state." *Id.* at 127, 9 P.3d at 439.

[129] Robbie Dingeman, *Waiāhole Water Allocation Rejected: Ruling Called Windward Victory*, HONOLULU ADVERTISER, Aug. 23, 2000, at A1.

Proceedings of the 2001 Symposium on Managing Hawai'i's Public Trust Doctrine

JIM PAUL: Good morning again and welcome to this symposium on managing Hawai'i's trust doctrine. My name is Jim Paul, and I'm a member of the committee that has been working on pulling this program together today.

We are privileged to have with us two of the most widely respected and well-known people in the United States, with respect to the public trust doctrine, Prof. Joseph Sax and Mr. Jan Stevens, whom you will be hearing from shortly. We are also privileged to have with us today, as I'm sure all of you here know, a very wide and very remarkable cross section of Hawai'i's leaders and people who are very interested in this doctrine. Most of you, as you know, have played a role in some way, some small and some very large, in the cases and in the development of this doctrine and where it is today. We have a very interesting array of perspectives from different points of view about the doctrine and what it means to people who are in some way responsible for dealing with it and implementing the doctrine.

The catalyst for this symposium was the August, 2000 *Waiāhole* Ditch decision.[1] Several interested parties who are involved in that case believed that a gathering such as this was essential to focus on the public trust doctrine and specifically that doctrine as it has now been established by that decision in Hawai'i. By coincidence, both of our speakers today, Prof. Sax and Jan Stevens, are quoted by the Hawai'i Supreme Court in that decision. We hope by the end of today that all of us here will have a better understanding of certain issues, such as just what is Hawai'i's public trust doctrine, who is responsible for managing and implementing that doctrine, what are the specific responsibilities of the state and its subdivisions and agencies, what does it mean on a day-to-day basis for regulators, policy makers and managers of the state, and why is it supportive of and consistent with many of the native Hawaiian and native American notions of the relationship between human beings and natural resources.

It is now my pleasure to introduce Prof. Denise Antolini, who will introduce our keynote speaker for the day, Prof. Joseph Sax. Denise is an assistant professor at the William S. Richardson School of Law, here at the University. She is very active in the law school's environmental program and has been very active, not only in this law school, but also in previous lives in environmental issues across this state and elsewhere. She was at the birth, if I can call it that, of the *Waiāhole* case, a long, long time ago, but not too far

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[1] *In re* Water Use Permit Applications, Petitions for Interim Instream Flow Standard Amendments, and Petitions for Water Reservations for the Waiāhole Ditch Combined Contested Case Hearing, 94 Hawai'i 97, 9 P.3d 409 (2000) [hereinafter "*Waiāhole*"].

away, when she represented the Waiāhole-Waikāne Community Association and others when this case became a contested case hearing before the water commission. Perhaps most importantly, she was a student of Prof. Sax's in his first year at the University of California, Berkeley, and she is looking forward to introducing him today.

DENISE ANTOLINI: Aloha and good morning. Especially in Hawai'i, water is life, and rain, literally and figuratively, environmentally, culturally, and economically, is a blessing. The Hawaiian word for water, "*wai*," is a beautiful word used to describe so many special places with special sources of water like Waiāhole, Waikāne, and Waianu. The importance of water to Hawaiian culture is evident in the term "*waiwai*," which means wealth and "*kanawai*," which means law.

Yesterday, I had the great privilege of accompanying Prof. Joseph Sax and his wife Ellie, and Jan Stevens and his wife Karen on a tour of the Waiāhole water system and stream. The morning was very gray and very rainy, circumstances that might have dampened the spirits of a less intrepid group of travelers, but Joe, Ellie, Jan, and Karen were not only, as you might guess, very experienced travelers, but each of them has visited Hawai'i many times over the past thirty years. So as we began driving up the Waiāhole Valley Road into the mist-shrouded Pali, I think they all knew we were in for an unforgettable Hawaiian adventure.

Suddenly, we had a view between the dripping trees of the stunningly steep cliffs ringing the back of Waiāhole Valley. The spectacular sight of a symphony of gushing waterfalls plunging down the Pali took our breath away. As we climbed up the rough road to the tunnel, it quickly became evident to me that, yesterday, the day that these very special people came to visit it, Waiāhole stream was spectacularly high, perhaps at record levels, and the roaring sound was phenomenal. It was a chicken skin experience.

So why do I relate this story to you as a way of introducing Prof. Joseph Sax? For three reasons. First, to me the rain was a sign of blessing for their visit to Hawai'i. I hope they continue to enjoy every minute of it and to come back often. Second, the full and wild stream was a tribute, in my mind, to Joe. Without knowing it, and in a far away place that he probably never knew he would visit, and as a result of scholarship that he began over thirty years ago, his wisdom and passion had a real, positive, immediate, and breathtaking impact. Yes, like so many of you in this room who had some role and a little something to do with the restoration of Waiāhole stream, Joe was partially responsible for the fact that that stream was gushing and not trickling. The third reason is that Joe and his lifetime of scholarship reminds me of the vitality, the purity, the wealth, and the blessing of our water in Hawai'i. For more than four decades, his contributions to law teaching, legal scholarship,

and public policy have been like those waterfalls; incredibly prolific, sometimes unexpected, always enriching, fluid, inviting, and powerful. He has authored over eight books and over a hundred articles on law and public policy that are listed in your bibliography in the areas of endangered species, citizen suits, environmental impact statement law, property law, takings, public lands, especially national parks, and, of course, water law and the public. His life of teaching and scholarship has touched so many lives, lives of people he never knew and probably will never meet—decades of students, advocates, communities, decision makers, and litigators, and most importantly, he's touched the *'āina*.

From my experiences, first as a student of his the first year when he arrived at Berkeley, then as a public interest litigator, and now as a law teacher teaching environmental law, I am very grateful to him for his pioneering work, especially in the areas of citizen suit litigation and water law. Joe is recognized throughout the country as one of the founding fathers of modern environmental law, not just the public trust doctrine. He's not only a lawyer's lawyer, but, in my view, he's a scholar's scholar. He makes a difference. His biography is summarized in your materials but let me highlight for you what other nationally recognized scholars themselves have said about Joe Sax.

In 1998, there was an extraordinary panel of scholars from across the country at an annual conference of the American Association of Law Schools in San Francisco, and I was lucky enough to be able to go to this panel discussion of five or six distinguished scholars, all there to talk about the scholarship of Joe Sax. And what a tribute it was. The room was packed. The convener of that panel, Richard Lazarus from Georgetown University Law Center, said this about Joe:

> If one were to ask legal scholars to name the two or three most significant natural resources law scholars of modern times, Prof. Joe Sax's name would be on everyone's list. Extraordinarily engaging in person, he is even more so in his legal scholarship. He presents a rare combination of passion and intellect. He has, in his own work both as a teacher and a scholar, demonstrated the positive attention for bridging academic scholarship and law reform. He has been a mentor, a model, and indeed, an inspiration of many of those who teach and practice natural resources law today.

He is a historian, a multi-disciplinarian, an inventor, a tinkerer, a first-class lawyer with a passion and a vision. Also known as the "dean of water law," he is a master of rhetoric, he's a populist, he's an optimist. Prof. Sax, thank you again for coming to Hawai'i. We thank you for inspiring us, for educating us, and for your creative and pragmatic approach to environmental law in the public interest. Aloha and welcome.

PROFESSOR SAX: Water is unique among resources and it's not unique simply because it sustains us, though, of course, it does that. Unlike other resources, unlike land, oil, or timber, which are also essential to our modern lives, water, whether we find it beneath the earth or in surface streams, is a moving and a cyclical resource. Its supply is uncertain and changeable from season to season and from year to year. By its very nature, it is a shared common property. We cannot command it as a fixed object as we do with land or with other minerals. The water we use today is not the same water we'll use tomorrow, and the water we use is routinely used again and again by someone else downstream or downgradient, and ultimately water returns to the sea. It is a continuum. Surface water and underground water are parts of a single integrated system. For these reasons, the legal regime applied to water is unlike any other, and this has been true in every state and in every nation and at all times. Water is never owned in the usual sense. We acquire only use rights in it, or what lawyers call a "usufruct." Because water is inherently a common resource, it is subject to common servitudes, such as the right of public navigation. We find these concepts in various forms in all legal systems, not only those familiar remnants of the ancient Roman law that underlie the modern public trust doctrine, which restricts privatization of the sea and the seashore, but also, for example, in Spanish law, some elements of which are still operative in the American Southwest.

One such concept is the *pueblo* right which establishes a common entitlement to water for the benefit of the whole community, or *pueblo*, and which therefore limits the ability of anyone to vest in themselves private rights in such water. You might be surprised to know that the City of Los Angeles is a *pueblo* and that even today it holds *pueblo* rights in the Los Angeles River and in the ground water in the San Fernando Valley tributary to the Los Angeles River. Similarly, in the eighteenth and nineteenth centuries, Spanish communities in America constructed community ditches, or *acequias*, which members of the community were obliged to maintain, and such facilities are still found and maintained in places like rural New Mexico. Irrigation projects in early Indian communities in the Southwest were also community and not individual efforts. All these diverse laws from widely separated places on the globe emphasize one idea: Water is first and foremost a community resource whose fate tracks the community's needs as time goes on.

Water law evolves in the common law tradition. Public trust law is common law founded on community water rights. Public trust law evolves to meet community needs. But public trust law is only one instrument in this more general world. In western water law, a whole panoply of distinctive rules apply to water, all of which insulate it in greater or lesser degree from ordinary commodification. While one can acquire these so-called usufructory, or use rights as property rights in water, and while they are constitutionally

protected property rights, they can only subsist so long as they are for beneficial use, only for the amount that's needed for that beneficial use, only to the extent the water is not wasted, and only so long as the need remains. One cannot hold water without using it merely as an investment, and non-use triggers forfeiture statutes that will return unused water to the public. These are the general principles of water law.

In more humid regions where riparian law prevails, the central public precept of water law is that rivers belong to the place where they arise. Traditional riparian law permits use only to those whose land borders the water, and it prohibits water from being taken out of the watershed of origin for use. Moreover, riparian doctrine traditionally restricted diminution of natural flows, holding that the values of a river must be protected for each successive resident and for the downstream community. While some of these rules have given way in light of contemporary water needs, it is a striking fact that elements of the riparian doctrine's communitarian ideology has been making a strong resurgence in many places in the arid west.

Watershed protection and restoration, which has recently emerged as a new environmental goal, is as old as the English common law of riparian rights and natural flow. A number of western states, among them Colorado, Montana, and California, have versions of so-called "area of origin" laws. These laws implement policies that are designed to assure access to native waters for those communities in which waters originate, as against the fully commodified market property approach to water and water rights.

There's one other feature of water law that reveals its essential status as a common resource. I've already referred to its evolutionary character that permits it to adapt to meet the changing needs of the community that depends upon it. Because water is so central to the life of a community of which it is a part, water law has shown itself to be remarkably adaptable to the evolving needs of the community. Some of these transformations are well known. In pre-industrial England and America, as I mentioned just a moment ago, the natural flow doctrine prevailed. Rivers were left to flow as they did in the state of nature, which suited agricultural and pastoral landscapes prior to the Nineteenth century. As industrialization got under way, most prominently with the mills that powered the early industries of New England, natural flow doctrine yielded to a more industry-friendly doctrine known as "reasonable use." The law changed to permit the diversions to produce hydropower, and natural flow doctrine gave way, though versions of it are making a strong comeback in the context of environmental restoration.

Similarly, the unique business needs of the timber industry in the upper Midwest, the lumber that built places like Chicago, demanded a revised definition of navigable water, one of the keystone concepts of traditional water law. Except during the winter when they could be skidded across the

snow, the only way to get the great white pine logs to market was by floating them down the rivers. But only waters where tides ebbed and flowed and where ships went carrying freight were traditionally navigable public highways. So the courts revised the notion of navigability and narrowed the rights of private land owners along these streams in the Midwest by determining that a river could be navigable even if it was not affected by the tides, and even if its suitability for commerce was measured by the movement of lumber and not by ships. This is another classic example of the common law's judicially led evolution to accommodate the public and public trust right in navigation.

As population moved west past the hundredth meridian, the line dividing the so-called humid and arid regions of North America, another and even more dramatic change occurred. Riparianism, the very essence of water law in Anglo-American tradition, was simply not recognized in most of the West. Instead, western states fashioned the prior appropriation system which, among other things, abolished watershed of origin restrictions, and permitted water to be moved out of the basin where it was needed, first for mining, later for irrigation, and finally to support municipal development in cities like Los Angeles, Denver, Albuquerque, and San Francisco. Riparian landowners objected that no such change could be achieved as against their traditional riparian rights to the water and that such rights were implicit in their land titles. Of course, as we now know, those claims too were overwhelmingly swept aside by the same reasoning that had led to the modification of the natural flow doctrine and to the redefinition of navigability. The courts found that water was a community resource and that rights in water were always contingent on the fundamental needs of the community at the time, reflecting natural conditions, such as aridity, or the evolution of social goals.

In a famous opinion in 1882, the Colorado Supreme Court said "we conclude that the common law doctrine is inapplicable here. Imperative necessity, unknown to the countries which gave it birth, compels the recognition of another doctrine in conflict with the old."[2] The evolutionary character of water law has continued in a variety of contexts. The principle of the *Coffin*[3] case that I just quoted, and the commitment to beneficial use which, at that time, meant economically productive use as the source and limit of water rights, gave rise to another Colorado case some twenty-five years later in which it was determined that leaving water instream could not qualify as a beneficial use and no one could acquire a right to leave water instream.[4] Why? Because by the standards and the goals of that day, water was

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[2] Coffin v. The Left Hand Ditch Co., 6 Colo. 443, 447 (1882).

[3] *Id.*

[4] Empire Water & Power Co. v. Cascade Town Co., 205 F. 123 (8th Cir. 1913).

considered too precious to be left in the river. Indeed, it was standard law that the only way to perfect the beneficial right of use was physically to take the water out of the river and to apply it to some economic purpose. When more contemporary values to protect fish and riparian services, as well as recreation, came to the fore, it was argued, as it had been when the appropriation doctrine first displaced the riparian doctrine, that to treat instream flows as beneficial and to allow an individual or a state agency to appropriate water instream for environmental protection was to take away the established property rights of others to appropriate the water. But the courts rejected this claim just as they had rejected the previous traditional claims, and today instream uses are everywhere considered beneficial, even essential, uses of water.

So once more, history's wheel turned. I noted a minute ago that Colorado eliminated riparian rights from the very beginning of settlement. Many other western states, the Dakotas, Oregon, and California, retained some of these riparian rights at least for a while. Then in various ways, with the one exception of Oklahoma, they either eliminated or restricted the acquisition of future riparian rights, although loss by nonuse was absolutely antithetical to traditional riparian doctrine. In each such instance, it was asserted that the abolition of unused riparian rights was a violation of vested property rights. Those claims too have failed. While California courts struggled with this issue over many years, they have finally accepted that unused riparian rights can be subordinated in order to foster more efficient and more beneficial uses of water, as called for by the Constitution's mandate that water be used for reasonable and beneficial purposes in the public interest.[5]

Nearly a half century earlier, the California Supreme Court had rejected the claims of riparians that they could use water as extravagantly as they wished to benefit their lands, however great the adverse impact on others who had a need for the water. This pre-existing riparian property right, inherited from the times of abundance of water, was abolished by state constitutional mandate in 1929, long after the common law entitlement had been recognized. Yet again, the courts rejected the claim that riparians' constitutionally protected property rights had been violated.[6] The courts held that traditional, riparian prerogatives were no longer permissible in light of the common interest in putting water to beneficial and reasonable use as understood by the needs of the time.

I could extend this list almost endlessly. To your relief, I will not, but I hope the central point I'm trying to make is by now obvious. The rules governing the use of water have always been in a dynamic relationship with

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[5] *In re* Waters of Long Valley Creek Stream Sys., 599 P.2d 656 (Cal. 1979).

[6] Chow v. City of Santa Barbara, 22 P.2d 5 (Cal. 1933).

the evolving values of the community. You will no doubt have noticed that in all the examples I have given you so far, I have made little mention of the public trust doctrine, as such, and indeed the examples I've provided did not rest explicitly on the public trust. The public trust doctrine provides the theoretical underpinning of a general legal superstructure that submits water rights and water uses to evolving community needs.

It is, however, in public trust cases that the courts have most fully articulated the legal relationship between private use and public entitlement. Public trust doctrine in America is nothing new. It is generally traced back to a New Jersey case[7] in 1821 and to the U.S. Supreme Court's decision in the famous *Illinois Central*[8] case in 1892. In each such case, the central message was that the land underlying navigable waters could never be privatized to the detriment of fundamental public rights in the lands and in the water overlying them. The trust is old, but its applications to water diversions and to environmental protection is new.

In congruence with the fundamental principle that I have been describing, public trust doctrine also adapts to emerging social goals and needs. It is often mistakenly asserted that the public trust deals only with submerged lands, such as tide lands, and thus that it has nothing to do with water used by irrigators or municipalities who divert water from rivers or who pump ground water. On the contrary, the public trust is centrally *about* water. States took ownership of bottom lands in the original thirteen colonies and later in the public land states (of which Hawai'i, of course, is not one) precisely in order to protect public uses in the overlying waters, uses that traditionally embraced navigation, water-related commerce, fishing, and in some places, fowling.

Restrictions on disposition of public trust bottom lands were imposed primarily to prevent filling or other uses that would limit use of the overlying waters or access to them. But there should be no misapprehension about the fact that public trust doctrine is primarily a water doctrine and only instrumentally a land doctrine. In a time before modern regulatory government existed, it was believed that bottom land proprietorship was essential to control overlying water use. While it's true that the 1983 *Mono Lake* decision[9] in California is the first case that expressly applied the public trust to diversionary uses, followed shortly thereafter by Idaho[10] (whose legislature has set itself up in opposition to the courts), and perhaps next by

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[7] Arnold v. Mundy, 6 N.J.L. 1 (1821).

[8] Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).

[9] Nat'l Audubon Soc'y v. Superior Court of Alpine County, 658 P.2d 709 (Cal. 1983) (commonly referred to as the "Mono Lake" case) [hereinafter, "*Mono Lake*"].

[10] Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085 (Idaho 1983). *But see* IDAHO CODE §§ 58-1201 to -1203 (Matthew Bender 2000).

Nevada,[11] you will find nothing in the public trust cases or in the literature to suggest that the trust as protection of overlying waters excludes protection against diversionary uses. Indeed it could hardly be argued that diversions that impaired public navigation, for example, could not or would not be enjoined under the public trust even in its most traditional forms. The explanation for the delayed application to appropriations for municipal use or irrigation, as we saw in the *Mono Lake* case[12] or as you've seen in your recent Hawai'i case, is founded in the fact that the need did not arise until social values evolved to recognize the need to protect instream, environmental, and related values.

Public trust doctrine, like water law doctrine generally, has tracked community goals and priorities. During the century and a half dating from the time of *Arnold v. Mundy*,[13] the 1821 New Jersey case, up to the era of the *Mono Lake* decision,[14] our priorities were overwhelmingly focused on the utilization of water to promote settlement and economic development. That is what I was describing earlier, noting the adoption of a new navigation doctrine, the changes in riparianism, and the innovation of appropriation doctrine. During those times, the public interest was viewed as being promoted by encouraging diversionary uses, even to the point of disallowing or forbidding instream uses. Of course, even in those days, no one thought it was a good idea to diminish fisheries or to destroy the biological productivity of estuarial areas. It was simply assumed that in the vastness of the country, those values would be taken care of in undeveloped streams, that they would be protected in reservations such as national parks or wildlife refuges, or that they would be dealt with by technological fixes, such as fish hatcheries that were to compensate for the destruction of salmon habitat.

As to the economies of indigenous people, insofar as they depended on water, it must be said tragically that for a long time it was generally believed that the public interest would be advanced by terminating traditional uses, repudiating native culture and beliefs, and assimilating native people into the mainstream economy. Today, everywhere in the mainland West, Native American water rights in the form of federal reserved rights are being asserted and are being recognized though they had been long ignored. As with trust rights generally, they do not expire simply because they have been unacknowledged for no matter how long a period of time. Today, each of these earlier conceptions that I've described, whether as to indigenous people, as to ecological services, or as to threatened species or fisheries, has either

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[11] Mineral County v. Nevada, 20 P.3d 800 (Nev. 2001) (concurring opinion).

[12] *Mono Lake*, 658 P.2d 709.

[13] 6 N.J.L. 1 (1821).

[14] *Mono Lake*, 658 P.2d 709.

been repudiated or sharply revised, just as the various earlier conceptions of water rights were revised to meet the public priorities of their day.

As water doctrine has evolved, so has the common law public trust doctrine, often in phase with new statutes and new constitutional provisions that made the trust explicit where it had previously been expressed only in common law judicial decisions. In terms of the public trust, probably the most significant modern decision is not the *National Audubon*[15] Mono Lake case, which is so well-known, but an earlier case called *Marks v. Whitney*,[16] decided in 1971. That case held the scope of public trust protection could evolve with changing public values and that the general purpose of the trust to protect public rights in overlying water was sufficient to encompass environmental values instream. As the court put it,

> The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs.... There is a growing public recognition that one of the most important public uses . . . is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments that provide food and habitat for birds and marine life . . . .[17]

One cannot contemplate the *Marks* case without recognizing that its conceptualization of the modern public trust made *National Audubon* inevitable. After all, how can one protect the marine environment without water? The adaptive or evolutionary nature of the public trust has been recognized in a number of states such as Washington and New Jersey.[18] A few years after *Marks v. Whitney*,[19] the North Dakota Supreme Court opined that planning must take into account the impact of water use as a public trust obligation.[20] In New Jersey, the courts have focused attention on beach access, recognizing the vastly increased importance of recreational use of water in modern times.[21]

A similar issue arose recently in Connecticut where limitation of beach access to town residents was challenged as a violation of the public trust, and while the court did not accept that theory, it did hold that the exclusion

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[15] *Mono Lake*, 658 P.2d 709.

[16] 491 P.2d 374 (Cal. 1971).

[17] *Id.* at 380.

[18] Orion Corp. v. Washington, 747 P.2d 1062 (Wash. 1987); State Dep't of Envtl. Protection v. Jersey Cent. Power & Light Co., 308 A.2d 671, *rev'd on other grounds*, 351 A.2d. 337 (N.J. 1976).

[19] 491 P.2d 374.

[20] United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n, 247 N.W.2d 457 (N.D. 1976).

[21] Borough of Neptune City v. Borough of Avon-By-The-Sea, 294 A.2d 47 (N.J. 1972).

violated expressive and associational rights under the Constitution.[22] The Wisconsin Supreme Court recently found that privatization of waters through what is called "dockominium" marinas violated the public trust;[23] another adaptive use of public trust doctrine to modern recreational conditions and a recognition of public as opposed to merely private uses of water. In Vermont, the court found that when private uses of trust lands consistent with the trust cease, such as use for wharfage, the trust restrictions reemerge and the property cannot be treated as free of the public trust.[24]

The public trust is of special importance, as the states have expressly recognized, because it invokes not just authority but a duty on the part of government to protect public rights. Agencies of the state have an affirmative obligation to come forward and to take on the burden of asserting and implementing the public trust. Moreover, the public trust is a continuing obligation. In trust waters there can be no such thing as a permanent, once-and-for-all allocation of trust waters or land. That principle is essential to acknowledge government responsibilities to respond to changing public needs and changing roles for water in the economy. *National Audubon* affirmed that the public trust is a continuing obligation that cannot be completed as to any given moment in time, but must remain open to accommodate new and changing conditions. That, by the way, was not an invention of *National Audubon* in 1983, but it had been the law in California since the 1920s when it was articulated in an off-shore oil development case.[25]

Similarly, in the old *California Fish*[26] case going back to 1913, the court held that grants of trust property must be read as implicitly reserving public rights and public trust uses as against assertions of permanent privatization. Other states, such as Arizona, have elevated the public trust to a sovereign obligation. The Arizona Supreme Court stated, "The public trust doctrine is a constitutional limit on legislative power."[27] The Illinois Supreme Court and the Illinois Federal District Court have each overturned express legislative grants of trust property to private entities making clear that they view the trust as a constitutional mandate.[28] The Washington Supreme Court said: "Courts review legislation under the public trust doctrine with a heightened degree of judicial scrutiny as if they were measuring that legislation against

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[22] Leyden v. Town of Greenwich, 777 A.2d 552 (Conn. 2001).

[23] ABKA Ltd. P'ship v. Wisconsin Dep't of Natural Res., 635 N.W.2d 168 (Wis. App. 2001), *review granted*, __ N.W.2d __ (Wis. 2001).

[24] Vermont v. Cent. Vt. Ry., 571 A.2d 1128 (Vt. 1989).

[25] Boone v. Kingsbury, 273 P. 797 (Cal. 1928).

[26] People v. Cal. Fish Co., 138 P. 79 (Cal. 1913).

[27] San Carlos Apache Tribe v. Superior Court, 972 P.2d 179 (Ariz. 1999).

[28] People *ex rel.* Scott v. Chicago Park Dist., 360 N.E.2d 773 (Ill. 1976); Lake Mich. Fed'n v. U.S. Army Corps of Eng'rs, 742 F. Supp. 441 (N.D. Ill. 1990).

constitutional protection."[29] Each of these approaches in its own way is in accord with the general constitutional view in western states that water belongs to the people, that it can never be fully privatized, and that the public interest in water can never be granted away.

As the New Jersey court put it 180 years ago, such a result "could never be long borne by a free people."[30] Speaking more broadly, it could be said that the whole history of property is not one of fixity but of adaptive change within an evolving social setting, and this process goes back as far as one might want to look. At one time, only eldest sons could inherit. When that posture became socially unacceptable, a dramatic change in property rights occurred. Similarly, and until much more recently, when a woman married, all of her property became her husband's to dispose of at his sole will. As the status of women changed, legislatures enacted Married Women's Property Acts, and ended the husband's dominion over spousal property. Well within the last century, child labor laws, maximum wage and hour laws, and minimum safety standards for workers have each invalidated valuable, contractual property rights that had previously been recognized.

Sometimes new technological information, such as knowledge about radiation, required that formerly valuable equipment be taken off the market. At one time, as some of you may recall, every shoe store had a machine with an x-ray that x-rayed your feet to show that the shoes were not too tight. Modern health laws made those machines valueless. Property became non-property. The invention of the airplane forced us to modify the notion that one owned his land from the center of the earth to the top of the sky. Sometimes, conversely, technology increases property rights. Newly intrusive eaves-dropping equipment, for example, moves us to reconsider the definition of what it means to trespass.

Sometimes social norms change. In the late nineteenth century, when a number of states adopted prohibition on liquor sales, stores and distilleries were left with liquor they could not legally sell. Courts rejected the claim that such laws violated property rights in the remaining stocks.[31] When the railroad was invented, noise and smoke, which by earlier standards would be a nuisance, became a feature of contemporary life that people were required to tolerate to some extent. In light of this history, it can hardly come as a surprise to anyone today that we should see property doctrine evolving to bring about a reorientation of traditional relationships between water devoted to diversionary offstream uses and instream retention. It should come as no surprise that there are now increased restrictions to promote water quality, and

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[29] Weden v. San Juan County, 958 P.2d 273 (Wash. 1998).

[30] Arnold v. Mundy, 6 N.J.L. 1, 78 (1821).

[31] Mugler v. Kansas, 123 U.S. 623 (1887).

that the long ignored claims of indigenous people are finally getting recognition.

Although the public trust doctrine has been one important means through which some of these reallocations have been achieved, it is not the only one and many parallel changes could take place, and indeed are taking place through other means. Even the most casual observer of contemporary resource law is aware that statutes like the Clean Water Act and the Endangered Species Act have been instrumental in reallocation of diversions in order to create greater instream flows. Indeed, within recent decades, we have seen instream flow rights recognized for the first time in a number of states and have seen a much greater use by water permit agencies, as well as federal land management agencies, to maintain and enlarge bypass flows so as to protect instream resources downstream. The U.S. Forest Service has utilized bypass flows as a condition on its right-of-way renewals for water projects and the same sort of conditions are being required on hydropower licenses as they come up for renewal. We have even seen these issues arise in the reopening of interstate water allocations in the U.S. Supreme Court.[32]

In addition, active litigation and settlements by Indians to finalize reserved right claims for reservations have made mainland native people and their traditional claims major factors in ongoing water reallocations that are taking place almost everywhere in the western states. Obviously, many of these developments parallel changes that may be generated by Hawai'i's recent *Waiāhole* Ditch case. To be sure, there are some features of that opinion that I'm sure will be discussed today that are distinctive to Hawai'i, or at least are only incipient in other states, such as the application of the trust to domestic use, to ground water without explicit reference to navigable waters, and references to native and traditional and customary uses.

Of course, California decisions also generated new applications of old principles, as I'm sure Jan Stevens will discuss in considerably more detail. In addition, the Hawai'i opinion may suggest a level of engaged judicial oversight that has not, or at least has not yet, been a feature of water rights administration in some other states under the public trust doctrine, regarding issues like burden of proof and the so-called precautionary principle. However, there are many examples, some of which I've already noted, of vigorous judicial commitment to protect public trust values, even including invalidation of legislation that was determined to undermine the public trust. Active implementation of public rights in water reflecting contemporary public values, rather than those of an earlier time, would put Hawai'i squarely in the mainstream of America's evolving water law system. Thanks.

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[32] Nebraska v. Wyoming, 515 U.S. 1 (1995).

JIM PAUL: Thank you very much, Prof. Sax. Now I'd like to introduce Peter Adler. He is our moderator for the first panel.

PETER ADLER: Good morning everybody. Thank you, Jim. Thank you Prof. Sax for a very thoughtful start to our symposium today.

Here's the way we are going to do this panel. First, I'm going to ask each of our distinguished panel members, all of whom are attorneys and two of whom are current or former chairs of the Board of Land and Natural Resources, to take five minutes each to summarize what's in the papers that people have in front of them but haven't yet had a chance to read. I know there will be a little bit of bargaining and dickering over time so some of them may yield time to others. Watching attorneys negotiate can be exasperating so I suggest we don't watch them too closely and just count on them to divide the time up and not go on too long. Jim Paul, I'm going to ask you to start, if you would, and tell us what's in your paper with as much particularity on Hawai'i's application of public trust as you can.

JIM PAUL: Thank you, Peter. Let me see if I can take less than five minutes. I have a paper that's in the materials that is an attempt to summarize the *Waiāhole* Ditch case with particular focus on the public trust doctrine, and I've tried to do that by quoting excerpts, hopefully in an organized way, that helps the reader understand what is a lengthy and at times complex decision and to make it perhaps a little bit easier to understand. I've also tried to pull out lists of what I believe are the duties of the state as a trustee of the statewide water resources trust, referred to for the first time by the *Waiāhole* decision. I tried to list those duties as I believe they flow from the decision. I tried to suggest duties of water applicants and the burdens they must carry as a result of the decision. I talked a little bit about the burden of proof issues as set forth by the Supreme Court, which may be, or certainly is a candidate for, the most important aspect of the decision for some people. And finally, I tried to talk a little bit about what the Hawai'i Supreme Court decision said about the relationship between counties in particular, county planning processes, and the water commission.

Let me suggest that there are some fundamental principles about the public trust doctrine as a result of the *Waiāhole* Ditch case, seven or eight fundamental principals of the Hawai'i public trust doctrine. Briefly and with some simplification for purposes of being brief. First, at its core, it provides enduring protection of certain precious natural resources in Hawai'i for the benefit of not only all people but for the benefit of future generations. Second, the State of Hawai'i is the trustee, the trustee of the public trust resources with all of the duties that go with the notion of being a trustee. Third, the public trust doctrine is a powerful property right of its own that in

most circumstances takes precedence over other property rights whether they are private property rights or governmental property rights. Fourth, the public trust doctrine requires principled public and rational planning processes concerning the use and potential destruction of public trust resources. Fifth, the burden is squarely placed on those who seek to use the public trust resources such as the Waiāhole Ditch water, squarely placed on those who seek permits to use that water, to prove that there will be no significant harm to the public resource. The court noted that that burden is higher in the case of private commercial uses. Sixth, Prof. Sax stated the so-called precautionary principle, when scientific data and analysis is simply inadequate to assess the potential damage to resources from requested uses. That lack of science should not be used as a basis to permit the use, the degradation, or the destruction of the public trust resource. The science-based precautionary principle should apply to protect resources when the harm from use or consumptive activity cannot be measured with some degree of confidence. Seventh, the public trust doctrine closely mirrors native Hawaiian and native American notions of stewardship of natural resources and the relationship between human beings and those resources. And eighth, as Prof. Sax has just articulated, hopefully convincingly, the doctrine evolves and it is a central feature of the doctrine that it has evolved and it will continue to evolve.

PETER ADLER: Thank you. Ken, can I ask you to go next so we try to take this somewhat in order.

KEN KUPCHAK: Thank you, Peter. Despite the fact that I've written a law review article in 1971 suggesting the burden of proof as it is today in this decision, today I'm acting as the devil's advocate, the ghost of Christmas future, exclaiming that the emperor has no clothes. Federal law suggests that Hawai'i's public trust doctrine evolved or was born anew in August 1959, the moment of statehood. What were the public resources in 1959? These 1959 resources are determined by law and not by science. They are determined by legal decisions and possibly how the government itself addressed these rights and maybe even taxed them. In 1959, public trust resources cannot be expanded without paying just compensation. The 1978 constitutional amendments that we made cannot take away previously recognized property rights. The highest courts in Maine, Massachusetts, New Hampshire, and New York have acknowledged, as Prof. Callies has indicated, that, if the state courts drift from the historic trust moorings, they risk running afoul of the Fifth Amendment.

In the last nine years, the U.S. Supreme Court has thrice reinforced this caution previously recognized by Justice Stewart in 1977, when he said, "A sudden change in state law, unpredictable in terms of relevant precedents, . . .

[would not] defeat the constitutional prohibition against taking property without due process of law . . . ."[33] In 1992, the *Lucas* Court,[34] which created the "background principle" exception, noted that only "objectively reasonable application of relevant precedent" would qualify.

This past year in *Bush v. Gore*,[35] Rehnquist, with Scalia and Thomas concurring, noted that state attempts to redefine background principles can't undermine a takings claim. This echoed a previous dissent to a denial of certiorari by Scalia, joined by O'Connor, in 1994. In 1997, the New York Court of Appeals was able to read these tea leaves in refusing to expand the public trust doctrine to non-navigable waters, because of the sudden and unstable impacts of such a decision on private property rights.[36]

Let me suggest that the reversal of *City Mill*[37] on science may run afoul of this caution by the Supreme Court. If so, where else does *Waiāhole* lead us?

Like *PASH*,[38] *Waiāhole* is a lawyer's dream. There are no standards. This case may create an unconstitutionally broad delegation of authority to the Water Commission. This decision provides few clues as to what a public trust use, purpose, or value is today. Even more scary is that these unknown terms are said to possess the potential to continually evolve. The only place they seem to come to rest, even momentarily, is at the Supreme Court.

These concepts should immediately intimidate any landowner, developer, or lender. Assuming that you could freeze "uses," "purposes," and "values," we are also missing the next starting point that is, what is the "natural state" of the stream in question? To what point do we measure the natural state? Pre-Menehune, pre-Tahitian and pre-Marquesan immigration, pre-Cook, pre-Mahele, pre-overthrow, pre-annexation, pre-Ditch, Pre-Statehood, pre-1978, or pre-code? What "stream flow" guarantees the perpetuation of a "natural state?" Is it a minimum? Is it a seasonally fluctuating standard? Is a use moratorium required while this is determined? What standards ensure that such a determination is not arbitrary?

Assuming that we can clear these hurdles, what water use allocation guidelines are there? Do instream uses trump diversions? How about the

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[33] Hughes v. Washington, 389 U.S. 290, 296-97 (1977) (Stewart, J., concurring).

[34] Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

[35] 531 U.S. 98 (2000).

[36] David L. Callies & J. David Breemer, *Background Principles: Custom, Public Trust, and Preeexisting Statutes as Exceptions to Regulatory Takings*, *in* TAKING SIDES ON TAKINGS ISSUES: THE PUBLIC AND PRIVATE PERSPECTIVES § 6.10, at 139-40 (Thomas E. Roberts ed., 2002).

[37] City Mill Co. v. Honolulu Sewer & Water Comm'n, 30 Haw. 912 (1929).

[38] Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n, 79 Hawai'i 245, 903 P.2d 1246 (1995) [hereinafter "*PASH*"].

following diversions: drinking water, customary and traditional uses, agriculture or aquaculture?

And what justifies a distinction between agriculture/aquaculture and other private uses? As between offstream uses, are there any allocation guidelines? The court's vested right dicta arguably is limited in application to distinguish between public trust uses and non-public trust uses. The public trust doctrine provides little support for favoring one private user over another. A use would either seem to be a public trust use or not. And we have not yet touched on the tension between this new constitutional child and pre-existing constitutional rights, including those superior rights under the federal constitution. Of course, under the police power, the state could always take what it needed, but it had to pay for it.

By trying to ex post facto shoehorn in under a *Lucas* footnote the recently resurrected public trust doctrine, Hawai'i seeks to avoid paying the piper. Will it be successful? We won't know until either the Water Commission or the Court actually denies the previously private use. The *Waiāhole* majority uses the words "exclusive use" when it distinguishes private uses from "public trust" uses. This might be a clue that the court did not mean to totally disenfranchise private uses, but rather merely subjected them to rationing.

One potential avenue through this maze might be to recognize pre-existing offstream uses, but limit them to their share of an intermittent and fluctuating "surplus" over the predetermined minimum "instream natural state" flow. This "surplus" might be divided pro rata between the preexisting offstream uses with reasonable and equally applied conservation standards.

New uses, however, might have to run the gauntlet of pre-qualification regulation and justification. Perhaps new uses might be allowed only to the extent that either sufficient surplus remained or rights to a pre-existing use were acquired. This might create a market in offstream use entitlements, but only in favor of pre-qualified new uses.

To the extent that, after some mystical guideline-less balancing, offstream public trust uses trump instream or pre-existing offstream private uses and survive the "takings" scrutiny, these trumped uses might also vie for any resultant surplus.

Without legislative-adopted, equally applied guidelines, however, the present system is subject to attacks for being arbitrary and a breeding ground for favoritism and graft. The bottom line, however, is that it appears that my workload is guaranteed for the future.

PETER ADLER: Thank you, Ken. Tim, if you would go next.

TIM JOHNS: Thank you, Ken, and what do you really think? I am a member of the land board, but nothing that I say today should indicate my preference

to vote one way or another on particular issues that might come in front of me so I'm speaking today as a private citizen. You could look at the paper that I submitted. The question that was posed to me was what is the public trust doctrine in Hawai'i? The short answer is it's really whatever the Supreme Court says it is. And I'm not trying to be flip about that, but basically it is a common law doctrine, it has its grounding in the Constitution but it's an underpinning that's floating around in a lot of case law and it's only going to be brought into focus by the Supreme Court, and possibly by the Water Commission, but, I think ultimately by the Supreme Court.

What I tried to do in my paper even more briefly than what Jim did, is talk a little about the lessons of *Waiāhole* and then raise some questions that I thought might be instructive to think about in terms of the *Waiāhole* water decision and what kind of themes might be floating around *Waiāhole* and the public trust doctrine. One major theme that I saw was that the public trust doctrine is an intragenerational, as well as an intergenerational, equity doctrine. So, it's a way to protect certain public uses in certain public resources, to have those uses distributed equitably among people today. It is also an intergenerational equity doctrine, so future generations' uses of certain public resources are to be protected, and that's very much in line with native Hawaiian land management practices and theories. I described it in a bit more detail in my paper, but basically it's intragenerational and intergenerational, so it's not only people today but also people in the future who are being protected.

The second major theme that I saw was that the public trust doctrine, as espoused in the *Waiāhole* water case, is both substantively protective, as well as procedurally protective. It sets out certain substantive rights, but it also, as Jim alluded to when he said the burden of proof is possibly one of the most important parts of the decision, has a very large procedural component to it as well. So for those of us that are going to be wrestling with those decisions in the future, the procedural part of it is going to be very important, and Jim spent quite a bit of time in his paper going through how those procedural protections are set up. *Waiāhole* not only sets out substantive rules but also procedural protection as well. In other words, it sets out *what* is protected, but also how it should be protected on a daily basis.

The second part of my paper addressed questions in light of the lessons of *Waiāhole*. Now the public trust doctrine may evolve in Hawai'i in the future, but if you want to know what the public trust doctrine means now, if you read *Waiāhole* very narrowly and very closely, it's pretty clear what it means for the Water Commission, the *Waiāhole* participants, and Oahu water planning. It's less clear what it might mean for the Water Commission issues that come down the road that don't fit the same fact pattern as the *Waiāhole* case. So, for example, what if it's a public use versus a public use? What does

Waiāhole tell us about that instead of a public versus a private use? To recap, the first level of question is, what does *Waiāhole* mean for water planning in general? And that's pretty clear. I think the Supreme Court was very clear about that. It's less clear when you start talking about what *Waiāhole* means for the Water Commission's business in general. I think it's even less clear when you start talking about the Land Board, the Land Use Commission, and Chris Yuen's planning department. How do you apply the *Waiāhole* decision to their actions with regard to water decisions? And then the next question that I posed is, what about non-water resources, public trust resources, or other resources that are protected under the Constitution or held in trust by the state for our people today and in future generations? Does the public trust doctrine, as set out in *Waiāhole*, only cover water, or does it cover land, or does it cover any other public trust resource?

So those are the four kinds of questions that, depending on how the supreme court and/or the bodies that are going to be forced to implement and decide those questions, will determine what the public trust doctrine is going to look like in Hawai'i in a few years. And even though Prof. Sax said we are in the mainstream, I think that we're probably going to be a bit on the cutting edge as well, depending on how those questions are answered.

PETER ADLER: Bill, if you would give us a summary of what's in your paper.

BILL TAM: I would like to disagree with the last two speakers, although they're old friends. I have more faith actually in the decision and in the water code than I have heard so far. I would begin by reminding all of us that the supreme court in the *McBryde*[39] decision pointed back to the source of title to land in Hawai'i so I am less afraid of the takings argument for a very simple reason. The background principles of property law in Hawai'i that Justice Scalia referred to in the *Lucas* case, and which the *McBryde* court referred to, go back to the very principles of the 1848 Land Commission and recognize that the public trust doctrine in Hawai'i is a function of Hawai'i law. It is not a national rule. It is Hawai'i law. The background principles include the following statement that is embedded in the title of all land in Hawai'i. "What is the nature of the extent of that power which the King has bestowed on this board?" I.e., the 1848 Land Commission board.

> [H]is private feudatory right as an individual participant in the ownership, not his sovereign prerogatives as head of the nation. Among these prerogatives which affect lands are the following: . . . [t]o encourage and to enforce the usufruct of the lands for the common good. These prerogatives, power and duties his

[39] McBryde Sugar Co. v. Robinson, 54 Haw. 174, 504 P.2d 1330 (1973).

> majesty ought not, and ergo, he cannot surrender. Hence the following confirmations of the board and titles consequent upon them must be understood subject to these conditions.[40]

Hawai'i's public trust doctrine has been embedded, not simply in the title of all the land. It has always been subject to that. So Ken's notion that it depends on the 1959 determination of the rights here is in error. But under the police power of any sovereign, there is always that ability to regulate. Hawai'i adopted the public trust doctrine, not in the *Waiāhole* decision, not in the *McBryde* decision, not in the 1978 ConCon, not in statehood, not in territorial time, not even in 1899 when the Republic Supreme Court formally adopted the common law doctrine, *King v. Oahu Railway*.[41] Arguably, the public trust doctrine, which was part of common law in England and in the United States, was adopted in 1892 when Hawai'i Revised Statutes 1-1 said that the common law of England, as amended by the common law of the United States and the statutory law, is the law of Hawai'i.

There is another notion of public trust which I want people to understand. It is a doctrine, distinct, but related. There are express public trusts as in the Admissions Act. This is a different line of cases and a different set of principles, although they overlap. The doctrine we are talking about here arises in judicial context as a limitation on the power of government itself to alienate permanently those trust assets.

In figuring out what the rules are for allocation going forward, I am more confident than Tim or Ken about how to figure out the answers. I would offer you the following thought. Think of the decisions that anyone in the government must make when they go to work in the morning. There are a lot of people here who are going to be faced with this issue in the next couple of years. You get to your desk in the morning and how do you actually do this? I would offer the following suggestion: Think of an inverted pyramid in which the fundamental questions have to be answered before you can get to the secondary questions, and the fundamental questions are, at a minimum, what is necessary to protect the resource now and in the future? Now, the supreme court on page 146 of their decision said that, looking at the preface and the purposes of the water code, there is not a categorical priority for protectional overuses. That is true in any particular instance where you have a specific decision you have to make, but with regard to the overall protection of the resource, it is necessarily a categorical imperative. It is necessary that the resource be in existence before you allocate it. So the issues that you have to sort through must start like a metaphorical raindrop in the hydrologic cycle from the top and work its way down. There are a series of rules with regard

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[40] *Id.* at 186, 504 P.2d at 1338.

[41] King v. Oahu Ry. & Land Co., 11 Haw. 717 (1899).

to how you allocate under the common law. There are riparian doctrine rules and there are the correlative use ground water rules as modified by the recent decision. We're not operating in a vacuum. Properly understood, those are sorted out. They do not say how much you get under a particular instance because that would depend on all the other competing uses. In Hawai'i, as Jim pointed out, there is a very close parallel between public trust doctrine and traditional Hawaiian customs. The public trust doctrine is just the secular western way of describing a lot of what Hawaiian practices were. So Hawai'i is particularly suited for the public trust doctrine in its own traditions and customs. People should look at those as parallel ideas employing different vocabularies to do similar things. They're not at odds with each other.

I think another factor that tends to get forgotten in academic discussions about the law are geographic facts affecting Hawai'i. That is what we all have to keep in mind. Although often unstated, we are on islands. We are bound by the shoreline and the ocean. We are here at the grace of the mountains that catch enough of the rainfall as clouds graze by and fill up parched aquifers. The water in Hawai'i's streams, unlike the Columbia River, for example, runs quickly down to the ocean. Hawai'i streams run out in a day. We, more than other places on continental landmasses, are constrained by the geographical limits and our close interrelationships. While prior appropriation might work on the mainland, it is inappropriate in Hawai'i, both by custom and by geography. So the public trust doctrine is uniquely suited for describing a lot of the traditions that already exist. The notion of caring for the future and caring for future generations is embedded in the culture here. Prof. Sax has written about Kenneth Boulding's notion that we are now on "spaceship earth." Our Hawaiian cousins figured that out a long time ago. They came here on small canoes. Finally, I want to bring to your attention two chronologies at the end of my paper: 1) the evolving nature of Hawai'i water law as Prof. Sax mentioned, and 2) a conceptual evolution. Thank you.

PETER ADLER: Gil, I want to invite you as a commentator if you have any reflections on either the points made or the issues that have been raised because they're starting to come up.

GIL COLOMA-AGARAN: I just wanted to make a couple of observations about some of the things that you've said and also about the public trust doctrine itself. First, I want you to think about the fact that Peter said that this entire panel here is made up of all lawyers except for himself. The first question you really have to think about is, do you want the only people who work on these types of issues to be lawyers? [Laughter.] This is the *Waiāhole* decision. I've been carrying it around for a couple of weeks now. When I first read the decision, I read it and said this may be something just for

lawyers, but I actually read it because I was sort of interested in seeing what they said. Now that I'm back at the department, I had to read it to see what they are telling us to do, and it's a lot easier to say it than to do it.

And the next thing I want to talk a little about is the notion of who the trustee is. I think a lot of people who will read the decision will say it's the Water Commission, but it's also the state legislature, and that's something people should take seriously because when I say it's a lot easier to say than to do, a lot of it's going to depend on what kind of resources the Water Commission and other people are interested in doing or getting the best scientific information you can have in order to allow decision makers to move forward. You're going to need resources. In a couple of weeks, hopefully, we'll have something coming before the Water Commission from some panel that the *Waiāhole* decision required that will be setting up a format to look at funding some studies. We also have some legislative proposals to help fund those studies as well. But what usually happens is the usual rule that the executive proposes, the legislature disposes, and sometimes you don't get what you're looking for.

The other thing I wanted to make a comment on a little bit, and I don't necessarily disagree with what Bill is saying, but I think we have to be very careful in the notion of whether or not the U.S. Constitution doesn't ultimately control what happens in Hawai'i if we're part of this country. I know that you're saying that the origin of the trust is really set in Hawaiian law and I don't know if you can say that separate or apart from what U.S. law is. I appreciate very much what Jim Paul said in his summary of the case, but I would encourage everybody to try to read the whole thing. One thing about summaries is that it sometimes depends on what you're looking for in the decision. I've seen summaries that focus on something on page sixty-five, for example, where the court said: "Apart from the question of historic practice, reason and necessity dictate that the public trust may have to accommodate offstream diversions inconsistent with the mandate of protection to the unavoidable impairment of public instream uses and values." If that's all you have in summary of what the *Waiāhole* case says then that suggests that, yeah, you can do the diversions, you can do a lot of things, but there's nothing protective about it. The other last thing is really again going back to who do you want making the decisions and the people that are appointed to these positions? What do they have to know before becoming part of that panel?

[Q & A Section omitted]

PETER ADLER: I would like to introduce Bill Tam, who is going to introduce our next speaker, Mr. Jan Stevens. Bill was the lawyer to the Water Commission for over ten years, and as many of you know was the lawyer for

the Water Commission during most of the underlying proceedings in the *Waiāhole* case.

BILL TAM: This morning we're honored to have a second speaker with enormous experience in the area of the public trust doctrine. Jan Stevens has been in the trenches for the last thirty-five to forty years trying to make the public trust doctrine work in California. Jan is responsible for introducing Mr. Don Maughn, the then-current chair of the California Water Resources Control Board, to Hawai'i. Don Maughn came here in 1987 and spoke at the state legislature and people's water conference. His presentation to legislators was critical in making them realize the importance of adopting a water code. Jan has been a lifelong public servant. He has brought a persistent intelligence and undaunted courage to that job. He has been a role model for other people in public life as to how to behave and how to bring the public issues to the floor of the right forums. Jan Stevens.

JAN STEVENS: Thank you very much, Bill. It's really a pleasure to be here in more ways than one. I've enjoyed this program enormously. The chant was deeply moving and appropriate, and the hospitality has been exceptional. I'll do my best to try and assist you in dealing with this complex antediluvian and ancient theory, the public trust.

I was interested to hear the *Waiāhole* Ditch hearings likened to the O.J. Simpson trial, and I wondered what Johnny Cochran might have done with this. Perhaps he would come up with an argument for water use like this, "If the use don't fit, you must change it." Maybe that would have convinced the water board. It's hard to simplify these matters but I do want to share some of my feelings about implementation of the trust and how it's worked in four cases in California.

It's hard to define the public trust doctrine. I think this program has gone far toward analyzing the beautifully drafted and very thoughtfully prepared opinion of the Hawai'i Supreme Court. When I was in one of my first public trust hearings in the California Supreme Court, Justice Richardson (no relationship to Chief Justice William S. Richardson, but a very brilliant man) leaned over, smiled, and said, "What is this thing that you call a public trust, that you're trying to impress upon Clear Lake?" Although literally foot after foot of pleadings had been filed attempting to define it, obviously the court had not grasped our argument. So, I stammered out something as I usually do, about how it's an interest of the public in property, akin to an easement, which precedes that of individual owners. And, as usual, I thought the next day about an example that might have been much better. Based on the gospel of St. Paul, I could have said, "It's the substance of things hoped for and the evidence of things unseen." And perhaps this is what it is in *Waiāhole*.

Now I want to welcome Hawai'i to the world of western water. Remember what Wallace Stegner said about the west: "It's about water." I was somewhat surprised that a state that I thought was blessed with large quantities of water would still be suffering from the conflicts and the scarcities that have pursued most of the arid west, particularly California. But since such conflicts exist here, I want to welcome you to the world of the water buffaloes, beasts that historically have rampaged over lakes, rivers, and underground basins in the west, defending what they perceive to be their rights against a motley but menacing crowd of fishermen, bird watchers, biologists, and environmentalists. The term "water buffalo," I think, is particularly suitable here. It's traditionally applied to the defenders of vested water rights, members of a very small and arcane water law bar. It can be contrasted to the phrase "tree hugger," which is usually applied by water buffaloes to environmentalists and others who advocate instream protections.

This buffalo must exist in Hawai'i because the dictionary says it is found in most tropical and subtropical regions. It's defined as an animal that, when pestered, wallows in the water on damp soil for protection.

For years the water buffaloes had things pretty much their own way. The water agencies believed they had no alternative but to approve an appropriation if the water was going to be put to an economic use. Riparians could draw their water subject to little control, and the owners of underlying ground water could pump to their heart's content. But as the great American poet Bob Dylan said, "The times they were a changin'." And as Joseph Sax said, "Beneath the murky navigable waters, there stirred an ancient doctrinal beast capable of giving the water buffalo a good fight."

The public trust doctrine goes back to Roman law. The Emperor Justinian is the ancient father of the public trust, just as Professor Joe Sax is its modern and youthful father. A primary attribute of public trust is that it's a part of governmental sovereignty. What we need to remember about the public trust is that it's an attribute of sovereignty that cannot be dealt away by legislatures or by administrative agencies. It is a central function of government. This trusteeship, this duty going back to Roman law, reflects that some things like the air, the waters, their beds and banks, cannot be reduced to that kind of "sole and despotic dominion and control" that Locke and Blackstone recognized as private property. Even in those days, the tidelands and the waters over them were held in trust for the people, and as the New Jersey Court stated in 1821, reducing them to positive possession was a concept that violated the law of nature and the constitution of a well-ordered society, and which never could be long borne by a free people. This statement came only thirty years after the revolution, which makes the court's words especially meaningful.

In this country, the trust was articulated in the *Illinois Central*[42] decision in 1892 by an otherwise rather conservative justice, but one of decided views and a firm character. Justice Steven Field came from California. He served on the California Supreme Court and then the United States Supreme Court. He wrote an eloquent opinion in *Illinois Central*, saying essentially that the legislature had no power to dispose of the people's interest in the navigable waters surrounding them. This has pervaded the law of ultimately every state since then. It is the principle that inspired the vehement declaration in the *Mono Lake* decision, that the trust is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands, and tidelands.

Logic compelled the conclusion that the rule of law protecting the waters of the state, as Prof. Sax said, necessarily must extend beyond the beds and banks of commercially navigable rivers and lakes. In the nineteenth century, commerce was important. We didn't have much time for recreation or bird watching, so it's natural that the public trust was defined in terms of commerce, navigation, and fisheries. But the public trust is a common law concept, and it has evolved in a number of different ways to protect public rights not only in commercially navigable rivers, but also in rivers capable of recreational use—rivers that support fisheries and riparian values.

There is another basis for the common law evolution of the trust, and that is the fact that when you do things in the tributaries of large navigable waters, they can affect those waters. They can obstruct navigation, and they can pollute, and they can destroy public trust values, which historically and traditionally exist within the larger water bodies. In the nineteenth century, hydraulic mining was a major industry in California, and the rubble washed down mountains. Debris obstructed the American and Sacramento Rivers way downstream, flooding fields and wiping out farmers. In a historic decision, the California Supreme Court upheld the prohibition of hydraulic mining on trust grounds. It didn't occur on the river itself; it occurred way upstream, but it was ruining public trust values in the navigable rivers, and the public trust was applied as a basis for stopping it. It was inevitable that this would lead to *National Audubon*,[43] an opinion which so eloquently explained why the public trust should protect the waters of Mono Lake. The facts of the *Mono Lake* case have been widely published. Mono Lake is the largest body of water entirely within California. Its large population of brine, shrimps, and flies made it a virtual avian travel-lodge, frequented by large numbers of California gulls, grebes, Wilson's Phalaropes, snowy plovers, and other birds that were annual migrants.

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[42] Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892).

[43] *Mono Lake*, 658 P.2d 709 (Cal. 1983).

By 1941, the Los Angeles Aqueduct, which was originally pushed up to the Owens Valley to take the waters of Owens Lake, was extended into the Mono Basin and started diverting the water going into the Mono Lake as well.

Now, by the time the *National Audubon* case had been filed in 1979 by a small motley crew of environmentalists, represented on a pro bono case by Morrison and Foerster, the city had largely drained Owens Lake and had begun diverting water from the Mono Lake Basin in greatly increased amounts through a second "barrel" of its aqueduct. Since 1941, when the diversions began, Mono Lake had dropped over forty feet. Its volume was reduced nearly fifty percent, and its salinity had nearly doubled to the point where even brine flies and shrimp creatures would not long be able to survive. Nearly 15,000 acres of dry lake bed had been exposed, giving rise to toxic dust storms, and creating a land bridge to Negit Island, then the principal nesting place for the California gulls. This bridge made it easy for predators to raid their nests.

By then most of the Owens Valley, and the Mono Basin as well, were owned by the L.A. Department of Water and Power. There was some forest service land left, but very little private land. And when you went through that whole pristine area of the Sierra, you would see L.A. Department of Water and Power trucks everywhere, carrying forth their duties of making sure that the water went down to this great city.

The city engineers tried a number of things to protect the gulls. They tried blasting to increase the channel; that didn't work. They put up big fences, coyote-proof fences supposedly, and we went out there and saw the coyotes' tracks pacing up and down in front of the fences until they found a place where they could jump in, take a short swim, and have a delicious meal. It wasn't very hard to realize that the only ultimate solution to saving Mono Lake and preventing it from becoming that "saline sump" that the city already saw it as, was by increasing the amount of water going into it. This, of necessity, would result in decreasing the amount of water going to Los Angeles.

Well, you can imagine what a gargantuan struggle ensued from this. The 1979 lawsuit was based on the public trust theory, one which had not been applied to water diversions in California, except by indirection in the early decisions prohibiting practices that affected waters downstream by siltation and debris. After a great many maneuvers through state and federal courts, the case finally reached the California Supreme Court. That court issued its historic *National Audubon* opinion holding that "appropriative water rights and the public trust doctrine were part of an integrated system of water law that permitted Audubon to pursue the public trust against the city."

Now the court realized that the public trust doctrine was on a collision course, as it said, with the appropriative rights system. These were rights that

the city believed it had secured fair and square. They were rights that, hitherto, the administrative agency charged with administering the water rights system believed it had no alternative but to grant, regardless of predictions of harm to the public trust values and the fisheries of the state. In reaching its decision, the court stressed four basic principles, all of them rooted in trust law: one, under the public trust doctrine, every citizen has standing to bring an action to protect the public trust. So the Mono Lake Committee, this small band of heroes in the Mono Basin who were virtually penniless but dedicated, had standing to bring this action, as did the National Audubon Society; two, the public trust applied to the non-navigable tributaries of navigable waters; three, it imposed a duty of continuing supervision and control over the public trust values of Mono Lake, a large navigable lake in California; four, it required the consideration of trust impacts in evaluating the water rights of the city, and it imposed the power and duty to avoid harm to trust values whenever feasible—a power not bound by past decisions made with respect to those water rights.

Southern L.A.'s water rights were not frozen in law. Public trust principles prevent any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust.

Now there was a caveat, just as there was in the *Waiāhole* case. The court recognized that as a matter of current and historical necessity, the legislature may authorize the diversion of water to distant parts of the state, even though unavoidable harm to trust uses of the source stream may result. The court recognized, in other words, that water had been going to Los Angeles for many, many years, and the city was somewhat dependent on it. This requires a balancing, but one involving the state's affirmative duty to take the public trust into account in planning the allocation of water resources and to protect trust uses whenever feasible. In the Mono Lake dispute, the water board had essentially thrown up its hands. In 1940, when L.A. perfected its permits, it concluded it was powerless to impose conditions to protect trust values. Forty years later, the California court took a fresh look and concluded that neither the legislature, the water board, or any judicial body had determined that the needs of Los Angeles outweighed the needs of the Mono Basin, and that the benefit was worth the price. Nor had any responsible body determined whether some lesser taking would better balance the diverse interests involved.

Accordingly, the court held that all uses of water, including public trust uses, must now conform to both public trust considerations and the state constitutional standard of reasonable use.

Well, this case went two places on remand. First off, it went to the Superior Court in El Dorado County for initial consideration and implementation of the California Supreme Court's decision. It was assigned to Judge Terrence

Finney, an ex-district attorney whose previous experience was largely criminal, and who was initially concerned at being saddled with such a monster case, handled by large bands of attorneys who flew in from all over the state.

National Audubon and the Mono Lake Committee asked the court to enjoin the city's diversions pending a final water rights determination. The hearings went for two and a half months. This was perhaps the eighth or ninth year of the Mono Lake litigation, a short case by water rights standards, but one which was dear to many. Ultimately, Judge Finney issued a preliminary injunction directing the city to refrain from making any more diversions, unless the lake levels reached a designated stage, pending a final determination. He concluded the lake was in danger of suffering irreparable harm.

The case then went back to the water board for consideration of the city's permits. After another two or three months of hearings, the board came up with a solution designed to preserve the habitat, prevent dust storms on the exposed lake bed, protect the brine shrimp, and maintain the scenic values of the lake. It didn't order that the lake be restored to its pre-diversion levels. It left some water for Los Angeles. But it directed the city not to take out any water until the lake had reached a level of sixteen feet. The board decided that in balancing trust interests, the best answer was to raise the lake high enough to preserve the gulls, prevent the dust storms, and to enhance the ecological and scenic values.

Los Angeles decided not to appeal this decision. The city felt that it had had enough, that the handwriting was on the wall, and that the environmental balance must be restored, at least in part, to the basin.

Since *National Audubon*, of course, there have been three more occasions in which to implement the public trust. The public trust creature has been liberated from its historical shackles, as Joe Sax once characterized it, and he's appeared in varying forms and guises. I always envisaged the trust as something that lurks below the waters of navigable lakes, rivers, and tidelands, but obviously, as you can see, it has a great deal of strength today. It has the ability to come out of those waters, to close floodgates, and to stop canals and diversions hitherto beyond attack. There are a number of ways in which the creature has appeared. There are statutes which express the public trust, and constitutional provisions as well, which can be characterized as means by which the legislature has carried out its duty as trustee. One California statute expresses a trust purpose by providing that the use of its water for recreation and preservation, for the enhancement of fish and wildlife, is beneficial. Another one provides that fish must be kept in good condition below dams and other structures. The California appellate court has expressly stated that this was a legislative implementation of the public trust doctrine.

Other western state courts, including those of Arizona, Idaho, Montana, and Washington, have expressly recognized the public trust. The Nevada Court indicates it may be willing to, when the time is right, and now, of course, the Supreme Court of Hawai'i has applied it to water in the state. Now you face the duty of implementing its principles in water allocations, which as Gil pointed out, is somewhat more difficult than enunciating those eloquent principles in general terms.

I was struck by the similarities between *National Audubon* and the *Waiāhole* Ditch decision. I think they go beyond their agreement on their legal principles, as important as that may be. Both cases involve the reallocation of water from large and costly structures built around the turn of the century to accommodate growing needs. In both cases, the court expressed a much broader view of the powers of the state, under the public trust doctrine, than did the administrative agency charged with administering these water rights. And in both cases, a number of parties and amici reflected a sort of who's who of all the economic, political, and environmental powers of the state.

What about the world after *National Audubon* in California? In the first place, the dire predictions made by the L.A. Department of Water and Power about the adverse impacts on economy and our civilization did not come true. Initially, the city published pamphlets suggesting inner city school children would have to go without drinkable water and affordable power if their diversions were restricted at all. This did not happen. The city went along with the water board's decision, and the decision was more palatable by a number of conditions. State funds were made available for water reuse programs. The Metropolitan Water District was happy to increase its sales of Colorado River water, which, along with state water project water from the San Joaquin Delta, goes to Los Angeles to satisfy its needs. It may be that the city does not have as firm an expectation of free potable water that it had prior to *National Audubon*, but maybe it never really had a right to that certainty. This sense of security was false to begin with, and we can no longer afford it today.

Now, a few cases have arisen since then, and I think the way they were handled might be of benefit to you here in Hawai'i. In one case, the court decided the case after reference to the water board for an expert opinion and recommendation. In another one, the superior court decided the case all by itself without the help of the water board, and in the third one, the water board itself is attempting to deal with public trust issues.

[Case descriptions have been omitted.]

Perhaps this pattern, if not the result, is what we should look at. The common law doctrine is somewhat amorphous. While it's powerful, it doesn't

really provide a focused directive that can be given by the legislature, which in the final analysis, is the trustee for the people of the state.

What lessons can we learn from California's encounters with the public trust? The trust doctrine isn't a cure-all for the resolution of competing water uses. It does provide some salutary guidelines and protections for resources that were sadly neglected in past allocations of water. It requires a consideration of trust values in determining the uses of water, and requires the avoidance of harm to those values whenever feasible. It reminds state agencies and property rights advocates alike that the state's power and duty to protect trust values is a continuing one, and the issuance of a riparian water rights permit does not place water beyond the reach of those protections.

What it does not do is revoke Mark Twain's observation that "while whiskey is for drinking, water is for fighting over." The long fierce battles between water buffalos and tree huggers are going to go on. Cases will last for generations, as water rights matters often do. The spirit of Bleak House will survive, but a few good results are emerging. First, the legislative and administrative agencies have been encouraged or prodded to consider the impacts of their actions on public trust values. Second, legislative guidelines are emerging. And third, the water rights agencies have slowly begun to consider values beyond the ones that they have traditionally followed. All of these cases I previously discussed, except the Yuba River one, were settled at the trial court or board level, begrudgingly, but nevertheless realistically. The public trust, that ancient behemoth, hidden for so long beneath the waters, has emerged to confront the water buffalo. His appearance on the field should do much to even up what was such an uneven battle in past decades. Thank you.

JIM PAUL: Thank you very much, Jan. Jan will now turn into the commentator for our next panel, which is going to be chaired by Kem Lowry. Prof. Kem Lowry, among many other things, is the chair of the Department of Urban and Regional Planning.

KEM LOWRY: Thank you, Jim. We've heard a great deal this morning about the public trust as legal doctrine, and our task on this panel is to grapple with some of the practical issues associated with implementing the public trust doctrine. Planners and resource managers have to grapple with drawing up use rules, making plans, making recommendations for regulatory decisions, and all those other things that we associate with management. To extend Peter's metaphor, it's the planners and the managers who have to line the duckies up. So the practical problem for those who are the planners and the managers is how is the public trust going to be manifested in the everyday work that they do. How is their work going to be different if they take the public trust seriously?

Joining me on the panel are five or six people who are directly involved in management, incorporating the public trust in management decisions, or whose management work is affected by public trust decisions. From the far end, we have Charlene Hoe, who is the Executive Director of the Strategic Planning Section of Kamehameha Schools. And Jan Stevens is joining us. And Colin Kippen, who is the Deputy Administrator of the Office of Hawaiian Affairs. Next to him is Senator Colleen Hanabusa from the twenty-first district and also Vice President of the Senate. Bill, the Director, Department of Land and Natural Resources, Division of Aquatic Resources. And Chris Yuen, who is the Big Island Planning Director. We've invited each of the panelists to make a short introductory statement that summarizes the key points in their paper, and then we'll go straight to the questions from that. So with that in mind, I'm going to start this time at this end. I'll ask you, Chris, if you would begin.

CHRIS YUEN: Good morning and aloha everyone. I'm impressed that so many people have taken their Saturday morning off to talk about this important topic. People often discuss that you have a distinguished panel. I want to recognize that we have a very distinguished audience, including people that were directly involved in the *Waiāhole* decision as public advocates, attorneys, members of the commission, and decision-makers. We have many people in the community who have worked hard on water issues without recognition or compensation for many, many years. And I also want to say aloha to many members of the DLNR who deal with these kinds of issues on a daily basis and are responsible for a lot of the day-to-day management of the things we have been talking about here this morning.

I'm not going to talk about water very much. We've heard a lot about water this morning. I could give a long explanation, and it's always useful to talk about where you're coming from and your background, and I could spend a long time talking about my transition from environmental activist to government bureaucrat with a stop as an attorney along the way. I have to confess that, but I guess to take one fact from my background, I grew up in Hilo. As a result, it's hard for me to completely relate to the idea of the scarcity of water. We have 135 inches of rain! I grew up by a stream, Honali'i Stream, where I, as a youth, enjoyed instream benefits and made beneficial use of the stream flow. Today we recognize many species of *O'opu* as an endangered species. As I grew up, we young fellows in the neighborhood recognized it as a delightful thing to spear and eat, and certainly we won't do that anymore, but I thought I would talk about something a little bit different than just water.

The question came up in the earlier panel, what are the implications of the public trust doctrine for other natural resources? I started off my paper by

quoting from the Hawai'i State Constitution, which says that "all public natural resources are a public trust." Now I want to say something right at the outset about this. The public trust doctrine, as discussed here today, and as discussed by Prof. Sax and in the *Waiāhole* water decision, is not going to be imported wholesale into all public natural resources. I'm going to talk in just a minute about what are public natural resources. As we talk about what those are, you'll see that there are many aspects of water law that don't apply, that are not going to apply. But I wanted to discuss this morning as a way of reminding us and reminding those of us who are responsible in some more direct way for the stewardship of those resources that yes, our state constitution says that those are something to be held in trust. I think that the overall direction that is being given to us by the *Waiāhole* decision is that the long-term health of those resources is what we must put first when we're making the hard decisions that we have to make.

Public natural resources, what are they? Let's start with the things that everybody would agree with. Air, that's a big one. Bill is in charge of aquatic resources, fish, wildlife, wild animals that live around us, not so wild sometimes, public lands, lands owned by the people of Hawai'i, geothermal energy. Another big one, the sea and the seabed, insofar as they are under state jurisdiction and insofar as the state has control of them. The big areas. How is this going to be a legal handle? My role as a planning director is to try to guide our decision-makers in our county so that they don't make mistakes that have to be undone some day by the courts. I think that a lot of law, a lot of legal decisions, are made as a result of public decision-makers making decisions that are, that do need to be undone and law is made in those respects, but the first line of action is the people that make the decisions in the first place and we need to make those in a very, very careful way. When I started working, one thing I told my staff, as a guiding principle we were going to go by, is something that's taught to carpenters, "measure twice, cut once." Take a good hard look at what you're doing. Take a hard look at it again before you make a decision that can't be undone. What are the areas that may be public natural resources that are not so obvious? I spoke earlier about public lands. Well, what about it? This is a tie-in to water, we've talked about water being a public trust resource. Our groundwater here and on all the islands depends on upland water recharge—the *mauka* lands. Much of this, fortunately, is in public ownership. It behooves us as managers of that public land to look at those aspects of managing those lands and seeing that those are managed properly for recharge. But there are also private lands. To what extent are private lands, upon which water recharge is dependent, upon which the aquifers depend, to what extent are those impressed with some kind of public trust for that purpose? And just to finish, and on the areas that are specifically in my paper, where I think that the court may some day step in one

of these areas outside of the water and say a mistake has been made is in the area of automatic approval. The state legislature in 1998 passed a law that essentially says that all business and development related permits, including those that are involved in land use, environmental regulation and the like, can be automatically approved if the governmental body does not act upon them within a set period of time. And thinking about the bodies that make these decisions, whether it's BLNR, our own Planning Commission, the Land Use Commission, the most likely way for there to be a really stupid decision coming out of one of these bodies is if they happen to blow the timeframe at some point and enact something by an automatic approval. And I would suggest that, some day, if a particularly egregious and damaging decision is made by virtue of an automatic approval, the courts may come in and say that the natural resource that is being jeopardized by that decision is a public trust and, like *Illinois Central*, like these other public trust cases, step in and reverse that. There are a couple of things I'd like to say and I'll entertain questions about. I just want to say, if I could just say one more thing on a theme, and I want to say this to try to explain to those of you in the public why sometimes people like myself who have jobs now in the government don't do what we ought to do or don't do as good a job as we should do, and you have to, we do a much better job at regulation than management.

In the *Waiāhole* water case, it was very important, and there was a question, is that something that was worth the effort? I think no doubt it was worth the effort, but in the *Waiāhole* water case you had maybe fifteen attorneys in the room, you had commissioners, you had transcribers, you had some of the brightest people in the state, maybe twenty-five people in the state in a room discussing the allocation of water. All that water depends upon recharge from upland forests. Folks, you don't have twenty to twenty-five people out there working on those upland forests, fixing the fences, making sure that alien plants don't spread in the forest. We need to do a much better job in active management.

KEM LOWRY: Thanks. Okay, Bill.

BILL DEVICK: I need to start with a disclaimer: I am not a lawyer. As such, I don't want to keep my thinking bound by legal principle. I look at the public trust, and I see a tool that should be interpreted in the broadest possible sense. If we look at what decision making has done in the past, things have really gotten rather messed up. If we look at fisheries, they've collapsed. If we look at what's happening in streams, we've got lots of problems. If we look at the land, we have serious problems. Why has this happened? It's because decision-making has largely been focused on economic interests. I see public trust as both a philosophy and a potential tool to shift that thinking, to shift the

balance in decision-making towards protection and conservation, thinking about the future, rather than simple immediate, economic advantage.

Obviously, we'd like to have this, and obviously it's much easier said than done. One thing that is seriously lacking in achieving this level of consideration is good science, a good understanding of what it is that we're dealing with. There is the precautionary principle, which is frequently associated with public trust, and it can be used at least by some people as an excuse to not collect the information. If we don't know, that becomes an argument for not making a decision, especially towards protection or conservation. So, we need the science. If we don't have that, if we don't have the good information, in terms of what we want to see, we simply fall back to the precautionary principal, and we're going to make the lawyers on the first panel very happy. They're going to have lots of work, and we're not going to get what we want.

KEM LOWRY: Thank you.

COLLEEN HANABUSA: I guess on the panel I'm one of those who you look to have something wise to say about where the legislature is going to go because, after all, we are deemed to be the state and the trustees of the public trust doctrine. All I have to say is that the reason why you do not have the kind of legislation that many are looking for is because of the fact that you have so many types of views, a lot of them conflicting, that have to be balanced, and we do not, we the legislature, do not balance that well at all.

The *Waiāhole* decision is very significant to me, not so much as an attorney but as a lawmaker, because of certain things that the Supreme Court said that I think will impact how we look at the public trust doctrine, how we look at the whole area of water rights into the future. And that is, I think, best stated by the dissent of Justice Ramil when he pointed out that, in his opinion, the majority trumped the water code by this nebulous common law doctrine called the public trust. And, of course, he was in the minority, but what it does tell us is that, in fact, the Supreme Court of Hawai'i has now actively interjected themselves in a way that I don't believe that they have in the past. They are saying that they are the ultimate entity that will determine whether or not we, the state, have fulfilled our public trust in terms of the natural resources, not only constitutionally mandated, but also mandated in common law principle.

What it tells us in the legislature is, as the court did say in the majority, that we are unable to abdicate our trust responsibilities, whether it is by way of the water code or even the water commission, that, in my opinion, were established constitutionally by the people in the constitutional amendment. But what does this then mean in terms of the legislature? We are undisputedly the trustees, but what does that then mean for us in terms of how we then

exercise the issue of the public trust and the management of this resource? And I will tell you I don't know whether the legislature as an entity has any idea as to how it will do it. It will continue to basically abdicate it, I believe, to the Water Commission as the entity that should be making those decisions, and it will continue to be lobbied by all of the varying interest groups to change that water code, which everyone will feel somehow affects how this necessary natural resource is managed, and the result will be probably what you all have seen. Many of your faces are very familiar because you're in our offices on various sides of various issues, and you know that for the most part what happens is practically nothing. And let me give you an example. How many of you know what LISA is? I mean, it's a constitutional requirement, and basically nothing has happened, and every time there's a move towards LISA, there's a movement against it, and what's really interesting is that many times, that move is done by both sides, what we would consider both sides of the issue. Both environmentalists don't want it done in a certain way, and the people who represent development, they don't want it touched. So we end up almost with status quo at every juncture, and we're almost at, what it seems to me, is that we have sort of an artificial balance here, and it isn't until one group is going to push that the other group is going to react. Let me give you another example. We all know *PASH*, the infamous *PASH* decision, gathering rights, native Hawaiian rights. If you ever come to a situation where people want to start to talk about, "Let's codify, let's do something about it." You'd be fascinated to know, you'd have people from both sides of that issue saying "Let it be." We think it's working because no one wants anyone else to get a one-upmanship on it. This legislature is going to probably continue that way as long as the people that are represented maintain that. When that balance shifts by the electorate's choices and whatever party preference or whatever the elections may be, I will predict that there will be a shift in that balance. At that point in time, my estimate will be that you'd probably have more lawsuits filed, and it will be filed under the public trust doctrine because that resource, and as you see the sentiments of the communities today, and especially in these economic times and the events of September 11th, I believe you will find more and more of these types of decisions made with the short, immediate future in mind, and for that, you will have sacrifices made, in terms of what people would like to say are the public trust and the future.

People are looking more to what is immediate and even saying, if there isn't an answer for the immediate, how can you look for the future, what are you preserving it for? So these are the kinds of issues that the legislature is going to be faced with, and unfortunately, I believe that the concept of the public trust in the near immediate future will be fine if we can just keep it in the balance that it is in now. Thank you.

KEM LOWRY: Colin.

COLIN KIPPEN: Aloha. We were asked to not so much focus our energies on what the decision itself says in terms of the doctrine. We've heard about it, and from my perspective, this is a seminal case. It is a case that, for someone who is a Hawaiian rights advocate, is long overdue, but all it does, in my opinion, is say something we all knew already existed. If you look at the materials I prepared, I began with a very simple statement, and it was this, "Without a resource, you can have no practice." For me, *Waiāhole* represents an opinion which basically says that we will care about the protection of the resources. In my paper that I presented, I go on and talk about some of the doctrine, some of the rules that are in the case, and I guess the fundamental things that I think have changed, and for all of you who are planners or who are bureaucrats or who are people who are deeply concerned about how we're going to meet this objective, the basic thing that has changed is what we have said, that those who make decisions about water are trustees. There is a picture in that case, and I'm a person that loves pictures, and the picture is a picture of an umpire. And if you read the case, it talks about how people who make these decisions, trustees, must not merely be umpires passively calling balls and strikes. Now Barry Bonds just hit seventy two, and I know that many of you here probably, in fact let me just see a show of hands. How many of you here play softball? You know, I got to say that you folks really need to spend more time on recreation.

The problem when you're playing softball, particularly if you're playing as an adult, which I love to do, and I don't do it as much because my knees are long gone, but the problem with playing softball is that they only give you one umpire when you're an adult playing in a *makuli* game. And when you're in the *makuli* league playing softball, that umpire's positioned behind the batter. And there might be a play at second base, and I want you to just imagine for a second a rather portly umpire standing behind the batter, and there's a steal on, and the guy runs to second base, and the umpire, looking through the pitcher, calls the play at second base. It's a close play; the throw was from the outfield. It is behind the second baseman, because he's looking from the outfield receiving the throw, and that umpire standing at home plate takes not one step to move out into the field to be able to see what's going on. For me, when I read that language in the opinion, you know, I've had some experiences with that situation, where the umpire is cemented into the ground and is not doing the things that he or she needs to do, which is to get out there, into the field. And see what's going on, ask the questions, get the data, do the analysis, and form a conclusion. Now, we know that science is evolving. We know that what we will know tomorrow will not nearly match what we knew yesterday, and it is that way with science. But this case says if you don't

know, then you need to adopt some precautionary principles which protect the resource. You can read all about that in what I've basically written, because it's there. I don't want to take any more time, but if you just remember that one principle. No more are we going to stand for umpires cemented behind home plate. They are going to have to get out there, ask the questions, and they are going to have to make decisions. I wasn't really going to talk about this, but Senator Hanabusa, you made just such a perfect segue for what I want to say now. I work for the Office of Hawaiian affairs, and everything that I've said is my own opinion, but imagine public trustees that are elected. What does that mean? Senator Hanabusa, I think, tried to indicate that you have your constituencies, and you have your political issues that need to be resolved, you have the need to have yourself elected in two years if you're a representative or four years if you happen to be in the Senate. How does that body go about implementing the public trust, one which is long-term and not short-term? I could write volumes about how that structure can lead to some very interesting situations at the Office of Hawaiian Affairs. And a lot of it is structural, but the legislature has a role to play here, and I see the role that the legislature has to play, that it has to provide the resources, the resources for those people to go out and to be able to do the studies that are necessary to make the decisions. How many planning departments have biologists on their staffs? You know, those are the kinds of questions we need to be asking. How many of them really have people who are cultural experts, so that they can define what it is that practice is, so that they can define how it is that we need to protect it?

I conclude my paper with something that all of us know whether you are *Kama'aina*, you are *malihini*, whoever you are, you are on this island, you live on islands, and you have a responsibility to *malāma 'āina*. And, for me, the thing that this case represents, it is just another case in a developing doctrine that our supreme court has embraced, and it is this: that we must *malāma 'āina*, that we must protect the land and the water, and we must protect the rights of those people to be able to practice their traditional and customary ways with respect to that resource.

KEM LOWRY: Thanks Colin. Charlene?

CHARLENE HOE: I'm here on behalf of myself and not on behalf of Kamehameha. The question of why am I here was one that I had in the very beginning. Perhaps it has to do with my job not as administrator of a governmental office or as a regulator on any level but simply as a citizen. I came to the issue of caring for water resources back in the earlier 1970s, and I came to it being much younger and much more naive than I am at this particular moment in time, so I looked to our state constitution for guidance.

To me, it was quite clear that we were to take care of our natural resources and, of course, that would include water as a primary resource. I was concerned about it because our family was trying to reopen some *lo'i* that had gone into remission for a period of time as the older generation passed away and the younger generation had yet to take up its mantle to *malāma* the *'āina*. And as we tried to do that, tried to access our appurtenant rights that came with the land and tend the *lo'i*, we found that the stream that had forever previous to that time in the experience of our family been perpetually running fully sufficient to feed all of the *lo'i* in our particular area was nearly dry. Water was being diverted *mauka*. We needed to find a way to restore water to the stream. So we did our research, we went to all of those agencies, all of those people that we thought were the caretakers of that resource and asked them for assistance. Can you help us find the cause? Can you help us find the solution? To the person, and this was at the county, at the state, and at the federal level, we were told, "It's not our *kuleana*, it's not our business, and furthermore, it's not really a big problem. It's just you folks in that particular little community."

Well, we didn't quite believe that, and so our particular community said well, let's go ask. Let's go statewide and see if our problem is just unique to our *ahupua'a*, or is it broader than that. We actually took up our family, and I say "we" because whatever we've done on these issues over the years, we've taken individual personal responsibility to do it, but we've never done it alone. It's always been multiple people coming together with positive energies to find solutions, rather than reasons why we cannot do problem solving. So, a group of people within our communities bundled up our families in our jalopies, sent our trucks to the neighbor islands, and literally went community to community asking, "Are you folks having water problems and what are those water problems?" We went from Kauai to Molokai, Maui, the Big Island, all around, and everyone that we visited had water problems. No one to that point had really said okay, what can we maybe do about it. As we started talking collectively statewide, one of the ideas that came to us was that maybe we could start with our own state constitution. Maybe we could look at the wording that said, take care of our water and natural resources, and make it a little bit stronger, a little bit clearer, to state that not only do we collectively have a responsibility, but also that our government, of which we are a part, has the responsibility to take the lead, and has the responsibility to set aside resources, both human and financial, to take that task on directly.

I ended up being the person with the short straw and was sent off to the Constitutional Convention in 1978 and became part of an effort, and I mean a very small part of a very broad effort statewide, to try to make the constitutional language clearer so that we could, in fact, have something to go to, some forum to go to, where more than just the economic voice prevailed,

which from our perspective at that point, seemed to be the only voice at the table in making decisions relative to the use and care of water resources. We felt it imperative to provide a forum where more voices could be at the table to look to the long-term care of our water resources, to look to the perpetuity of the health for that resource, not just how to make a dollar today in this time and in this generation. I think we have before us an imperfect vehicle with our water code, and I think we are in the process, collectively as a broad community, of having an ongoing dialogue of how do we best take care of our resource. It's not going to be resolved by one act.

The *Waiāhole* decision is a very important decision, as I would agree with Colin to my left, and it provides a very important step forward, that we need to be actively supporting and working toward resolutions, but I also agree that there are multiple needs to balance, and the question is how do we do that with an eye to forever, not just for today, but with an eye to forever? It takes leadership, yes, from our legislature, but maybe more importantly, from all of us.

I think that I have strong faith in many minds coming together to look for resolution. After serving in the Constitutional Convention and being much more naive, my hopes were, okay, the Constitution says we're going to have this entity, we're going to create this forum, we're going to have a water code, that would happen quickly and instantaneously, and we would have a chance to have a voice. As you know, it took nearly ten years to define what the water code would actually be, and how we would get a water commission. All of those balances, all of those competing voices were part of the dialogue for nearly ten years. Through the course of that, though, I think there was agreement on the need to care for the resource in perpetuity. To me, that's the hope; that common ground there, is the hope.

KEM LOWRY: Anyone want to say anything uplifting? I want to thank the panel. Prof. Sax, if you would be so kind to try to sum up for us perhaps in ten minutes.

PROFESSOR SAX: Well, the panel ended with the question, does anyone want to say anything uplifting? I'll volunteer. First, I think you're very fortunate in your human resources. I was amazed at the depth of knowledge, the commitment, the energy that was expressed by the various people from this state who have been on the two panels we heard. I think it's extraordinary, and you should feel very good about that. It seems to me that's a very positive sign, and I don't think there are very many places that you'd be able to put together panels like that.

Let me add a few words about what I would take home from what I heard today. I thought the point that the public trust is a philosophy and a tool was

just right on the mark. I think that's exactly right. I think it creates an opportunity to revise priorities, to utilize good science and to turn things around from the way they've traditionally been done so that, in the planning process, in the management and administrative processes that are going to go on, resources will be looked at first, and they'll be looked at in the context of good data about what the potential losses and potential opportunities are.

I also want to say something about a question that was raised: Does a court, as a result of a decision like this arrogate to itself authority as against the legislature? I think if you handle things right, that's not the case at all. I hope you picked up some of this from what Jan Stevens said. The importance of having a court that has a strong commitment to such a doctrine and a willingness in an energetic way to see that it's enforced is this. If things work right, it empowers the legislature to move forward, let's say it pushes the legislature to move forward on some agenda items that otherwise would not have received adequate attention. It energizes administrative agencies to act, and it stands ready in the background to make sure that they do their jobs. So the court is there, if you play it right, to help you get the job done and to create some incentives to move in ways that you haven't been able to do before. But you've got to take advantage of that opportunity.

I want to say something also about the fact that comments were frequently made about water controversies that go on and on and on and are endless. Again, if you listened carefully to what Jan was saying, and to the examples that he gave, he indicated that the experience in California has basically been that the potential of having endless litigation has induced people to sit down and to try to work out solutions. In most of these cases, we have worked out solutions that don't give anybody all that they want, but generate a resolution that's acceptable to everybody, and gives to resources a great deal more than they've had traditionally. I think that that's a very positive experience and one that you might want to look to for some potential guidance.

Another point that Jan made that I would also emphasize is that, in the aftermath of the *Mono Lake* case, which was viewed as a very radical decision by a court that had stepped outside of its ordinary role, there was a lot of talk about collapse and catastrophe, that nothing could be built anymore, that people would not get water, that food would not be available, and every other bad thing that you can think of. But as you can see, we're still more or less in business. Things haven't collapsed and people have responded in a positive way, and that's something to be encouraged about.

On a legal point that arose on the first panel, that is, concerns that were expressed about whether the public trust interpretation you have is the taking of property. I want to say a brief word about that. These are questions that will eventually find their way to the U.S. Supreme Court. My own observation is that the critical issue the U.S. Supreme Court will want to look

at is: what is the state law? The Court has been traditionally very deferential to states' interpretation of their own law. You heard Jan and me refer to states like Montana, Idaho, and Arizona. You heard one of the panelists refer to Maine and New York. The reason we referred to different states is that Maine and New York are states that have taken a very narrow view of the public trust. Hawai'i and others take a broad view of the public trust. I think you can expect the Supreme Court of the United States to follow where the states go, so states that have taken a narrow view are likely to have a much more limited public trust and stronger private rights in water. Another question that's important is whether the Court ultimately will take the view that these are rights and commitments, obligations that have in fact been a part of your law for a long time going way back, or whether they are very new ideas, that either the state court itself innovated or that came only at the time of your most recent constitution, which was 1978.

Those are the questions to which I don't know the answer, but those will be the critical questions. In many circumstances, the state courts will say, here is a provision in recent law, but in fact the recent law is simply an affirmation by the legislature or by a constitutional convention of something that had been accepted principles of law in the state for a long, long time. I think this is one question that will undoubtedly arise in the Hawaiian situation if your public trust doctrine is challenged on constitutional grounds.

Finally, I want to say that the public trust doctrine is a very important potential tool. It's not a cure-all, it isn't going to solve all of your resource problems, but it is an important and valuable tool as long as it's used right. As someone who's worked on environmental issues now for forty years, I want to say you are not going to solve all of your problems. This is a world of never-ending struggle. It just goes on and on and on, and you don't move forward as rapidly as you like. But if you're moving forward, even if you'd like to go by miles but you're actually going by inches, at least you're moving forward. As long as you keep at it, you know eventually you'll get there. The fact of the matter is that there never is enough money and everyone has that problem. And there are always powerful forces with projects that want to misuse resources. You have to face up to that reality and you work against it. Now you've got some newly recognized and powerful tools to help you. You also have a lot of knowledgeable and committed people to work on it. From across the water, we wish you good luck.

Risky Business: Assessing Dangerousness in Hawai'i

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I. OVERVIEW

Should something be done about the disgruntled worker who threatens mass murder? Should a fifteen year old robber be treated as an adult or a juvenile? What should the courts do with a criminal defendant who is mentally ill? Should a convicted child molester be incarcerated or placed on probation? Every day, the courts are faced with such questions. The optimal resolution for such situations often hinges upon obtaining an accurate assessment of a person's dangerousness.

This article presents an overview of the dangerousness concept in Hawai'i, focusing on situations that require a judicial determination of dangerousness, including civil commitment proceedings, the adjudication of juveniles, bail determination hearings, determining competency to stand trial, the disposition of defendants acquitted by reason of insanity, and sentencing. The analysis reveals that although the applicability of dangerousness is widespread, dangerousness prediction has heretofore been rudimentary and inaccurate, relying on clinical judgment rather than on objective measures.[1]

By examining the manner in which risk assessments[2] are made in Hawai'i, this article seeks to provide guidance for jurists and advocates in resolving these difficult situations. In order to appreciate the process by which dangerousness is assessed, it is important to understand the context in which

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[1] *See infra* Part III.

[2] The terms "risk assessment," "dangerousness prediction," and "violence prediction" are used interchangeably throughout this article to refer to the estimated likelihood that an individual convicted of a violent offense will commit another act of violence within a specified time period in the future. An act of violence is one in which the offender unlawfully and intentionally harms or attempts to harm another person or property. W.S. Davidson II, *Violence*, *in* 3 ENCYCLOPEDIA OF PSYCHOLOGY 455-56 (Raymond J. Corsini ed., 1994).

the question arises. Thus, Part II of this article presents an overview of the kinds of situations that require a judicial determination of dangerousness, including civil commitment proceedings, the adjudication of juveniles, bail determination hearings, determining competency to stand trial, the disposition of defendants acquitted by reason of insanity, and sentencing. Part III describes advances in violence prediction and provides both guidelines and a sample report for use in clinical-forensic settings and situations. Part IV concludes that recent advances in the science of risk analysis have resulted in significant gains in the accuracy and utility of actuarially-based methods of predicting dangerousness and recommends the most promising methods.

II. ASSESSING DANGEROUSNESS UNDER HAWAI'I LAW

The State has a duty to protect the public from those who are dangerous.[3] It is also obligated to safeguard each individual's right to personal liberty.[4] Moreover, in its role as *parens patriae*,[5] the State is obligated to care for those least able to care for themselves: minors and the mentally ill.[6] Often these interests conflict. When they do, a person's dangerousness can be a key factor in determining the proper balance. This part presents an overview of the kinds of situations that require a determination of dangerousness under Hawai'i law.

A. Civil Commitment

As noted, the State owes a duty, as *parens patriae*, to care for people who, because they are suffering from a mental illness, are unable to care for

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[3] *See* Addington v. Texas, 441 U.S. 418, 426 (1979). Addington, a paranoid schizophrenic with a history of assault, argued on appeal that the jury, when determining whether he should be involuntarily committed, should have applied a "reasonable doubt" standard. *Id.* at 420-22. The Texas Supreme Court, however, found a mere preponderance of the evidence standard sufficient. *Id.* at 422. Construing Addington's appeal as a petition for certiorari, *id.* at 422-23, the United States Supreme Court ruled that due process required at least a showing of clear and convincing evidence for involuntary civil commitment. *Id.* at 433.

[4] *See id.* at 425; *see also* Vitek v. Jones, 445 U.S. 480, 494-96 (1980) (finding that the involuntary transfer of a prison inmate to a mental hospital implicated a liberty interest and that due process mandated procedural protections such as written notice and an adversarial hearing); Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (citing Youngberg v. Romeo, 457 U.S. 307, 316 (1982)) ("Freedom from bodily restraint has always been at the core of the liberty interest protected by the Due Process Clause from arbitrary governmental action.").

[5] The term *parens patriae* refers to "the state in its capacity as provider of protection to those unable to care for themselves." BLACK'S LAW DICTIONARY 1137 (7th ed. 1999).

[6] *Addington*, 441 U.S. at 426; *In re* Gault, 387 U.S. 1, 16-17 (1967) (holding that due process required such procedural safeguards as written notice, court appointed counsel, and sworn testimony subject to cross-examination before a juvenile delinquent could be committed to a state institution).

themselves.[7] At the same time, those who are mentally ill have the same right as other citizens not to be deprived of their liberty without due process of law.[8] The United States Supreme Court has observed that "[a] finding of 'mental illness' alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement."[9] The Court concluded that "a State cannot constitutionally confine . . . a *nondangerous* individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family or friends."[10]

Recognizing that the interests in a civil commitment proceeding differ from those in criminal proceedings, the United States Supreme Court observed:

> [T]he initial inquiry in a civil commitment proceeding is very different from the central issue in either a delinquency proceeding or a criminal prosecution. In the latter cases the basic issue is a straightforward factual question—did the accused commit the act alleged? There may be factual issues to resolve in a commitment proceeding, but the factual aspects represent only the beginning of the inquiry. Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the meaning of the facts which must be interpreted by expert psychiatrists and psychologists. Given the lack of certainty and the fallibility of psychiatric diagnosis, there is a serious question as

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[7] *See supra* note 6.

[8] *See supra* note 4.

[9] O'Connor v. Donaldson, 422 U.S. 563, 575 (1975). In *O'Connor*, which involved a mental patient who was confined even though he was not dangerous, *id.* at 573, the United States Supreme Court unanimously held that a state cannot confine a nondangerous individual, capable of surviving safely in freedom, to a mental institution. *Id.* at 576. The Court explained:

> A finding of "mental illness" alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. Assuming that that term can be given a reasonably precise content and that the "mentally ill" can be identified with reasonable accuracy, there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom.
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> May the State confine the mentally ill merely to ensure them a living standard superior to that they enjoy in the private community? That the State has a proper interest in providing care and assistance to the unfortunate goes without saying. But the mere presence of a mental illness does not disqualify a person from preferring his home to the comforts of an institution. Moreover, while the State may arguably confine a person to save him from harm, incarceration is rarely if ever a necessary condition for raising the living standards of those capable of surviving safely in freedom, on their own or with the help of family or friends.
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> May the State fence in the harmless mentally ill solely to save its citizens from exposure to those whose ways are different? One might as well ask if the State, to avoid public unease, could incarcerate all who are physically unattractive or socially eccentric. Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.

Id. at 575-77 (citations omitted).

[10] *Id.* at 576 (emphasis added).

> to whether a State could ever prove beyond a reasonable doubt that an individual is both mentally ill and likely to be dangerous.
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> The subtleties and nuances of psychiatric diagnosis render certainties virtually beyond reach in most situations. The reasonable-doubt standard of criminal law functions in its realm because there the standard is addressed to specific, knowable facts. Psychiatric diagnosis, in contrast, is to a large extent based on medical "impressions" drawn from subjective analysis and filtered through the experience of the diagnostician. This process often makes it very difficult for the expert physician to offer definite conclusions about any particular patient. Within the medical discipline, the traditional standard for "factfinding" is a "reasonable medical certainty." If a trained psychiatrist has difficulty with the categorical "beyond a reasonable doubt" standard, the untrained lay juror--or indeed even a trained judge--who is required to rely upon expert opinion could be forced by the criminal law standard of proof to reject commitment for many patients desperately in need of institutionalized psychiatric care. Such "freedom" for a mentally ill person would be purchased at a high price.[11]

The Court concluded that, while due process required the government to justify involuntary confinement by more than a mere preponderance of the evidence, the clear and convincing standard of proof was sufficient.[12]

Subsequently, the United States District Court for the District of Hawai'i determined that, at a minimum, due process required such safeguards as adequate prior notice, a hearing before a neutral judicial officer, the effective assistance of counsel, the right to be present, the right to cross-examine witnesses and offer evidence, adherence to the rules of evidence applicable in criminal cases, the privilege against self-incrimination, proof beyond a reasonable doubt, consideration of less restrictive alternatives, written findings of fact, the availability of appellate review, and a periodic redetermination of the need for confinement.[13] Accordingly, Hawai'i law now provides that, before a person may be civilly committed, a court must find beyond a reasonable doubt that the person is mentally ill or suffering from substance

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[11] *Addington*, 441 U.S. at 429-30 (citations omitted).

[12] *Id.* at 432-33.

[13] Suzuki v. Quisenberry, 411 F. Supp. 1113, 1127 (D. Haw. 1976). Six years after Hawai'i adopted a mental health, mental illness, drug addiction and alcoholism law based on the medical model, attorneys from the Legal Aid Society of Hawai'i, Office of the Public Defender, and American Civil Liberties Union of Hawai'i sued on behalf of Suzuki and others involuntarily committed to challenge the constitutionality of the law. *Id.* at 1117. The federal district court granted injunctive and declaratory relief after it found that, aside from the short-term emergency hospitalization section, the provisions for nonconsensual civil commitment failed to satisfy due process requirements. *Id.* at 1135. *Suzuki* was superseded by the Supreme Court's decisions in Allen v. Illinois, 478 U.S. 364 (1986) and United States v. Salerno, 481 U.S. 739 (1987), *see* United States v. Sahar, 917 F.2d 1197, 1205 n.9 (9th Cir. 1990), but those cases did not address the constitutionality of Hawai'i's involuntary civil commitment law.

abuse.[14] The court must further find by clear and convincing evidence that: 1) the person is imminently dangerous to himself or to others, unable to care for himself, or unable to make decisions about his care; and 2) the person is in need of treatment for which there is no suitable alternative to hospitalization.[15] Interestingly, while recognizing that a mentally ill person may also be dangerous by threatening or inflicting damage on property, the statutes do not make the risk that a person might damage property a ground for civil commitment.[16]

Such a determination may only be made at a hearing after the person has been given adequate notice, the right to counsel, the right to obtain and present evidence, and the right to silence.[17] Hospitalization may not be required absent testimony by at least one physician or psychologist who has examined the person to be committed, unless that person refuses to be examined.[18] Lastly, Hawai'i law provides for periodic post-commitment review to ensure that a person is discharged as soon as he no longer meets the criteria for commitment.[19] Thus, a person's potential dangerousness to himself or others is clearly a critical factor in determining whether and for how long a mentally ill person should be civilly committed.

B. Juveniles

Cases involving juveniles represent something of a hybrid between civil and criminal cases. Although accused of conduct which if committed by an adult would be a crime, juveniles are not considered criminals.[20] The State has an interest as *parens patriae*, similar to its interest in protecting the mentally ill, in treating and rehabilitating a juvenile to save him from his "downward career."[21] As a result, courts historically viewed juvenile proceedings as civil matters and denied juveniles many of the safeguards accorded criminal defendants, such as the right to a public trial, the right to a jury trial, the right to bail, and the right to indictment.[22]

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[14] HAW. REV. STAT. §§ 334-1, 334-60.2, 334-60.5(i) (1993 & Supp. 2000).

[15] *Id.*

[16] *Id.* §§ 334-1, 334-60.2, 334-60.5.

[17] *Id.* §§ 334-60.4, 334-60.5.

[18] *Id.* § 334-60.5(g). Moreover, if the person refuses to be examined and there is "sufficient evidence" to believe that the person meets the criteria for commitment, the court may nonetheless make a temporary order committing the person to a psychiatric facility for not more than five days for diagnostic examination and evaluation. *Id.*

[19] *Id.* § 334-60.6.

[20] *See, e.g., In re* Gault, 387 U.S. 1, 14-16 (1967); HAW. REV. STAT. § 571-1.

[21] *Gault*, 387 U.S. at 15-17.

[22] *Id.* at 14; *see also* Kent v. United States, 383 U.S. 541, 555 (1966) (holding that an order waiving jurisdiction over a juvenile was invalid where the court denied the juvenile a hearing,

Recognizing that many of the benefits anticipated from treating juvenile proceedings as civil matters had not materialized, the United States Supreme Court explained:

> We do not mean . . . to indicate that the hearing to be held must conform with all of the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.[23]

The Court found that due process required advance written notice of the specific charge, the right to counsel, the right to silence, and that any determination be based upon sworn testimony subject to cross-examination.[24] Current Hawai'i law specifically addresses these requirements.

Thus, Hawai'i law authorizes the State to take custody of or otherwise provide for a child when needed for the child's immediate welfare or to protect the community.[25] "Immediate welfare" means that the minor is in physical or emotional danger, no responsible adult is willing and able to protect the child from that danger, and no other secure facility is appropriate.[26] "Protection of the community" means that there is a need to protect the person or property of others from a minor who is alleged to have committed an offense threatening or causing physical harm or an offense causing damage to or theft of property, if control measures have failed to stem the minor's history of property offenses.[27] As with civil commitment, dangerousness is defined in terms of the possibility of violence to self, others, or property.

Under Hawai'i law, whenever the Family Court is informed that a juvenile may be a law violator, the case is referred to an intake officer who first determines whether the case can be informally adjusted through various alternatives ranging from placement in a shelter to participation in community service projects.[28] If informal adjustment is not appropriate or fails, the intake officer initiates formal action, and the Family Court must determine whether it should waive jurisdiction and allow the juvenile to be criminally prosecuted as an adult.[29]

Family Court may waive jurisdiction over any juvenile, regardless of age, accused of murder or attempted murder, if there is no evidence that the person

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denied the juvenile access to records used to determine whether waiver was warranted, and failed to state reasons for waiver).

[23] *Gault*, 387 U.S. at 30.

[24] *Id.* at 31-59.

[25] HAW. REV. STAT. §§ 571-2, 571-11, 571-31.

[26] *Id.* § 571-31.1(b).

[27] *Id.* § 571-31.1(a).

[28] *Id.* §§ 571-21, 571-31.5.

[29] *Id.* §§ 571-22, 571-31.4.

should be civilly committed.[30] Further, the court may waive jurisdiction over any minor, sixteen years of age or older and accused of a felony, if the court finds that there is no evidence that the minor should be civilly committed, the minor is not treatable in any juvenile facility, or the "safety of the community" requires that the minor be subject to judicial restraint extending beyond age eighteen.[31] Alternatively, the Family Court may waive jurisdiction over a child fourteen years of age or older accused of a felony that resulted in bodily harm, charged with a class A felony, or adjudicated with one or more prior offenses which would be felonies if committed by an adult, and there is no evidence that that child should be civilly committed.[32] Hawai'i Revised Statutes ("H.R.S.") section 571-22(c) lists the various factors that must be considered in determining whether jurisdiction over a juvenile should be waived under H.R.S. sections 571-22(a) or (b).[33]

Waiver can only be determined after a hearing at which the charges are presumed to be true, and the only issue is whether the evidence justifies waiver.[34] As the hearing is considered dispositional, like sentencing, it is

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[30] *Id.* § 571-22(d).

[31] *Id.* § 571-22(a).

[32] *Id.* § 571-22(b).

[33] Under Hawai'i Revised Statutes [hereinafter H.R.S.] section 571-22(c), the factors to be considered are:

(1) The seriousness of the alleged offense;
(2) Whether the alleged offense was committed in an aggressive, violent, premeditated, or willful manner;
(3) Whether the alleged offense was against persons or against property, greater weight being given to offense against persons, especially if personal injury resulted;
(4) The desirability of trial and disposition of the entire offense in one court when the minor's associates in the alleged offense are adults who will be charged with a crime;
(5) The sophistication and maturity of the minor, including previous contacts with the family court, other law enforcement agencies, courts in other jurisdictions, prior periods of probation to the family court, or prior commitments to juvenile institutions;
(6) The record and previous history of the minor, including previous contacts with the family court, other law enforcement agencies, courts in other jurisdictions, prior periods of probation to the family court, or prior commitments to juvenile institutions;
(7) The prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the minor (if the minor is found to have committed the alleged offense) by the use of procedures, services, and facilities currently available to the family court; and
(8) All other relevant matters.

Id. § 571-22(c).

[34] Kent v. United States, 383 U.S. 541, 553-54 (1966); *In re* Doe, 61 Haw. 561, 564, 606 P.2d 1326, 1328 (1980) [hereinafter *Doe I*] (holding that the failure of the court to conduct a hearing prior to waiving jurisdiction violated a juvenile's due process rights); State v. English,

subject to neither full criminal procedural protections nor the procedural requirements of H.R.S. section 571-41; however, the minor is entitled to the effective assistance of counsel and a statement of reasons warranting waiver,[35] and the court may consider evidence normally excluded by the Hawai'i Rules of Evidence.[36] While the Family Court must give the State a fair opportunity to show that the conditions for waiver exist, the decision whether or not to waive jurisdiction over a juvenile rests in the sound discretion of the court.[37]

As noted, if the Family Court waives jurisdiction, a juvenile is tried like any adult criminal defendant. If, however, the Family Court retains jurisdiction, the juvenile is given a hearing without a jury to determine whether or not he committed the conduct of which he is accused.[38] Procedure at such a hearing is governed by H.R.S. section 571-44, supplemented with the Hawai'i Rules of Penal Procedure.[39] The Hawai'i Rules of Evidence also apply to this initial phase. As a result, unlike criminal trials, the general public is excluded and the proceedings may be informal.[40] The juvenile, witnesses, and parents are entitled to be warned of their right to silence and their right to counsel when appropriate.[41] In addition, minors are entitled to have a parent or other adult present.[42] No juvenile under the age of twelve may be adjudicated without the recommendation of a licensed psychologist, psychiatrist, or physician trained in child psychiatry.[43] At the initial phase, the burden is on the State to prove

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61 Haw. 12, 24-25, 594 P.2d 1069, 1077 (1978) (holding that the failure of the court to conduct a new hearing before waiving jurisdiction over a juvenile arrested for robbery while under a juvenile treatment plan violated due process).

[35] *Doe I*, 61 Haw. at 564, 606 P.2d at 1327; *In re* Dinson, 58 Haw. 522, 527, 574 P.2d 119, 123 (1978) (affirming waiver of jurisdiction despite juvenile's complaint that probation officer's report contained impermissible legal conclusions and admission of report denied a juvenile the right to confrontation).

[36] *See Dinson*, 58 Haw. at 528-30, 574 P.2d at 124.

[37] *In re* Doe, 67 Haw. 466, 470-71, 691 P.2d 1163, 1166 (1984) [hereinafter *Doe II*] (holding that State had no right to appeal refusal of juvenile court to waive jurisdiction but was entitled to a hearing before determination of request for waiver); *In re* Doe, 61 Haw. 167, 169, 598 P.2d 176, 178 n.1 (1979) [hereinafter *Doe III*] (holding that the decision to waive jurisdiction over a juvenile defendant rested in the family court's discretion, but that due process required the waiver order to specify grounds); State v. Stanley, 60 Haw. 527, 538, 592 P.2d 422, 429 (1979) (holding that a juvenile who waited until after he was convicted of murder and robbery could not then appeal a waiver of jurisdiction; such a waiver, being discretionary, would be overturned on appeal only if the appeal occurred before trial and the decision was arbitrary).

[38] HAW. REV. STAT. § 571-41(a) (1993 & Supp. 2000).

[39] *In re* Doe, 79 Hawai'i 265, 269-72, 900 P.2d 1332, 1336, 1339 (Ct. App. 1995) [hereinafter *Doe IV*] (holding that the Hawai'i Rules of Penal Procedure could be employed in the absence of comparable provisions in the Family Court Rules).

[40] HAW. REV. STAT. § 571-41(a).

[41] *Id.* § 571-41(b).

[42] *Id.*

[43] *Doe IV*, 79 Hawai'i at 275, 900 P.2d at 1342; HAW. REV. STAT. §§ 571-41(c), 571-44.

beyond a reasonable doubt that the juvenile committed the acts of which he is accused.[44]

Following a juvenile's adjudication, the Family Court must then determine his proper disposition. Section 571-1 of the Hawai'i Revised Statutes provides that "all children found responsible for offenses shall receive dispositions that provide incentive for reform or deterrence from further misconduct, or both."[45] Unlike the adjudication hearing, disposition is not governed by the Hawai'i Rules of Evidence, and any relevant and material information is admissible and relied upon to the extent of its probative value.[46] Any disputed issue need only be established by a preponderance of the evidence, rather than the stricter beyond a reasonable doubt standard required for adjudication.[47] The Family Court may place an adjudicated juvenile on probation or in confinement at a youth correctional facility, or may impose a monetary fine or require public service in lieu of a fine, among other alternatives.[48] The Family Court cannot, however, incarcerate anyone in an adult correctional facility who was a minor at the time of his offense and was not waived, but was over twenty-one at the time of his adjudication and disposition.[49]

It is clear that dangerousness is a critical factor in determining whether the Family Court should retain jurisdiction or waive a juvenile to be treated as an adult. Although the statute does not expressly mention dangerousness as a factor to be considered by the Family Court in the disposition of a juvenile offender, it is nonetheless relevant to and essential in determining that disposition which will deter future misconduct by a delinquent juvenile.

C. Criminal Proceedings

Article I, Section 10 of the Hawai'i Constitution provides that "[n]o person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury or upon a [judicial] finding of probable cause after a preliminary hearing."[50] As a result, in any criminal case, there is always a concern whether the accused presents a danger to the

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[44] HAW. REV. STAT. §§ 571-41(c) and (d); *Doe IV*, 79 Hawai'i at 275, 900 P.2d at 1342 (stating that, in reviewing the sufficiency of proof, evidence must be viewed in the light most favorable to the prosecution).

[45] HAW. REV. STAT. § 571-1.

[46] *Id.* § 571-41(d).

[47] *Id.*

[48] *Id.* § 571-48.

[49] *In re* Doe, 86 Hawai'i 517, 518-22, 950 P.2d 701, 702-06 (Ct. App. 1997) [hereinafter *Doe V*] (holding that the family court lacked jurisdiction to commit a defendant, convicted at age twenty-one for crimes committed when he was seventeen, to either the youth correctional facility or prison, because of its prior failure to waive jurisdiction).

[50] HAW. CONST. art. I, § 10.

community. Thus, assessing a criminal defendant's dangerousness is often a critical factor in determining the proper disposition of the defendant at various stages of the proceedings.

1. Bail decisions before and after trial

Once a defendant is accused of a crime, the question arises whether he should be detained or released on bail. Bail determinations pit the State's interest in protecting the public and maintaining the integrity of judicial proceedings against the individual's personal interest in liberty and due process. Despite the Eighth Amendment's prohibition against excessive bail, Congress may define which offenses are bailable.[51] At the same time, courts have recognized that the traditional right to pretrial release

> permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction. Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.[52]

As a result, the Hawai'i Supreme Court has held that, prior to trial, Article I, Section 12 of the Hawai'i Constitution not only prohibits excessive bail, but also unreasonable or arbitrary denial of bail.[53] "To infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act."[54] Reflecting the balancing of the accused's interest in pretrial freedom with society's interest in obtaining the presence of the accused at trial, courts have ruled that bail is "excessive" if set in an amount higher than needed to fulfill those interests.[55] Similarly, despite conflicting considerations, courts have also recognized that the State's interest in protecting the community may legitimately be determined in setting bail.[56]

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[51] Carlson v. Landon, 342 U.S. 524, 545 (1952) (holding that, under the Internal Security Act of 1950, the Attorney General was authorized to deny bail for alien members of Communist Party who were detained pending determination of their deportability); Huihui v. Shimoda, 64 Haw. 527, 532, 644 P.2d 968, 972 (1982) (holding that the Hawai'i Constitution protected defendants from the unreasonable or arbitrary denial of bail).

[52] Stack v. Boyle, 342 U.S. 1, 4 (1951) (citation omitted) (holding that the constitutional prohibition against excessive bail was violated unless the government was forced to justify high bail as to each defendant individually); *Huihui*, 64 Haw. at 533, 644 P.2d at 972.

[53] *Huihui*, 64 Haw. at 539, 644 P.2d at 976.

[54] Sakamoto v. Chang, 56 Haw. 447, 451, 539 P.2d 1197, 1200 (1975) (holding that pretrial bail of $300,000 for a murder defendant was excessive where the State failed to show a fair likelihood of conviction, the defendant was not a man of means, and no evidence was presented that the defendant would not be present for further proceedings).

[55] *Stack*, 342 U.S. at 5; *Huihui*, 64 Haw. at 539, 644 P.2d at 976; *Sakamoto*, 56 Haw. at 451, 539 P.2d at 1200.

[56] United States v. Salerno, 481 U.S. 739, 752-55 (1987) (holding that the denial of bail for two criminal defendants was warranted by evidence that defendants, as "boss" and "captain"

Because pretrial detention deprives an accused of liberty without a formal adjudication of guilt, the manner in which the legislative branch allows public safety and other interests to be reflected in the bail decision must be reasonable and satisfy the minimal standards of due process.[57] Thus, early Hawai'i cases found that a bail hearing was a non-jury proceeding at which the issue was not a determination of guilt but whether an accused was entitled to bail.[58]

The court may determine bail at an informal, in camera proceeding based on affidavits; the accused, if he objects, is entitled to an evidentiary hearing at which he has the right to cross-examine state witnesses and introduce evidence in his favor.[59] At the same time, the court should confine the evidence to the issue at hand and not allow the accused to turn the bail hearing into an unorthodox discovery procedure.[60]

The State bears the burden of proof of establishing that an accused is not eligible for bail.[61] While the type and sufficiency of evidence cannot be broadly categorized in advance, hearsay may support a finding if it is "the kind of evidence on which responsible persons are accustomed to rely in serious affairs."[62] Thus, the State bears the burden of proving, not by the stricter beyond a reasonable doubt standard used to prove guilt, but by a "fair likelihood," the existence of those conditions under which an accused is not entitled to bail.[63] Further, in a subsequent case, the Hawai'i Supreme Court struck down a statute which it found

> exceed[ed] the bounds of reasonableness and due process by conclusively presuming a defendant's dangerousness from the fact that he had been charged previously with a serious crime and presently with a felony, and by leaving no discretion in the trial judge to allow bail based on other factors which may be directly relevant to a determination of the likelihood of the defendant's committing other crimes while free pending trial.[64]

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of the Genovese organized crime "family," had conspired to further illegitimate enterprises through violent means including murder); *Huihui*, 64 Haw. at 542, 644 P.2d at 978.

[57] *Huihui*, 64 Haw. at 542, 644 P.2d at 978.

[58] Bates v. Ogata, 52 Haw. 573, 576, 482 P.2d 153, 156 (1971) (holding that a court could rely on hearsay to deny bail if it was the kind of evidence upon which a responsible person would rely).

[59] Bates v. Hawkins, 52 Haw. 463, 464-66, 478 P.2d 840, 841-42 (1970) (holding that the trial court's denial of bail, based on newspaper accounts of possible violence and the prosecution's representations of defendant's guilt, was erroneous).

[60] *Id.* at 468, 478 P.2d at 843 (quoting State v. Menillo, 268 A.2d 667 (Conn. 1970)).

[61] *Id.* at 466-67, 478 P.2d at 842.

[62] *Ogata*, 52 Haw. at 574-76, 478 P.2d at 155-56.

[63] *Hawkins*, 52 Haw. at 467-68, 478 P.2d at 842-43.

[64] Huihui v. Shimoda, 64 Haw. 527, 543, 644 P.2d 968, 978-79 (1982) (footnote omitted). The Hawai'i Supreme Court explained that

> [t]he statute simply reflects a legislative determination that an entire class of accused persons is not entitled to bail by reason of their presumed dangerousness, without affording these persons a fair opportunity to rebut such presumption. Judges acting pursuant thereto, denied discretion to consider other circumstances, are thus required to arbitrarily deny these individuals bail solely on the nature and proof of the crimes charged. Indeed, the record in this case indicates that the trial judge considered the

Moreover, unlike the Eighth Amendment of the United States Constitution, Article I, Section 12 of the Hawai'i Constitution provides that "[t]he court may dispense with bail if reasonably satisfied that the defendant or witness will appear when directed, except for a defendant charged with an offense punishable by life imprisonment."[65] Accordingly, the Hawai'i Supreme Court found that a statute creating an irrebuttable presumption of dangerousness impermissibly restricted the judiciary's discretionary right to set or dispense with bail granted by the Hawai'i Constitution.[66]

Accordingly, Hawai'i law now provides that a judge may deny bail to any person charged with murder or most Class A and B felonies if there is a serious risk that the accused will flee, will obstruct justice, poses a danger to any person or the community, or will engage in illegal activity.[67] The statute further creates a rebuttable presumption that a person will flee if charged with an offense punishable by life imprisonment without possibility of parole.[68] Regarding dangerousness, it creates a rebuttable presumption that a person poses a serious danger or will engage in illegal activity where the court determines that:

(1) The defendant has been previously convicted of a serious crime involving violence against a person within the ten year period preceding the date of the charge against the defendant;
(2) The defendant is already on bail on a felony charge involving violence against a person; or
(3) The defendant is on probation or parole for a serious crime involving violence to a person.[69]

Similarly, if the court finds that no combination of conditions will reasonably assure defendant's appearance or "the safety of any other person or community, bail may be denied."[70] H.R.S. section 804-7.1 also provides that:

> Upon a showing that there exists a danger that the defendant will commit a serious crime or will seek to intimidate witnesses, or will otherwise unlawfully interfere with the orderly administration of justice, the judicial officer named in

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statutory language mandatory and did not take into account any facts or circumstances other than those relevant to the petitioner's participation in the crimes for which he was charged before denying bail.

Id.

[65] HAW. CONST. art. I, § 12.

[66] *Huihui*, 64 Haw. at 543-44, 644 P.2d at 978-79; *see also* HAW. CONST. art. I, § 12.

[67] HAW. REV. STAT. § 804-3(a) and (b) (1993 & Supp. 2000).

[68] *Id.* § 804-3(c).

[69] *Id.*

[70] *Id.* § 804-3(d).

> section 804-5 may deny the defendant's release on bail, recognizance, or supervised release.[71]

Thus, a defendant's dangerousness is a critical factor in determining whether he should be admitted to bail. Once a defendant is convicted, however, the policy concerns underlying bail shift.[72]

The Hawai'i Supreme Court has held that Article I, Section 12 applies only to pretrial bail, and, therefore, the Legislature may reasonably withhold bail from convicts.[73] Accordingly, Hawai'i law provides that "[n]o bail shall be allowed pending appeal of a felony conviction where a sentence of imprisonment has been imposed."[74] At the same time, in apparent contradiction, Hawai'i law also states that if a person is convicted and sentenced to prison, the court shall order him detained unless the court finds:

> (1) By clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released; and
> (2) That the appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in reversal or an order for a new trial.[75]

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[71] *Id.* § 804-7.1.

[72] State v. Handa, 66 Haw. 82, 86-87, 657 P.2d 464, 468 (1983) (holding that a state statute that denied bail to criminal defendants appealing a felony conviction where imprisonment could be imposed did not violate a defendant's equal protection or due process rights). The Hawai'i Supreme Court explained:

> Prior to conviction the criminal defendant is cloaked with a presumption of innocence. After conviction and sentencing, however, the presumption disappears and the defendant's right to freedom is significantly qualified. In this latter situation there is an insufficient liberty interest at stake to justify invocation of either an intermediate or strict level of judicial scrutiny which might otherwise be applicable. Thus, the appropriate level of review [for analysis under an equal protection claim] is the rational relation test--the statutory classification must have a legitimate purpose, and it must have been reasonable for the lawmakers to believe the challenged classification would promote that purpose.
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> . . . Clearly the State has a legitimate interest in implementing bail reform in order to remedy apparent defects in the criminal justice system. More specifically, the Legislature's expressed purposes of (1) protecting the community from the dangers posed by convicted felons and (2) enhancing the deterrent effect of punishment are legitimate legislative purposes.
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> We further find that the Legislature rationally could have believed that the above purposes are promoted by denying bail to the class of convicted felons sentenced to imprisonment. Of course denial of bail pending appeal removes a felon from society and prevents the felon from posing a danger to the community. At the same time denial of bail pending appeal necessarily effectuates the swift imposition of sentence, which the Legislature rationally could have believed would enhance the deterrent effect of punishment.

Id. at 86-87, 657 P.2d at 467 (citation omitted).

[73] *Id.* at 85, 88-89, 657 P.2d at 466, 468.

[74] HAW. REV. STAT. § 804-4(a)(2).

[75] *Id.* § 804-4(b).

Accordingly, the Hawai'i Supreme Court recently recognized that, following conviction, the burden shifts to the defendant to prove that: he is not likely to flee or pose a danger; his appeal is not solely for the purpose of delay; his appeal raises a substantial question of law or fact; and a favorable decision is likely to result in a reversal or new trial on all counts for which imprisonment was imposed.[76] All four conditions must be met before an individual may be released on bail pending appeal; failure to satisfy even one requirement precludes bail.[77] Again, it can be seen that accurately predicting a defendant's dangerousness is crucial to determining whether they should be released on bail.

2. Mental fitness to stand trial

Issues of dangerousness also arise when the criminal courts determine how to treat a criminal defendant suffering from a mental illness. The Hawai'i Supreme Court has observed:

> The State is confronted by the following trilemma in dealing with a defendant who may be mentally incompetent to proceed to trial: (1) if he is actually incompetent but is nonetheless tried, the trial would have been in violation of an express statutory provision and due process; (2) if he is not tried but committed to an institution after a determination of his incapacity for "so long as such incapacity endures," and such incompetency eventuates in permanent disability, the commitment would then have been tantamount to a life sentence without trial; and (3) if he is neither tried nor committed, but released, the defendant would, as a practical matter, be free to engage in further criminal conduct with impunity.[78]

The Hawai'i Supreme Court has recognized that a criminal defendant's right to equal protection is violated if the standards for committing a criminal defendant are more lenient than those for civil commitment.[79] The Court has further ruled that "Due Process . . . require[s] 'that the nature and duration of commitment bear some reasonable relation to the purpose for which the

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[76] State v. Cullen, 86 Hawai'i 1, 13-15, 946 P.2d 955, 967-69 (1997) (holding that the trial court's grant of bail to a criminal defendant convicted of multiple felonies pending appeal constituted an abuse of discretion because the defendant had failed to identify a substantial issue affecting both convictions).

[77] *Id.* at 15, 946 P.2d at 969.

[78] State v. Raitz, 63 Haw. 64, 73, 621 P.2d 352, 359-60 (1980) (footnotes omitted) (holding that Hawai'i law required a determination, within a reasonable time, as to whether pretrial detainees found to be unfit to stand trial would recover their sanity within a reasonable time period, and, if not, required that the detainee either be released or civilly committed).

[79] *Id.* at 69, 621 P.2d at 357.

individual is committed.'"[80] Thus, in accordance with the "reasonable rule" mandated by the federal courts, the Hawai'i Supreme Court construed Hawai'i law to provide as follows:

> (1) A criminal defendant initially committed pursuant to [H.R.S.] § 704-406 because of a lack of fitness to proceed may only be held for a reasonable period necessary to determine if there is a substantial probability that he will regain fitness to proceed in the future;
> (2) If it is determined that he probably will be able to proceed soon, his continued confinement must be justified by progress toward recovery; [and]
> (3) If it is determined that a substantial probability exists that he will remain unfit to proceed, he must be released or subjected to civil commitment procedures[.][81]

Hence, Hawai'i law now provides that, if there is a reason to doubt a criminal defendant's fitness to proceed, the court may suspend proceedings and appoint a panel of one to three examiners to examine and report upon the physical and mental condition of the defendant.[82] If neither side contests the finding of the reports of the examiners, the court may determine the defendant's fitness from those reports.[83] Any party contesting the report is entitled to a hearing at which that party has the right to present evidence and to summon and cross-examine the members of the panel preparing reports.[84] No expert who did not examine the defendant is competent to testify regarding that expert's opinion as to the defendant's physical or mental condition.[85]

Should the court determine that a defendant lacks fitness, the court shall commit him to the custody of the director of health to be placed in a proper institution for detention, care, and treatment as needed.[86] However, if satisfied that it can do so without danger to the defendant or to the person or property of others, the court shall release the defendant upon such conditions as the court determines necessary.[87] If, at any time, the court finds that the defendant

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[80] *Id.* at 69-70, 621 P.2d at 357 (quoting Jackson v. Indiana, 406 U.S. 715, 738 (1972)).

[81] *Id.* at 73, 621 P.2d at 359-60.

[82] HAW. REV. STAT. § 704-404(1), (2) (1993 & Supp. 2000).

[83] *Id.* § 704-405.

[84] *Id.*

[85] *Id.* § 704-410(1); State v. Nizam, 7 Haw. App. 402, 406-08, 771 P.2d 899, 902-03 (1989). After Nizam was convicted of murder and assault, the Hawai'i Supreme Court ruled that, while the State's expert could not testify about Nizam's insanity defense because he had failed to examine Nizam, he could testify about Nizam's claim that he acted under the influence of extreme mental or emotional disturbance. *Id.* at 404-08, 771 P.2d at 902-04. Further, because Nizam's refusal to be examined denied the State the ability to rebut his insanity defense, the lower court could properly strike testimony by Nizam's expert concerning Nizam's sanity. *Id.* at 406-09, 771 P.2d at 902-04.

[86] HAW. REV. STAT. § 704-406(1) (1993 & Supp. 2000).

[87] *Id.*

has failed to comply with the conditions of his release or has become a danger, the court may either modify the conditions of release or order the person committed.[88]

Following the United States Supreme Court decision in Riggins v. Nevada,[89] the Hawai'i Supreme Court held that, while committed, an unfit criminal defendant can be involuntarily medicated to the extent that the State can show by clear and convincing evidence that: (1) the defendant poses a danger of physical harm to himself or others; (2) the medication is in defendant's medical interest; and (3) after considering less intrusive alternatives, the treatment is essential to forestall such danger as the defendant poses to himself or to others.[90] The United States Supreme Court has hinted that the State might also be able to involuntarily medicate an unfit defendant solely for the purpose of rendering him fit for trial;[91] to date, however, the Hawai'i Supreme Court has not addressed this issue.[92]

Should the defendant regain fitness to proceed, penal proceedings shall resume.[93] If, however, the court finds that the lapse of time has rendered it unjust to resume proceedings, it may dismiss the charges and order the defendant discharged or subjected to civil commitment.[94] Within a reasonable time following commitment or conditional release, the court must appoint a panel to determine whether it is likely that the defendant will regain fitness to proceed.[95] If the court determines that the defendant is unlikely to regain fitness, the lower court may dismiss the charges and order the defendant either released or subjected to civil commitment proceedings.[96] Thus, again, it can be seen that a defendant's dangerousness figures prominently in determining the proper disposition of a defendant who is unfit to stand trial.

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[88] *Id.* §§ 704-404, 704-406, 704-413(3); State v. Burgo, 71 Haw. 198, 203, 787 P.2d 221, 223-24 (1990) (holding that the "fitness to proceed" provisions of H.R.S. section 704-406 did not apply to post-acquittal proceedings).

[89] 504 U.S. 127, 136-38 (1992) (holding that the trial court's failure to determine the need for the drug, its medical appropriateness, and reasonable alternatives violated a criminal defendant's right to a fair trial and due process liberty interest in freedom from unwanted antipsychotic drugs).

[90] State v. Kotis, 91 Hawai'i 319, 322-23, 329-45, 984 P.2d 78, 81-82, 88-104 (1999) (holding that a trial court order requiring involuntary administration of psychotropic medication was constitutional, legally authorized, and supported by the evidence).

[91] *Riggins*, 504 U.S. at 135.

[92] *Kotis*, 91 Hawai'i at 333, 984 P.2d at 92.

[93] HAW. REV. STAT. § 704-406(2).

[94] *Id.*

[95] *Id.* § 704-406(3), (4).

[96] *Id.* § 704-406(3).

3. Acquittal by reason of insanity

A criminal defendant who is fit to stand trial might nonetheless contend that he should be acquitted[97] by reason of his insanity, that is, at the time of the offense, as a result of physical or mental disease, disorder, or defect, he lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.[98] As with the issue of fitness, once a defendant indicates that he intends to raise an insanity defense, the court may suspend proceedings and appoint a panel to report on the defendant's physical or mental condition.[99]

If the panel's report indicates that the defendant may have been cognitively and/or volitionally impaired, the court must submit the issue to the jury or trier of fact at the defendant's trial.[100] As insanity is an affirmative defense, the burden rests on the defendant to establish by a preponderance of the evidence that he was substantially impaired at the time of the offense.[101] Again, only experts who have examined the defendant are competent to testify regarding their opinion concerning the defendant's physical or mental condition.[102] However, nothing would preclude an expert who has not examined the defendant from testifying about the methodology used by the sanity panel examiners or the soundness of their conclusions.[103] If a defendant is acquitted by reason of insanity, the question then arises what should be done with him.

The United States Supreme Court has recognized that, because an insanity acquittee has not been convicted, he cannot be punished.[104] Further, as noted, it is unconstitutional to confine a harmless person merely because he is

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[97] It is interesting to note that Hawai'i has the highest number of acquittals by reason of insanity in the nation. *See* Carmen Cirincione & Charles Jacobs, *Identifying Insanity Acquittals: Is It Any Easier?*, 23 LAW & HUM. BEHAV. 487, 492 (1999).

[98] HAW. REV. STAT. § 704-400.

[99] *Id.* § 704-404.

[100] *Id.* § 704-408.

[101] *Id.* §§ 701-111, 704-402.

[102] *Id.* § 704-410(1).

[103] *Id.*; *see also* State v. Young, 93 Hawai'i 224, 229, 999 P.2d 230, 235 (2000). The defendant in *Young* was convicted of murder for his unprovoked attack with a hammer on a Burger King patron. On appeal, his conviction was affirmed, but his sentence was vacated for lack of evidence to support the trial court's conclusion that the attack was "unnecessarily torturous." *Id.* at 226-27, 234-38, 999 P.2d at 232-33, 240-44.

[104] Jones v. United States, 463 U.S. 354, 369 (1983), *cited in* Foucha v. Louisiana, 504 U.S. 71, 80 (1992). In *Jones*, the Court held that, under the Due Process Clause, an insanity acquittal justified detention until the acquittee either regained mental health or was no longer dangerous, even though detention exceeded the maximum possible sentence for the offense of which he was acquitted. *Id.* at 369. In *Foucha*, the Supreme Court held that a state statute permitting continued detention of an insanity acquittee who had regained his sanity, merely because he was dangerous, violated the acquittee's right to due process. *Foucha*, 504 U.S. at 80.

mentally ill.[105] Hence, the United States Supreme Court has recognized that "[t]he purpose of commitment following an insanity acquittal, like that of civil commitment, is to treat the individual's mental illness and protect him and society from his potential dangerousness."[106]

To escape penal responsibility, an insanity acquittee must establish by the preponderance of the evidence that he committed an offense because his cognitive or volitional capacity was substantially impaired by a mental disease or defect. The United States Supreme Court has recognized that "[f]rom these two facts [commission of a criminal act because of mental illness], it could be properly inferred that at the time of the verdict, the defendant was still mentally ill and dangerous and hence could be committed."[107] Accordingly, courts have recognized that the policies underlying commitment of an insanity acquittee warrant use of the lower preponderance of the evidence standard rather than the clear and convincing evidence standard required for civil commitment.

> There is justification for the preponderance of proof standard for confinement of the insanity-acquitted even assuming a higher standard is required prior to civil commitment for propensity.
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> The difference between the classes for purposes of burden of proof, is in the extent of possibility and consequence of error. If there is error in a determination of mental illness that results in a civil commitment, a person may be deprived of liberty although he never posed any harm to society. If there is any similar error in confinement of an insanity-acquitted individual, there is not only the fact of harm already done, but the substantial prospect that the same error, ascribing the quality of mental disease to a less extreme deviance, resulted in a legal exculpation where there should have been legal responsibility for the antisocial action.[108]

As a result, Hawai'i law now provides that, where a criminal defendant is acquitted by reason of insanity, the trial court must determine the proper disposition of the defendant based upon the report of the sanity panel and the evidence at trial, as well as any evidence given at a separate post-acquittal hearing, held at the request of either party or upon the court's own initiative, on the issue of the danger the acquittee poses to himself or others.[109]

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[105] *Foucha*, 504 U.S. at 77; O'Connor v. Donaldson, 422 U.S. 563, 576 (1975).

[106] *Jones*, 463 U.S. at 368.

[107] *Foucha*, 504 U.S. at 76.

[108] Thompson v. Yuen, 63 Haw. 186, 188-89, 623 P.2d 881, 882-83 (1981) (quoting United States v. Brown, 478 F.2d 606, 611 (D.C. Cir. 1973)) (holding that the lower preponderance of the evidence standard of proof for civil commitment did not deny an insanity acquittee equal protection); *see also Jones*, 463 U.S. at 368 (stating that the preponderance of evidence standard of proof comports with due process for commitment of insanity acquittees).

[109] HAW. REV. STAT. § 704-411(1), (2) (1993 & Supp. 2000).

Hawai'i law mandates that the court order the insanity acquittee committed if it finds that he presents a risk of danger to self or others and is not a proper subject for conditional release.[110] Alternatively, the court must order an insanity acquittee conditionally released if it finds that he presents a danger to self or others, but can be controlled adequately and given proper care, supervision, and treatment.[111] If, however, the court finds that the insanity acquittee is no longer affected by a physical disease, disorder, or defect, or, if so affected, no longer presents a danger to self or others and is not in need of care, supervision, or treatment, then the acquittee must be discharged.[112] It is the State's burden to prove by a preponderance of evidence that the insanity acquittee may not be safely discharged and should be either committed or conditionally released.[113]

Further, as noted, the purpose of committing an insanity acquittee is two-fold: to treat the underlying illness and to protect the community. As a result, the United States Supreme Court has held that an insanity acquittee can only be committed so long as he is both mentally ill and dangerous.[114] Once an insanity acquittee has been committed, he may periodically apply to the court for an order of discharge or conditional release upon the ground that he is not a danger to himself or to the persons or property of others.[115] Upon such application, the court appoints a panel to examine the insanity acquittee and report upon his physical and mental condition.[116]

If satisfied by the report (and any additional testimony deemed necessary) that the insanity acquittee may be discharged or conditionally released without "danger" to himself or to the persons or property of others, the court may grant the application[117] and order the insanity acquittee discharged or conditionally released. If not so satisfied, the court shall promptly order a hearing to determine whether the insanity acquittee may be safely discharged or released.[118] Such a hearing is deemed a civil proceeding and the burden of establishing that he may be safely discharged or released lies upon the insanity acquittee.[119]

In a recent case, the Hawai'i Supreme Court upheld the determination of the Hawai'i Intermediate Court of Appeals that, once committed, an insanity

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[110] *Id.* § 704-411(1)(a).

[111] *Id.* § 704-411(1)(b).

[112] *Id.* § 704-411(3).

[113] *Id.* § 704-411(4).

[114] Foucha v. Louisiana, 504 U.S. 71, 77 (1992); Jones v. United States, 463 U.S. 354, 369 (1983).

[115] HAW. REV. STAT. § 704-412(2).

[116] *Id.* § 704-414.

[117] *Id.* § 704-415.

[118] *Id.*

[119] *Id.*

acquittee bears the burden of proving by a preponderance of the evidence that he is free from mental illness and dangerous propensities,[120] and that shifting the burden of proof to an insanity acquittee violated neither his right to due process nor his right to equal protection.[121]

Thus, dangerousness nonetheless plays a pivotal role in determining whether and how long an insanity acquittee should be committed.

4. Sentencing alternatives

Lastly, dangerousness figures prominently in criminal sentencing. H.R.S. section 701-103 states that: "[t]he purposes of this [Hawai'i Penal] Code are to codify the general principles of the penal law and to define and codify

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[120] State v. Miller, 84 Hawai'i 269, 275, 933 P.2d 606, 612 (1997) (holding that requiring an insanity acquittee to prove that he was no longer mentally ill or dangerous by a preponderance of the evidence did not violate his rights to due process or equal protection).

[121] *Id.* at 275-77, 933 P.2d at 612-14. As the Hawai'i Supreme Court explained:

> As discussed previously, *Foucha* did not squarely address the constitutionality of placing the burden of proof on the insanity acquittee at the release hearing. However, a careful reading of that case indicates that the Supreme Court tacitly approved of such a procedure. For instance, the Court in *Foucha* relies heavily on *Jones* and its disparate treatment of insanity acquittees. The Court stated that so long as there is a legitimate basis for the continuing confinement of the insanity acquittee, the insanity acquittee may be treated differently from the civilly committed individual. 504 U.S. at 85, 112 S.Ct. at 1788. In the instant case, the state has alleged and argued that Miller, unlike Foucha, is still suffering from a mental illness that renders him dangerous. Therefore, because the state continues to have a legitimate reason to keep Miller in the mental facility, it may require him to prove his eligibility for release.
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> . . . .
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> For the reasons stated above, we hold that H.R.S. § 704-415 does not violate due process principles. . . .
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> . . . .
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> In 1982, the legislature determined that it is in the best interest of the public to place the burden on the insanity acquittee to prove that he or she is eligible for release. The legislature's determination is reasonable. Although both the insanity acquittee and the civil committee are committed for the purpose of receiving treatment for their mental illness, *see Jones*, 463 U.S. at 369, 103 S.Ct. at 3052, there is unquestionably an increased risk to the public associated with the release of an insanity acquittee. Unlike the civil committee, the insanity acquittee has demonstrated his or her dangerousness by engaging in criminal behavior. The insanity acquittee also raised mental illness as a defense to a criminal charge and there has been an adjudication that he or she was legally insane when the criminal act was committed. Therefore, there is a rational basis for treating the insanity acquittee differently from the civil committee at the release proceeding.
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> . . . .
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> Based on the foregoing, we hold that H.R.S. § 704-415 does not violate equal protection.

Id. at 275-77, 933 P.2d at 612-14.

certain specific offenses which constitute harms to basic social interests which the Code seeks to protect."[122] Thus, the very fact that an offense is codified in the Hawai'i Penal Code reflects a legislative determination that the conduct endangers a public interest. In a sense, a criminal conviction itself represents a determination of dangerousness.

When the Hawai'i Penal Code is thus viewed, it becomes apparent that the statutory sentencing scheme reflects the legislature's determination of the relative dangerousness of different offenders. Hence, offenses are divided into different categories: two degrees of murder and attempted murder; three classes of felonies; and misdemeanors and petty misdemeanors.[123] Each such category of offenses is subject to a different maximum sentence ranging from thirty days incarceration up to life imprisonment without parole.[124]

Additional judgments regarding dangerousness are reflected in provisions identifying mitigating and aggravating factors. For example, in determining the particular sentence to be imposed, the court is directed to consider, among other things, the need:

(a) To reflect the seriousness of the offense, to promote respect for law, and to provide just punishment for the offense;
(b) To afford adequate deterrence to criminal conduct;
(c) To protect the public from further crimes of the defendant; and
(d) To provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.][125]

Under H.R.S. section 706-667, first time felons who are less than twenty-two years of age may receive lighter sentences "if the court is of the opinion that such special term is adequate for the young adult defendant's correction and rehabilitation will not jeopardize the protection of the public."[126] Further, the law provides that factors such as the lack of harm, the presence of extenuating circumstances, and the defendant's character weigh in favor of granting probation.[127]

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[122] HAW. REV. STAT. § 701-103.
[123] *Id.* § 701-107.
[124] *Id.* §§ 701-107, 706-656, 706-659, 706-660, 706-663.
[125] *Id.* § 706-606(2).
[126] *Id.* § 706-667.
[127] H.R.S. section 706-621 lists the factors to be considered:
(a) The defendant's criminal conduct neither caused nor threatened serious harm;
(b) The defendant acted under a strong provocation;
(c) There were substantial grounds tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense;
(d) The victim of the defendant's criminal conduct induced or facilitated its commission;

Conversely, the legislature has provided for mandatory minimum terms of imprisonment where the defendant is a repeat offender,[128] uses a firearm,[129] or victimizes a person who is at least sixty years old, blind, paraplegic or quadriplegic, or eight years of age or younger.[130] Further, the legislature has provided that the court may impose an extended term if it finds that the defendant falls into one or more of several categories of defendants, including a "defendant [who] is a dangerous person whose imprisonment for an extended term is necessary for protection of the public."[131]

(e) The defendant has no history of prior delinquency or criminal activity or has led a law-abiding life for a substantial period of time before the commission of the present crime;
(f) The defendant's criminal conduct was the result of circumstances unlikely to recur;
(g) The character and attitudes of the defendant indicate that the defendant is unlikely to commit another crime;
(h) The defendant is particularly likely to respond affirmatively to a program of restitution or a probationary program or both;
(i) The imprisonment of the defendant would entail excessive hardship to the defendant or the defendant's dependents.

Id.

[128] *Id.* § 706-606.5.

[129] *Id.* § 706-660.1.

[130] *Id.* § 706-660.2.

[131] Specifically, H.R.S. section 706-662 provides that a convicted defendant may be subject to an extended term of imprisonment if one or more of the following are satisfied:

(1) The defendant is a persistent offender whose imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless the defendant has previously been convicted of two felonies committed at different times when the defendant was eighteen years of age or older.
(2) The defendant is a professional criminal whose imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless:
    (a) The circumstances of the crime show that the defendant has knowingly engaged in criminal activity as a major source of livelihood; or
    (b) The defendant has substantial income or resources not explained to be derived from a source other than criminal activity.
(3) *The defendant is a dangerous person* whose imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless the defendant has been subjected to a psychiatric or psychological evaluation that documents a significant history of dangerousness to others resulting in criminally violent conduct, and this history makes the defendant a serious danger to others. Nothing in this section precludes the introduction of victim-related data in order to establish dangerousness in accord with the [Hawai'i] rules of evidence.
(4) The defendant is a multiple offender whose criminal actions were so extensive that a sentence of imprisonment for an extended term is necessary for protection of the public. The court shall not make this finding unless:
    (a) The defendant is being sentenced for two or more felonies or is already under sentence of imprisonment for felony; or

Further, because imposing appropriate sentences requires a careful balancing of different interests, different types of sentences are subject to different procedural safeguards. For example, H.R.S. sections 706-601 through 706-604 provide for the gathering and compilation of various data from numerous sources concerning a convicted defendant's history for the court to consider in imposing sentence.[132] When, in an early case, a defendant argued that it was improper for the judge to consider his juvenile record in sentencing him, the Hawai'i Supreme Court noted:

> What should be borne in mind is that a clear distinction exists between the adversary proceeding in court and the sentencing process. During the latter, the presiding judge is no longer dealing with the process of determining factual issues, that is, the guilt or innocence of the defendant, but rather must concern himself with "imposing a fair, proper and just sentence."[133]

Accordingly, the Hawai'i Supreme Court held in *State v. Kamae*[134] that, because a judge during ordinary sentencing is no longer concerned with determining factual issues of guilt or innocence, the court could acquire information about a defendant from any source, including juvenile court

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(b) The maximum terms of imprisonment authorized for each of the defendant's crimes, if made to run consecutively would equal or exceed in length the maximum of the extended term imposed, or would equal or exceed forty years if the extended term imposed is for a class A felony.

(5) The defendant is an offender against the elder, handicapped, or minor under the age of eight whose imprisonment for an extended term is necessary for the protection of the public. The court shall not make this finding unless:

(a) The defendant attempts or commits any of the following crimes: murder, manslaughter, a sexual offense that constitutes a felony under chapter 707, robbery, felonious assault, burglary, or kidnapping; and

(b) The defendant, in the course of committing or attempting to commit the crime, inflicts serious or substantial bodily injury upon a person who is:

(i) Sixty years of age or older;

(ii) Blind, a paraplegic, or a quadriplegic; or

(iii) Eight years of age or younger; and

(c) Such disability is known or reasonably should be known to the defendant.

Id. (emphasis added).

[132] *Id.* §§ 706-601 to -604.

[133] State v. Nobriga, 56 Haw. 75, 77, 527 P.2d 1269, 1271 (1974) (quoting Commonwealth *ex rel.* Hendrickson v. Myers, 144 A.2d 367, 370 (Pa. 1958)). In *Nobriga*, the Hawai'i Supreme Court held that the trial court had properly considered a convicted defendant's juvenile record, which was included in the presentence report, in sentencing. *Id.* at 76, 81-84, 527 P.2d at 1270, 1273-75.

[134] 56 Haw. 628, 637, 548 P.2d 632, 638 (1976) (holding that a trial court's finding that a convicted defendant was subject to sentencing enhancement could only be made following an evidentiary hearing, subject to the ordinary rules of evidence, at which the State bore the burden of proving all relevant issues beyond a reasonable doubt); *see also Nobriga*, 56 Haw. at 81-84, 527 P.2d at 1273-75.

records contained in the presentence report. At the same time, the high court recognized that the extended term sentencing provisions were tantamount to making a new charge leading to punishment and, as such, were subject to the full panoply of protections which due process guarantees in State criminal proceedings.[135] Among other things, the ordinary rules of evidence applied, and the State was required to prove the aggravating circumstances beyond a reasonable doubt.[136] Subsequently, in *State v. Huelsman*,[137] the Hawai'i Supreme Court clarified that imposition of an extended term required a two step process, each involving different procedural standards.[138]

Meanwhile, in a separate case, *State v. Apao*,[139] the Hawai'i Supreme Court noted that before an enhanced sentence could be imposed for murdering a witness under H.R.S. section 706-606, "the better rule is to include in the indictment allegations which, if proved, would result in application of a statute enhancing the penalty for the crime committed. This will give defendants fair notice of the charges against them."[140] The high court subsequently explained

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[135] *Kamae*, 56 Haw. at 633-36, 548 P.2d at 636-37.

[136] *Id.* at 635-38, 548 P.2d at 637-39.

[137] 60 Haw. 71, 79-80, 588 P.2d 394, 400 (1978).

[138] In *Huelsman*, the Hawai'i Supreme Court adopted a two-step process for determining a convicted defendant's eligibility for extended term sentences, explaining that:

> The determination that the defendant is a member of the class of offenders to which the particular subsection of § 662 applies involves "historical facts", the proof of which exposes the defendant to punishment by an extended term sentence, similarly to the manner in which the proof of his guilt exposes him to ordinary sentencing. For reasons which we stated in *Kamae*, the procedural standards laid down in that case apply to that phase of a § 664 hearing in which proof is made that the defendant is a persistent offender, a professional criminal, a dangerous person, a multiple offender or an offender against the elderly or handicapped. But when the status of the defendant has been established, the process by which the court determines that the defendant's commitment for an extended term is necessary for the protection of the public, or in the case of § 662(4) that the defendant's criminality was so extensive that a sentence of imprisonment for an extended term is "warranted," is one which deals with the subject matter of ordinary sentencing. As was said in *United States v. Neary*, [] with respect to the determination that a defendant is "dangerous" for the purposes of the dangerous special offender statute after a finding has been made that the defendant is a "special offender": "The (finding of dangerousness) essentially involves both evaluation of the character of the defendant and a prediction of future conduct, matters which are traditionally left to wide discretion of a sentencing court." 552 F.2d at 1193. The procedural standards to which the second phase of an extended term sentence proceeding should be subject are those applicable to ordinary sentencing.

Id. at 79-80, 588 P.2d at 400.

[139] 59 Haw. 625, 634-36, 586 P.2d 250, 257-58 (1978) (holding that evidence, presented to the grand jury, that a convicted defendant knew that his victim had been a witness against him in a prior murder prosecution did not prejudice the defendant; such evidence, if proved, would subject the defendant to an enhanced sentence).

[140] *Id.* at 636, 586 P.2d at 258.

in *State v. Estrada*[141] that "*Apao* required a defendant to have 'fair notice of the charges against' him: the aggravating circumstances must be *alleged in the indictment and found by the jury*."[142]

Subsequently, in *State v. Schroeder*,[143] when a defendant challenged the imposition of a mandatory minimum sentence for the use of a firearm, the question arose whether the procedural requirements were governed by cases such as *Kamae* and *Huelsman* or cases such as *Apao* and *Estrada*. In *Schroeder*, the Hawai'i Supreme Court resolved the apparent conflict as follows:

> For present purposes, two aspects of the *Huelsman* rule are significant. First, the "historical facts" pertinent to the imposition of extended prison terms pursuant to H.R.S. § 706-662 are to be found by the sentencing court *after* the defendant's adjudication of guilt at trial by the trier of fact. Second, this particular fact-finding process is wholly independent of the allegation of any foundational "aggravating circumstances" in the indictment or complaint containing the charges against the defendant. This is precisely why *Apao*, which did not involve H.R.S. § 706-662 extended term sentencing, received no mention in *Huelsman* and why the *Estrada* court construed *Huelsman* as recognizing that such extended term sentencing was subject to "different procedures" than those applicable to other forms of "enhanced" sentencing.
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> In short, the *Huelsman* rule is limited to enhanced sentencing, such as extended prison terms pursuant to H.R.S. §§ 706-661, 706-662, and 706-664, in which the "determination that the defendant is a member of the class of offenders to which the particular [statute] applies involves 'historical facts.'" This is because such "historical facts" are wholly *extrinsic* to the specific circumstances of the defendant's offenses and therefore have no bearing on the issue of guilt *per se*. By contrast, if the "aggravating circumstances" justifying the imposition of an enhanced sentence are "enmeshed in," or, put differently, *intrinsic* to the "commission of the crime charged," then, in accordance with the *Estrada* rule, such aggravating circumstances "*must* be alleged in the indictment in order to give the defendant notice that they will be relied on to prove the defendant's guilt

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[141] 69 Haw. 204, 229-30, 738 P.2d 812, 829 (1978) (vacating a convicted defendant's sentence on the grounds that, before an enhanced sentence could be imposed, the aggravating circumstance must be alleged in the indictment and found by the jury).

[142] *Id.* at 230, 738 P.2d at 829.

[143] 76 Hawai'i 517, 880 P.2d 192 (1994). In *Schroeder*, a criminal defendant convicted of robbery and kidnapping argued on appeal that it was error for the lower court to sentence him to a mandatory minimum term of imprisonment for the use of a firearm in the commission of the kidnapping, because the aggravating circumstance was alleged only in the robbery count of the indictment. *Id.* at 518, 522, 880 P.2d at 193, 197. While the Hawai'i Supreme Court agreed that Schroeder was entitled to fair notice of the charges, it found that an implicit reference in the kidnapping charge to the robbery charge sufficiently notified Schroeder that he was alleged to have used a firearm in committing the kidnapping as well. *Id.* at 528-30, 880 P.2d at 203-05.

and support the sentence to be imposed, and they must be determined by the trier of fact."[144]

Thus, it can be seen that the decision to impose criminal penalties on certain kinds of conduct represents a legislative determination that such conduct is dangerous. Further, by identifying various mitigating and aggravating factors which, if found, justify upward or downward departures in sentence, the Legislature had codified those characteristics it deemed made a defendant dangerous.[145] Finally, the Legislature also provided that, during ordinary sentencing phases, the court could consider a defendant's dangerousness when the Legislature mandated the court to consider whether a certain sentence is needed to "protect the public from further crimes of the defendant."[146] Dangerousness is a critical factor in determining the best sentence to impose in any given case.

D. Summary

As can be seen from the foregoing, before a person can be detained, it must be established that the person is either mentally ill and dangerous, a juvenile and dangerous, or convicted of a crime.[147] While the standard of proof required may vary according to the competing policies involved, whether a person is committed and the length of such detention depends, in large part, on an assessment of the person's dangerousness.

III. VIOLENCE RISK ANALYSIS METHODS[148]

Violence risk analysis[149] provides a means by which to predict the likelihood that an individual will commit a violent or dangerous act within a given future time period.[150] Such analyses have, in the past, been based solely on clinical

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[144] *Schroeder*, 76 Hawai'i at 528, 880 P.2d at 203 (citations omitted).

[145] *See supra* Part II.C.4.

[146] HAW. REV. STAT. § 706-606(2)(c) (1993).

[147] *See supra* Part II A-C.

[148] For a comprehensive article on the current state of dangerousness prediction, see HAROLD V. HALL & DAVID A. PRITCHARD, PACIFIC INSTITUTE FOR THE STUDY OF CONFLICT & AGGRESSION, WORKPLACE VIOLENCE RISK ANALYSIS: EFFECTIVE PREDICTION AND INTERVENTION STRATEGIES (2002), *excerpted in* J. THREAT ASSESSMENT (forthcoming 2002) [hereinafter HALL & PRITCHARD, WORKPLACE VIOLENCE RISK ANALYSIS].

[149] *See supra* note 4.

[150] Kirk Heilbrun, *Prediction Versus Management Models Relevant to Risk Assessment: The Importance of Legal Decision-Making Context*, 21 LAW & HUM. BEHAV. 347, 351 (1997).

opinion and were fairly poor predictors of future behavior.[151] With the evolution of violence risk analysis, however, it is now possible to predict, with a higher degree of accuracy, the potential risk of dangerousness.[152] Thus, violence risk analysis can help police, attorneys, and the judiciary in determining the appropriate disposition of juveniles; sentencing, probation and parole of adults convicted of crimes or acquitted by reason of insanity; and appropriate treatment and intervention strategies for inmates.

This part will trace the history of violence risk analysis and will provide an overview of the empirical methods currently available to predict future dangerousness. This article will focus on quantitatively derived methods and decision analysis, as it is well-settled that violence risk assessment based on statistically-derived empirical factors and decision analysis is more accurate than clinical assessment alone.[153] Lastly, appendix A provides a sample report

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[151] Clinical opinion "relies on [the] human judgment [of a mental health professional] that is based on informal contemplation and . . . discussion with others . . . [for example] in case conferences." William M. Grove & Paul E. Meehl, *Comparative Efficiency of Informal (Subjective, Impressionistic) and Formal (Mechanical, Algorithmic) Prediction Procedures: The Clinical-Statistical Controversy*, 2 PSYCHOL. PUB. POL'Y & L. 293, 293 (1996). Actuarial assessment, by contrast, "uses an equation, a formula, a graph, or an actuarial table to arrive at a probability, or expected value, of some outcome." *Id.* at 294.

[152] *Id.* at 293-99; *see also* R. Karl Hanson, Dep't of the Solicitor Gen. (Canada), *What Do We Know About Sex Offender Risk Assessment?*, 4 PSYCHOL. PUB. POL'Y & L. 50, 54 (1998) [hereinafter Hanson, *What Do We Know?*].

[153] *See, e.g.*, Grove & Meehl, *supra* note 151, at 293 ("Empirical comparisons of the accuracy of the [clinical and actuarial] methods . . . show that the [actuarial] method is almost invariably equal to or superior to the clinical method."); VERNON L. QUINSEY ET AL., VIOLENT OFFENDERS: APPRAISING AND MANAGING RISK 44-45 (1998) [hereinafter Quinsey, Violent Offenders] ("[A]n overwhelming amount of research demonstrates that actuarial prediction systems are more valid than clinical judgment, especially in the case of the prediction of violence, in part because actuarial systems are more reliable than clinical judgment."); HALL & PRITCHARD, WORKPLACE VIOLENCE RISK ANALYSIS, *supra* note 148, at 94.

In regard to sex offender recidivism across various studies and investigations, for example, Hanson found strong support for the use of actuarial risk assessment methods, which have reported predictive accuracy of up to seventy-seven percent, as opposed to clinical assessment, which was significantly less accurate, reportedly not much better than chance (i.e., fifty percent predictive accuracy). *See* Hanson, *What Do We Know?*, *supra* note 152, at 54, 62. *See generally* R. Karl Hanson & Monique T. Bussiere, *Predicting Relapse: A Meta-Analysis of Sexual Offender Recidivism Studies*, 66 J. CONSULTING & CLINICAL PSYCHOL. 348, 348-62 (1998). This finding reflects a trend favoring the use of quantitative methods of violence prediction over the last five decades involving a wide variety of violent subpopulation groups. Hanson, *What Do We Know?*, *supra* note 152, at 50; *see also* JAMES BONTA & R. KARL HANSON, DEP'T OF THE SOLICITOR GEN. (CANADA), REP. NO. 1994-09, GAUGING THE RISK FOR VIOLENCE: MEASUREMENTS, IMPACTS, AND STRATEGIES FOR CHANGE (1994), http://www.sgc.gc.ca/epub/corr/e199409/e199409.htm (last modified Dec. 23, 1999); James Bonta et al., *The Prediction of Criminal and Violent Recidivism Among Mentally Disordered Offenders: A Meta-Analysis*, 123 PSYCHOL. BULL. 123-42 (1998) [hereinafter Bonta, *Meta-Analysis*]; Randy Borum & Randy Otto, *Advances in Forensic Assessment and Treatment: An*

applying the principles of dangerousness prediction to criminal sentencing.

A. The Evolution of Violence Risk Analysis

Over the past five decades, the science of violence risk analysis has evolved from the purely subjective toward quantitative methods of violence prediction involving a wide variety of violent subpopulation groups, with corresponding increases in reliability and validity.[154]

The first stage of violence prediction methods, from an applied perspective, consisted of *unstructured clinical opinions.* A psychiatrist or psychologist reviewed medical records and conducted a personal interview, which formed the basis for a professional judgment as to the subject's potential dangerousness. Unstructured clinical opinions were, by definition, subjective, and reliability was poor; as a result, this method did not satisfy the rigorous standards demanded by the judiciary. A second stage, consisting of *structured clinical opinions*, did not fare much better due to its low reliability.[155]

A proliferation of research in the 1980s provided the basis for a third stage of violence prediction methods, consisting of *empirically guided evaluations.* These methods assessed whether certain factors statistically associated with an increased risk of future violence were present:

> 1. *Historical factors*,[156] including multiple or recent incidents of violence, a past history of different kinds of violence, reinforcement of the consequences of violence, child abuse, and the presence of violent parent and/or sibling models;
> 2. *Opportunity factors*[157] associated with violence, including the recent purchase of a lethal weapon, cessation of psychotropic medication, and release into the community, and

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Overview and Introduction to the Special Issue, 24 LAW & HUM. BEHAV. 1-7 (2000); William Gardner et al., *A Comparison of Actuarial Methods for Identifying Repetitively Violent Patients with Mental Illness*, 20 LAW & HUM. BEHAV. 35-48 (1996); HAROLD V. HALL & RONALD S. EBERT, VIOLENCE PREDICTION: GUIDELINES FOR THE FORENSIC PRACTITIONER (2d ed. 2002); Vernon L. Quinsey et al., *Actuarial Prediction of Sexual Recidivism*, 10 J. INTERPERSONAL VIOLENCE 85-105 (1995) [hereinafter Quinsey, *Actuarial Prediction*].

[154] *See supra* note 152.

[155] *See id.*

[156] It is well-established that "the best predictor of violence is past violence." Harold V. Hall, *Overview of Lethal Violence*, *in* LETHAL VIOLENCE 2000: A SOURCEBOOK ON FATAL DOMESTIC, ACQUAINTANCE, AND STRANGER AGGRESSION 1, 20 (Harold V. Hall ed., 1999). "Lethal violence [generally] does not occur without some historical precedent." *Id.* Through numerous studies, social scientists have identified a number of historical factors associating an individual with later violence. *Id.*

[157] Opportunity factors "consist of events or behaviors which make violence possible." *Id.* at 23. An opportunity factor may be "an event as simple as release from incarceration, to [one as] complex [as] . . . holding a position of authority in an institution that sanctions violence." *Id.* Opportunity factors must be present for lethal violence to occur. *See id.*

3. *Triggering stimuli*,[158] including substance intoxication and the breakup of the central love relationship.[159]

Many, if not most, forensic mental health experts currently utilize empirically guided evaluation methods. Such methods, mantled in scientific methodology, yield results that tend to be more accurate than clinical opinion alone and, therefore, are usually well-received by civil and criminal courts.

The fourth stage, consisting of *pure actuarial measures*, was first developed in the mid-1990s and continues to be used today.[160] Actuarial measures based on statistical analysis allowed mental health professionals to determine quantitative degrees of certainty and the corresponding probability of violence recurring within a specified future time period, ranging from one to ten years.[161] As such, actuarial measures represented a quantum advancement in violence prediction.[162]

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[158] Triggering stimuli, or triggers, are "precipitating causes of lethal violence, short-term in duration, [that] tend to set violence into motion." *Id.* at 21.

[159] Judith V. Becker & Emily M. Coleman, *Incest*, *in* HANDBOOK OF FAMILY VIOLENCE (Vincent B. Van Hasselt et al. eds., 1988); HALL & PRITCHARD, WORKPLACE VIOLENCE RISK ANALYSIS, *supra* note 148, at 26-27 & tbl. 1-L; Harold V. Hall et al., *Dangerous Myths about Predicting Dangerousness*, 2 AM. J. FORENSIC PSYCHOL. 173, 179 (1984) [hereinafter Hall, *Dangerous Myths*]; Deirdre Klassen & William A. O'Connor, *Assessing the Risk of Violence in Released Mental Patients: A Cross-Validation Study*, *in* 1 PSYCHOL. ASSESSMENT: AM. J. CONSULTING & CLINICAL PSYCHOL. 75-81 (1989).

[160] HALL & PRITCHARD, WORKPLACE VIOLENCE RISK ANALYSIS, *supra* note 148, at 95; *see also* R. Karl Hanson & David Thornton, *Improving Risk Assessments for Sex Offenders: A Comparison of Three Actuarial Scales*, 24 LAW & HUM. BEHAV. 119, 119-20 (2000); QUINSEY, VIOLENT OFFENDERS, *supra* note 153, at 44.

[161] *See supra* note 160.

[162] Researchers are no longer vexed by violence representing a low base rate phenomenon. "The base rate is the proportion of a population that exhibits the phenomenon of interest, [for example,] violent recidivism. . . . A low base rate of violent recidivism affects the apparent accuracy of predictions." QUINSEY, VIOLENT OFFENDERS, *supra* note 153, at 40. This problem has been resolved through the use of statistical methods such as Receiver Operating Characteristics [hereinafter ROC], first developed in communications technology and in signal detection theory in psychophysics, that look at the tradeoff between the hit rate (defined as "the proportion of violent recidivists correctly predicted") and the false alarm rate (defined as "the proportion of nonviolent offenders incorrectly predicted to be violent") in predicting violent events. *Id.* at 47, 51. The ROC permits an estimate of the true accuracy of a test, yielding an "index of effect size, the area under the ROC [curve], that is unaffected by variations in selection ratio and base rate," thus allowing a comparison of the predictive accuracy of the various violence prediction methods. *Id.* at 52. The ROC has been utilized extensively in the creation of actuarial devices to predict violence. *Id.* at 51-53. Some test developers allow for the forensic professional to clinically adjust the actuarial measure (for example, due to the predictee developing a sudden debilitating illness, incorporating verified violence which did not result in arrest or conviction), so long as the modifications are slight and do not violate the measure's underlying statistical assumptions. *See, e.g.*, R. KARL HANSON, DEP'T OF THE

A fifth and most recent stage, consisting of *combinations* of the above, is commonly advocated by leading forensic practitioners who routinely predict violence in the course of their forensic work.[163] A variety of actuarial and other empirically-based methods are typically employed, with the mental health professional reporting the findings for each method utilized in the risk analysis report. The mental health professional usually provides an opinion on the overall risk of violent recidivism within a given future time period, citing the results of the actuarial methods used as the basis for the proffered conclusion.

The sixth stage, still in its infancy, will utilize a *classification tree approach*, focusing on violence prediction measures that attempt to incorporate clinical thinking and the overall, sometimes mind-boggling, complexity in individual cases. Prior to 2000, only two such empirically-derived methodologies were available: 1) the Assaultive Risk Screening Sheet,[164] used by the state of Michigan in prison assignment and parole decision-making, and 2) the Dangerousness Prediction Decision Tree,[165] (developed by the second author and discussed below), a violence prediction method for the short term (three-month future period). The classification tree approach tends to be straightforward and easy to utilize and is significantly more accurate than the

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SOLICITOR GEN. (CANADA), REP. NO. 1997-04, THE DEVELOPMENT OF A BRIEF ACTUARIAL RISK SCALE FOR SEXUAL OFFENSE RECIDIVISM (1997), http://www.sgc.gc.ca/epub/corr/e199704/e199704.htm (last modified Dec. 23, 1999) [hereinafter HANSON, ACTUARIAL RISK SCALE]; Hanson, *What Do We Know?*, *supra* note 152, at 53. Others discourage this practice if the predetermined probabilities associated with given scores are to be utilized. *See, e.g.*, QUINSEY, VIOLENT OFFENDERS, *supra* note 153, at 65.

[163] *See, e.g.*, J. Reid Meloy, Violence Risk and Threat Assessment 1, 67 (Presentation in Honolulu, Hawai'i, Sept. 1999); ANNA C. SALTER, TREATING CHILD SEX OFFENDERS AND VICTIMS: A PRACTICAL GUIDE (1988).

[164] JOHN MONAHAN, PREDICTING VIOLENT BEHAVIOR: AN ASSESSMENT OF CLINICAL TECHNIQUES (1981). The Michigan group studied 2,200 inmates released on parole. Inmates were assessed using a simple decision-tree analysis. For example, the study found that inmates who satisfied the following criteria were likely to be at high risk of committing violence again in the future:

(a) the crime description fit robbery, sex assault, or murder;
(b) the inmate had demonstrated serious institutional misconduct; and
(c) first arrest occurred before their fifteenth birthday.

Similarly, inmates who satisfied the following criteria were likely to be at very low risk for future violence:

(a) the inmate had committed no serious crimes (that is, robbery, sex assault, murder);
(b) no juvenile felonies;
(c) no assaultive felonies; and
(d) inmate had been or was still married.

The decision analysis is simple to utilize; the examiner merely follows the path created by the subject's responses to its assigned risk category. *See id.* at 61.

[165] HALL & EBERT, VIOLENCE PREDICTION, *supra* note 153; *see also infra* Part III.B.

earlier methods. It could, in the near future, evolve into a practical tool for identifying high and low risk individuals and could be used by forensic professionals involved in sentencing and parole determinations and the development of proposed treatment and risk management strategies.[166]

The empirically-based violence prediction systems available in the mental health-law interface today are discussed in greater detail below. As noted, the development of empirically-based violence prediction scales has been vigorously addressed by investigators only in the last fifteen years.[167] At this stage, statistical analyses in validation studies show that the systems are far less than perfect in terms of "sensitivity" (i.e., percentage of true positives) and "specificity" (i.e., percentage of true negatives).[168] The use of multiple measures and methods to predict violence is, therefore, strongly recommended.[169]

B. Violence Risk Analysis Methods

With a clearer understanding of the evolution of violence risk analysis, we turn now to the specific methods currently available for use in assessing dangerousness. This part presents a brief explanation of the currently available empirically-based methods for violence risk analysis. Table I summarizes the methods explained below.

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[166] The classification tree approach, rather than a main effects regression approach, may thus provide an opportunity to assist mental health professionals in a user-friendly, direct fashion. One recent study elucidated how the classification tree approach can employ two decision thresholds for identifying high and low risk cases; in this way, conclusions can be directly tied into proposed treatment and risk management strategies. *See* Henry J. Steadman et al., *A Classification Tree Approach to the Development of Actuarial Violence Risk Assessment Tools*, 24 LAW & HUM. BEHAV. 83-100 (2000). This approach is congruent with the findings from the MacArthur Violence Risk Assessment Study. *See* Kirk Heilbrun & Gretchen Witte, *The MacArthur Risk Assessment Study: Implications for Practice, Research, and Policy*, 82 MARQ. L. REV. 733, 747-49 (1999). It is also worth noting that the classification tree approach is highly compatible with artificial intelligence methodology.

[167] *See, e.g.*, HALL, VIOLENCE PREDICTION, *supra* note 153; HANSON, ACTUARIAL RISK SCALE, *supra* note 162; Hanson & Bussiere, *supra* note 153; VIOLENCE AND MENTAL DISORDER: DEVELOPMENTS IN RISK ASSESSMENT (John Monahan & Henry Steadman eds., 1994); QUINSEY, VIOLENT OFFENDERS, *supra* note 153.

[168] In other words, "*[s]ensitivity* is the rate at which a test identifies recidivists [or repeat offenders] correctly. *Specificity* is the rate at which it identifies nonrecidivists correctly." Eric S. Janus & Paul E. Meehl, *Assessing the Legal Standard for Predictions of Dangerousness in Sex Offender Commitment Proceedings*, 3 PSYCHOL. PUB. POL'Y & L. 33, 50 (1997) (citing Robert A. Prentky et al., *Risk Factors Associated with Recidivism among Extrafamilial Child Molesters*, 65 J. CONSULTING & CLINICAL PSYCHOL. 141, 144 (1997)).

[169] In addition, mental health professionals should include appropriate caveats and limitations in the dangerousness report. *See infra* App. A.

Table I: Actuarial Measures to Assess Dangerousness

	SCALE	TARGET POPULATION	FACTORS ASSESSED	FINDINGS	FORECAST PERIOD	PREDICTIVE ACCURACY[170]
LONGER TERM PREDICTORS	VIOLENCE RISK APPRAISAL GUIDE (VRAG)[171]	Violent and/or mentally disordered offenders.	Developmental, personality, and non-violent and violent history scores. Includes PCL-R score.	Predicts the risk that the individual will commit another violent (non-sexual) offense.	Predicts risk of reoffending within next 7-10 years.	77% accuracy in predicting violent recidivism.[172]
	SEX OFFENDER RISK APPRAISAL GUIDE (SORAG)[173]	Sex offenders.	Developmental, personality, history, and deviant sexual preferences.	Predicts the risk that sex offender will commit another sexual or violent offense.	Predicts risk of reoffending within next 7-10 years.	70% accuracy in predicting sexual recidivism.[174]
	RAPID RISK ASSESSMENT FOR SEXUAL OFFENSE RECIDIVISM (RRASOR)[175]	Sex offenders.	Victim and victim relationship factors, prior sexual offenses, and age of release. All data may be obtained from administrative records.	Assesses the risk that a sex offender will commit another sexual or violent offense.	Predicts risk of reoffending within next 5 - 10 years.	77% accuracy in predicting sexual recidivism.[176]
	MINNESOTA SEX OFFENDER SCREENING TEST-REVISED (MNSOST-R)[177]	Sex offenders.	History, victim, substance use, and other factors.	Predicts the risk of sexual and violent recidivism for high and low risk sex offenders.	Predicts risk of reoffending within next 6 years.	65% accuracy in predicting sexual recidivism.[178]
	STATIC-99[179]	Sex offenders.	Considers victim and sexual offense history factors	Assesses the risk that a sex offender will commit another sexual or violent offense.	Predicts risk of reoffending within next 6 years.	70% accuracy in predicting sexual or violent recidivism.[180]
	CALIFORNIA ACTUARIAL RISK ASSESSMENT TABLES (CARAT)[181]	Child molesters and rapists.	Victim and sex offense history factors.	Assesses the base rate percentage of child molesters and rapists who will commit another sexual or violent offense.	Predicts risk of reoffending within next 5 years.	n/a

SHORTER-TERM PREDICTORS	PSYCHOPATHY CHECKLIST-REVISED (PCL-R)[182]	Adult males only.	Factors suggesting exploitation of others and chronically unstable lifestyle. Few violence-related items.	PCL-R scores are the single best predictor of violent recidivism, although scale was not designed for such.	PCL-R has been incorporated into the VRAG, SORAG, HCR-20, and SVR-20.	71%	accuracy in predicting violent recidivism.[183]
	DANGEROUSNESS PREDICTION DECISION TREE[184]	Young adult males.	Remote and recent history, opportunity, and triggers, after inhibitions are taken into account.	Assesses the risk that an individual will commit another violent act, using a five-step decision path.	Predicts risk of reoffending within next 3 months.	75%	accuracy in predicting violent recidivism.
IMMEDIATE RISK ("SNAPSHOT") ASSESSMENTS	SERIOUSNESS SCORING SYSTEM[185]	Any age, both genders.	History of harm or injury inflicted, sex acts, and intimidation.	Quantifies the amount of harm resulting from past violent act(s).	Evaluates harm caused by violent act(s) committed recently, or in past 1, 5, or 10 years.	n/a	
	HISTORICAL, CLINICAL, RISK MANAGEMENT (HCR-20, V.2)[186]	Adult males.	Historical, clinical, and risk management factors.	Professional guidelines for assessing the risk of future violence that have generated significant international research.	n/a	n/a	
	SEXUAL VIOLENCE RISK-20 (SVR-20)[187]	Sex offenders.	Psycho-social adjustment factors.	Professional guidelines for assessing risk of sexual violence that have generated significant international research.	n/a	n/a	
	STATIC AND DYNAMIC RISK ASSESSMENT TOOLS[188]	Sex offenders.	History of sex offenses and demographic factors, attitudes.	Assesses whether the individual is at low, medium, or high risk of sexual recidivism.	n/a	n/a	

IMMEDIATE RISK ("SNAPSHOT") ASSESSMENTS	SPOUSAL ASSAULT RISK ASSESSMENT GUIDE (SARA)[189]	Sex offenders.	Spousal assault, criminal history, psycho-social adjustment, and most recent alleged incident.	Assesses the risk of future violence toward partner, as well as toward others in general.	n/a	n/a	n/a
	LEVEL OF SERVICE INVENTORY-REVISED (LSI-R)[190]	Adult males and females.	Data concerning almost all areas of offender's life (criminal history, education, employment, finances, recreational activities, family, friends, substance use, emotional and personal attitudes).	LSI-R score related to institutional problems, likelihood of early release, recidivism, self-reported criminal activities, parole outcome, and halfway house success.	n/a	n/a	n/a
	WORKPLACE VIOLENCE RISK ASSESSMENT CHECKLIST (WVRAC)[191]	Adult males and females.	Historical factors, recent critical events, and work attitudes and traits.	Professional guidelines for assessing risk of violence in work-places or vocationally-related areas.	n/a	n/a	n/a
META-ANALYSES	SEXUAL RECIDIVISM META-ANALYSIS[192]	Sex offenders.	Deviant sexual arousal, violence history, and personality studies.	Meta-analysis found a 30% base rate of reoffending.	n/a	n/a	n/a
	VIOLENCE META-ANALYSIS[193]	Sex offenders.	Objective risk assessment, juvenile delinquency, family problems, and other factors.	Identified recidivism factors applicable to all offenders, regardless of mental disability.	n/a	n/a	Criminal history best predictor; clinical factors worst.

[170] Predictive accuracy refers to the "degree to which tactual outcomes match predicted outcomes." QUINSEY, VIOLENT OFFENDERS, *supra* note 153, at 44.

[171] *Id.* at 141-169.

[172] Howard E. Barbaree et al., *Evaluating the Predictive Accuracy of Six Risk Assessment Instruments for Adult Sex Offenders*, 28 CRIM. JUST. & BEHAV. 506 tbl. 3 (2001).

[173] QUINSEY, "VIOLENT OFFENDERS, *supra* note 153, at 155-59, 241-44.

[174] Barbaree, *supra* note 172, at 506 tbl. 3.

[175] HANSON, ACTUARIAL RISK SCALE, *supra* note 162.

[176] Barbaree, *supra* note 172, at 506 tbl. 3.

[177] DOUGLAS L. EPPERSON ET AL., MINNESOTA SEX OFFENDER SCREENING TOOL-REVISED (MnSOST-R) 71-75 (materials on file with author).

[178] Barbaree, *supra* note 172, at 506 tbl. 3.

[179] R. KARL HANSON & DAVID THORNTON, DEP'T OF THE SOLICITOR GEN. (CANADA), REP. NO. 1999-02, STATIC 99: IMPROVING ACTUARIAL RISK ASSESSMENTS FOR SEX OFFENDERS (1999), http://www.sgc.gc.ca/epub/corr/e199902/e199902.htm (last modified Dec. 23, 1999).

[180] Barbaree, *supra* note 172, at 506 tbl. 3.

[181] Gary Schiller & Janice Marques, The California Actuarial Risk Assessment Tables (CARAT) (Presentation at the "Risk Assessment of Sexual Offenders" Conference, Honolulu, Hawai'i, 1999) (materials on file with author).

[182] ROBERT D. HARE, MULTI-HEALTH SYSTEMS, INC., THE HARE PCL-R: INTERVIEW AND INFORMATION SCHEDULE (1991).

[183] Barbaree, *supra* note 172, at 506 tbl. 3.

[184] HALL & EBERT, VIOLENCE PREDICTION, *supra* note 153; Hall, *Dangerous Myths*, *supra* note 159, at 173-93.

[185] MARVIN WOLFGANG ET AL., U.S. DEP'T OF JUSTICE, REP. NO. NCJ-96017, THE NATIONAL SURVEY OF CRIME SEVERITY 131-33 (1985).

[186] CHRISTOPHER D. WEBSTER ET AL., SIMON FRASIER UNIVERSITY, HCR-20: ASSESSING RISK FOR VIOLENCE, VERSION 2 (1997).

[187] DOUGLAS P. BOER ET AL., SIMON FRASIER UNIVERSITY, MANUAL FOR THE SEXUAL VIOLENCE RISK-20 (1997).

[188] HANSON, ACTUARIAL RISK SCALE, *supra* note 162.

[189] P. Randall Kropp & Stephen D. Hart, *The Spousal Assault Risk Assessment (SARA) Guide: Reliability and Validity in Adult Male Offenders*, 24 LAW & HUM. BEHAV. 101-18 (2000).

[190] DON A. ANDREWS & JAMES L. BONTA, MULTI-HEALTH SYSTEMS, INC., THE LEVEL OF SERVICE INVENTORY-REVISED: USER'S MANUAL (2000).

[191] HALL & PRITCHARD, WORKPLACE VIOLENCE RISK ANALYSIS, *supra* note 148, at 131, 177-207.

[192] Hanson & Bussiere, *supra* note 153, at 348-62.

[193] Bonta, *Meta-Analysis*, *supra* note 153, at 123-42.

1. Seriousness scoring system

The seriousness scoring system[194] quantifies the harmful consequences of past violence. The scoring system is based on the responses of over sixty thousand Americans participating in the U.S. Department of Justice's National Survey of Crime Severity.[195] Each past act of violence committed within a specified prior time period (that is, within the past one, five, or ten years, or even over an individual's lifetime, if that is of interest) is assigned a statistically-derived point value. The sum of the points is a number that represents the degree of harm caused by the subject's violent acts.[196] Points are calculated from the following categories: a) death or injuries inflicted upon others; b) sexual assault by force or intimidation; and c) intimidation of all types, as provided in Table II.[197] The total severity score (net harm) can be linked to victim restitution criteria or to sentencing procedures, thus adding a quantitative dimension to a notoriously subjective task. In addition, the seriousness scoring system can show whether there has been an increase or decrease in an individual's violent behavior over time.[198]

2. Violence Meta-Analysis

A meta-analysis,[199] involving fifty-two studies and 16,191 persons, was conducted to determine whether the predictors of recidivism for mentally disordered offenders were different from the predictors for non-disordered offenders.[200] They were the same.[201] Effect sizes were calculated for twenty-

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[194] WOLFGANG, *supra* note 185, at 131-33.

[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] Forensic mental health professionals may wish to determine if an individual's violence is escalating over time. A declining slope suggests deceleration, much as an upward slope suggests escalating violence. The second author has used such acceleration/deceleration data in court but always in conjunction with other predictive methods. *See generally* HALL & EBERT, *supra* note 153; HAROLD V. HALL & JOSEPH G. POIRIER, DETECTING MALINGERING & DECEPTION: FORENSIC DISTORTION ANALYSIS (2d ed. 2001); DISORDERS OF EXECUTIVE FUNCTIONS: CIVIL AND CRIMINAL LAW APPLICATIONS (Harold V. Hall & Robert J. Sbordone eds., CRC Press 1998) (1993). The key question is whether the violent act under scrutiny represented an ongoing trend or the last gasp of a fading propensity. Only additional clinical-forensic information can answer this question.

[199] Bonta, *Meta-Analysis*, *supra* note 153. Meta-analysis is defined as "[t]he process of using statistical methods to combine the results of different studies." STEDMAN'S MEDICAL DICTIONARY (27th ed. 2000).

[200] Bonta, *Meta-Analysis*, *supra* note 153, at 123.

[201] *Id.*

seven predictors of violent recidivism, with the meta-analysis finding that criminal history variables were the best predictors and clinical variables the worst.[202] The meta-analysis suggested that risk assessment of mentally disordered offenders can be enhanced with a focus on the criminological literature and less reliance on notions of psychopathology.[203] The predictors for violent recidivism are presented in Table III.

TABLE II: SERIOUSNESS SCORING SYSTEM

Score sheet

Name and Identification Number(s):

Component Scored	Number of Victims	X	Scale Weight	=	TOTAL
I. Injury	_____		1.47		_____
(a) Minor harm	_____		8.53		_____
(b) Treated and discharged	_____		11.98		_____
(c) Hospitalized	_____		35.67		_____
(d) Killed	_____		25.92		_____
II. Forcible sex acts					
III. Intimidation	_____		4.90		_____
(a) Verbal or physical	_____		5.60		_____
(b) Weapon	_____		1.50		_____
IV. Premises forcibly entered					
V. Motor vehicle stolen	_____		4.46		_____
(a) Recovered	_____		8.07		_____
(b) Not recovered	_____				_____
VI. Property theft/damage (optional)*					
	TOTAL		**SCORE:**		_____

*.log10Y = .26776656log10X, where Y is the crime severity weight and W is the total dollar value of theft or damage. WOLFGANG, *supra* note 185.

[202] *Id.*

[203] *Id.* The meta-analysis used predictors of effect sizes equal to or greater than .10 or -.10, a practice with some statistical support.

TABLE III: PREDICTORS OF VIOLENT RECIDIVISM

Predictor	Violent Recidivism	N	k
Objective risk assessment	.30	2,186	9
Adult criminal history	.14	2,163	8
Juvenile delinquency	.20	985	3
Antisocial personality	.18	1,634	3
Nonviolent criminal history	.13	1,108	4
Institutional adjustment	.14	711	4
Hospital admissions	.17	948	3
Poor living arrangements	NR		
Gender (male)	NR		
Substance abuse (any)	.08	2,013	4
Family problems	.19	1,481	5
Escape history	NR		
Violent history	.16	2,878	9
Drug abuse	NR		
Marital status (single)	.13	1,068	4
Weapon	.12	716	2
	Mixed Relationship		
Days hospitalized	-.09	850	4
Alcohol abuse	NR		
Employment problems	.22	1,326	5
Clinical judgment	.09	786	3
Education	-.02	1,066	4
Intelligence	-.02	1,873	4
Socioeconomic status	NR		
Race (minority)	.09	999	3
	Negative Relationships		
Mentally disordered offender	-.10	2,866	6
Homicide index offense	NR		
Age	-.18	1,519	5
Violent index	-.04	2,241	6
Violent index (broadly defined)	.08	1,950	7
Sex offense	.04	1,636	3
Not guilty by reason of insanity	-.07	1,208	3
Psychosis	-.04	3,891	11
Mood disorder	.01	1,520	3
Treatment history	NR		
Offense seriousness	.06	1,879	5

3. Psychopathy Checklist-Revised (PCL-R)

The well-received Psychopathy Checklist-Revised ("PCL-R")[204] "measures behaviours and personality traits that are considered fundamental to the clinical construct of psychopathy."[205] The PCL-R is incorporated in several other empirically-based violence prediction methods, including the Violence Risk Appraisal Guide ("VRAG"),[206] Sex Offender Risk Appraisal Guide ("SORAG"),[207] Historical Clinical Risk Management ("HCR-20"),[208] and the Sexual Violence Risk—20 ("SVR-20"),[209] all of which are discussed in greater detail below. Hence, the abbreviated and other versions of the PCL-R will not be discussed in this article.

The PCL-R yields information on two main factors which comprise psychopathy:

FACTOR I: The selfish, callous, and remorseless use of others (for example, items reflecting superficial charm, pathological lying, manipulation, lack of remorse, failure to accept responsibility for own actions); and

FACTOR II: A chronically unstable, antisocial, and socially disruptive lifestyle (for example, items reflecting a high need for stimulation, early behavior problems, parasitic lifestyle, poor behavioral controls).[210]

Canadian courts have encountered three problems with the PCL-R,[211] all of which the second author has also observed in American courts. First, experts frequently render substantially different PCL-R scores for the same defendant.[212] Defense experts typically present lower scores on the PCL-R for the defendant compared to their prosecution counterparts. Second, some

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[204] HARE, *supra* note 182. Psychopathy is defined as "a mental disorder characterized by an extremely antisocial personality that often leads to aggressive, perverted, or criminal behavior." BLACK'S LAW DICTIONARY 1242 (7th ed. 1999).

[205] Ivan Zinger & Adelle E. Forth, *Psychopathology and Canadian Criminal Proceedings: The Potential for Human Rights Abuses*, 40 REVUE CANADIENNE DE CRIMINOLOGIE [CANADIAN J. CRIMINOLOGY] 237, 248 (1998).

[206] *See infra* Part III.B.4.

[207] *See infra* Part III.B.5.

[208] *See infra* Part III.B.13.

[209] *See infra* Part III.B.12.

[210] Robert D. Hare et al., *The Revised Psychopathy Checklist: Reliability and Factor Structure*, 2 PSYCHOL. ASSESSMENT: AM. J. CONSULTING & CLINICAL PSYCHOL. 338, 340 (1990); *see also* Martin Grann et al., *Psychopathy (PCL-R) Predicts Violent Recidivism Among Criminal Offenders with Personality Disorders in Sweden*, 23 LAW & HUM. BEHAV. 205-17 (1999).

[211] Zinger & Forth, *supra* note 205, at 241, 249.

[212] *Id.* at 249.

forensic mental health professionals use the PCL-R on populations other than the normative base (for example, women, adolescents).[213] Third, Canadian courts have been provided with PCL-R scores based solely on a records review, which generally slightly underestimates the total scores.[214] One commentator points out that omitting the interview is acceptable only if "extensive" collateral information is available.[215]

4. Violence Risk Appraisal Guide

The Violence Risk Appraisal Guide ("VRAG") is the best currently available method to predict future violence.[216] The culmination of twenty-five years of research with mentally disordered offenders, conducted at a psychiatric facility at Penatanguishene, Ontario, Canada, the VRAG was developed based on the results of a study which followed over six hundred males, all of whom who had a basal history of serious violence, for a ten year period after release.[217] The VRAG measures and assigns a weighted score to each of the following predictors:

1. Lived with both biological parents to age sixteen;
2. Elementary school maladjustment;
3. History of alcohol problems;
4. Marital status;
5. Criminal history score for nonviolent offenses;
6. Failure on prior conditional release;
7. Index offense;
8. Victim injury in index offense;
9. Meets DSM-III criteria for any personality disorder;
10. Meets DSM-III criteria for schizophrenia; and
11. Psychopathology Checklist-Revised ("PCL-R") score.[218]

The items on the VRAG can be obtained from a records review and/or from interviewing significant or knowledgeable others, where it is not possible to interview the predictee directly. [219]

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[213] *Id.*

[214] *Id.*

[215] HARE, *supra* note 182.

[216] QUINSEY, VIOLENT OFFENDERS, *supra* note 153, at 141-69; Barbaree, *supra* note 172, at 492-93, 506 tbl. 3.

[217] HALL & PRITCHARD, WORKPLACE VIOLENCE RISK ANALYSIS, *supra* note 148, at 116-17.

[218] QUINSEY, VIOLENT OFFENDERS, *supra* note 153, at 147 exh. 8.1.

[219] The forensic mental health professional should note that the VRAG for adults can be used without directly measuring psychopathy through PCL-R scores by simply scoring the PCL-R as zero and utilizing the same probability table to calculate the risk of violent recidivism. Telephone interview with Vernon L. Quinsey (May 14, 2000) [hereinafter Quinsey interview]. If the subject is a psychopath, however, the obtained probability of risk may be lower than

otherwise. In cases where psychopathology is suspected, therefore, the actual PCL-R score should be derived and included in the VRAG scoring. Alternatively, the Child and Adult Taxon Scale (CATS), discussed below, can replace the PCL in its entirety. QUINSEY, VIOLENT OFFENDERS, *supra* note 153, at 166-67.

The CATS illustrates the static nature of the VRAG and supports the authors' speculation that psychopathology is a life history strategy. Importantly, such replacement allows the forensic clinician to calculate risk from the same probability table used in the original measure. The univariate correlation for the CATS is essentially the same as the PCL-R, with the CATS more heavily loaded on Factor 2 of the PCL-R, reflecting a disruptive, conflictual lifestyle. The CATS items include: (1) several VRAG items, (2) more than three DSM-III Conduct Disorders symptoms, (3) ever suspended or expelled from school, and (4) arrested under the age of sixteen. *See* QUINSEY, VIOLENT OFFENDERS, *supra* note 153, at 167 exh. 8.3. One researcher stated that:

> The practical and theoretical significance of this result (if borne out in cross validation) is profound. First, from a practical point of view, actuarial appraisal of the risk of violent recidivism may be accomplished without reference to a restricted psychological test which, in some jurisdictions, requires a licensed professional for its administration. We would argue that a more appropriate approach to qualifying risk appraisers lies in the evaluation of the reliability and validity of predictions, irrespective of general professional certification. Second, from a theoretical perspective, we would argue that a measure of psychopathy might be necessary for the prediction of violent recidivism, but that the PCL-R might not be. That is, although the two PCL-R factors are highly correlated (r = .50, approximately; see Harpur & Hare, 1988), there is considerable theoretically motivated debate about which PCL-R factor better predicts violence. The results showing that the entire PCL-R can be replaced by variables pertaining only to antisocial childhood behavior imply that PCL-R Factor I items reflecting apparently adult personality (e.g., glibness, grandiosity, lying, conning, remorseless, shallowness, callousness) do little or nothing to reduce uncertainty about the likelihood of violent recidivism. This is not to say that these characteristics are not associated with psychopathy. It is also possible that our record-based measurement was not the ideal way to measure these interpersonal behaviors.

QUINSEY, VIOLENT OFFENDERS, *supra* note 153, at 167-68. The possibility—even likelihood—that the VRAG can be accurately calculated without directly interviewing the subject is raised by the foregoing discussion.

The second author recommends, however, that mental health professionals personally interview the predictee whenever possible, as courts and other forensic entities seem to assign greater credibility to those experts who have met with the subject. The notion of fairness—allowing the subject to explain past behavior and events—may be inextricably bound up with the perception of the accuracy of the instrument.

The mental health professional who predicts violence in the absence of interviewing the subject is well-advised to obtain a strong multi-sourced database. Possible sources of information include, but are not limited to, the following:

(a) Interviewing and/or testing of previous victims and significant/knowledgeable others;
(b) Behavioral observations of the subject in both social and nonsocial contexts;
(c) Behavioral observations of the subject in both structured and nonstructured situations;
(d) Behavioral observations of the subject in both stressed/intoxicated (for example, alcohol EEG) and tranquil/non-intoxicated circumstances;
(e) A functional analysis of previous violence-related responses;

Support for the VRAG's reliability and validity, as well as its applicability to other populations, continues to mount,[220] making the VRAG the recommended method for predicting violent recidivism.

5. Sex Offender Risk Appraisal Guide

The Sex Offender Risk Appraisal Guide ("SORAG")[221] predicts the risk that an adult male sex offender will commit another sex offense within a seven to ten year period in the future.[222] The SORAG was developed with the same methodology as the VRAG.[223] The fourteen items in the SORAG consist, in part, of similar factors as the VRAG (that is, living with biological parents to age sixteen, elementary school maladjustment, history of alcohol problems, marital status, criminal history of nonviolent offenses, failure on prior conditional release, age at index offense, meeting the DSM-III Criteria for any personality disorder or for schizophrenia, and the PCL-R or CATS score).[224] In addition, the score is computed from new items (that is, criminal history of violent offenses, number of previous convictions for sexual offenses, history of sex offenses only against male children or adults, and phallometric test results).[225]

(f) An environmental assessment, including culturally relevant stimulus factors;
(g) Description of probable but unknown behavioral traits from actual demographic traits observed by others;
(h) Use of relevant violence base rate data;
(i) Results of medical, neurological, and laboratory examinations of the subject performed by others;
(j) Inspection of crime scenes or sites where violence was previously exhibited;
(k) Various intrusive medical procedures (for example, alcohol EEG);
(l) Semantic and transcript analysis, if available;
(m) Results from instrumentation such as the polygraph;
(n) Records produced by the subject (for example, diaries, letters);
(o) Records produced by others (for example, military, school, job);
(p) "Expunged" records usually available to court examiners in the State or federal archives; and
(q) Relevant psychological-mathematical models which could then be used as a basis for further inquiry (for example, geographic profiling).

[220] *See, e.g.*, Barbaree, *supra* note 172, at 511-12; R. Karl Hanson & A. Harris, *Where Should We Intervene? Dynamic Predictors of Sex Offense Recidivism*, 27 CRIM. JUST. & BEHAV. 6, 12 (2000); HALL & PRITCHARD, WORKPLACE VIOLENCE RISK ANALYSIS, *supra* note 148, at 121.

[221] QUINSEY, VIOLENT OFFENDERS, *supra* note 153, at 155-59.

[222] *Id.* at 244 tbl. B-1.

[223] *Id.* at 156.

[224] *Id.* at 157 exh. 8.2 (listing factors); *see also id.* at 241 app. B (scoring details).

[225] *Id.* at 157 exh. 8.2.

While more reliable than mere chance, the SORAG's ability to predict sexual recidivism is modest, with a predictive accuracy of about seventy percent.[226] Still, the SORAG has done as well as other sexual recidivism scales that other investigators have produced.[227]

6. Sexual recidivism meta-analysis

One sexual recidivism meta-analysis,[228] which compiled the results of eighty-seven articles, sixty-one datasets, and 28,972 sexual offenders with a median follow-up period of four years, stands as a superb statistical achievement in sex offender research.[229] The base rate for reoffending was about thirty-six percent across all offenders.[230] Among other findings, a combination of (a) previous sex offenses, (b) boy victims, and (c) never married, equaled a seventy-seven percent chance of the predictee committing another violent act within the fifteen to thirty year follow-up period.[231] The likelihood of the predictee committing any new offense for this group was

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[226] Barbaree, *supra* note 172, at 506 tbl. 3.

[227] *See, e.g., id.* at 490-521 (comparing the predictive accuracy of the SORAG and the STATIC-99, among other methods).

One researcher, importantly, observed:

> We developed the SORAG as an enhancement of the VRAG for sex offenders but have been *unable to show so far that the SORAG is more accurate than the VRAG for sex offender subjects in predicting violent or sexual recidivism.* We ordinarily do not score both because they are highly correlated. The omission of the plethysmograph item slightly degrades accuracy on the SORAG but [] these instruments are quite robust. Missing data move the estimated probability of a subject toward the base rate of the construction sample.

Quinsey interview, *supra* note 219.

These points are far-reaching in their implications. The VRAG may be more accurate than the SORAG because sexual assaults may reflect a propensity and desire to harm, rather than seek sexual gratification, an argument long raised by feminists and those who treat sex victims. Alternatively, the extra items in the SORAG relating specifically to sexual assaults may not be all that sensitive, despite the research findings upon which their inclusion was based. The finding that omitting the plethysmograph only slightly degrades accuracy on the SORAG, together with the finding that the VRAG is more accurate than the SORAG, suggests that the plethysmograph may not be necessary in order to accurately predict sexual recidivism. Yet research findings show that the plethysmograph is the single best predictor of sexual violence. HANSON, ACTUARIAL RISK SCALE, *supra* note 162, at 17.

The answer may lie in the higher correlation of the VRAG with both physical and sexual recidivism ($r = .44$). Until more cross-validation is available, the forensic professional is advised to utilize both the VRAG and SORAG to predict sexual recidivism, especially since the SORAG utilizes phallometric testing, which is objective and reliable.

[228] Hanson & Bussiere, *supra* note 153, at 348-62.

[229] *Id.* at 350-51.

[230] *Id.* at 351.

[231] *Id.* at 351, 357.

forty-two percent.[232] The likelihood of the predictee committing any new offense within the next three to five years was thirty-seven percent, and thirteen percent for a new sex offense.[233] Importantly, treatment did *not* reduce the chances of sexual recidivism.[234]

7. Rapid Risk Assessment for Sexual Offense Recidivism

The Rapid Risk Assessment for Sexual Offense Recidivism ("RRASOR")[235] predicts the risk that an individual will commit a new sex offense within the next five to ten years.[236] The RRASOR does not require that the mental health professional interview the predictee; the required information can be determined from a review of administrative records.[237] The RRASOR measures four factors. The factors and their scoring[238] are as follows:

FACTOR I:	*Prior Sexual Offenses*
	None = 0 points
	1 conviction and/or 1-2 charges = 1 point
	2-3 convictions and/or 3-5 charges = 2 points
	4 or more convictions and/or 6 or more charges = 3 points
FACTOR II:	*Age at Release*
	25 or more years of age = 0 points
	Less than 25 years old = 1 point
FACTOR III:	*Victim Gender*
	Only female victims = 0 points
	Any male victims = 1 point
FACTOR IV:	*Relationship to Victim*
	Only related = 0 points
	Any non-related = 1 point

The total score (the sum of the four factors) is correlated with recidivism rates for five and ten year periods. The obtained score and corresponding estimated recidivism rates for five and ten year periods are provided below.

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[232] *Id.* at 356 tbl. 5.

[233] *Id.* at 351, 357.

[234] *Id.* at 358.

[235] HANSON, ACTUARIAL RISK SCALE, *supra* note 162, at 13.

[236] *Id.* at 14-15.

[237] *Id.* at 19.

[238] *Id.* at 14 tbl. 4.

ESTIMATED RECIDIVISM RATES	FOR FIVE YEAR PERIOD
Obtained score	Estimated recidivism rate
0	4.4%
1	7.6%
2	14.2%
3	32.7%
5	49.8%

ESTIMATED RECIDIVISM RATES	FOR TEN YEAR PERIOD
Obtained score	Estimated recidivism rate
0	6.5%
1	11.2%
2	21.1%
3	36.9%
4	48.6%
5	73.1%

The RRASOR has a predictive accuracy of seventy seven percent in predicting sexual recidivism.[239] The finding that roughly three-quarters of sex offenders who score positive on all four factors recidivate within ten years, should serve as a caution that sexual offenders, especially those with boy victims, are generally recalcitrant to change.

8. Minnesota Sex Offender Screening Test-Revised

The Minnesota Sex Offender Screening Test-Revised ("MnSOST-R")[240] predicts the risk that a violent offender will commit another act of violence within the next six years.[241] The sixteen factors are as follows:

1. Sex-related convictions;
2. Duration of sex-offending history;
3. Supervisory status at time of commission of a sex offense for which they were charged or convicted;
4. Whether the sex offense was in a public place;
5. Threat of force in any sex offense for which they were charged or convicted;
6. Multiple acts on a single victim during one contact event;

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[239] *Id.* at app. I.

[240] EPPERSON, *supra* note 177, at 71-75.

[241] Barbaree, *supra* note 172, at 506 tbl. 3.

7. Age groups victimized;
8. Offenses against a thirteen to fifteen year old victim (or perpetrator more than five years older than victim);
9. Stranger victim for any sex-related offense;
10. Adolescent antisocial behaviors;
11. Substance abuse in the year preceding index offense;
12. Employment history;
13. Documented discipline or infractions while incarcerated;
14. Substance abuse treatment while incarcerated;
15. Sex offender treatment while incarcerated; and
16. Age at release or discharge from incarceration.[242]

The MnSOST-R has been shown to have an accuracy of sixty-five percent in predicting sexual recidivism.[243]

9. Static and dynamic risk assessment tools

Static and dynamic risk assessment tools yield low, medium, and high risk predictors for sexual offenses.[244] *Static risk assessment* examines factors that cannot be altered, such as history, demographic variables (except for age), and characteristics of past offenses.[245] Because static factors cannot measure change over time, static risk assessment should not be used in designing therapeutic interventions. *Dynamic risk assessment*, on the other hand, measures factors which can change over time, including sexual interests, socioaffective functioning, response to treatment, and other factors that can be used for risk reduction and/or risk management.[246]

10. Dangerousness Prediction Decision Tree

The second author and his colleagues have developed a method which utilizes both dynamic and static violence risk factors to predict the risk that an individual will commit another act of violence within the next three months.[247] The study found that:

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[242] EPPERSON, *supra* note 177, at 71-74.

[243] Barbaree, *supra* note 172, at 506 tbl. 3.

[244] *See, e.g.*, Hanson & Thornton, *supra* note 160, at 132-33.

[245] *Id.* at 120; *see also* Hanson, *What Do We Know?*, *supra* note 152, at 51.

[246] Hanson & Thornton, *supra* note 160, at 132; *see also* Hanson, *What Do We Know?*, *supra* note 152, at 51.

[247] HALL & PRITCHARD, WORKPLACE VIOLENCE RISK ANALYSIS, *supra* note 148, at 112-14; HALL & EBERT, *supra* note 153, at 66-69 & fig.V; Hall, *Dangerous Myths*, *supra* note 159, at 173-93. In this study, young adult military males were followed over a ninety day period, and their on-post and off-duty behavior was recorded. HALL & PRITCHARD, WORKPLACE VIOLENCE RISK ANALYSIS, *supra* note 148, at 112; Hall, *Dangerous Myths*, *supra* note 159, at 173.

> The best predictor of short-term dangerousness [was the presence of] multiple stimulus triggers (at least two), short-term in duration (less than one month), high in impact, superimposed on past violence.[248]

The most potent external trigger[249] was environmental stress, particularly the actual or threatened breakup of the central love relationship.[250] The second most potent external trigger was a deteriorating work environment or work conflict.[251] Peer pressure to aggress, institutional commands to perform sanctioned violence, and other factors emerged from the literature as potential triggers, but were not isolated in this study.[252]

The most potent internal trigger was substance intoxication.[253] Other important internal triggers from the literature were command hallucinations, some organic and paranoid states, and obsessive thoughts of revenge or violence.[254]

The most important dynamic conditions were age (young), socioeconomic status prior to the military (lower class or lower middle class), and substance abuse or dependence (particularly alcohol, opiates, and amphetamines).[255] Other important static and dynamic conditions were sex (male), subcultural acceptance of violence, the belief that certain types of violence (that is, child or spouse abuse) would go unpunished, deficits in verbal skills, violent peers, and a weak community support base.[256]

The Dangerousness Prediction Decision Tree thus analyzes static and dynamic violence risk factors to predict the risk that an individual will commit another violent offense within the next three months.

11. Spousal Assault Risk Assessment

The Spousal Assault Risk Assessment Guide ("SARA")[257] assesses the risk of future violence toward the predictee's partner as well as toward others in general. The SARA was developed in Canada based on a study of over 2,300

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[248] HALL & EBERT, *supra* note 153, at 27. This prediction presupposed victim availability and a context within which to act out. *Id.*

[249] *See supra* note 158.

[250] HALL & EBERT, *supra* note 153, at 27.

[251] *Id.*

[252] *Id.* at 27-28.

[253] *Id.* at 28. The trigger was considered likely if substance abuse occurred within the month previous to the prediction using Diagnostic and Statistical Manual, Third Edition [DSM-III] criteria. *Id.*

[254] *Id.*

[255] *Id.*

[256] *Id.*

[257] Kropp & Hart, *supra* note 189, at 101-18.

male offenders, including criminal court referrals, probationers, and inmates.[258] The SARA is essentially a clinical checklist of risk factors for spouse assault identified in scientific literature.[259] Risk factors include: 1) past assault, 2) violations of conditional release or supervision, 3) problems in work or primary relationships, 4) abuse victim, 5) substance abuse, 6) psychological problems or conditions, including suicidal behavior and personality disorders, 7) use of weapons, 8) violation of no-contact orders or minimizing or denying violent history, and 9) attitudes that support spousal assault.[260] The SARA can be used for comparing men who did and did not reoffend following referrals for group treatment.[261]

12. Sexual Violence Risk-20

The Sexual Violence Risk-20 ("SVR-20")[262] was developed as a set of professional guidelines for evaluating the risk of sexual violence. It does not, however, predict the risk of future sexual violence.

Factors in the SVR-20 include those reflecting "psychosocial adjustment" (that is, presence of future plans, attitude towards intervention) and "criminal history" (that is, past assault of family members, strangers, or acquaintances, and past violation of conditional release or community supervision).[263] The SVR-20 can be utilized for intervention, according to the authors, as it contains both static and dynamic factors.[264]

13. Historical Clinical Risk Management-20

The Historical Clinical Risk Management-20 ("HCR-20"),[265] like the SVR-20, was developed as a set of professional guidelines to assess the risk of violence.[266] Factors include historical items (for example, previous violence,

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[258] *See id.* at 103-05. Norms were obtained on two large groups totaling 2,309 offenders, many of whom had a known history of spousal assault, with probation and correctional staff constructing the SARA ratings. Generally, probationers had lower scores than inmates. Overall, about twenty to thirty-five percent of the offenders studied were judged by evaluators to be at high risk for spousal assault. Structural reliability analyses suggested that the SARA had at least moderate internal consistency and item homogeneity.

[259] *Id.* at 102.

[260] *Id.* at 102-03 & tbl. 1.

[261] *Id.* at 111-14.

[262] BOER, *supra* note 187.

[263] *Id.* (assessment form).

[264] *Id.*

[265] WEBSTER, *supra* note 186.

[266] *See* Darryl G. Kroner & Jeremy F. Mills, *The Accuracy of Five Risk Appraisal Instruments in Predicting Institutional Misconduct and New Convictions*, 28 CRIM. JUST. & BEHAV. 471, 474 (2001).

early maladjustment, substance use problems), clinical items (for example, lack of insight, negative attitude, and impulsivity), and risk management items (for example, exposure to destabilizers, lack of personal support, noncompliance with remediation efforts).[267] The HCR-20, like some other measures of risk, contains both dynamic and static factors. This means that outcomes can be linked to risk management strategies.

14. California Actuarial Risk Assessment Tables

The California Actuarial Risk Assessment Tables ("CARAT")[268] present the base rate percentage of reoffenses within five years for both child molesters and rapists.[269] For rapists, the range presented was from "minimal" risk (for example, 21.5% for an offender with an average IQ, acquaintance victim, prior felony convictions, age between twenty-five and thirty-five at release from incarceration) to "substantial" (91.8% for an offender with an average IQ, acquaintance victim, was sexually abused as a child, under twenty-five at release).[270] For child molesters, the range is more restricted, from a "mild" risk (46.3% for an offender who had a stranger victim, victim less than six years old, has prior felonies, age between twenty-five and thirty-five at release) to "moderate" risk (70.4% for one prior sex offense, has prior felonies, molests boys only, age between fifteen and thirty-five at release).[271]

15. Level of Service Inventory-Revised

The Level of Service Inventory-Revised ("LSI-R")[272] is a risk reduction/ management tool that evaluates data from almost all areas of an offender's life, including criminal history, educational and employment history, financial,

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[267] WEBSTER, *supra* note 186 (coding sheet).

[268] Schiller & Marques, *supra* note 181.

[269] *Id.*

[270] *Id.*

[271] *Id.* For comparison, another researcher estimated that the base rate for reoffense for child molesters is about forty percent after twenty-five years following release. *See* Hanson, *What Do We Know?*, *supra* note 152, at 57. Thus, the use of these combinations of factors can significantly improve the accuracy of prognostication beyond that expected by the base rate. Further, the base rates for both rapists and child molesters do *not* include offenses for which the perpetrator avoided detection or apprehension, where the charges were dropped, or where a judicial alternative, such as mental health treatment in lieu of prosecution, was imposed. A deception analysis should be performed to avoid either an underestimate or overestimate of basal violence and therefore future risk. *See, e.g.*, Harold V. Hall, *The Forensic Distortion Analysis: A Proposed Decision Tree and Report Format*, 4 AM. J. FORENSIC PSYCHOL. 31-59 (1986); HALL & EBERT, *supra* note 153.

[272] ANDREWS & BONTA, *supra* note 190.

family and marital data, leisure and recreational activities, companions, substance use, emotional and personal information, and personal attitudes.[273] The LSI-R can assign *a priori* risks for (1) institutional maladjustment, (2) likelihood of early release, (3) recidivism and self-reported criminal activities, (4) parole outcome, and (5) halfway house success.[274] The presence of dynamic factors makes the LSI-R a particularly appealing management tool.

16. The Workplace Violence Risk Assessment Checklist

The Workplace Violence Risk Assessment Checklist ("WVRAC")[275] does not predict the risk of future violence; rather, it is intended to be used by human resource managers, probation officers, and mental health personnel as a "screening device to identify those employees who should be referred for a more comprehensive risk analysis."[276] The WVRAC includes factors from the scientific literature that have been associated with workplace violence, such as history, recent events, and work attitudes and traits.[277] The WVRAC factors are listed in Table IV.

The WVRAC has been utilized to evaluate clinical-forensic cases of workplace violence, with a general finding that increased violence potential is associated with a greater number of endorsed items.[278] It is important to note, however, that a simple sum of risk factors and the use of specific cutoffs does not automatically equate to varying degrees of risk.[279] The items are not exhaustive, fixed, or mutually exclusive, and the entire checklist should be considered a work in progress and a list of warning signs.[280] Importantly, some form of previously threatened, attempted, or consummated violence to others, self, or property must be present to reasonably predict future violence from the predictor variables.[281] The inclusion of both dynamic and static factors suggests that the WVRAC may be utilized as a management/risk-reduction tool.

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[273] *See id.*

[274] *Id.*

[275] HALL & PRITCHARD, WORKPLACE VIOLENCE RISK ANALYSIS, *supra* note 148.

[276] *Id.* at 131-32.

[277] *See id.* at 131, 177-207; *see also* Theodore Feldman & Phillip Johnson, *Workplace Violence: A New Form of Lethal Aggression*, *in* LETHAL VIOLENCE 2000: A SOURCEBOOK ON FATAL DOMESTIC, ACQUAINTANCE, AND STRANGER AGGRESSION 311-38 (Harold V. Hall ed., 1999); COLLECTIVE VIOLENCE: EFFECTIVE STRATEGIES FOR ASSESSING AND INTERVIEWING IN FATAL GROUP AND INSTITUTIONAL AGGRESSION (Harold V. Hall & L.C. Whitaker eds., 1999).

[278] *See* HALL & PRITCHARD, WORKPLACE VIOLENCE RISK ANALYSIS, *supra* note 148, at 177-207.

[279] *Id.* at 177. This must be determined by cross-validating research.

[280] *Id.*

[281] *Id.* at 178.

TABLE IV: THE WORKPLACE VIOLENCE RISK ASSESSMENT CHECKLIST

HISTORICAL ITEMS
Previous attempted or consummated violence towards others
Previous damaging of work-related property
Previous direct or veiled threats to harm other employees
Substance abuse or dependence (alcohol and/or drugs)
Poor compliance with company attempts to remediate worker
Belligerence toward customers or clients
Reckless or hazardous behavior on job
Past use or threatened use of weapons outside work

RECENT EVENTS
Physical violence to others unrelated to work
Stress or desperation in family, domestic or financial matters
Acquires firearm, or related equipment
Signs of rehearsal (e.g., practices at the shooting range, assembles weaponry)
Exposure to, or increase of, destabilizers (e.g., alcohol, drugs)
Fascination with or statements about other incidents of workplace violence
Poor compliance with remediation attempts or directives by management
Lost job or perceives job will soon be lost
Stalking including repeated harassment of other employees
Threats of suicide or homicide
Shows behavior suggesting a wish to harm co-workers or management

WORK ATTITUDES AND TRAITS
Sees self as victimized or treated unfairly by other employees
Sense of identity wrapped up in job
Does not take criticism well, including projection of blame to others
Authority issues regarding control from others present
Tends to be a loner or and/or off job
Hostile attitudes toward aspects of work
Perceived intrusions into private life (e.g., believes monitoring by management is excessive)

17. Other Measures

Some extant methods of determining violence recidivism were not included in the above list. For example, the STATIC-99,[282] which attempts to predict sexual recidivism by using a stepwise regression approach to classify offenders

[282] HANSON & THORNTON, *supra* note 179.

as high, medium, or low risk, was developed from a merging of the database for the RRASOR and a tool called the SACJ developed from a British database.[283] However, the STATIC-99 was not significantly more accurate than either the RRASOR or the SACJ and was outperformed by the VRAG.[284]

Other measures were not included because of a lack of a norm base, the failure to report reliability/validity data or, in some cases, failure to provide a listing of the empirically-based factors evaluated.[285] Similarly, no objective or projective psychological test is listed, as no research shows that any psychological test or subtest will postdict, let alone predict, violence.[286]

IV. CONCLUSION

Violence risk analysis has evolved dramatically in recent years, particularly with the development of objective, quantitative methods to determine dangerousness. The currently available empirically-based risk assessment methods presented in this article will, hopefully, be revised and improved as more research is conducted in this fascinating area. Certain findings regarding risk analysis, however, will steadfastly remain. Among these is the finding that empirically-based risk assessment methods are more accurate and, therefore, superior to clinical judgment alone.[287]

Violence prediction is a process which, regardless of the measures utilized, *always* involves questions regarding the comprehensiveness of the database, whether deliberate deception and involuntary distortion are taken into account, and whether basal history and recent factors associated with violence, such as triggers and opportunity factors, are present. Although significant gains in

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[283] *See* DON GRUBIN, POLICE RESEARCH SERIES PAPER 99 (LONDON), SEX OFFENDING AGAINST CHILDREN: UNDERSTANDING THE RISK (1998), http://www.homeoffice.gov.uk/prgpubs/fprs99.pdf.

[284] Greg M. Kramer & Kirk Heilbrun, *Decades of Advances in Risk Assessment: Implications for Corrections*, *in* 2 CORRECTIONAL MENTAL HEALTH REP. 17, 28 (2000).

[285] The Analysis of Aggressive Behavior falls into this category.

[286] Commonly used objective psychological tests include the Minnesota Multi-Phasic Personality Inventory-Revised (MMPI-2), Millon Clinical Multiaxial Personality Inventory III (MCMI-III), and the California Psychological Inventory-Revised (CPI-R). Robert J. Craig, *MMPI-Based Psychological Assessment of Lethal Violence*, *in* LETHAL VIOLENCE 2000: A SOURCEBOOK ON FATAL DOMESTIC, ACQUAINTANCE, AND STRANGER AGGRESSION 505 (Harold V. Hall ed., 1999). A commonly used projective psychological test is the Rorschach "ink blot" test. Charles L. Golden et al., *Psychometric Testing and Lethal Violence*, *in* LETHAL VIOLENCE 2000: A SOURCEBOOK ON FATAL DOMESTIC, ACQUAINTANCE, AND STRANGER AGGRESSION 479 (Harold V. Hall ed., 1999).

[287] This has now been established by scientific research, thus reversing a trend in forensic mental health practice over the last century. *See supra* note 153.

predictive accuracy have been made, the currently available risk analysis methods are far from perfect.[288]

Nonetheless, as this article illustrates, there have been substantial advances in violence prediction. As the process becomes more objective and statistically quantifiable, courts and legal practitioners alike should be more confident about individual risk assessments. Hopefully, these improved methods for determining dangerousness will enable the courts to find the optimal disposition for any potentially dangerous individual, while protecting the public from harm.

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[288] *See supra* notes 167 to 169 and accompanying text.

APPENDIX A: SAMPLE DANGEROUSNESS ASSESSMENT REPORT

[Date]

The Honorable John Smith
[Address]

RE: State of Hawaii v. [Defendant]
CR. NO._____
Counts I-III: Sexual Assault in the Third Degree

Dear Judge Smith:

Pursuant to your [Date] Order granting the State's motion for assessment of dangerousness of [Defendant], DOB_____, POB_____, SSN_____, this report is presented. The Defendant is a__-year-old, single man who is currently being detained at the_____. No empirically based risk assessments were found in his records.

This same report has been submitted to the Honorable Jane White in the sentencing for the Kidnapping offense in Criminal Number____. The sole difference is that the index offense used as a basis for prediction corresponds to the separate charges for which the Defendant was found guilty. The change in index offenses did not alter the risk probability as discussed below.

Forensic Database: Records supplied by the Department of the Prosecuting Attorney included police and Grand Jury audio and video tapes relevant to Criminal Numbers _____ and_____ (original arrests for Kidnapping, Sexual Assault in the Third Degree and Failure to Register as a Sex Offender; convicted of Kidnapping and Sexual Assault in the Third Degree). Police report____ for Sexual Assault and Kidnapping was also reviewed. An Adult Probation Division criminal history list and background information as well as a Hawaii OBTS/CCH form were also reviewed.

Measures administered to the Defendant at_____ High Security Facility or later scored from data obtained from the Defendant or from the____ medical and the above records included the following:

1. Clinical Interview and Mental Status Evaluation
2. Shipley Institute of Living Scale (estimated WAIS-R Full Scale IQ = 64-71)
3. Wechsler Memory Scale-Revised (Mental Control, 6/6 correct)
4. Wechsler Adult Intelligence Scale (Digit Span, Digits Forward = 6; Digits Backward = 4)
5. Violence Risk Appraisal Guide (VRAG): 82% (probability of violent recidivism over 10-year period)
6. Hare Psychopathy Checklist-Revised: 35 (severe psychopath)

7. Predictors of Violent Recidivism (meta-analysis): Positive for violent recidivism (see below)
8. HCR-20 (Historical, Clinical, Risk Management Items: 28 (high risk for violent recidivism)
9. SVR-20 (Sexual, Violence, Risk): 13 indicators, high risk
10. Rapid Risk Assessment for Sexual Offense Recidivism: 4; 48.6% risk of sexual recidivism over 10-year period
11. Static Risk Assessment: 9; high risk classification for recidivism
12. Minnesota Sex Offender Screening Tool-Revised (MnSORT-R): 8; Percent Correct High Risk (70%)
13. National Severity Scoring System (increasing degrees of violence from 1970s, 1980s to 1990s)
14. Problem Identification Checklist (6 month period): Negative for violence
15. Dangerousness Prediction Decision Tree (3 month period): Negative for violence based on history, opportunity, and triggering stimuli
16. Dynamic Antisociality (1 month period): Negative for violence based on traits and relevant behaviors

Test Results:

1. The forensic database is sufficiently diverse and comprehensive to arrive at conclusions beyond a reasonable degree of psychological probability. Deception analysis revealed that, for the Defendant's history and most recent convictions, he minimized and denied past violence and events/behaviors associated with violence.

2. The Violence Risk Appraisal Guide (VRAG) is considered the best validated extant measure of violence risk and generates a 10-year probability of recidivism as a function of risk scores (Quinsey, Harris, Rice, & Cormier, 1998). The percent probability for the Defendant for the 10-year period was 82% (96th percentile, category 8).

   Predictive items typically considered but not weighted into the VRAG included:

   a. Results of IQ testing

      Results: < 90 = high risk

      Results of Shipley testing yielded a WAIS-R Estimated Full Scale IQ of 67 with impaired vocabulary (T = 22; < 1st percentile) and abstraction skills (T = 36; < 10th percentile). The Standard Error of Measurement (SEM) for the Shipley is 8.6, which suggested that the Defendant's true IQ ranges from defective to borderline. All test data considered, borderline intelligence is indicated.

      Attentional skills were overall low average to average (DF = 6; 24.6th percentile; Mental Control = 6/6); his ability to concentrate was low average (Digits Backward = 4; 17.6th percentile)

Ability to abstract was poor (e.g., He said that "Strike while the iron is hot" means "iron clothes, cause it is hot"; he defined a "green thumb" as "your hand")

Judgment was poor (e.g., he would "run" if he were the first person in a movie theater to see smoke and fire, then return and make sure everyone was out of the theater).

Possible brain damage from years of sniffing paint thinner (see arrest history), which then, as with the above items, may increase his dangerousness beyond the obtained risk probability.

b. Attitudes supportive of crime:

Yes = high risk

Includes for the Defendant a criminal history from an early age with incarceration at the Hawaii Youth Correctional Facility, denial of responsibility for many offenses and/or projection of blame to others, and being critical of his victims.

c. Attitudes toward convention:

Yes = high risk

Poor work history, chronic polysubstance abuse, limited responsibility for maintaining continual employment, poor attachment and bonding with others.

Since 1989, the Defendant has been free in the community for only one year (1997 to 1998); he was imprisoned for the remainder of the time. His response to treatment has been poor.

3. The Hare Psychopathy Check List-Revised is considered an excellent measure of violence by itself and is included in Quinsey et al.'s VRAG as well as some other tests discussed below. The Defendant's score of 36 out of a possible 40 reflects a severe psychopath with behaviors and attitudes in the two main factors: (1) Selfish, callous, and remorseless use of others and (2) Chronically unstable antisocial and socially deviant lifestyle.

4. Positive predictors of violent recidivism from a meta-analysis involving 52 studies and 16,191 persons by Bonta, Law, & Hanson (1998) included (a) adult criminal history, (b) juvenile delinquency, (c) antisocial personality, (d) nonviolent criminal history, (e) family problems, and (f) violent history. Only one negative predictor was found (age).

5. The HCR-20, Version II (Webster, Douglas, Eaves, & Hart, 1997) (History, Clinical and Risk Management items) score of 28 is considered high risk. Although the HCR-

20 was designed as a guide to risk assessment and not a formal psychological test, empirical studies from a variety of settings and countries have validated the concept that increased risk occurs with increased scores. On this measure, the Defendant revealed his problem with alcohol consumption (drinking cheap wine) despite Alcoholics Anonymous attendance. After the undersigned proceeded through the Defendant's rap sheet, the Defendant reluctantly admitted to an 8-year history of arrests for inhaling paint thinner with a rag (first arrest for Promoting Intoxicating Compound on November 5, 1980 and last on September 3, 1988, with a total of seven arrests). He minimized his abuse of paint thinner by stating that it was infrequent, and that paint thinner is not really a drug since it was inhaled and only resulted in dizziness.

6. The SVR-20 (Boer, Hart, Kropp, & Webster, 1997), much as the HCR-20, is a guide to sexual risk evaluation. The Defendant's sexual violence was rated high based on his scores. Relevant items which applied to the Defendant included, but were not limited to (a) high density offenses (particularly with multiple victims in 1998); (b) multiple sex offense types (i.e., forced sex with adults to sexual overtures to children); (c) escalation in frequency/severity; (d) extreme minimization/denial of offenses; and (e) attitudes that support or condone violence (e.g., he alleged that the 1989 victim was a prostitute, which in part justified his behavior).

7. The Rapid Risk Assessment for Sexual Offense Recidivism (RRASOR) yielded a 48.6 chance of sexual recidivism over a 10-year period. The relatively low 48.6% change occurred because the measure loads heavily on male-on-male victims and only sexual violence. Nevertheless, the base rate for sexual offenses in the normal population is < 1% and about 30% over 10 years among sexual offenders. Hence, the Defendant's score is significantly higher than the base-rate group to which he belongs (sexual offenders).

8. The Static Risk Assessment indicated a high recidivism risk classification for the Defendant. The static as opposed to dynamic items means that the high-risk classification will unlikely change in the future.

9. The Minnesota Sex Offender Screening Tool-Revised (MnSORT-R) score of 8 yields a percent correct high risk of 70%. This means that an evaluator would be correct 70% of the time if he predicted a high risk of sexual violence for an individual such as the Defendant over a 6-year followup period.

10. The National Severity Scoring System, based on the survey of over 60,000 Americans by the National Institute of Justice (1986), allows for comparison and possible escalation of violence over time. Multiplying the scaled weights for the Defendant shows an acceleration of violence for the 1970s to the 1990s, even though he spent much of the 1990s in prison. The resumption of sexual violence not long after he was released from prison is a very poor prognostic sign.

11. The Problem Identification Checklist, Dangerousness Prediction Decision Tree, and Dynamic Antisociality predict violence for periods of one month, three months, and

six months, respectively. Together, they show that the Defendant is not an imminent danger to others and comports with his overall good institutional adjustment. Further, risk is low because the Defendant does not have the opportunity to aggress against others in the community. Overall, these low rates represent fine-tuning for short periods of time within an overall high risk (84%) on the VRAG over the 10-year period.

The above represent results from quantitatively-derived, empirically-based systems of prediction. Qualitatively, violence has been shown over the last century to fall into two types: affective (impulsive) and predatory (self-controlled aggression). A number of the Defendant's violent acts and behaviors clearly fit the predatory type. For example, the 1989 Kidnapping and Sexual Assault in the First Degree yielded a statement from him that he was going to pay the victim ($100) for the sex but did not particularly enjoy the act itself. He neglected to discuss the proactive nature of the crime, the force that was employed, the threats to the victim, and the assault on the male party. He later admitted to assaulting the male party. For the 1998 offenses, he neglected to mention the planned, purposeful acts and denied that he sexually abused, molested, or raped anyone in his life.

When asked to state what he would say to the victims of the offenses if he had an opportunity, he disparaged and blamed the victims as well as their significant others (e.g.,- "Why do you do this to me?"; "I screw your mother everyday; she is a dope addict").

Summary: Testing on multiple scales of violence prediction revealed a 41-year-old sexual psychopath who has a high risk of violent recidivism for the next decade. Many strong signs of violent recidivism were apparent on these empirically-derived scales. The Defendant does not appear to be "burning out" in terms of his aggression toward others, a particularly disturbing finding. He is a low risk of violence while incarcerated because, among other factors, he does not have *ad lib* access to the victim pool in the community. The Defendant has a significant history of dangerousness to others resulting in criminally violent conduct, and such a history makes him a serious danger to others.

Sincerely,

Harold V. Hall, PhD, ABPP

Enclosure

Is Agricultural Land in Hawai'i "Ripe" for a Takings Analysis?

I. INTRODUCTION

At present, approximately four percent of the land area in the State of Hawai'i ("State") is classified "urban" by the Hawai'i State Land Use Commission ("LUC").[1] Of the remainder of the land, forty-eight percent is classified as "agricultural" and forty-eight percent "conservation," with less than one percent classified for "rural" purposes.[2] This proportion of land classifications established by the LUC was suited perfectly for the pineapple and sugar cane plantations that dominated much of the landscape in the Twentieth Century; however, in the Twenty-first Century, agriculture is no longer the mainstay of Hawai'i's economy. Much of the agricultural industry in Hawai'i has been abandoned due to high labor and marketing costs, housing shortages, company mergers, exits from the industry, and lower returns to producers.[3] This fact, coupled with a growing need for affordable residential housing,[4] has the beginnings of a very complicated land use dispute in Hawai'i.[5] As a result of the diminishing returns from agricultural uses, it is only a matter of time before landowners begin seeking other uses for their land. Based on Hawai'i's changing economy and the increasing value of urban and residential land, it is likely that development will also increase.[6]

As the first step in developing tracts of land that are not currently classified urban, landowners are required by law to submit petitions to the LUC for reclassification of their land from "agricultural" or "conservation" to "urban." This presents an interesting conflict between the LUC and the private landowner because it has long been the responsibility of the LUC to preserve the natural and open spaces in the State of Hawai'i.[7] In accordance with its

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[1] DAVID L. CALLIES ET. AL., CASES AND MATERIALS ON LAND USE 690 (3d ed. 1999) [hereinafter CALLIES, CASES AND MATERIALS ON LAND USE].

[2] *Id.*

[3] Annette Clauson, *Hawaii's Sugar Industry Under Stress*, AGRICULTURAL OUTLOOK, Oct. 1991, at 15.

[4] DAVID L. CALLIES, PRESERVING PARADISE: WHY REGULATION WON'T WORK 98 (1994) [hereinafter CALLIES, PRESERVING PARADISE].

[5] The Hawai'i Legislature has recognized that the sugar cane and pineapple based agriculture is rapidly declining and that new standards and criteria may be needed to protect state agriculture land. Pat Omandam, *Market Upheaval Prompts Review of Farm Land Policy*, THE HONOLULU STAR-BULLETIN, Aug. 29, 2001, at B1.

[6] Andrew Gomes & Susan Hooper, *Modest Gains Expected in Most Real Estate Markets*, THE HONOLULU ADVERTISER, Jan. 30, 2000, at B10.

[7] The LUC's responsibility to preserve agricultural land is explicitly set forth in the Hawai'i Constitution: "*The State shall conserve and protect agricultural lands*, promote

constitutionally imposed responsibility of limiting development, the LUC will find it difficult to approve every reclassification petition. This, in turn, gives rise to a possible "takings" claim by landowners because the Constitution explicitly states that "private property [shall not] be taken for public use, without just compensation."[8] Although similar takings claims have yet to be litigated before the Hawai'i courts, as the economy continues to move away from agriculture, a takings claim seems imminent.

This paper analyzes the possible takings claim that may arise as a result of the LUC's refusal to reclassify agricultural land. Specifically, this paper focuses on the issue of ripeness and analyzes the current standards implemented by the United States Supreme Court in determining if a takings claim is ripe. Part II provides an overview of the role of agriculture in Hawai'i's economy and outlines the general process by which a landowner can request a boundary amendment from the LUC. Part III describes the genesis of the "ripeness" doctrine and traces its development through the leading United States Supreme Court decisions of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*[9] and *MacDonald, Sommer & Frates v. County of Yolo*.[10] Part IV applies the ripeness standard to a hypothetical situation and argues that under the current Supreme Court decisions, a landowner has a strong takings claim under *Lucas v. South Carolina Coastal Commission*[11] if the LUC denies a boundary amendment.

II. BACKGROUND

A. The History of Agriculture in Hawai'i

The history of agriculture in Hawai'i is critical to an understanding of how the LUC arrived at the current scheme of land use classifications. Prior to 1778, when Captain James Cook first visited the Hawaiian Islands, the Hawaiian people practiced only subsistence farming of plants such as taro,

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diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands. The legislature shall provide standards and criteria to accomplish the foregoing." HAW. CONST. art. XI, § 3 (emphasis added). In accordance with the State Constitutional mandate, the Hawai'i legislature enacted the Quality Growth Policy to "halt urban sprawl with its attendant need for costly urban services, to preserve and conserve open space areas, [and] to enhance and protect the environment of Hawaii . . . ." HAW. REV. STAT. § 223-1 (Rev. 1999).

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

[9] Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985).

[10] MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986).

[11] 505 U.S. 1003 (1992).

sugar cane, banana, bamboo, sweet potato, and breadfruit.[12] Although sugar cane was one of the plants that the Hawaiians farmed, it was not cultivated in the large quantities that are required for commercial distribution.[13] Instead, the Hawaiians used sugar cane primarily as a source of food and as a sweetener for other foods.[14] It was not until 1835 that the first farms and mills began commercial sugar production in Hawai'i.[15] Similarly, pineapple was introduced to Hawai'i in 1813 by the Spanish, but large scale production did not begin until the early 1900s.[16] Both crops were suited perfectly for Hawai'i's warm climate, and benefited from the tremendous amount of groundwater available in the islands. In addition, the population during the early 1900s consisted of approximately 154,000 people spread throughout the entire territory, thereby leaving significant portions of the island available for farming.[17] As a result, from 1900 to 1950, the sugar cane and pineapple industry in Hawai'i flourished.[18] Along with increased agricultural productivity, Hawai'i's population soared as hundreds of thousands of immigrant workers came to work in the fields.[19] At the peak of the agricultural industry during the 1960s, Hawai'i supplied over eighty percent of the world's output of canned pineapple and produced over 1.2 million tons of raw sugar.[20]

However, with the introduction of passenger planes, the tourism industry in Hawai'i began to grow so quickly that it rapidly replaced agriculture as the State's primary economic activity.[21] By the 1970s, tourism, high labor and marketing costs, a housing shortage, company mergers, exits from the industry, and lower returns to producers had brought the agricultural industry

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[12] *Some History of Hawai'i Agriculture, at* http://www.hawaiiag.org/history.htm (last visited Sept. 20, 2001).

[13] *Canoe Plants of Ancient Hawaii, at* http://www.hawaii-nation.org/canoe/ko.html (last visited Oct. 1, 2001).

[14] *Id.*

[15] The first successful mill established in Hawai'i was located in Koloa on the island of Kauai. *Hawai'i Agricultural Research Center: Hawai'i's Sugar Industry, at* http://www.Hawaiiag.org/harc/HARCHS11.htm (last visited Oct. 1, 2001).

[16] *Some History of Hawai'i Agriculture, supra* note 12.

[17] *Real Estate Center Hawai'i Population by Decades, at* http://recenter.tamu.edu/data/popsd/pops15.htm (last visited Oct. 13, 2001).

[18] *Some History of Hawai'i Agriculture, supra* note 12. Sugar production peaked in 1933 with 254,563 acres planted, whereas pineapple production reached its peak in 1955 with 76,700 acres planted. *Id.*

[19] *Hawai'i Agricultural Research Center, supra* note 15. In fact, Hawai'i's population more than tripled during the same fifty year period. *Real Estate Center, supra* note 17. Estimates show that the population in 1950 was approximately 500,000 people. *Id.*

[20] *Some History of Hawai'i Agriculture, supra* note 12.

[21] *Hawai'i Agricultural Research Center, supra* note 15.

in Hawai'i to its knees.[22] The sugar industry experienced a rash of mill closings in the 1990s, with five companies closing within a two-year period.[23] At present, there are only three remaining producers of sugar in the State, with mills on only two islands.[24] The islands of Hawai'i and Oahu have stopped producing sugar, and the only operational mills are located on the islands of Kauai and Maui.[25] Similarly, the pineapple industry slowed dramatically in the 1980s and 1990s. From their 1960s peak, the total amount of land farmed for pineapples has decreased from over 76,000 acres[26] to approximately 21,000 acres in 1999.[27]

Although the studies are inconclusive, it is estimated that agriculture contributes approximately 0.5%[28] to 6.1%[29] of Hawai'i's gross product. As such, it is clear that agriculture is no longer the mainstay of Hawai'i's economy. Thus, it seems only a matter of time before owners of agricultural land begin looking into other nonagricultural uses for their land.[30] In seeking the proper approvals for these new uses, the LUC plays an important role.

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[22] *See* Clauson, *supra* note 3, at 15. In addition to these pressures, federal legislation has been proposed periodically that would dramatically reduce the federal price supports for sugar growers. Pete Pichaske, *Sugar Growers Brace for Legislative Assault*, THE HONOLULU STAR-BULLETIN, May 18, 1999, at B1. If passed, the measure "would displace U.S. sugar production with subsidized foreign production, jeopardize the 420,000 American jobs in . . . the industry, and wreak havoc on the many rural economies heavily dependent on farming." *Id.* Although the measure highlighted in the article was defeated, the risk of a similar measure being passed in the future is still a possibility based on the fact that the House came within five votes of abolishing the program in 1996. *Id.*

[23] *Some History of Hawai'i Agriculture*, *supra* note 12.

[24] Tim Ruel, *Paia Mill Closure to Cost 77 Jobs*, THE HONOLULU STAR-BULLETIN, Sept. 15, 2000, at B1.

[25] *Hawai'i Agricultural Statistics Service: Sugarcane: Number of Farms, Acreage, Yield, Production, Price, and Value, by Counties, 1994-98, available at* http://www.nass.usda.gov/hi/stats/stat-19.htm (last visited Sept. 20, 2001).

[26] *Some History of Hawai'i Agriculture*, *supra* note 12.

[27] *Hawai'i Agricultural Statistics Service: Acreage in Crop and Total Farm Acreage, by Counties, 1995-99, available at* http://www.nass.usda.gov/hi/stats/stat-6.htm (last visited Oct. 8, 2001).

[28] Andrew Gomes, *Size of Ag Work Force Bucks Overall Decline*, PACIFIC BUSINESS NEWS, Mar. 5, 1999, http://pacific.bcentral.com/pacific/stories/1999/03/08/story2.html.

[29] Ping Sun Leung et. al., *Agriculture's Contribution to Hawai'i's Economy*, http://www2.ctahr.hawaii.edu/oc/freepubs/index.asp (Feb. 2000).

[30] The development trend is already evident as demonstrated by the recent increase in the number of residential and nonresidential building permits. "Residential building permits rose 24 percent and nonresidential permits rose 33 percent in 1999. First quarter 2000 building permit totals rose 14 percent." Hawaii 1999: Annual Economic Report, Vol. 48, *available at* http://www.boh.com/econ/aer/1999/aer1999.pdf.

B. The Hawai'i State Land Use Commission

The Hawai'i Legislature created the LUC as part of a measure designed to "preserve prime agricultural land from the perceived ravages of urban sprawl on Oahu."[31] Section 205 of the Hawai'i Revised Statutes ("HRS") authorized the creation of a commission composed of nine appointed individuals, with at least one member from each of Hawai'i's four counties.[32] The two main purposes of the LUC were, first, to determine the classification of all land in the State according to four established districts[33] and, second, to serve as the government agency responsible for processing amendments to district boundaries involving land areas greater than fifteen acres.[34] By 1964, the classification of land was complete, with approximately ninety-five percent of the land placed in agricultural, rural, or conservation districts; this had the practical effect of giving the State partial or total control of future boundary amendments.[35]

As an example, the process of seeking a boundary amendment for a 100-acre tract of land currently classified in an agricultural district by the LUC is as follows. The first step is to file a petition with the LUC in accordance with State statute.[36] The LUC must conduct a quasi-judicial hearing on the island on which the property is located no earlier than sixty and no later than 180 days after the filing of the petition.[37] All parties who have an interest in the land and those who can demonstrate that they will be "directly and immediately affected by the proposed change [such] that their interest in the proceeding is clearly distinguishable from that of the general public"[38] are entitled to be entered as parties in the hearing. The hearings, often referred to as contested case hearings, are not limited in their duration or in the number of times they may be continued.[39] The statute provides that a decision must be

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[31] CALLIES, PRESERVING PARADISE, *supra* note 4, at 11.

[32] HAW. REV. STAT. § 205-1 (Rev. 1999).

[33] HAW. REV. STAT. § 205-2 (Rev. 1999). The four districts are: (1) urban, (2) conservation, (3) agricultural, and (4) rural. *Id.*

[34] HAW. REV. STAT. § 205-4 (Rev. 1999). For areas less than fifteen acres, the Statute delegated the decision making authority to the local county land use authority, provided the change was not sought for land that was in the conservation district. HAW. REV. STAT. § 205-3.1 (Rev. 1999).

[35] CALLIES, PRESERVING PARADISE, *supra* note 4, at 12. The state has jurisdiction over the lands classified as agricultural, conservation, and rural. HAW. REV. STAT. § 205-4. Jurisdiction over urban classified land is delegated to the local county governments. *Id.*

[36] HAW. REV. STAT. § 205-4.

[37] *Id.*

[38] *Id.*

[39] CALLIES, PRESERVING PARADISE, *supra* note 4, at 61.

rendered within 365 days from the filing of the petition; however, it does allow for exceptions via court order or other internal processes.[40]

Approval of a boundary amendment requires a two-thirds majority of the LUC (six members) concluding by a "clear preponderance of the evidence that the proposed new boundary is reasonable."[41] As part of the approval process, the LUC must specifically consider the criteria established in HRS section 205-17[42] and file findings of fact and conclusions of law on the matter.[43] Furthermore, the LUC has the authority to impose conditions upon the parties so long as the conditions are "necessary to uphold the intent and spirit of the [Statute] or the policies and criteria established pursuant to Section 205-17."[44] Following the proceedings, the statute allows judicial review.[45]

If the application for a boundary amendment is denied, the petitioner can apply for a special permit pursuant to HRS section 205-6. If the section of land in question is less than fifteen acres, the county planning commissions have jurisdiction over granting the permit; if over fifteen acres, the application must be made to the LUC.[46] The special permit process allows "unusual and reasonable uses within agricultural and rural districts . . . but only when the use would promote the effectiveness and objectives of [HRS section 205]."[47] For

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[40] HAW. REV. STAT. § 205-4.

[41] *Id.* In addition to being reasonable, the proposed boundary must also not be "violative of section 205-2 and consistent with the policies and criteria established pursuant to sections 205-16 and 205-17." *Id.*

[42] Some of the criteria listed in HRS section 205-17 are: (1) the extent to which the proposed reclassification conforms to the goals and objectives of the Hawai'i state plan; (2) the impact of the proposed reclassification on the maintenance of cultural, historical, or natural resources; (3) the impact of the proposed reclassification on the preservation or maintenance of important natural systems or habitats; and (4) *the impact of the proposed reclassification on the maintenance of other natural resources relevant to Hawai'i's economy, including, but not limited to, agricultural resources.* HAW. REV. STAT. § 205-17 (Rev. 1999) (emphasis added).

[43] HAW. REV. STAT. § 205-4.

[44] *Id.*

[45] HAW. REV. STAT. § 91-14 (Rev. 1999). The judiciary is authorized to review the decision, "provided that the court may also reverse or modify a finding of the commission if such finding appears to be contrary to the clear preponderance of the evidence." HAW. REV. STAT. § 205-4(i).

[46] HAW. REV. STAT. § 205-6 (Rev. 1999).

[47] *Id.* In determining whether a particular use is "unusual and reasonable," five guidelines set forth in the Land Use District Regulation, section 5-2, should be applied:

> (1) Such use shall not be contrary to the objectives sought to be accomplished by the Land Use Law and Regulations; (2) That the desired use would not adversely affect surrounding property; (3) Such use would not unreasonably burden public agencies to provide roads and streets, sewers, water, drainage and school improvements, and police and fire protection; (4) Unusual conditions, trends and needs have arisen since the district boundaries and regulations were established; and (5) That the land upon which the proposed use is sought is unsuited for the uses permitted within the District.

example, a golf course,[48] a cellular telephone tower,[49] and a quarrying operation[50] were all approved under the special permitting process. On the other hand, a special permit was found to be inappropriate for a 103 acre theme park because the "use of the special permit to effectuate essentially what amounts to a boundary [amendment] . . . frustrates the objectives and effectiveness of Hawai'i's land use scheme."[51] Thus, based upon factors such as the size and proposed use of the land, the special permit process may be more appropriate than an application for a boundary amendment.

Although the LUC has established numerous criteria and rules to facilitate the boundary amendment process, the process is far from simple. Nonetheless, as part of Hawai'i's land use law, it must be complied with if one is to have any hope of receiving a boundary amendment from the LUC.

III. *WILLIAMSON COUNTY, MACDONALD, LUCAS,* AND *PALAZZOLO*: LAYING THE FOUNDATION FOR A TOTAL TAKINGS CLAIM

Much like the proposed developments to which they are so closely related, takings claims usually require a great deal of time to be completed. The typical development that results in a takings claim often starts with some sort of denial from a regulatory agency.[52] This initial denial of the proposed development is often not of the magnitude that would immediately require that just compensation be paid because from a single denial, it is difficult to argue that the government has taken all beneficial economic use of the land. Therefore, to prevent the court dockets from being overcrowded by cases that could be resolved through further administrative hearings, the United States Supreme Court developed the concept of "ripeness" though two decisions: *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*[53] and *MacDonald, Sommer & Frates v. Yolo County*.[54]

Neighborhood Bd. No. 24 v. State Land Use Comm'n, 64 Haw. 265, 270, 639 P.2d 1097, 1101 (1982).

[48] *See* Maha'ulepu v. Land Use Comm'n, 71 Haw. 332, 790 P.2d 906 (1990).

[49] *See* Curtis v. Bd. of Appeals, 90 Hawai'i 384, 978 P.2d 822 (1999).

[50] *See* Perry v. Planning Comm'n, 62 Haw. 666, 619 P.2d 95 (1980).

[51] *Neighborhood Bd. No. 24*, 64 Haw. at 272, 639 P.2d at 1102-03.

[52] ROBERT MELTZ ET. AL., THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION 45 (1999).

[53] 473 U.S. 172 (1985).

[54] 477 U.S. 340 (1986).

A. The Williamson County *and* MacDonald *Ripeness Test*

The 1985 decision of *Williamson County* established the first element of the ripeness doctrine. There, the developer submitted a preliminary subdivision plat in 1973 that included 676 acres, of which 260 acres were devoted to an open space use in the form of a golf course.[55] The remainder of the land was scheduled to be developed as a residential area pursuant to final subdivision approval from the County Regional Planning Commission.[56] Upon approval of the preliminary plat, the developer proceeded to convey to the county a permanent open space easement and began installing the infrastructure for the projects, such as utility lines and roads.[57] The developer spent approximately 3.5 million dollars during this phase of the development.[58] In 1979, a section of the development outlining the construction of 212 dwelling units received final approval, and during that time, the preliminary plat was reapproved four times.[59] However, before the developer received final approval for the remaining residential dwellings, the county amended the zoning ordinances in a manner that reduced the allowable development density.[60] As a result of the zoning amendment, the developer in 1980 submitted a revised preliminary plat, which was rejected by the commission on numerous grounds.[61] In addition to the cited deficiencies in the commission's report, other changes within the commission itself and in the local community may have increased the pressure for the commission to reject the preliminary plat.[62] The developer successfully appealed to the County Board of Zoning Appeals, which determined that the commission should have applied the zoning regulations as they were in 1973 when the original preliminary plat was approved.[63] However, in the following year, the developer's revised preliminary plat was again rejected by the commission, which cited to the same density and grading problems as the prior denial in 1980.[64] The commission declined to follow the

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[55] *Williamson County*, 473 U.S. at 177.

[56] *Id.*

[57] *Id.* at 178.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.* at 180. The commission cited two primary reasons for rejecting the revised preliminary plat: "[F]irst, the plat did not comply with the density requirements . . . and second, lots were placed on slopes with a grade greater than 25%." *Id.*

[62] "Although not reported in the decision, apparently there was a change in the local administration as well as increased community resistance to the large project, which made it politically difficult to approve the final phases." MELTZ, *supra* note 52, at 50.

[63] *Williamson County*, 473 U.S. at 181.

[64] *Id.*

recommendations made by the County Zoning Board of Appeals, stating that the board lacked jurisdiction to hear appeals from the commission.[65]

As a result, the developer filed a claim alleging that the commission had taken its property without just compensation.[66] The jury found for the developer, awarding damages for the temporary taking of the property.[67] Remarkably, the court granted judgment notwithstanding the verdict in favor of the commission, stating that a temporary deprivation of the economic benefit of property was not a compensable taking.[68] The court also granted a permanent injunction to require the commission to apply the zoning ordinance in effect in 1973 to the project.[69] The Court of Appeals for the Sixth Circuit upheld the jury's award for the temporary taking, and the United States Supreme Court granted certiorari on the issue of whether a temporary taking was a taking within the meaning of the Fifth Amendment.[70]

The Supreme Court reversed the court of appeals, holding that the developer's claim was premature because the Fifth Amendment requires that "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."[71] Specifically, the Court noted that the developer had failed to request a variance from the requirements of either the 1973 or 1980 ordinance and the Court thus rejected the developer's claim that it "did everything possible to resolve the conflict with the commission."[72] The Court also noted that the claim was not ripe because the developer did not seek compensation through state procedures.[73]

In making its decision, the *Williamson County* Court established a two-pronged test that plaintiffs must satisfy before seeking judicial remedies in federal court: (1) the administrative agency must arrive at a "final, definitive position regarding how it will apply the regulations at issue to the particular land in question,"[74] and (2) the plaintiff must "seek compensation through the procedures the [s]tate has provided for doing so."[75]

Unfortunately for potential plaintiffs, *Williamson County* did not specify how far a developer would have to go for a decision to be considered final and

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[65] *Id.* at 182.
[66] *Id.*
[67] *Id.* at 183.
[68] *Id.*
[69] *Id.*
[70] *Id.* at 185.
[71] *Id.* at 186.
[72] *Id.* at 188-89.
[73] *Id.* at 194.
[74] *Id.* at 191.
[75] *Id.* at 194.

definitive. The Court addressed this issue one year later in *MacDonald, Sommer & Frates v. Yolo County*.[76]

In *MacDonald*, the developer submitted a tentative residential subdivision plan to the Yolo County, California planning commission.[77] The commission rejected the plan, and the Board of Supervisors of the county affirmed the decision.[78] The developer filed suit claiming that the commission's decision had effectively restricted the property to an open space, agricultural use by denying the necessary permits for development.[79] Notably, the developer included specific language stating that it had "exhausted all of its administrative remedies and that its seven causes of action were 'ripe' for adjudication."[80] When the case ultimately reached the Supreme Court, the Court dismissed the complaint on ripeness grounds, holding that the developer had not received a final, definitive decision.[81] The Court reasoned that the decisions below left open the possibility that some development would be permitted; thus, the commission had not yet made the requisite final, definitive decision.[82]

At first glance, the Court seemed to be requiring the developer to pursue "useless"[83] or "futile"[84] applications, but the Court specifically stated that this was not its intention.[85] Instead, the Court offered the rationale that its decision was based on a much more reasonable theory: "[R]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews."[86] Thus, as long as "meaningful application[s]"[87] can be made, the claim will be dismissed on ripeness grounds. In sum, the Supreme Court's decisions in *Williamson County* and *MacDonald* establish the applicable standard for determining whether a takings claim is ripe for federal judicial review.

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[76] 477 U.S. 340 (1986).
[77] *Id.* at 342.
[78] *Id.*
[79] *Id.* at 344.
[80] *Id.*
[81] *Id.* at 351.
[82] *Id.* at 352.
[83] *Id.* at 353 n.8.
[84] *Id.*
[85] *Id.*
[86] *Id.* at 353 n.9.
[87] *Id.* at 353 n.8.

B. Palazzolo *and the Court's Recent Return to the Ripeness Issue*

In its most recent foray into takings jurisprudence, the Supreme Court reviewed the ripeness issue in the case of *Palazzolo v. Rhode Island*.[88] The property at issue in *Palazzolo* was a twenty-acre lot located in Westerly, Rhode Island.[89] Most of the twenty acres were designated as coastal wetlands under local land use law.[90] Anthony Palazzolo formed Shore Gardens, Inc. ("SGI") with a few of his associates to purchase the property, but subsequently bought out their interests and became the sole shareholder of SGI.[91] From 1962 to 1966, SGI filed several applications with the Rhode Island Coastal Resources Management Council ("Council") in an attempt to fill substantial portions of the property; however, all were rejected.[92] In 1971, the State of Rhode Island enacted strict regulations designed to protect designated salt marshes like those on SGI's property.[93] In 1978, SGI's corporate charter was revoked for nonpayment of taxes and the property passed to Palazzolo as the corporation's sole shareholder.[94] Two more attempts were made to develop the property in 1983 and 1985, but both were rejected by the Council on the grounds that the proposed project conflicted with the regulatory standard for a special exception.[95]

Palazzolo then filed an inverse condemnation action in the Rhode Island Superior Court alleging that the state regulation had deprived him of all economically beneficial use of his property.[96] The superior court ruled against Palazzolo and the State Supreme Court affirmed on the bases that: (1) the claim was not ripe; (2) Palazzolo did not have the right to challenge the regulation because he took title to the property subject to the restrictions; and (3) a *Lucas*-type taking was not established because it was undisputed that there was developmental value in the upland portion of the twenty-acre lot.[97] In overruling the Rhode Island Supreme Court, the United States Supreme Court held that the claim was ripe and that a property owner is not barred from challenging a regulation that was in place at the time the property was

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[88] 121 S. Ct. 2448 (2001).

[89] *Id.* at 2455.

[90] *Id.* at 2454.

[91] *Id.* at 2455.

[92] *Id.*

[93] *Id.* at 2456.

[94] *Id.*

[95] *Id.* The relevant regulations required the landowner to obtain a special exception from the Council that would only be granted if the proposed activity served "a compelling public purpose which provide[d] benefits to the public as a whole as opposed to individual or private interests." *Id.*

[96] *Id.*

[97] *Id.* at 2457.

purchased.[98] The Court agreed, however, that Palazzolo was not denied all economically beneficial use and remanded to the state court[99] to review the claim under the principles set forth in *Penn Central Transportation Co. v. City of New York*.[100]

In concluding that Palazzolo's claim was ripe for review, the Court reaffirmed the final decision requirement of *Williamson County*: "[O]nce it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened."[101] The state argued that Palazzolo's claim was not ripe because the Council may have reacted more favorably towards a smaller proposed development; however, the Court did not accept this reasoning.[102] The Court instead reasoned that the Council's decisions made it clear that Palazzolo could not engage in any filling at all; consequently, the size of the proposed development ceased to be a factor in determining whether the claim was ripe.[103] Specifically, the Court referred to the *MacDonald* test stating that "[the] [r]ipeness doctrine does not require a landowner to submit applications for their own sake."[104] This statement by the Court lowers the ripeness barrier by not requiring the landowner to submit applications for development where the "unequivocal nature of the . . . regulations"[105] and the "application of the regulations to the subject property"[106] make it clear that the proposed development will not be allowed.

Thus, although the Court did not seem to make any substantial changes to the basic ripeness doctrine,[107] the decision has the practical effect of making it easier for property owners to show that a takings claim is ripe for review.[108]

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[98] *Id.*

[99] *Id.*

[100] 438 U.S. 104 (1978). The *Penn Central* test is used for partial regulatory takings, whereas the *Lucas* test is used for total regulatory takings. For a discussion of the *Penn Central* test, see generally David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan, *and What State and Federal Courts are Doing About It*, 28 STETSON L. REV. 523 (1999).

[101] *Palazzolo*, 121 S. Ct. at 2459.

[102] *Id.* at 2458.

[103] *Id.* at 2459.

[104] *Id.* at 2460.

[105] *Id.* at 2458.

[106] *Id.*

[107] John D. Echeverria, *A Preliminary Assessment of* Palazzolo v. Rhode Island, 31 ENVTL. L. Rep. 11112, 11115 (2001).

[108] Erwin Chemerinsky, *Expanding the Protections of the Takings Clause*, 37 TRIAL 70 (Sept. 2001).

C. Lucas *and the Denial of All Economically Beneficial Use*

As the Supreme Court's decisions in *Williamson County*, *MacDonald*, and *Palazzolo* demonstrate, developers face two formidable obstacles in asserting a possible takings claim. First, the developer must demonstrate that a final decision has been rendered with regard to the particular section of land.[109] Second, the developer must seek compensation from procedures provided by the state.[110] If the developer is successful in fulfilling these requirements, there still remains the question of what type of taking the landowner has sustained.[111]

In 1922, when the Supreme Court first established that a regulation could effect a taking if it "goes too far,"[112] the decision spawned a great deal of case law that tried to determine when a regulation goes "too far."[113] In its forays into takings law, the Court has established few bright line tests or categorical rules. Rather, the Court often has chosen to employ a balancing approach that considers factors such as the nature of the governmental action, the economic impact of the regulation, and the effect on the investment-backed expectations of the landowner.[114] In its 1992 decision of *Lucas v. South Carolina Coastal Council*,[115] however, the Court established that "where a regulation denies all economically beneficial or productive use of land,"[116] a categorical taking has occurred. The Court decided to forego the fact-specific balancing approach commonly employed in takings analyses based upon the reasoning that, in the extreme situation where the landowner was deprived of all economically beneficial use, "it is less realistic to indulge our usual assumption that the legislature is simply adjusting the benefits and burdens of economic life."[117] The Court continued:

> [R]egulations that leave the owner of land without economically beneficial or productive options for its use—typically, . . . by requiring land to be left substantially in its natural state—carry with them a heightened risk that private

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[109] Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 191 (1985).

[110] *Id.* at 194.

[111] *See generally* CALLIES, PRESERVING PARADISE, *supra* note 4, at 4-7 (discussing the various types of regulatory takings).

[112] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[113] *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (finding a taking where a private landowner was required by state statute to allow the installation of two cable boxes and a cable); Agins v. City of Tiburon, 447 U.S. 255 (1980) (focusing the inquiry of how far a regulation can go on whether the regulation advances a legitimate state interest).

[114] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

[115] 505 U.S. 1003 (1992).

[116] *Id.* at 1015.

[117] *Id.* at 1017 (citing *Penn Central*, 438 U.S. at 124).

> property is being pressed into some form of public service under the guise of mitigating serious public harm.[118]

This statement by the Court demonstrates its unwillingness to give total legislative deference to state land use regulations in circumstances where a landowner is deprived of all economically beneficial use.

However, the Court did go on to address two situations where the categorical rule did not apply. The first was in situations where the limitation on use "must inhere in the title itself, in the restrictions that background principles of the State's law of property . . . already place on land ownership."[119] The second exception was provided for in situations where the government was regulating a "harmful or noxious use" of property.[120] In defining the scope of the exceptions, the Court cited the Restatement of Torts for factors that might be involved in the nuisance analysis.[121] However, no guidance was provided for interpreting what constitutes a background principle of state property law. A few courts have made an attempt to define the nuisance and background principles exceptions to *Lucas*, but with little success.[122]

Of particular interest is the concept of the "denominator issue."[123] Specifically, the Court stated:

> [W]hen . . . a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened

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[118] *Id.* at 1018.

[119] *Id.* at 1029.

[120] *Id.* at 1023.

[121] *Id.* at 1030-31.

> The 'total taking' inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, the social value of the claimant's activities and their suitability to the locality in question, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike. The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so. . .[)]. So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.

Id. (internal citations and quotations omitted).

[122] *See* M & J Coal v. United States, 47 F.3d 1148 (Fed. Cir. 1994); United States v. 30.54 Acres of Land, 90 F.3d 790 (3d Cir. 1996).

[123] *See* Loveladies Harbor Inc. v. United States, 28 F.3d 1171, 1119-82 (Fed. Cir. 1994); K & K Constr., Inc. v. Dep't of Natural Res., 575 N.W.2d 531, 536-39 (Mich. App. 1996). *See generally* John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. CHI. L. REV. 1535 (1994).

> portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. . . . The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property -- *i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value.[124]

Although the Court does not provide an answer to its hypothetical, it does highlight the significant role that the denominator issue plays in determining if a *Lucas*-type taking has occurred.

IV. ANALYSIS OF THE PARCEL HYPOTHETICAL

As *Williamson County*, *MacDonald*, *Lucas*, and *Palazzolo* illustrate, it is exceedingly difficult to assert a successful takings claim unless the landowner carefully fulfills the requirements set forth by the Court. The following section will use a Parcel Hypothetical as a practical guide of how to increase the likelihood of a takings claim being ripe for review. For purposes of this discussion, the Parcel Hypothetical refers to a hypothetical tract of land (the "Parcel") located on the North Shore of Oahu that is larger than fifteen acres, held in fee simple, and currently classified as agricultural by the LUC. Furthermore, it will be assumed that the owner of the Parcel has unsuccessfully applied for a boundary amendment from the LUC.[125]

A. The Final Decision Requirement

The first step in asserting a takings claim is to determine if the claim is ripe for adjudication in the courts. As discussed in *Williamson County* and *Palazzolo*, a final decision must be rendered against the specific parcel of land in question.[126] Here, the owner of the Parcel ("Petitioner") was refused a boundary amendment by the LUC. Statutorily, Petitioner may obtain judicial review pursuant to HRS section 91-14 because the Supreme Court of Hawai'i has recognized that the denial of a boundary amendment constitutes a "final decision" for purposes of HRS section 91-14.[127] Thus, Petitioner should first appeal to the circuit court within thirty days of the LUC's ruling or within

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[124] Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003, 1016 n.7 (1992).

[125] The specific attributes of the proposed development in the Parcel Hypothetical and the grounds for the LUC's denial of the reclassification petition are deliberately omitted in order to make the discussion of the ripeness barrier more applicable to a variety of factual situations.

[126] See *supra* Part III.A.

[127] *See, e.g.*, Ka Pa'akai O' Ka'Aina v. State Land Use Comm'n, 94 Hawai'i 31, 42, 7 P.3d 1068, 1079 (2000) (stating that the appeal of the LUC's action on a boundary amendment petition is governed by HRS section 91-14).

thirty days after service of the final decision and order of the agency.[128] This appeal will help the Petitioner solidify his claim that a final decision has been rendered against the Parcel. Furthermore, the United States Supreme Court has offered some insight as to the purpose of the final decision inquiry: "The focus of the 'final decision' inquiry is on ascertaining the extent of the governmental restriction on land use."[129] As such, the denial of the boundary amendment is likely to be a final decision because, in denying the application, the LUC has expressed its desire to keep the Parcel restricted in its current agricultural classification.

B. Forum Choice and the Preclusion Problem

The second prong of the *Williamson County* test that requires a landowner to seek compensation through state procedures creates two unique problems. The first problem is that of forum selection. The issue of whether to file an action in federal or state court is of extreme importance because the choice of forum can sometimes alter the outcome of a decision. For example, a federal judge may be more willing than a state judge to find a taking because the federal judge is appointed for life, thereby insulating him from any possible political repercussions of the decision. Factors such as timing, convenience, and other considerations also come in to play when deciding on a forum.[130]

The Court's decision in *Williamson County* requires that Petitioner "seek compensation through the procedures the [s]tate has provided."[131] However, this requirement creates an interesting problem when read in conjunction with the federal Full Faith and Credit statute which provides: "The records and judicial proceedings of any court of any such State . . . shall have the same full faith and credit in every court within the United States . . . as they have by law or usage in the courts of such State . . . from which they are taken."[132] For example, in order to satisfy the Court's mandate in *Williamson County*, Petitioner must first file a claim in the state circuit court pursuant to state statute.[133] If the claim is unsuccessful, Petitioner will have satisfied the second prong of the *Williamson County* ripeness test. Assuming that the final decision

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[128] HAW. REV. STAT. § 91-14(b) (Rev. 1999).

[129] Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 746 (1997) (Scalia, J., concurring).

[130] STEPHEN C. YEAZELL, CIVIL PROCEDURE 5 (4th ed. 1996). For a general discussion on ripeness and forum selection, see Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. LAND USE & ENVTL. L. 37 (1995).

[131] Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194 (1985).

[132] 28 U.S.C. § 1738 (2000).

[133] In Hawai'i, the relevant statutory authority can be found at: HAW. REV. STAT. § 101-10 (Rev. 1999).

requirement is satisfied, Petitioner would now have a ripe claim in the federal courts under 42 U.S.C. § 1983. However, the Full Faith and Credit statute bars the Petitioner from filing a claim in federal court.[134] Furthermore, the Supreme Court has expressly stated that the Full Faith and Credit statute applies to claims brought under 42 U.S.C. § 1983.[135] Thus, in satisfying the tests that are necessary to gain entry to a specific forum, Petitioner effectively denies himself access to that forum.

Many scholars have discussed the issue of preclusion from the federal courts, and one thing is clear: there is no readily apparent solution to the problem.[136] As one author states,

> assumptions about the intent of the Supreme Court, the right of takings plaintiffs to [have] a federal forum, and the ability of state courts to handle takings cases have led federal courts of appeals to fashion various methods of avoiding preclusion under Williamson County. Their attempts, however, have not only failed to solve the preclusion problem, but have also ignored or distorted Supreme Court precedents and established legal doctrines.[137]

Given the inability of the federal courts to decide takings cases uniformly, it has been suggested that state forums are more appropriate for takings claims because the state judiciary is more familiar with local politics, regulations, and administrative procedures.[138] To date, the Supreme Court has not issued an opinion as to whether the decision in *Williamson County* does in fact bar takings claims from being heard in federal courts. Therefore, until that ground is tested, the state forum seems to be the best starting place for Petitioner.[139]

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[134] Claim preclusion and issue preclusion both fall under the ambit of 28 U.S.C. § 1738. "Claim preclusion forbids a party from relitigating a claim that 'should have' been raised in former litigation. Issue preclusion comes into play when a claim is not barred but when some issue involved in that claim has been previously litigated." YEAZELL, *supra* note 130, at 783. *See, e.g.*, Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 373 (1996); Kremer v. Chem. Constr. Corp., 456 U.S. 461, 485 (1982).

[135] *See* Allen v. McCurry, 449 U.S. 90 (1980) (holding that 28 U.S.C. § 1738 applies to claims filed under 42 U.S.C. § 1983).

[136] *See, e.g.*, John Martinez & Nick J. Colessides, *Taming the Takings Tiger*, 12 UTAH B. J. 7 (1999); MELTZ, *supra* note 52, at 60; Thomas E. Roberts, *Fifth Amendment Taking Claims in Federal Court: The State Compensation Requirement and the Principles of Res Judicata*, 24 URB. LAW. 479 (1992) [hereinafter Roberts, *Fifth Amendment Takings Claims*].

[137] Kathryn E. Kovacs, *Accepting the Relegation of Takings Claims to State Courts: The Federal Courts' Misguided Attempts to Avoid Preclusion Under* Williamson County, 26 ECOLOGY L.Q. 1, 20 (1999).

[138] *Id.* at 46.

[139] Some commentators have suggested that "[l]itigants would do well to reevaluate decisions to sue in federal court. Where dismissal is a virtual guarantee in a taking case, as it often will be, the federal suit may simply waste the client's money and the court's time." Roberts, *Fifth Amendment Takings Claims*, *supra* note 136, at 480.

Petitioner may also find some comfort in the fact that the Ninth Circuit did not accept the proposition that *Williamson County* was intended to prevent every takings claimant from filing a federal claim.[140] Although this does not guarantee that the Petitioner will prove successful in federal court if the claim in state court is denied, it does offer the possibility that Petitioner's claim will be heard in a federal forum.[141]

C. Exceedingly Grandiose Development Plans

One argument that can possibly be made against Petitioner is that the proposed boundary amendment is for an exceedingly grandiose development plan. As seen in *MacDonald*, the Court was unwilling to adjudicate a claim on ripeness grounds because it determined that the landowner still retained the possibility of developing the land, just in a less grandiose fashion.[142] For example, if the Parcel were 1,000 acres, the argument could be made that, although the LUC denied the boundary amendment for the 1,000-acre development, it might approve an application for a smaller area of development.

MacDonald is inapplicable to the Parcel Hypothetical because the "less grandiose development" standard seems only to apply in situations where the land is already suited to the proposed development. The tract of land in *MacDonald* was already zoned as residential, and the rejection of the proposed subdivision was based on factors such as lack of sewer services and public streets.[143] Thus, the question in the *MacDonald* case boils down to "How much can a landowner develop?" as opposed to "Is the landowner able to develop?" The fact that the land in *MacDonald* was zoned residential did not mean that any proposed residential use would be allowed. It simply meant that the land was suited for residential use and that plans could be submitted in accordance with that use. Therefore, the Court's suggestion that a less grandiose development might be more favorably looked upon was appropriate.

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[140] Dodd v. Hood River County, 59 F.3d 852, 860-61 (9th Cir. 1995).

> Reduced to its essence, to hold that a taking plaintiff must first present a Fifth Amendment claim to the state court system as a condition precedent to seeking relief in a federal court would be to deny a federal forum to every takings claimant. We are satisfied that *Williamson County* may not be interpreted to command such a revolutionary concept and draconian result.

Id.

[141] A few other courts have addressed the issue of res judicata as it applies to the ripeness of a regulatory taking claim. *See, e.g.*, Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, 708 F. Supp. 1477 (W.D. Va. 1989); McNulty v. Town of Indialantic, 727 F. Supp. 604 (M.D. Fla. 1989).

[142] MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 353 n.9 (1986).

[143] *Id.* at 343.

On the other hand, the factual situation in *Palazzolo* seems more applicable to the Parcel Hypothetical. In *Palazzolo*, the Court made it clear that the landowner did not have to submit applications for development "for their own sake."[144] There, the claim was adjudicated as ripe because, based on the refusal to grant a permit on multiple occasions, it was clear to the Court that the "permissible uses of the property [we]re known to a reasonable degree."[145] Here, the LUC's denial of the boundary amendment effectively declares that the Parcel shall not be used for "urban" purposes. Based on the fact that the classifications of land are so distinct according to the LUC's definitions, it is difficult to argue that the LUC's denial is suggesting that the Parcel is too grandiose and that a smaller Parcel might be more favorably received. Land in Hawai'i is classified as urban, agricultural, rural, or conservation. There is no mention of an interim classification in the statute. Land is either urban or it isn't. This assessment is similar to the assessment employed by the Court in *Palazzolo* where Justice Kennedy wrote that the *MacDonald* test was "belied by the unequivocal nature of the wetland regulation at issue and by the Council's application of the regulations to the subject property."[146] Based upon the four distinct land classifications by the LUC, the repeated refusal to reclassify land has the potential to be held as unequivocal in nature, similar to the Council's refusal in *Palazzolo*.

Therefore, if the Parcel is ever reclassified as urban, the *MacDonald* test may be applied, but until then, it seems as if the *MacDonald* standard does not apply to the Parcel Hypothetical. Furthermore, if the LUC is adamant in refusing to allow reclassification of the Parcel, it may be inadvertently strengthening the property owner's argument that the claim is ripe for a takings analysis.

D. Nuisance and Obnoxious Use

The *Lucas* court created two exceptions that can defeat a takings claim; both are applicable to the Parcel Hypothetical. First, the LUC could argue that its refusal to reclassify the Parcel was based on state nuisance law. Upon review of the factors enumerated by the Court as to what activity may be deemed a nuisance, the most applicable seem to be: (1) "the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities," and (2) "the social value of the claimant's activities and their suitability to the locality in question."[147] In considering the harm to

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[144] Palazzolo v. Rhode Island, 121 S.Ct. 2448, 2460 (2001).

[145] *Id.* at 2459.

[146] *Id.* at 2458.

[147] *See supra* Part III.C.

public lands and resources, the LUC might argue that the development of a residential subdivision on the North Shore of Oahu will cause damage to the aesthetics and historical nature of the area. However, the Court's mention of harm to the public does not include a reference to aesthetics or historic preservation. In addition, the Hawai'i Supreme Court specifically addressed the issue of whether damage to an aesthetic interest constitutes harm to a property interest in the case of *Sandy Beach Defense Fund v. City Council of Honolulu*.[148] In that case, local organizations appealed the City Council's decision to grant a Shoreline Management Permit.[149] The organizations sought to have a contested case hearing, similar to those held by the LUC, in which they would be afforded the benefits of cross-examination of witnesses, findings of fact and conclusions of law, and other procedures.[150] In rejecting the claim, the court stated: "While we have recognized the importance of aesthetic and environmental interests in determining an individual's standing to contest the issue . . . , we have not found that such interests rise to the level of 'property' within the meaning of the due process clause."[151] As such, it will be very difficult to assert that the preservation of aesthetics rises to the level where the government will not be required to compensate for a taking.

Another argument that might be made is that the development of a residential area is unsuitable for the locality. In particular, arguments regarding the lack of infrastructure and failure to adhere to the Hawai'i state plan may be asserted.[152] Admittedly, the LUC is bound to adhere to the Hawai'i state plan. However, the guidelines established by state plan for population growth and land resources priority are easily met by Petitioner. For example, the statute authorizes the LUC to "[m]ake available marginal or nonessential agricultural lands for appropriate urban uses while maintaining agricultural lands of importance in the agricultural district."[153] The remainder of the provisions are extremely general and non-prohibitive in nature.[154] Thus, failure to adhere to the Hawai'i state plan is an argument that is unlikely to prove successful. If the argument is raised that the Parcel lacks infrastructure, Petitioner can remedy that situation by agreeing to pay for the construction of

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[148] 70 Haw. 361, 773 P.2d 250 (1989).

[149] *Id.* at 364, 773 P.2d at 253.

[150] *Id.* at 367, 773 P.2d at 255.

[151] *Id.* at 377, 773 P.2d at 261.

[152] The LUC must "conform[] to the applicable goals, objectives, and policies of the Hawaii state plan." HAW. REV. STAT. § 205-17 (Rev. 1999). Codified in section 226 of the HRS, the Hawai'i State Plan identifies the goals, objectives, policies, and priorities for the State in regard to the long-range development of the State. The guidelines are very general and do not include maps or specific details as to how the property in the State should be developed.

[153] HAW. REV. STAT. § 226-104 (Rev. 1999).

[154] *See, e.g.*, HAW. REV. STAT. § 226-104. *See generally* HAW. REV. STAT. § 226 (Rev. 1999).

a sewage treatment facility, extension of water lines, roads, and other necessary improvements. As concessions of this sort are often the case in large developments, it is unlikely that a lack of infrastructure will be a serious ground for contention.

In addition, the existing sugar mills on Maui and Kauai are located in close proximity to existing towns that have the necessary infrastructure to support urban growth. Thus, as the sugar industry weakens and the Maui and Kauai mills are forced to close, the owners of agricultural land will have an even stronger argument supporting their proposed boundary amendment because the proposed reclassification would support the LUC's goal of controlling urban sprawl by keeping developed areas close together.

E. Asserting a Lucas *Taking and Demonstrating a Loss of All Economically Beneficial Use*

Assuming that Petitioner has followed the procedures set forth by the LUC and satisfied the requirements of *Williamson County*, the claim will most likely be deemed ripe for litigation. In his assertion that a taking has occurred, Petitioner can argue that all economically beneficial use of the land is being denied by the State. In supporting his claim, Petitioner would have to demonstrate that agriculture is no longer an economically beneficial use for the Parcel.[155] Petitioner could cite to studies showing that the agriculture industry is no longer profitable.[156] In addition, based on the high cost of labor and marketing and the need for affordable housing, Petitioner could argue that by keeping the land classified as agricultural, the State is effectively rendering the property worthless.[157]

This situation is nearly identical to the one in *Lucas*, where the Court stated that requiring Lucas's land to be left in its natural state renders the land without economically beneficial use.[158] The one critical distinction between *Lucas* and the Parcel is that the Parcel is still arguably fit for agricultural use. In response, Petitioner can claim that the agricultural use is no longer economically beneficial (assuming Petitioner can show that the Parcel is operating at a loss). The counterargument would be that although not as profitable as in prior years, there is still some economically beneficial use in the land and thus there is no total taking. However, it is unclear what facts will most persuade the court in its analysis of whether the Parcel has lost all economically beneficial use. Even the Court in *Lucas* admitted that "the

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[155] Part of this analysis would include looking at the uses allowed in the agricultural district and making an argument that these uses are not economically beneficial.

[156] *See supra* Part II.A.

[157] *Id.*

[158] *See supra* Part III.C.

rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured."[159]

Furthermore, the Court seemed to confuse the issue even more by interchanging the terms "economically feasible,"[160] "economically viable,"[161] "economically productive,"[162] and "economically valuable."[163] As such, commentators have suggested that courts will continue "an ad hoc factual inquiry, balancing, as always, notions of injustice, fairness, and state police powers."[164] This factors into the analysis of the Parcel Hypothetical because it is unclear at what point the courts will conclude that the Parcel has lost all economically beneficial use.

One aspect that is sure to be included in determining whether the land has lost all economically viable use is the concept of diversified agriculture. As sugarcane and pineapple production has declined over the years, Hawai'i has seen a steady increase in the number of farms engaged in diversified agriculture. Crops such as papayas, macadamia nuts, coffee, tropical flowers, taro, and watermelons are some of the 250 crops and livestock commodities produced by Hawai'i's farmers.[165] In fact, leaders in Hawai'i's agricultural development feel that "diversified agriculture is growing steadily more valuable to the State, and the rate of growth can be increased significantly with strategic investment."[166] However, others have cautioned that diversified agriculture may not be as successful as some may hope: "While there is some potential for growing other crops, much of the land currently classified for agricultural use by the State is not so suited. Moreover, the market therefore is limited, and the record of truck farming as a major industry in Hawai'i is not good."[167]

In terms of what result will occur when individual courts struggle with these complex factual situations, there is no telling what the outcome will be.

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[159] Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003, 1016 n.7 (1992).

[160] *Id.*

[161] *Id.* at 1020.

[162] *Id.* at 1030.

[163] *Id.* at 1028.

[164] Barry I. Pershkow & Robert F. Housman, *In the Wake of* Lucas v. South Carolina Coastal Council: *A Critical Look at Six Questions Practitioners Should Be Asking*, 23 ENVTL. L. REP. 10008, 10013 (1993).

[165] *Hawaii Department of Agriculture: Overview of Hawaii Agriculture, at* http://www.hawaiiag.org/600.htm (last visited Sept. 20, 2001).

[166] Helen Altonn, *Diversified Agriculture Key To State Economy, Dean Says*, THE HONOLULU STAR-BULLETIN, Feb. 14, 2001, *available at* http://www.starbulletin.com/2001/02/14/news/story10.html.

[167] CALLIES, PRESERVING PARADISE, *supra* note 4, at 13.

However, if the court finds in favor of the Petitioner, the ripeness issue will only be the beginning of the litigation.[168]

F. Methods for Decreasing the Risk of Future Takings Claims

Although the Parcel Hypothetical may occur in the future, it is not to say that it is certain to occur. It may be in the State's best economic interest to attempt to avoid possible takings claims before they arise. For example, the State may want to develop a smart growth program.[169] One of the more notable smart growth success stories can be found in *Construction Industry Ass'n of Sonoma County v. City of Petaluma*.[170] In that case, the City of Petaluma implemented a growth management program that established a fixed housing development growth rate for a period of five years.[171] The Ninth Circuit upheld the City's plan against a takings claim, stating that the "concept of the public welfare is sufficiently broad to uphold Petaluma's desire to preserve its small town character, its open spaces and low density of population, and to grow at an orderly and deliberate pace."[172]

However, the plan in *Petaluma* is not the only alternative. There are various methods that have been applied in states such as Florida, Oregon, Vermont, and New Jersey.[173] Some methods have proven more successful than others, but the fact that growth management programs have been implemented and upheld is positive news for the State if it plans to maintain its objective of preserving open space and agricultural uses. By creating a growth management plan, the State may be able to legitimately prevent development of areas by citing to the growth restrictions mandated by the plan. Although

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[168] After overcoming the ripeness barrier, the Petitioner must show that a taking of the property has occurred. If the court concludes that a taking has occurred, the next step would be to determine what amount of compensation is necessary.

[169] "Smart growth reduces the consumption of land for roads, houses and commercial buildings by channeling development to areas with existing infrastructure. It centers growth around urban and older suburban areas and preserves green space, wetlands, and farm land." CALLIES, CASES AND MATERIALS ON LAND USE, *supra* note 1, at 598-99. *See generally* Justin Shoemaker, *The Smalling of America?: Growth Management Statutes and the Dormant Commerce Clause*, 48 DUKE L.J. 891 (1999) (providing a general description of growth control measures at state and local levels); Maryann Froehlich, *Smart Growth: Why Local Governments Are Taking a New Approach to Managing Growth in Their Communities*, PUB. MGMT., May 1, 1998 at 5, *available at* 1998 WL 10328353; Dwight H. Merriam & Gurdon H. Buck, *Smart Growth, Dumb Takings*, 29 ENVTL. L. REP. 10746 (1999).

[170] 522 F.2d 897 (9th Cir. 1975).

[171] *Id.* at 901.

[172] *Id.* at 909.

[173] James H. Wickersham, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489 (1994) (discussing the various models available for growth management statutes).

specifics of such a plan are far more complicated than citing a specified growth rate, the possibility still exists.

Another alternative the State may implement is the use of development agreements. In general, development agreements are contracts between a unit of local government and a private landowner.[174] As contracts, development agreements are extremely flexible insofar as they allow the government to require the developer to provide public benefits without having those requirements scrutinized under the *Nollan/Dolan* takings test.[175] In return, the developer is guaranteed that "at least some of the land-use and development laws applicable to his or her property will not change during the land development process."[176] Authorized by statute in many jurisdictions,[177] development agreements are an effective way to "elicit contributions from the developer, most often in return for 'freezing' the developer's rights in the project to reflect the land use regulations in effect at the time of the agreement."[178] Furthermore, the Hawai'i legislature specifically stated that the promulgation of a development agreement statute was motivated by recent takings litigation and complaints regarding the complexity of the development approval process.[179] Although enacted in 1984, Hawai'i has been slow to implement the development agreement statute.[180] In fact, of the four counties in Hawai'i, only one has taken the first step by establishing local procedures for entering into development agreements.[181] It has been suggested that the opposition to development agreements stems from "a variety of public interest groups . . . on the grounds that [development agreements] will be privately and secretly done, contrary to good planning practices."[182] However, if the counties enter into open negotiations with landowners such as Petitioner, they may be able to preclude takings claims by allowing development in a manner that adheres to their general goal of open space preservation. The statute also specifically authorizes the State, federal agencies, or any local government

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[174] CALLIES, PRESERVING PARADISE, *supra* note 4, at 52.

[175] For an overview of the *Nollan/Dolan* takings test as applied to exactions and dedications, see Richard Duane Faus, *Exactions, Impact Fees, and Dedications: Local Government Responses to* Nollan/Dolan *Takings Law Issues*, 29 STETSON L. REV. 675 (2000).

[176] CALLIES, PRESERVING PARADISE, *supra* note 4, at 52.

[177] *See* HAW. REV. STAT. §§ 46-121 to -133 (Rev. 1999).

[178] Deborah Rhoads, *Developer Exactions and Public Decision Making in the United States and England*, 11 ARIZ. J. INT'L & COMP. L. 469, 506 (1994). In California, development agreements have been widely used since 1980 without a single lawsuit being filed in their opposition. CALLIES, PRESERVING PARADISE, *supra* note 4, at 53.

[179] HAW. REV. STAT. § 46-121.

[180] CALLIES, PRESERVING PARADISE, *supra* note 4, at 53.

[181] *Id.*

[182] *Id.*

agencies to be included in the process.[183] Therefore, if the LUC were brought into the process by the County of Honolulu, an acceptable agreement could be made between the Petitioner, the State, and the County in a way that is sensitive to open space and agricultural preservation.

The "rural" classification may also provide an avenue by which the LUC may escape a takings claim. At present, less than one percent of the land in the State is classified as rural.[184] The definition of the rural district states in relevant part: "Rural districts shall include activities or uses as characterized by low density residential lots of not more than one dwelling house per one-half acre . . . ."[185] However, if the Hawai'i legislature modified the rural classification to provide for more uses, the LUC would have the option to reclassify the land as rural instead of urban. For example, the rural classification could be modified to allow for higher residential density. This would allow the land to retain some of its open-space characteristics, but provide enough economically beneficial use to the landowner to avoid a takings claim.

V. CONCLUSION

The Parcel Hypothetical presents a novel issue to the courts: Where one use is unprofitable and the alternative very profitable, is the denial of that use a deprivation of all economically beneficial use? To apply this question to the Parcel Hypothetical, when the agricultural use of the Parcel becomes unprofitable, if the State prevents the Petitioner from implementing a new use of the Parcel, will that constitute a loss of all economically beneficial use? The answer is unclear. However, by insuring that the claim is ripe for adjudication and gathering evidence that supports the claim of having lost all economically beneficial use of the land, Petitioner will have substantially increased the possibility of prevailing in a takings claim against the State.

The intent of this paper, however, is not to suggest that claimants begin perfecting their takings claim against the State. Instead, this paper suggests that the reality of the matter is that takings claims of great magnitude are possible in the State's not so distant future. In an attempt to avoid litigating takings claims and possibly paying compensation if a taking is found, the State should be aware of the various methods by which to protect its interests while preserving the rights of landowners. If the State fails to recognize this possibility, and the situation continues unchanged, the LUC may succeed in

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[183] HAW. REV. STAT. § 46-126 (Rev. 1999).

[184] CALLIES, CASES AND MATERIALS ON LAND USE, *supra* note 1, at 690.

[185] HAW. REV. STAT. § 205-2 (Rev. 1999).

keeping ninety-six percent of the State classified as agriculture or conservation, but the State will likely have to pay for it.

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Lucas Takings: Why Investment-Backed Expectations are Irrelevant when Applying the Categorical Rule

I. INTRODUCTION

James Madison pledged that our government would be "instituted no less for protection of the property, than of the persons of individuals."[1] His rhetoric became substance in the Takings Clause, which the states ratified as part of the Fifth Amendment to the United States Constitution.[2] The Takings Clause restricts the inherent power of the sovereign by guaranteeing that "private property [will not] be taken for public use, without just compensation."[3] Like much of the Constitution, the text of the rule is simple, but its application has often proved complex and problematic.[4] That observation is particularly true in the context of property regulations and regulatory takings.[5] For guidance through the morass of conflicting law, state and lower federal courts generally rely on two U.S. Supreme Court opinions.

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[1] THE FEDERALIST No. 54, at 370 (James Madison) (Jacob E. Cooke ed., 1961). James Madison penned this sentence in defense of the unfortunate and repugnant method used to apportion representatives in the original Constitution. *See id.* at 369-71. The context of the statement, however, should not overshadow its sentiment. Madison was not defending slavery (indeed Madison privately favored a constitutional amendment to abolish slavery) but rather defending the idea that property rights are tantamount to personal rights. *See generally* William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 852 (1995) (discussing Madison's views on property, the Takings Clause, and slavery).

[2] *See* Treanor, *supra* note 1, at 836-37. Professor Treanor provides a detailed discussion of the history of the Takings Clause and Madison's prominent role in its promulgation. *See id.* at 836-55.

[3] U.S. CONST. amend. V. Although initially binding only on the federal government, the Takings Clause is made applicable to the states through the Fourteenth Amendment. *See, e.g.*, San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 623 n.1 (1981).

[4] *See* Treanor, *supra* note 1, at 887 ("As virtually every one of the legion of commentators to discuss takings law has observed, takings law today is incoherent."); David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan, *and What State and Federal Courts Are Doing About It*, 28 STETSON L. REV. 523, 523 (1999) ("Much has been made of the terrible state of takings jurisprudence since the U.S. Supreme Court recommenced deciding takings cases twenty-five years ago after a half a century of silence.").

[5] *See, e.g.*, Penn Cent. Trans. Co. v. New York City, 438 U.S. 104, 124 (1978) ("[T]his Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government . . . .").

First, in *Penn Central Transportation Co. v. New York City*,[6] the Court suggested that a balancing test is required when a regulation has partially taken the economic value or use from a parcel of land.[7] The *Penn Central* Court held that a regulatory takings claim requires an "ad hoc, factual inquiry" where the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are . . . relevant considerations. So, too, is the character of the governmental action."[8]

The Court recognized a second test in *Lucas v. South Carolina Coastal Council*.[9] The *Lucas* Court established a *categorical rule* to be applied in a "total takings" situation.[10] The Court held, "[W]hen . . . a regulation that declares 'off-limits' all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it."[11]

The *Penn Central* and *Lucas* tests are mutually exclusive.[12] The latter test applies when the regulation deprives an owner of all the economically beneficial use of her property, while the former applies when she loses something less.[13] Many courts, however, have interpolated a new standard by conflating the *Penn Central* and *Lucas* tests.[14] These courts have denied compensation to property owners, who alleged a categorical taking under *Lucas*, solely because the claimants lacked distinct investment-backed expectations or knew of a regulation or regulatory scheme before purchasing the property.[15]

This comment argues that those courts have misapplied the Supreme Court's pronouncements. A total deprivation of economically viable use, like a physical invasion, forces a landowner to shoulder a particularly heavy public

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[6] 438 U.S. 104 (1978).

[7] *See id.* at 124.

[8] *Id.* (internal citations omitted).

[9] 505 U.S. 1003 (1992).

[10] *Id.* at 1015.

[11] *Id.* at 1030 (emphasis added).

[12] *See generally* Barry M. Hartman, Lucas v. South Carolina Coastal Council*: The Takings Test Turns a Corner*, 35 ENVTL. L. REP. 1003 (1993) (discussing the differences between the *Lucas* and *Penn Central* tests).

[13] *Lucas*, 505 U.S. at 1019 n.8 (An owner who is not denied all economically beneficial use "might not be able to claim the benefit of our categorical formulation, but, as we have acknowledged time and again, '[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally.") (alteration in original) (internal citations omitted).

[14] *See infra* PART III.

[15] *See, e.g.*, Florida v. Burgess, Case No. 1D99-1764, 2000 Fla. App. LEXIS 8450 (July 6, 2000).

burden. In *Lucas*, the Court recognized the unique nature of these intrusions and created an appropriate remedy: a regulation, which extinguishes the economically viable use of land, effects a compensable taking unless a narrow exception is satisfied. In this analysis, a landowner's investment-backed expectations—or lack thereof—are irrelevant as to whether a total taking of property has occurred. Instead, an owner's expectations and any existing governmental regulations, which do not merely express background principles of state law, are relevant as to valuation when determining what compensation is due. By improperly reading the investment-backed expectations factor into the *Lucas* rule, courts have denied property owners the full protections of the Takings Clause.

Part II begins with a brief discussion of the Takings Clause, the public use requirement, physical takings, and the origin of regulatory takings to provide some general knowledge of—and hopefully insight into—when state or federal action requires compensation. Part II concludes by examining *Penn Central*, *Lucas*, and the respective analytical tests employed by the Court. Part III details three of the numerous state and lower federal court decisions that have read a *Penn Central* factor into the *Lucas* rule. Part IV posits that neither the landowner's investment-backed expectations, nor her knowledge of existing property restrictions, which do not satisfy the *Lucas* exception, are relevant in a categorical takings analysis. Finally, Part V suggests that in those rare cases where a categorical taking is found, existing governmental regulations are relevant as to what compensation is due, and consequently there is little danger that the government will assume the cost of a bad bargain.

II. WHEN A TAKING OF PROPERTY REQUIRES COMPENSATION

A. An Introduction to Takings Jurisprudence

The import of the Takings Clause is simple: the government may take private property, but only for public use, and it must pay the owner for the interests and rights taken.[16] Opinions vary as to the scope and application of

[16] *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use without just compensation."). Such a restriction on government is consistent with the fundamental importance of private property rights in the United States. *See, e.g.*, Cooley v. United States, 46 Fed. Cl. 538, 546 (2000) ("Property rights have been one of the trinity of fundamental values that has defined our Nation's commitment to the integrity of the person since its founding."); *see also* Callies, *supra* note 4, at 526 ("Property rights, and in particular rights in land, have always been fundamental to and part of the preservation of liberty and personal freedom in the United States.").

the Clause,[17] but most commentators agree, and the Court has consistently held, that the Takings Clause prevents the government from forcing excessive public burdens upon private individuals.[18] To implement this restriction, the Court fashioned three steadfast rules. First, a taking of property must be "rationally related to a conceivable public purpose."[19] Second, any physical intrusion of property requires compensation.[20] Finally, a restriction on the use of property that "goes too far" effects a taking of property.[21]

1. The government may only take property for a public use

The express language of the Takings Clause requires that any taking of property be for public use.[22] The 1984 case of *Hawai'i Housing Authority v. Midkiff*[23] is the Court's standing pronouncement as to what satisfies that provision.[24] In *Midkiff*, the Court emphasized judicial deference to legislative decision-making and held that it "will not substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be

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[17] *Compare* Callies, *supra* note 4, at 526 ("This Article suggests that what the Court has done is clear enough for most purposes. The problem is what the states and lower federal courts have done with the Court's pronouncements."), *with* Treanor, *supra* note 1, at 782 ("Attempts to [bring clarity to regulatory takings jurisprudence] . . . have created a body of law that more than one recent commentator has described as a 'mess.'").

[18] *See* Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893) (stating that the Takings Clause "prevents the public from loading upon one individual more than his just share of the burdens of government . . . ."); Armstrong v. United States, 364 U.S. 40, 49 (1960) (The Takings Clause prevents the government "from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."); Pa. Coal v. Mahon, 260 U.S. 393, 416 (1922); Penn Cent. Trans. Co. v. New York City, 438 U.S. 104, 123 (1978); *see also* Treanor, *supra* note 1, at 791-92.

[19] *See, e.g.*, Hawai'i Hous. Auth. v. Midkiff, 467 U.S. 229, 241 (1984).

[20] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432 (1982); Kaiser Aetna v. United States, 44 U.S. 164, 179-80 (1979).

[21] Pa. Coal, 260 U.S. at 415; *see also* Treanor, *supra* note 1, at 782; Callies, *supra* note 4, at 529; Peter C. Meier, Stevens v. City of Cannon Beach: *Taking Takings Into the Post*-Lucas *Era*, 22 ECOLOGY L.Q. 413, 417 (1995); Laura McKnight, *Regulatory Takings: Sorting Out Supreme Court Standards After* Lucas v. South Carolina Coastal Council, 41 KAN. L. REV. 615, 621-22 (1993).

[22] U.S. CONST. amend. V; *see also Midkiff*, 467 U.S. at 240-41; Thompson v. Consol. Gas Corp., 300 U.S. 55, 76-80 (1937); Callies, *supra* note 4, at 551 ("The first inquiry . . . [is] whether government has established a legitimate state interest in the challenged regulation.").

[23] 467 U.S. 229 (1984).

[24] *Midkiff* involved a challenge to the Land Reform Act of 1967, which established a system for changing the method of home ownership in Hawai'i from predominantly leasehold to free hold by condemning certain lands and then selling them in fee simple. *Midkiff*, 467 U.S. at 233-34. Lower federal courts consistently apply the *Midkiff* standard. *See, e.g.*, Richardson v. City and County of Honolulu, 124 F.3d 1150, 1156-58 (9th Cir. 1997).

palpably without reasonable justification.'"[25] The Court reasoned that this standard does not require that the intended good in fact materialize,[26] and does not mean that the government must take "actual possession of the land."[27]

The necessity of a public use is now a low hurdle and few courts strike down a taking as failing to satisfy the *Midkiff* standard.[28] The opinion, however, is limited to situations involving an exercise of eminent domain.[29] Thus, in a takings claim where there has not been a formal exercise of eminent domain, such as a regulatory taking, the public use requirement continues to ensure that when the government takes property, it is not for a private purpose,[30] and the taking at least has the possibility of advancing a legitimate state interest.[31]

2. *Physical invasions always require compensation*

It is well settled that a physical invasion of property requires compensation,

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[25] *Midkiff*, 467 U.S. at 241.

[26] *Id.* at 242 ("Of course, this Act, like any other, may not be successful in achieving its intended goals. But 'whether *in fact* the provision will accomplish its objectives is not the question: the [constitutional requirement] is satisfied if . . . the . . . [state] Legislature *rationally could have believed that* the [Act] would promote its objective.'") (internal citations omitted).

[27] *Id.* at 244 ("[G]overnment does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause.").

[28] *See generally* 2A JULIUS A. SACKMAN, NICHOLS ON EMINENT DOMAIN §§ 7.02, 7.06 (perm. ed., rev. vol. 1999) (discussing the broad view most courts have taken with respect to the public use clause); *see also Richardson*, 124 F.3d at 1157-58. While the federal public use requirement is largely a truism after *Midkiff*, a landowner may be successful in challenging the purported public use as a violation of a state's constitution. *See, e.g.*, City of Owensboro v. McCormick, 581 S.W.2d 3 (Ky. 1979).

[29] *See, e.g., Midkiff*, 467 U.S. at 241 ("Thus, in *Missouri Pacific R. Co. v. Nebraska*, where the 'order in question was not, *and was not claimed to be*, . . . a taking of private property for a public use under the right of eminent domain,' the Court invalidated a compensated taking of property for lack of a justifying public purpose.") (internal citations omitted).

[30] *See id.* at 245 ("A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."); Montgomery v. Carter County, 226 F.3d 758, 767 (6th Cir. 2000) ("A person whose property is confiscated for a strictly private use need not settle for 'just compensation.'"); Porter v. Diblasio, 93 F.3d 301, 310 (7th Cir. 1996) ("The Constitution forbids a taking executed for no other reason than to confer a private benefit on a particular private party, even when the taking is compensated.").

[31] *See, e.g., Richardson*, 124 F.3d at 1166 (holding that a land use regulation must substantially advance a "legitimate government interest," or it works an unconstitutional taking); *see generally* Callies, *supra* note 4, at 551-52 (Professor Callies discusses other opinions where courts have applied the legitimate state interest requirement to strike down a land use regulation).

whether there has been a formal exercise of eminent domain or not.[32] Two Court opinions—spanning a century—illustrate the immutability of this rule. In the 1871 case of *Pumpelly v. Green Bay Co.*,[33] the Court held that the continual flooding of Pumpelly's land, which was caused by a state-authorized dam that raised the level of a nearby lake, effected a taking of his property.[34] The Court reasoned that such an intrusion was a taking because "where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution[.]"[35]

In the 1982 case of *Loretto v. Teleprompter Manhattan CATV Corp.*,[36] the Court reaffirmed the principle that a physical invasion of property requires compensation. The Court held that placing a small cable box, pursuant to state authorization, on the top of a multi-story apartment building was a physical invasion of property and required compensation.[37] Summarizing the jurisprudence, the Court stated, "When the 'character of the government action' is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner."[38]

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[32] *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992) ("In general (at least with regard to permanent invasions), no matter how minute the intrusion, and no matter how weighty the public purpose behind it, we have required compensation."); *see also* Treanor, *supra* note 1, at 782 ("The original understanding of the Takings Clause of the Fifth Amendment was clear . . . . The clause required compensation when the federal government physically took private property . . . ."); McKnight, *supra* note 21, at 616-17 ("[T]he Supreme Court has consistently . . . held that government's permanent physical invasion of private property is equivalent to condemnation and therefore requires compensation."); Callies, *supra* note 4, at 536 ("[I]nvasions of any sort are takings requiring compensation.").

[33] 80 U.S. 166 (1871).

[34] *Id.* at 177.

[35] *Id.* at 181. The Court decided this case under the state's constitution, because at that time the Fifth Amendment only applied to the federal government. *Id.* at 176. However, the Court was clear that the state's takings clause mirrored the federal government's and posited that it would reach the same result under the Fifth Amendment. *Id.* Moreover, the Court dismissed several state court decisions that would have concluded the flooding did not work a taking. *See id.* at 177-81.

[36] 458 U.S. 419 (1982).

[37] *Id.* at 421. The Court noted that it has "long considered a physical intrusion by government to be a property restriction of an unusually serious character for purposes of the Takings Clause." *Id.* at 426.

[38] *Id.* at 434-35 (internal citations omitted). The Court has made some distinction between permanent physical occupation and temporary ones. *See id.* at 428. In general, if the taking is permanent, then compensation is required, even if the intrusion is minimal. *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992). Similarly, if the owner is denied

3. *A regulation effects a taking of property when it "goes too far"*

For much of its history, the Takings Clause guaranteed landowners compensation when their property was taken by eminent domain or physically invaded (*Pumpelly* and *Loretto*) but not for restrictions on the use of property.[39] Such a narrow application is not surprising, as land use regulations were generally limited to proscribing activities akin to public nuisances.[40] The twentieth century, however, has witnessed a proliferation of state and federal regulations – well beyond anything seen in the previous century.[41] Zoning classifications, historic districts, aesthetic standards, and particularly the multitude of environmental regulations have imposed new burdens upon landowners and have brought a new dimension to takings jurisprudence.[42]

The Court examined these issues in the landmark case of *Pennsylvania Coal v. Mahon*[43] and established that restrictions on the use of land can result in a taking of property as surely as a physical invasion. The controversy arose in

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all use of her property, even for a temporary period, compensation is required. *See, e.g.*, First English Evangelical Church of Glendale v. Los Angeles County, 482 U.S. 304, 322 (1987). A partial and temporary physical taking might be subjected to a balancing test. *See Loretto*, 458 U.S. at 432.

[39] *See, e.g., Lucas*, 505 U.S. at 1014; *see also* Treanor, *supra* note 1, at 783 (Professor Treanor posits that the original intent of the framers was to apply the Takings Clause only to physical takings); McKnight, *supra* note 21, at 618 ("For over a hundred years after the Fifth Amendment was drafted . . . a 'regulatory taking' was a conceptual impossibility . . . ."); Meier, *supra* note 21, at 418 ("Courts did not originally recognize 'takings' through the governmental regulation of property."); Callies, *supra* note 4, at 529; Julia Kreidler Hickey, Florida Rock Industries v. United States*: A Categorical Regulatory Taking*, 2 GEO. MASON L. REV. 245, 248 (1995).

[40] *See* Mugler v. Kansas, 123 U.S. 623 (1877) (the Court upheld a statute prohibiting the manufacture of alcohol against a due process challenge); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (the Court upheld an ordinance prohibiting the operation of a brickyard within city limits against a Fourteenth Amendment challenge); Miller v. Schoene, 276 U.S. 272 (1928) (the Court upheld an order to cut cedar trees to prevent the spread of a plant disease against a due process challenge); *see also Lucas*, 505 U.S. at 1026 n.13 (the Court discussed other early, nuisance-like cases).

[41] *See* Penn Cent. Trans. Co. v. New York City, 438 U.S. 104, 107-08 (1978); Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 386-87 (1926) ("[W]ith the great increase and concentration of population, problems have developed . . . which require . . . additional restriction in respect of the use and occupation of private lands in urban communities.").

[42] *See Lucas*, 505 U.S. at 1014; *Penn Central*, 438 U.S. at 107, 108 n.1; *Euclid*, 272 U.S. at 386; *see also* McKnight, *supra* note 21, at 620 ("As the scope of state police powers expanded . . . in response to changing social conditions . . . the Court grew less convinced that every police power regulation was immune from the [Takings Clause]."); Hickey, *supra* note 39, at 246 ("Courts have seen a sharp increase in the number of regulatory takings claims under the Clean Water Act."); Callies, *supra* note 4, at 530.

[43] 260 U.S. 393 (1922).

1921 when the state legislature passed the Kohler Act, which prohibited the mining of coal beneath any inhabited structure.[44] The Act had the effect of depriving the Company of its subsurface rights in a parcel of land.[45] In an eloquent opinion authored by Justice Holmes, the Court reasoned that although government may regulate property and consequently affect property values to some extent, when a regulation "reaches a certain magnitude . . . there must be an exercise of eminent domain."[46] Justice Holmes concluded that whether a regulation has reached such a magnitude will depend on the facts before the Court, and he did not establish a firm analytical model to be applied in subsequent cases.[47] It was clear to the Court, however, that the Kohler Act had exceeded the bounds of permissible regulation because the Act made it "commercially impracticable" to mine coal.[48] Consequently, the Court held that the Act was unconstitutional.[49]

B. Penn Central Transportation Co. v. New York City

A strong line of precedent did not follow from *Pennsylvania Coal*. In general, the Court left it to state and lower federal courts to define the parameters of regulatory takings jurisprudence.[50] As land use regulations grew more detailed and comprehensive, however, the need for a more lucid test became palpable.[51] In the 1978 case of *Penn Central Transportation Co. v. New York City*,[52] the Court endeavored to deal with these issues when it

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[44] *Id.* at 412-13.

[45] *Id.* In 1878, Pennsylvania Coal Company conveyed the surface rights to a parcel of land, but "in express terms reserve[d] the right to remove all the coal under the [parcel]." *Id.* at 412. The grantee was to bear any risks and waive any claims. *Id.*

[46] *Id.* at 413.

[47] *Id.* at 416.

[48] *Id.* at 414.

[49] *Id.* at 416. The Court concluded that making it "commercially impractical to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it." *Id.* at 414. The Court also announced the oft-quoted rule: "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415. Finally, the Court concluded that although the Act had a sufficiently valid purpose, forcing the burden on the private landowner was unconstitutional. *Id.* at 416.

[50] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992) ("In 70-odd years of succeeding 'regulatory takings' jurisprudence, we have generally eschewed any 'set formula' for determining how far is too far . . . ."); *see also* Callies, *supra* note 5, at 524 (Following *Pennsylvania Coal*, "[i]t was left to the states to interpret—and generally to erode—Holmes's regulatory taking doctrine over the intervening half-century.").

[51] *See, e.g.*, Meier, *supra* note 21, at 418 ("In the past quarter century, Congress and the states have passed far-reaching laws in response to public threats that were unforeseen a generation before.")

[52] 438 U.S. 104 (1978).

addressed a takings challenge to New York City's Landmarks Preservation Law.[53]

The controversy arose when the Penn Central Transportation Company applied for but was denied permission to erect an office building atop Grand Central Station,[54] which had been designated a "landmark" in 1967.[55] The Company claimed that the prohibition effected a taking and therefore required compensation.[56] A divided Court disagreed.

The Court began its analysis by acknowledging that it has been unable "to develop any 'set formula' for determining when . . . economic injuries caused by public action" become a taking of property, and concluded that it will generally depend upon the circumstances of the case.[57] The Court, however, identified three factors which are usually assessed when "engaging in these essentially ad hoc, factual inquires."[58] The Court reasoned that "[t]he economic impact of the regulation on the claimant and, particularly the extent to which the regulation has interfered with distinct investment-backed expectations are . . . relevant considerations. So, too, is the character of the governmental action."[59]

Applying these factors to Penn Central's takings claim,[60] the Court first compared the Landmark Act with zoning regulations and other examples of land use restrictions enacted for public safety, and concluded that the Act furthered an important state interest.[61] As to the economic impact of the Act on Penn Central, the Court reasoned that the restriction only affected the air rights above the terminal, not the whole "city tax block designated as the

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[53] *Id.* at 124. New York City adopted the ordinance pursuant to a state enabling act in 1965. *Id.* at 108-09.

[54] *Id.* at 117-18.

[55] *Id.* at 116.

[56] *Id.* at 122.

[57] *Id.* at 123-24.

[58] *Id.* at 124.

[59] *Id.* The Court added, "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . ." However, physical takings always require compensation when they are permanent or reach a certain magnitude, and therefore this section of the Court's analysis is strange. *See, e.g.*, Callies, *supra* note 4, at 532-33.

[60] *See Penn Central*, 438 U.S. at 125-37. Although paying particular attention to the "character of the government action," the Court did examine the economic impact on Penn Central, as well as the company's "distinct investment-backed expectations." *See id.*

[61] *Id.* at 124-28. The Court relied on *Euclid v. Ambler Realty Co.*, 272 U.S 365 (1926), which upheld the facial constitutionality of zoning against a substantive due process challenge, and *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), which upheld an ordinance that prohibited mining below the water table for safety reasons and other similar decisions. *See id.* The Court distinguished the issue in *Penn Central* from *Pennsylvania Coal*, noting that the Kohler Act had made it "commercially impractical" to mine. *Id.* at 127.

'landmark site,'" and therefore the impact was minimal.[62] Lastly, the Court determined that the Act did not abridge the Company's investment-backed expectations, because the "law [did] not interfere with the present uses of the Terminal."[63] After thus weighing the relevant inquiries, the Court held that the Landmark Law did not effect a taking, because "the restrictions imposed are substantially related to the promotion of the general welfare and *not only permit reasonable beneficial use* of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site, but also other properties."[64]

As the opinion demonstrates, the *Penn Central* test is flexible. Individual courts must determine the relevant weight to accord each factor and then balance the competing interests. This "balancing" is highly case-specific and an owner need not allege a total destruction of either property value or use to bring a takings claim under *Penn Central*.[65] Because courts generally find that the "character of the government action" is a legitimate exercise of police power, whether a regulation effects a taking of property will largely depend upon the aggrieved owner's ability to show a significant economic impact and clear interference with distinct investment-backed expectations.[66]

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[62] *Id.* at 130-31. The determination of the relevant parcel from which to assess the economic impact of the regulation is known as the denominator. *See, e.g.*, Callies, *supra* note 4, at 562-64. In *Penn Central*, the Court viewed the denominator as including the value of the Company's other holdings in the area. *See Penn Central*, 438 U.S. at 130-31. Such a broad view of the relevant parcel is in disfavor. *See, e.g., Lucas*, 505 U.S. at 1016 n.7 ("For an extreme—and, we think, unsupportable view of the relevant calculus, see *Penn Central Trans. Co. v. New York City*, 438 U.S. 104 (1978) . . . .").

[63] *Penn Central*, 438 U.S. at 136. The Court focused on the current use of the terminal to determine Penn Central's investment-backed expectations. *Id.* The Court also concluded that Penn Central was able to make a "reasonable return" on its investment under the preservation law. *Id.*

[64] *Id.* at 138 (emphasis added).

[65] *See generally* Fla. Rock Indus. v. United States, 45 Fed. Cl. 21 (1999); Buckles v. King County, 191 F.3d 1127 (9th Cir. 1999); Mekuria v. Washington Metro. Area Transit Auth., 45 F. Supp. 2d 19 (1999); Massachusetts v. Blair, 98-2758-G, 2000 Mass. Super. LEXIS 172 (Mass. Super. Ct. May 1, 2000); Adams Outdoor Adver. v. City of East Lansing, 614 N.W.2d 634 (Mich. 2000); *see also* Callies, *supra* note 4, at 565-67.

[66] *See Blair*, 2000 Mass. Super. LEXIS 172 at *17-19 (the court held that the economic impact was a diminution of less than sixty percent and there was no interference with distinct investment-backed expectations because the Blairs were able to use the property for the purpose they intended); *Adams Outdoor Advertising*, 614 N.W.2d at 639-40 (the court found that the ordinance was valid, the impact was slight, and the interference with investment-backed expectations was limited); *see also* Callies, *supra* note 4, at 565-67.

C. Lucas v. South Carolina Coastal Council

Until 1992, the *Penn Central* balancing test was the primary analytical tool available to state and lower federal courts.[67] The situation changed when a very different Court fashioned a categorical rule for regulatory takings in the case of *Lucas v. South Carolina Coastal Council*.[68] The issue arose in 1988, when the South Carolina Legislature enacted the Beachfront Management Act.[69] The Act had the effect of denying David Lucas the ability to erect any "permanent habitable structures" on two beachfront parcels, which he had purchased in 1986.[70] Lucas immediately filed an as applied takings claim. Lucas conceded that the Act was a valid exercise of police power, but argued that he was nevertheless entitled to compensation because the Act had completely extinguished the economic value of his property.[71] The Court agreed.

Writing for the majority, Justice Scalia began the opinion by examining seventy years of precedent, and concluded that a case-specific inquiry has never been required when a regulation either compels a "property owner to suffer a physical 'invasion,'" or "denies all economically beneficial or productive use of land."[72] Following this precedent, the Court held that when a regulation reaches such a magnitude, compensation is always required.[73] Because the trial court found that the regulation had extinguished the

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[67] Soon after *Penn Central*, the Court decided *Agins v. City of Tiburon*, 447 U.S. 164 (1979). In *Agins*, the Court held that the very *enactment* of a regulation effects a taking of property when the measure either lacks a legitimate public purpose, or extinguishes the economically viable use of the property. *Agins*, 447 U.S. at 260. In the intervening years, the Court also decided *Keystone v. Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), which basically followed *Agins*' reasoning. *See Keystone*, 480 U.S. at 485-91. These cases have important precedential value, which will be discussed in Part IV; however, because these cases involved facial challenges, they did not alter the analysis established in *Penn Central*. *See* Callies, *supra* note 4, at 534-35, 541-42; Meier, *supra* note 21, at 417-21.

[68] 505 U.S. 1003 (1992).

[69] *Id.* at 1008.

[70] *Id.* at 1008-09.

[71] *Id.* at 1009-10. Lucas originally filed suit in state court. *Id.* The trial court held that he was entitled to compensation because the Act deprived him of "any reasonable economic use of the lots . . . eliminated the unrestricted right of use, and render[ed] them valueless." *Id.* at 1009 (alteration in original) (internal citations omitted). The South Carolina Supreme Court reversed, holding that the Act could not effect a taking of property because it was designed to prevent public harm. *Id.* at 1010.

[72] *Id.* at 1015-18. After citing a number of decisions, including *Agins v. City of Tiburon*, 447 U.S. 164 (1979), the Court concluded, "As we have said on numerous occasions, the Fifth Amendment is violated when land-use regulation 'does not substantially advance legitimate state interests or denies an owner economically viable use of his land." *Id.* at 1016.

[73] *Id.* There is an exception to this rule, which the Court discussed in the succeeding section. *See id.* at 1020-29.

economic value of Lucas' lots, the Court applied the categorical rule to his claim.[74]

With the effect of the regulation and the appropriate rule established, the only issue left before the Court was whether the concededly legitimate purposes of the act were sufficient to deny compensation.[75] The Court reasoned that they were not, as there is no "objective, value free basis" for determining the relative weight to be accorded the state's justifications.[76] Instead, the Court concluded that "[a]ny limitation so severe cannot be newly legislated or decreed . . . but *must inhere in the title itself*, in the restrictions that background principles of the State's law of property and nuisance already place upon ownership."[77]

In determining when a regulation will satisfy this standard, the Court reasoned that the starting point of the analysis is the recognition that although a property owner may expect to have the uses of her property restricted, "from time to time," she does not hold title with an "'implied limitation'" that a regulation may "subsequently eliminate all economically viable use."[78] Rather, the Court concluded, such a regulation must "do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances or [for actual necessity]."[79] In concluding its opinion, the Court noted that it was unlikely that South Carolina's common law principles would prevent Lucas from building upon his lots, but the Court remanded this issue as a question of state law.[80]

As the reasoning and holding of the opinion indicate, the *Lucas* test is not flexible; compensation is owed when a regulation extinguishes the beneficial

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[74] *Id.* at 1020.

[75] *Id.* at 1025. The legislature proffered a number of reasons for the Act, including habitat and species protection, and encouraging tourism. *Id.* at 1010.

[76] *Id.* at 1026.

[77] *Id.* at 1029 (emphasis added).

[78] *Id.* at 1027-28.

[79] *Id.* at 1029, 1029 n.16. This is an unequivocal standard, and the Court was equally clear that the state has the burden of proof. *Id.* at 1031.

[80] The Court remanded with clear instructions, stating:

> [T]o win its case South Carolina must do more than proffer the legislature's declaration that the uses Lucas desires are inconsistent with the public interest, or the conclusory assertion that they violate a common-law maxim . . . . Instead, . . . South Carolina must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found. Only on this showing can the State fairly claim that, in proscribing all such beneficial uses, the [Act] is taking nothing.

Id. at 1031-32. For an application of this standard, see *Ohio ex rel. R.T.G., Inc. v. Ohio*, 753 N.E.2d 869 (Ohio Ct. App. 2001).

economic use of land, unless the restriction falls within a narrow exception.[81] The burden is on the landowner to show that a regulation has denied all economically viable use of her property.[82] Once she meets that burden, the government cannot avoid compensation unless it proves that "an objectively reasonable application of relevant precedents would exclude those beneficial uses in the circumstances in which the land is presently found."[83]

III. CONFLATING A FACTOR AND A BRIGHT-LINE RULE

From a thorough reading of *Penn Central* and *Lucas*, it seems axiomatic that the respective opinions established mutually exclusive modes of analysis.[84] Of course, a court that finds an owner has not suffered a total deprivation of economically viable use (Justice Scalia noted that a "total taking" will be relatively rare)[85] should employ a partial takings analysis to determine if that owner has nevertheless suffered a loss sufficient to warrant compensation. Such an approach is logical and has been followed by a number of courts.[86] Far too many courts, however, have inquired into an owner's investment-backed expectations while purporting to apply the categorical rule. These courts have denied compensation because a property owner was unable to demonstrate such expectations, or because the owner knew of a regulation or regulatory framework when she acquired title.

For example, in *Florida v. Burgess*,[87] a landowner brought a total takings claim when the State Department of Environmental Protection denied his permit to build a dock, boardwalk, and a camping shelter on land that had recently been designated as "wetlands," and consequently was subject to stringent permitting requirements.[88] The court reasoned that to prevail in a

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[81] *Lucas*, 505 U.S. at 1030.

[82] *Id.* at 1016 n.6.

[83] *Id.* at 1032 n.18.

[84] Despite the cases discussed in the following section, the majority of courts recognize that investment-backed expectations are irrelevant in a total takings analysis. *See, e.g.*, Palm Beach Isles Assoc. v. United States, 231 F.3d 1354 (Fed. Cir. 2000); *see also* Callies, *supra* note 4, at 551 ("Many state and lower federal courts have easily grasped the 'total taking' rule for which the decision in Lucas stands.").

[85] *See, e.g.*, *Lucas*, 505 U.S. at 1017.

[86] *See* Adams Outdoor Adver. v. City of East Lansing, 614 N.W.2d 634 (Mich. 2000); Massachusetts v. Blair, 98-2758-G, 2000 Mass. Super. LEXIS 172 (Mass. Super. Ct. May 1, 2000); Walcek v. United States, 44 Fed. Cl. 462 (1999); Dist. Intown Prop. v. Dist. of Columbia, 198 F.3d 874 (D.C. Cir. 1999); Dodd v. Hood River County, 136 F.3d 1219 (9th Cir. 1998); K & K Constr., Inc. v. Dep't of Natural Res., 575 N.W.2d 531 (Mich. 1998); Alegria v. R.E. Keeney, 687 A.2d 1249 (R.I. 1997); *see also* Callies, *supra* note 4, at 565-67.

[87] 2000 Fla. App. LEXIS 8450 (Fla. Dist. Ct. App. 2000).

[88] *Id.* at *1-2. Burgess purchased the land in 1956. *Id.* at *1. In 1992, he applied for and was denied a dredge and fill permit; that denial was the genesis of his takings claim. *Id.* at *2.

total regulatory takings claim, Burgess would need to prove not only that he was deprived of all economically beneficial use, which the trial court found, but also "demonstrate that the permit denial interfered with his reasonable, distinct, investment-backed expectations, held at the time he purchased the property."[89] The court held that Burgess failed to meet this burden because he had always used the property for recreation, the state permitted this use to continue, and Burgess's claim that he purchased the property as an "investment" was too vague.[90]

Similarly, in *McQueen v. South Carolina Coastal Council*,[91] a property owner applied for a permit to build bulkheads on his land to prevent further soil erosion.[92] The Council denied his application, and McQueen filed suit claiming that this denial effected a taking without compensation.[93] The trial court found that by denying the permits, the Council had extinguished the economic value of the lots and thereby effected a taking.[94] The state supreme court reversed. That court held, "In order to recover on a takings claim, a property owner must establish the regulation interfered with his distinct, investment-backed expectations."[95] The state court reasoned that the property in question had been "the subject of at least some developmental regulation for over a century," and concluded that this "pre-existing permit requirement is relevant to [McQueen's] investment-backed expectations."[96] The court held that "[McQueen's] prolonged neglect of the property and failure to seek

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[89] *Id.* at *7-9. The trial court found that the denial of the permit constituted a taking and required compensation. *Id.* at *2-3. That the requisite expectations must be "reasonable" is something of an addition to the case law. Neither *Penn Central* nor *Lucas* uses any such language to explain the investment-backed expectations element of the partial takings test. *See Penn Central*, 438 U.S. at 124; *Lucas*, 505 U.S. at 1017 n.8. The only requirement is that such expectations be "distinct." *See Penn Central*, 438 U.S. at 124.

[90] *Id.* at *10-11. Burgess testified that he purchased the property as an investment, which he thought would appreciate, as well as for recreational purposes. *Id.* at *5-6. However, because Burgess had not made any earlier attempts to develop the land, the court held that he failed to demonstrate any distinct investment-backed expectations. *Id.* at *7-8.

[91] 530 S.E.2d 628 (2000).

[92] *Id.* at 630. McQueen purchased the lots in the 1960s, and although his lots were unimproved, most lots in the area had homes and bulkheads. *Id.* at 629-30. He applied for the permits in 1991, and in 1993 received the final denial. *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.* at 633. The court concluded that without such a requirement, "a property owner could obtain a windfall by claiming a taking in the face of new regulations, without any real intent to develop." *Id.* The court acknowledged that this issue was not discussed in *Lucas*, but it concluded that there was no doubt the claimant in *Lucas* had such expectations. *Id.*

[96] *Id.* at 634.

developmental permits in the face of ever more stringent regulations demonstrate a distinct *lack* of investment-backed expectations."[97]

A final example reveals that some federal courts (at least in dicta) succumb to a similar interpretation of the categorical rule. In *Good v. United States*,[98] the plaintiff purchased a parcel of land in 1973, and initiated the development process in 1981.[99] The next thirteen years involved a cycle of federal, state, and local permits being granted and revoked as Good endeavored to comply with the comprehensive—and often duplicative—regulatory scheme.[100] Finally, in 1994 the Army Corps of Engineers, upon the recommendation of the Fish and Wildlife Service, issued its conclusive denial of the permits.[101] Good filed a takings claim.[102] The district court concluded that Good was not required to leave his land in its natural state, and therefore the categorical rule was inapplicable.[103] The circuit court affirmed, and because Good was not deprived of all economically viable use of his property, applied the *Penn Central* balancing test.[104] Before reaching that conclusion, however, the court

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[97] *Id.* at 634 (emphasis added).

[98] 189 F.3d 1355 (Fed. Cir. 1999).

[99] *Id.* at 1357.

[100] *Id.* at 1357-59. Good's saga is particularly troubling to anyone who believes in the rights of property ownership. Good applied for and received: a dredge and fill permit from the Army Corps of Engineers in 1983, the state permit in 1983, and the county permit in 1983. *Id.* at 1357. However, the Florida State Department of Community Affairs determined that Good's project had not been subjected to stringent enough review, and ordered a reevaluation of the project in 1986. *Id.* at 1358. Although Good succeeded in a court challenge to the heightened review, the county only granted preliminary approval, subjecting final approval to fifteen conditions, and the delay caused his dredge and fill permit to expire. *Id.* Good was forced to scale down his plans to comply with the county requirements and had to reapply for a new dredge and fill permit. *Id.* at 1358-59. In the intervening years, two developments occurred: first, the Lower Keys marsh rabbit was listed on the endangered species list; and second, another Act now required consultation with the Fish and Wildlife Service ("FWS"). *Id.* at 1359. Although concluding that Good's development posed no threat to the rabbit, the FWS required a new study anyway because the "silver rice rat," also found on the property, was listed as an endangered species in 1990. *Id.* Following the study, the FWS now found that the rabbit and rat were threatened by the project and recommended denial of the permit. *Id.* The Army Corps complied with the FWS and notified Good that his project could not proceed. *Id.*

[101] *Id.* at 1359.

[102] *Id.* Good filed a total and a partial takings claim. Good v. United States, 39 Fed. Cl. 81, 84 (1997). On appeal, the circuit court accepted the trial court's finding that the parcel retained economically viable use. *Good*, 189 F.3d at 1359-60.

[103] *Id.* at 1359-60.

[104] *Id.* at 1362-63. Good argued that he had investment-backed expectations because when he purchased the property and proposed the development, he was only required to obtain a dredge and fill permit, which he did three times, and was only denied permission to proceed because of a subsequently enacted measure. *Id.* at 1361. The court rejected this argument, and held that "[i]n view of the regulatory climate that existed when [Good] acquired the subject

engaged in a general discussion of the categorical rule and reasoned, "The *Lucas* Court did not hold that the denial of all economically beneficial or productive use of land eliminates the requirement that the landowner have reasonable, investment-backed expectations of developing his land."[105] The court concluded, "[o]ne who buys with knowledge of a restraint assumes the risk of economic loss."[106]

The foregoing cases illustrate the way some state and lower federal courts have analyzed a total regulatory takings claim. These courts have essentially held that an existing property restriction or regulatory framework made it impossible for the landowner to have had any distinct investment-backed expectations in developing her land.[107] Unfortunately, these examples are far from an exhaustive list; legions of other courts have applied similar interpretive structures.[108] The primary error of these opinions is a simple misinterpretation of *Lucas*. An additional—and more fundamental—mistake is that these courts have ignored the unique nature of a total regulatory taking. The following section will explore the categorical rule established in *Lucas*, as well as the applicable precedent and the distinct character of a total regulatory taking to demonstrate that courts should not inquire into an owner's investment-backed expectations when a regulation has extinguished the economically viable use of property.

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property, [Good] could not have had a reasonable expectation that he would obtain approval [of the project.]" *Id.* at 1361-62.

[105] *Id.* at 1361. The court determined that "[a] *Lucas*-type taking . . . is categorical only in the sense that the courts do not balance the importance of the public interest advanced by the regulation." *Id.*

[106] *Id.* (quoting Creppel v. United States, 41 F.3d 627, 632 (Fed. Cir. 1994)).

[107] *See, e.g.*, McQueen v. South Carolina Coastal Council, 530 S.E.2d 628, 635 (S.C. 2000).

[108] *See* Outdoor Graphics, Inc. v. City of Burlington, 103 F.3d 690, 694 (8th Cir. 1996) (holding that an inquiry into whether a regulation is a background principle of state law requires an examination of the owner's investment-backed expectations); Town Council of New Harmony v. Parker, 726 N.E.2d 1217, 1226-27 (Ind. 2000) (holding that the plaintiff's takings claim failed because the plaintiff lacked reasonable investment-backed expectations); Matter of Gazza v. Dep't of Envtl. Conservation, 679 N.E.2d 1035, 1037-40 (N.Y. 1997) (holding that no taking occurred because Gazza purchased the property with the knowledge that he would need a variance, and thus he had no right to build anything and no cognizable property interest); Matter of Brotherton v. Dep't of Envtl. Conservation, 252 A.D.2d 498, 499 (N.Y. Supp. Ct. App. Div. 1998) (holding that denying permission to reconstruct washed-out bulkheads was not a taking because the permit requirement predated the plaintiff's acquisition of the property); Grant v. South Carolina Coastal Council, 461 S.E.2d 388, 354 (S.C. 1995) (denying a permit to fill tideland to prevent another washout of the plaintiff's property was not a taking because, when he purchased the property, a permit to fill tidelands was required); *see also* Callies, *supra* note 4, at 556-57 (discussing other cases that have misapplied *Lucas*, sometimes flagrantly).

IV. INVESTMENT-BACKED EXPECTATIONS HAVE NO BEARING ON WHETHER PROPERTY HAS BEEN TAKEN WITHOUT COMPENSATION IN A TOTAL TAKINGS CLAIM

A. Lucas *Established an Unqualified Categorical Rule*

As the preceding discussion demonstrates, a number of courts have interpreted *Lucas* as implicitly incorporating the investment-backed expectations factor. Such an interpretation necessarily means that the *Lucas* rule is not categorical at all, but instead requires an "ad hoc, factual inquiry" into why the claimant acquired title and whether her intentions were reasonable. An examination of the *Lucas* majority's analysis and holding, however, does not support such a conclusion.

In *Lucas*, the Court juxtaposed the different types of regulatory takings claims.[109] The Court reasoned that while most claims require a balancing test, a case-specific inquiry is unnecessary when the property restriction either "compel[s] the property owner to suffer a physical 'invasion,'" or "denies all economically beneficial or productive use."[110] In contrasting these factually-distinct takings claims, the Court expressly recognized two categories of regulatory takings: on one side are those that merely diminish property values; and on the other are those that either compel a physical invasion or remove all economically viable use from land.[111] The Court followed this dichotomy and announced, "[W]hen the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."[112] This rule is plainly categorical. Its text simply does not permit a consideration into why the owner purchased the property, what she planned to do with it, or which regulations were in place when she acquired title.[113]

The Court applied this rule to Lucas' claim. The Court did not examine whether Lucas had reasonable, distinct investment-backed expectations, held at the time he purchased the property.[114] Instead, the Court's reasoning was

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[109] 505 U.S. at 1015.

[110] *Id.*

[111] *See id.* at 1016-18.

[112] *Id.* at 1019.

[113] *See* Palm Beach Isles Assoc. v. United States, 231 F.3d 1354, 1363 (Fed. Cir. 2000) ("When government seizes the entire estate for government purposes [by] . . . categorical regulatory taking, it is not necessary to explore what those expectations may have been."); *see also* Callies, *supra* note 4, at 545-46 ("[Deprivation of all economically viable use] is a taking regardless of how or when the property was acquired, and – of course – regardless of the public purpose or state interest which generated the regulation, which is the classic definition of a per se rule.").

[114] *See Lucas*, 505 U.S. at 1015-32; *see also* Callies, *supra* note 4, at 545-46.

simplistic: Lucas proved that the regulation had extinguished the economically beneficial use of his property,[115] and therefore the regulation effected a taking.[116] There is no indication that the Court assumed Lucas had investment-backed expectations in developing his property, and no discussion of whether such expectations were reasonable.[117] Thus, the analysis of Lucas' claim tracks the plain text of the categorical rule, and there is no hint that a landowner's investment-backed expectations were an implicit component of either.[118]

This conclusion is supported by the majority's response to some of the many criticisms leveled by the dissenting Justices.[119] Significantly, Justice Stevens attacked the categorical rule as being "wholly arbitrary," because "[a] landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value."[120] The majority responded by acknowledging that a landowner who has not been deprived of all economically viable use "might not be able to claim the benefit of our categorical formulation," *but* insisted that she will be able to bring a takings claim under the usual balancing test.[121] Specifically, the Court recognized, "'the economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations' are *keenly relevant to takings analysis generally*."[122]

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[115] *Lucas*, 505 U.S. at 1020. It is important to note that the majority apparently considered recreational uses, such as constructing wooden docks or a walkway, irrelevant because those uses were permitted by the Act. *Id.* at 1009 n.2. Moreover, Lucas retained the right to exclude, and to "picnic, swim, camp in a tent, or live on the property in a moveable trailer." *Id.* at 1044 (Blackmun, J., dissenting). Thus, it is clear that the majority focused on Lucas's right to develop his property—to make economically viable use of it.

[116] *Id.* at 1015-18; *see also supra* PART II C.

[117] *See id.* at 1030-32.

[118] *See, e.g.*, Palm Beach Isles Assoc. v. United States, 231 F.3d 1354, 1362 (Fed. Cir. 2000).

[119] Some weight should also be accorded the dissenting Justices' interpretation of the majority opinion. It is clear, from the many blistering attacks they launched, that the dissenting Justices interpreted the majority opinion as employing a categorical or per se rule. Specifically, Justice Stevens lamented that although "[i]t is well established that a takings case 'entails inquiry into [several factors] . . . [t]he categorical rule addresses a regulation's economic impact." *Lucas*, 505 U.S. at 1071 (Stevens, J., dissenting). Equally instructive is Justice Blackmun's statement that "[the Court] . . . takes the opportunity to create a new scheme for regulations that eliminate all economic value. From now on, there is a categorical rule." *Id.* at 1046 (Blackmun, J., dissenting).

[120] *Id.* at 1064 (Stevens, J., dissenting).

[121] *See id.* at 1019 n.8.

[122] *Id.* (emphasis added) (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). The Court did not include the "character of the governmental action" factor. *Id.* This is likely because of the majority's opinion that much mischief has been done by courts giving that factor paramount importance. *See id.* at 1022-26; *see also* Callies, *supra* note 4, at

Thus, in answering the dissent, the Court again made an analytical distinction between regulations that effect a total loss of economically viable use and those that merely diminish property values.[123] This distinction would be irrelevant if a property owner's investment-backed expectations were a necessary component of the categorical rule, because the first factor, the economic impact, is an essential part of every regulatory takings claim.[124] To give this distinction substance, the severity of the economic impact must be the only element of a total takings claim.

Finally, the *Lucas* exceptions do not suggest a different result. Significantly, the Court reasoned that with respect to real property, an owner's interest is one in land, which has "a rich tradition of protection at common law."[125] Consequently, a landowner does not hold title "subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use."[126] Instead, the government may save an otherwise compensable taking "only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."[127] That is, a regulation is relevant if it simply "duplicate[s] the result that could have been achieved in the courts—by adjacent landowners . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise."[128] In that circumstance, no taking has occurred, not because of a lack of investment-backed expectations, as the owner's expectation is generally to make economically viable use of her property, but rather because background "principles of [state] nuisance and property law" demonstrate that the

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545. Moreover, a valid public purpose is a threshold requirement in any takings analysis, including partial and total takings. *See, e.g.*, Hawai'i Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

[123] *See Lucas*, 505 U.S. at 1019.

[124] This is so because in a total taking, the claimant must prove that she has lost all economically viable use of her land. *See, e.g.*, *Lucas*, 505 U.S. at 1015. That is, she must prove the *economic impact* of the regulation is such that she lost the ability to make productive use of her land. Consequently, if her investment-backed expectations are also part of the categorical rule, it is the same as the balancing test because in every taking the government must prove that it is for public use, which is the only remaining factor. Of course, the economic impact of a measure is irrelevant when a physical invasion has occurred. *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982).

[125] *Lucas*, 505 U.S. at 1016 n.7.

[126] *Id.* at 1028.

[127] *Id.* at 1027.

[128] *Id.* at 1029.

proscribed use was never part of her title.[129] Thus, the opinion is internally consistent, and each section weighs against qualifying the categorical rule.

B. Traditional Principles of Takings Jurisprudence Support the Imposition of a Categorical Rule When a Regulation Extinguishes the Economically Viable Use of Property

The conclusion that investment-backed expectations are irrelevant in a total takings analysis need not rest solely on the *Lucas* opinion. A total deprivation of economically viable use is unique, both in its effect on a landowner and in its analysis, and the Court has frequently recognized as much. *Lucas* was not an exercise in Delphic inspiration, but rather represents an application of existing precedent and principles of regulatory takings jurisprudence.

1. The Court has consistently held that a deprivation of all economically viable or productive use requires compensation

In *Lucas*, Justice Blackmun dissented, and he lambasted the majority for ignoring precedent.[130] This sentiment has since been echoed by a number of legal commentators.[131] Those criticisms are misplaced, because the Court has consistently recognized that a case-specific inquiry is not required when a regulation extinguishes the economic viability of property.

For example, in the 1980 case of *Agins v. City of Tiburon*,[132] the Court held that the very enactment of a property regulation effects an unconstitutional taking of property when the measure either "does not substantially advance legitimate state interests, *or denies an owner economically viable use of his land*."[133] The Court phrased this rule in the alternative, and both facets are plainly unqualified. When either element of the rule is satisfied, no

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[129] *Id.* at 1030-32. The Court was explicit in defining the type of regulation or regulatory scheme that would pass muster. The Court focused on harm-causing activities, and reasoned that, if proved, such activities might be prohibited. *Id.* at 1031. The Court added, however, that a regulation would not likely be shielded, if the use "has long been engaged in by similarly situated owners," or if "other landowners, similarly situated, are permitted to continue the use denied to the claimant." *Id.* Finally, the Court concluded that a state "must identify background principles of nuisance and property law that prohibit the uses he now intends in the circumstances in which the property is presently found." *Id.* at 1031-32. *See generally* Ohio ex rel. R.T.G., Inc. v. Ohio, 753 N.E.2d 869 (Ohio 2001) (discussing and applying the nuisance exception).

[130] *Lucas*, 505 U.S. at 1061 (Blackmun, J., dissenting) ("The Court makes sweeping and, in my view, misguided and unsupportable changes in our takings doctrine.")

[131] *See, e.g.*, Treanor, *supra* note 1, at 808.

[132] 447 U.S. 255 (1980).

[133] *Id.* at 260 (internal citations omitted) (emphasis added).

consideration of a landowner's investment-backed expectations is appropriate, and no balancing test is necessary.[134] Since *Agins*, the Court has restated this rule in a number of situations.[135] Thus, the categorical rule already existed, and far from remaking the world anew, Lucas has merely extended this jurisprudence.

2. *The categorical rule comports with the import of the Takings Clause*

The Takings Clause assures Americans that they will not be forced to sacrifice their property for a public good without compensation.[136] Of course, the government may regulate property to some extent, which will indirectly affect property values,[137] but a total regulatory taking exacts an unusually heavy toll. In such cases, the landowner is forced to sacrifice a great deal for an assertedly public benefit.[138] She is denied the right to make *any* economically viable or productive use of her property. If a lack of investment-backed expectations or the mere existence of a regulatory scheme—even a pervasive one—is sufficient to defeat a takings claim, the Takings Clause becomes qualified, and "the natural tendency of human nature is to extend the qualification more and more until at last private property disappears."[139] To ensure that private owners are not forced to bear a disproportionate public burden, the categorical rule requires government to pay when it demands that property remain economically fallow.[140]

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[134] *See id.*; Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987); Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295-96 (1981); *see also Lucas*, 505 U.S. at 1015-16.

[135] On several occasions and in varying contexts, the Court has repeated this rule, ironically with the agreement of the *Lucas* dissenters. *See, e.g.*, *Keystone*, 480 U.S. at 495.

[136] *See, e.g.*, Monongahela Navigation Co. v. United States, 148 U.S. 312, 325 (1893) ("[The Takings Clause] prevents the public from loading upon one individual more than his just share of the burdens of government . . . .").

[137] *See, e.g.*, Pa. Coal v. Mahon, 260 U.S. 393, 415 (1922) ("The general rule at least is . . . property may be regulated to a certain extent . . . .").

[138] *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1018 (1992). The Court stated:

> [R]egulations that leave the owner of land without economically beneficial or productive options for its use--typically . . . by requiring land to be left substantially in its natural state--carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

Id.

[139] *Pennsylvania Coal*, 260 U.S. at 415.

[140] *See* Palm Beach Isles Assoc. v. United States, 231 F.3d 1354, 1362 (Fed. Cir. 2000) (stating that when the government affects a regulatory taking, it leaves "the owner with essentially no viable economic uses whatever and no rights except bare legal title. A purchaser . . . [has] expectations that the parcel can be used for some lawful purpose.").

3. *A total regulatory taking is analogous to a physical taking*

The Court has generally held that physical invasions of any sort require compensation.[141] In such cases, when and how the owner acquired the property, or what her expectations were with respect to its use are irrelevant.[142] In *Lucas*, the Court recognized this general rule, and concluded "similar treatment must be accorded confiscatory regulations, *i.e.*, regulations that prohibit all economically viable use of land."[143] Standing alone, this analogy would seem to dispel the notion that investment-backed expectations are necessarily a component of the categorical rule.[144] It need not, however, because well before *Lucas*, the Court made identical comparisons.

Significantly, in *Pennsylvania Coal v. Mahon*,[145] the progenitor of modern regulatory takings jurisprudence, the Court held that the Kohler Act caused a taking of property because it completely extinguished the company's right to mine coal for a profit.[146] The Act did not physically dispossess the company of any property interest, but merely prohibited a specific activity.[147] The Court reasoned, however, that rendering a legal use "commercially impracticable . . . has very nearly the same effect for constitutional purposes as appropriating or destroying it."[148] That is, the Kholer Act was unconstitutional because extinguishing the economically viable use of land is tantamount to physically seizing or invading it.[149]

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[141] *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434 (1982) ("[W]hen the 'character of the government action' is a permanent physical occupation of property, our cases uniformly have found a taking to the extent of the occupation . . . .") (internal citations omitted).

[142] *See, e.g.*, *Palm Beach Isles Assoc.*, 231 F.3d at 1362 ("[I]n takings law involving a 'physical' taking of land by the government, the reason the owner acquired the land in the first instance is of no concern; that is, the owner's investment-backed expectations, or lack of them, are not a consideration."); Rohaly v. New Jersey, 732 A.2d 524, 526 (N.J. Super. Ct. App. Div. 1999) ("[A] 'taking' that predates the ownership of land apparently is not an impediment to a subsequent owner's right to seek redress . . . ."); *see also* Nolan v. California Coastal Comm'n, 483 U.S. 825, 831-33 (1987).

[143] *Lucas*, 505 U.S. at 1029.

[144] *See, e.g.*, *Palm Beach Isles Assoc.*, 231 F.3d at 1362 ("Had the Court intended to make analysis of a categorical regulatory taking different from the categorical physical taking, for example regarding the question of investment-backed expectations, surely somewhere in the opinion there would be a hint of it. There is not.").

[145] 260 U.S. 393 (1922).

[146] *Id.* at 414.

[147] *See id.* at 412-13.

[148] *Id.* at 414.

[149] *See id.*

The Court reached the same conclusion in other contexts. For example, in *Armstrong v. United States*,[150] the Court held that a forced transfer of personal property to the United States, which had the effect of destroying the value of liens held by the plaintiff against that property, was a taking and required compensation.[151] The government had not physically taken these liens, and indeed the government action was not directed at the plaintiff.[152] Nevertheless, the Court reasoned that "[t]he total destruction by the Government of all value of these liens . . . has every possible element of a Fifth Amendment 'taking.'"[153] That is, in rendering these liens valueless by regulation, the government essentially destroyed the claimant's property.[154] If there is any substance to the Court's repeated statements that a total regulatory taking is analogous to a physical taking, it must be that, like a physical taking, a landowner's investment-backed expectations and any preexisting regulations are irrelevant when the government asks her to sacrifice all beneficial use of her property for a public good.

V. PROPERLY APPLYING THE CATEGORICAL RULE WILL NOT RESULT IN A WINDFALL

An objective evaluation of *Lucas* and the principles of takings jurisprudence establish that investment-backed expectations are not a component of the categorical rule. The courts reaching a contrary conclusion have generally offered little legal explanation for their position.[155] Instead, the usual justification is a fear that the landowner will reap a "windfall" if she purchases property with knowledge of an existing regulation, is denied a development

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[150] 364 U.S. 40 (1960).

[151] *Id.* at 48.

[152] *See id.* at 48-49.

[153] *Id.* at 48.

[154] *See id.*

[155] *See* Good v. United States, 189 F.3d 1355, 1361 (Fed. Cir. 1999) ("In *Lucas*, there was no question of whether the plaintiff had [distinct investment-backed expectations.]"); Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1178 (Fed. Cir. 1994) ("There was no question that Lucas had distinct investment-backed expectations for his property."). This analysis is flawed. A cursory recognition in the factual background of the opinion that Lucas intended to "erect single family residences" is the only reference in the opinion to Lucas' intention. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1008 (1992). It seems spurious to conclude that this statement equates to judicial acceptance, without further debate, that Lucas had "distinct investment-backed expectations" with respect to his land. Moreover, the Court's repeated statements that it was applying a categorical rule, without hinting that this rule was qualified, weigh against an implicit recognition that an owner's investment-backed expectations are relevant in a total takings analysis. *See* Palm Beach Isles Assoc. v. United States, 231 F.3d 1354, 1362-63 (Fed. Cir. 2000).

permit, but is still able to sue for compensation.[156] A windfall, however, is unlikely—never mind that such fears should be insufficient to circumvent the Constitution—because a total regulatory taking is atypical,[157] and no compensation is owed if the regulation merely made explicit what was always prohibited.[158] The most salient argument against the windfall explanation, however, is valuation; regulations, which existed before the acquisition of title, will certainly be relevant when awarding compensation.[159]

As an initial matter, it is important to note that a total regulatory taking is the exception.[160] More often, a regulation will merely diminish property values or impair the economic use of property, and consequently the categorical rule will be inapplicable.[161] When a landowner alleges something less than a total taking, her distinct investment-backed expectations will be "keenly relevant" to the analysis.[162] Of course, mere notice of a preexisting regulation neither precludes the existence of investment-backed expectations, nor presumes the constitutionality of that regulation. Such notice, however, is a relevant consideration in determining what the landowner's expectations were.[163] That is, the regulation may be considered in evaluating the landowner's investment-backed expectations, which will in turn be balanced with the economic impact of the regulation and the character of the government action.[164]

When the categorical rule is appropriate, the government may save an otherwise compensable taking "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not

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[156] *See Good*, 189 F.3d at 1361 ("Compensating him for a 'taking' would result in a windfall."); McQueen v. South Carolina Coastal Council, 530 S.E.2d 628, 633 (S.C. 2000) ("Without the requirement of investment-backed expectations, a property owner could obtain a windfall by claiming a taking in the face of new regulations, without any real intent to develop.")

[157] *See, e.g., Lucas*, 505 U.S. at 1017.

[158] *See, e.g., id.* at 1027-29.

[159] *See, e.g., Palm Beach Isles Assoc.*, 231 F.3d at 1363.

[160] *Lucas*, 505 U.S. at 1017-18; *see also Palm Beach Isles Assoc.*, 231 F.3d at 1364 ("[M]ost land use regulations do not deny the owner of the regulated property all economically viable use of it.")).

[161] *See Lucas*, 505 U.S. at 1017.

[162] *See id.* at 1018 n.8 ("'[T]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally." (alteration in original) (internal citation omitted).

[163] *See Palm Beach Isles Assoc.*, 231 F.3d at 1363 ("In the parlance of takings law, the purchaser does not have reasonable expectations that the property can be used for the prohibited purpose . . . .").

[164] *See, e.g.*, Penn Cent. Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).

part of his title to begin with."[165] That is, no taking occurs if the property restriction, either preexisting or subsequently enacted, merely expresses what was always prohibited.[166] This exception is narrow,[167] but it will deny compensation to an owner who, for example, is denied a permit to engage in a landfilling operation which would have the effect of flooding her neighbors' land, because such a use was never permissible "under relevant property and nuisance principles."[168] In that circumstance, the proscription has taken nothing.[169]

Assuming no background principle of state law saves the taking, the fear of a windfall is misplaced because it overlooks the important issue of valuation. Once it has been determined that a regulation effected a total taking of property, unless the government rescinds that regulation,[170] the issue of "just compensation" remains.[171] Compensation can be a complicated issue.[172] The goal, however, is simply to place the owner "in the same position monetarily as he would have occupied if his property had not been taken."[173] To achieve this result, compensation is generally "measured by 'the market value of the property at the time of the taking contemporaneously paid in money.'"[174]

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[165] *Lucas*, 505 U.S. at 1027.

[166] *Id.* at 1030.

[167] *Id.* at 1030-31. The *Lucas* Court held, "The 'total taking' inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property posed by the claimant's proposed activities . . . ." *Id.* Moreover, the burden is on the state to prove the use was always illegal by "an *objectively reasonable application* of relevant precedents." *Id.* at 1032. For an excellent discussion and application of the *Lucas* exception, see *Ohio ex rel. R.T.G., Inc. v. Ohio*, 753 N.E.2d 869 (Ohio 2001).

[168] *Lucas*, 505 U.S. at 1032.

[169] *Id.* This is a narrow exception, and likely does not include positive state or federal regulatory legislation. *See id.* at 1027-32; *see also* Preseault v. United States, 100 F.3d 1525, 1539 (Fed. Cir. 1996) ("Nothing in *Lucas* suggests that the background principles of a state's property law include the sweep of a century of federal regulatory legislation . . . ."). Rather, the exception only applies to background principles of the state's common law of nuisance and property. *See Lucas*, 505 U.S. at 1027-32.

[170] *Lucas*, 505 U.S. at 1030 n.17 ("Of course, the State may elect to rescind its regulation and thereby avoid having to pay compensation for a permanent deprivation."). The state may still be liable, however, for a temporary taking. *See id.*

[171] U.S. CONST. amend. V; *see also* Palm Beach Isles Assoc. v. United States, 231 F.3d 1354, 1363 (2000).

[172] *See generally* Cooley v. United States, 46 Fed. Cl. 538 (2000) (discussing the issue of valuation in total regulatory takings).

[173] Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 473-74 (1973) (citations omitted); *see also* 4 SACKMAN, *supra* note 28, at § 12 (discussing valuation generally).

[174] United States v. 50 Acres of Land, 469 U.S. 24, 29 (1984) (quoting Olson v. United States, 292 U.S. 246, 255 (1934)).

Thus, valuation is essentially a two-part inquiry: first, what is the "market value" of the property; and second, when did the taking occur.[175]

The market value of the property taken (in a simple valuation equation) is "equivalent to the full value of the property," and consequently all factors that would affect its use or influence a potential buyer are relevant.[176] The government is only obligated to pay for "the fair market value of the parcel, not the owner's hopes regarding its use."[177] Any existing and applicable zoning ordinances and land use restrictions are therefore relevant to valuation, because the uses to which a property may be put will influence what the land is worth.[178]

To complete the valuation equation, the date of the taking must be determined because the effects of a land use restriction are relevant only if the imposition of that restriction predates both the taking and the owner's acquisition of the property at issue.[179] When a newly enacted or imposed regulation results in a taking, the market value should be assessed as the value of the land before implementation of that restriction.[180] This is so because the property had economically viable uses before that regulation was either enacted or applied.[181] It was the imposition of a new restriction that caused a

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[175] *See generally* 4 SACKMAN, *supra* note 28, at § 12A (discussing market value and the time of valuation generally). The time of the taking must be ascertained so as to fix a point to determine the value of the property taken as of that date. *See id.* at § 12A.01.

[176] *See Almota Farmers*, 409 U.S. at 473; *see also* Campbell v. United States, 266 U.S. 368 (1924).

[177] *See Palm Beach Isle Assoc.*, 231 F.3d at 1363.

[178] *See id.* at 1363. Whether the claim is analyzed as a partial taking, where investment-backed expectations are relevant, or as a total taking, where such expectations and existing regulations may be relevant to valuation, a regulation should only be considered if it specifically affects the property in question. The enactment or existence of broad legislation, which merely authorizes an agency to establish regulations, is generally inadequate. *See, e.g.*, Preseault v. United States, 100 F.3d 1525, 1539 (Fed. Cir. 1996). Authorization statutes or the bald existence of jurisdiction are, without more, insufficient to either effect a taking, or normally devalue property. *Preseault*, 100 F.3d at 1538. Consequently, these regulatory schemes should not be considered when assessing whether a partial taking has occurred or when determining compensation. *See, e.g.*, Ultimate Sportsbar, Inc. v. United States, 48 Fed. Cl. 540, 548-49 (2001).

[179] *See, e.g.*, 4 SACKMAN, *supra* note 28, at §12A. "[A] point of time must be fixed as of which the property is to be valued. It is the value at that time which the owner is entitled to receive, even if the value of the land rises or falls before the money is actually paid to him." *See id.* Thus, while any regulations enacted after the property is taken may indeed diminish the market value of the land, such impact will not be considered in determining the landowner's award.

[180] *See* Whitehead Oil Co. v. City of Lincoln, 515 N.W.2d 401, 411 (Neb. 1994).

[181] *See, e.g.*, *Lucas*, 505 U.S. at 1008-09. Before the regulation, Lucas could build a single-family home on his land; after the regulation, he only had essentially recreational uses left. *See id.*

taking by denying the owner the ability to make any economically viable use of her property.[182] For example, there is no doubt that an owner has suffered a taking if her property is designated "open space."[183] Because the new designation caused the taking and altered the market, the time of valuation should be fixed at a point before implementation of the restriction, when the property was developable. The same conclusion follows for any new restriction, such as a taking by moratorium or a prohibition on development because of the discovery of an endangered species on the property.

A different result follows when the imposition of a regulation predates both the taking and the acquisition property, because the effect of the restriction on property values had already materialized. That is, the taking occurred after the land had been devalued because of the property restriction.[184] For example, if a claimant acquired property, which was designated "wetlands" and subject to stringent permit requirements, a taking has certainly occurred if she must leave the land undeveloped because her permit applications are denied.[185] It would be illogical, however, to pay her the value of the property fully developed or undeveloped but unfettered in its possibilities, because the effect of the regulation on property values predated her acquisition of the property and the taking. Instead, the market value of the property should reflect—as it naturally would in the free market—the impact of the pre-taking, pre-acquisition restriction.[186] In this situation, the aggrieved claimant may well receive less in compensation than the purchase price of the property. Thus, while neither investment-backed expectations nor existing regulations are relevant as to

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[182] *See, e.g., id.*

[183] *See, e.g., id.* at 1015-18.

[184] *See, e.g., Palm Beach Isle Assoc.*, 231 F.3d at 1363.

[185] *See, e.g., Lucas*, 505 U.S. at 1015-17. The taking in this example did not occur before the permit was denied because of the finality requirement. *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985) (holding that a regulatory takings claim is not ripe and cannot be brought until "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.").

[186] This valuation analysis assumes that the government acquires title when it pays compensation. If instead the government only pays for the loss of economic potential because of the regulation, compensation will be the difference between the market value of the property with the zoning or permitting restrictions (or unrestricted if no regulations were in place) and the value of the property after the government has denied the owner the right to make economically viable use of her land. In this case, the owner retains title and the government pays for the loss of the land's economic potential. For an example of this type of valuation see *Whitehead Oil Co. v. City of Lincoln*, 515 N.W.2d 401, 411 (Neb. 1994). This analysis also assumes that the government does not merely rescind the regulation or grant the permit and pay compensation for a temporary taking.

whether a total taking has occurred,[187] the danger of a windfall is obviated by the recognition that the preexisting restrictions are relevant as to what the owner will receive.[188]

VI. CONCLUSION

In *Lucas*, the Court recognized that a total deprivation of economically viable or productive use presents a unique claim, and consequently requires an independent analytical framework. In fashioning an appropriate remedy for these total takings, the Court carefully distinguished between a total regulatory taking and regulatory takings generally, and created an analytical dichotomy: a categorical rule applies when a property owner has been denied all economically viable use of her property, while a balancing test applies when she loses something less. This dichotomy is consistent with precedent and furthers the purpose of the Takings Clause, as it ensures that property owners will not be forced to bear a disproportionate public burden. Thus, Madison's promise that our government will protect property as vigorously as it does the other pillars of freedom remains more than hyperbole.

Unfortunately, many courts have weakened the categorical rule by requiring owners, who demonstrate that their property has lost all economically viable use, also prove that they had distinct investment-backed expectations. The proffered reason is generally an abstract fear that the categorical rule will result in an unjust windfall for some property owners. This fear, however, is unwarranted because, even in the relatively rare situation where a total regulatory taking is found, any restrictions or regulations that existed *before* the purchase of land are relevant when determining what compensation is due. Consequently, under the categorical rule, there is little danger that the government will shoulder the cost of a bad bargain and there is no reason to eviscerate the protections of the Takings Clause.

VII. EPILOGUE

In *Palazzolo v. Rhode Island*,[189] the Court took a significant step toward bringing confused and wayward courts home. The Court held that an owner who acquires title to land encumbered by regulation is not precluded from

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[187] *See, e.g., Palm Beach Isles Assoc.*, 231 F.3d at 1363 ("The purchaser [in a categorical taking] may have had no particular expectations regarding immediate use, but only purchased for long-term investment. Or the purchaser's expectations may have been wholly unrealistic, and she may have paid more than the property is worth. It matters not.").

[188] *See, e.g., id.* at 1364.

[189] 121 S. Ct. 2448 (2001).

asserting that the regulation effects either a total or a partial taking.[190] In doing so, the Court invalidated the unfortunate idea that once a parcel that is burdened by an unconstitutional regulation changes hands, it is forever so burdened.[191] Several issues, however, remain unresolved.

First, the Court did not consider "the precise circumstances when a legislative enactment can be deemed a background principle of state law or whether those circumstances are present here."[192] The result of this equivocal statement will likely be a legion of conflicting and largely unsatisfactory standards. That is particularly unfortunate because *Lucas*, of course, established that a positive enactment is only relevant when it merely "duplicate[s] the result that could have been achieved in the courts—by adjacent landowners . . . under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise."[193]

Second, the issue of whether investment-backed expectations are a proper consideration in a total takings analysis was not directly before the court, and consequently lower courts still lack a definitive statement. The holding certainly supports the argument that such concerns are irrelevant; but without a definitive statement, many courts will continue to follow the analytical framework discredited in this comment.[194]

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[190] *Id.* at 2464-65. The issue arose when Anthony Palazzolo purchased and attempted to develop a parcel of property that was predominantly "coastal wetlands." With some associates, Palazzolo formed a corporation to purchase the land in 1959, after which Palazzolo became the sole shareholder in the corporation. *Id.* at 2455. The corporation made several permit applications, all of which were denied, and the property lay fallow for a decade. *Id.* In 1971, the Council designated the property a "coastal wetland." *Id.* at 2456. In 1978, the corporation's charter was revoked for failure to pay income taxes, and title to the property passed to Palazzolo. *Id.* Subsequently, Palazzolo renewed his efforts to develop the property. *Id.* The Council issued its final denial in 1985, and Palazzolo filed a takings claim. *Id.* The Rhode Island High Court held that because the regulation was in place before Palazzolo acquired title, he was precluded from asserting a takings claim. *Id.* In doing so, the court effectively decided that "[a] purchaser or successive title holder . . . is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking." *Id.* at 2462. The Court disagreed, and held that the "Takings Clause is not so quixotic. A blanket rule that purchasers with notice have no compensation right when a claim becomes ripe is too blunt an instrument to accord with the duty to compensate for what is taken." *Id.* at 2463.

[191] The Court reasoned that to hold otherwise would "put an expiration date on the Takings Clause." *Id.* The Court concluded that this "ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land." *Id.*

[192] *Id.* at 2464.

[193] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992).

[194] For example, in *Laguna Gatuna, Inc. v. United States*, No. 96-157 L, 2001 U.S. Claims LEXIS 175 (Fed. Cl. 2001), the court, despite concluding that the plaintiff had been denied all economically viable use, applied the *Penn Central* balancing test. *Id.* at *37-40. As to the *Lucas* rule, the court noted only that a total loss of value "arguably" does not require an

Finally, *Palazzolo* revealed a new jurisprudential rift, which is directly relevant to the role of investment-backed expectations in partial takings cases. That split was borne out in the concurring opinions.

Justice O'Connor concurred but wrote separately to assert her opinion as to how the partial taking issues should be considered on remand. According to Justice O'Connor,[195] the state court erred only in holding that "the preacquisition enactment of the use restriction *ipso facto* defeats any takings claim based on that use restriction."[196] The proper view, she concluded, is that the existence of a preacquisition regulation is merely a factor that will shape and define the claimant's investment-backed expectations,[197] and those expectations are in turn but one of three factors to be weighed when determining whether a *partial taking* has occurred.[198] To Justice O'Connor then, the "regulatory backdrop against which an owner takes title to property" remains relevant under *Penn Central*, but it is not the only consideration.[199]

Justice Scalia, in a concurrence authored specifically to refute Justice O'Connor's,[200] emphasized that the mere passage of time or title should not transform an unconstitutional regulatory taking into permissible state action.[201] Rather, Justice Scalia concluded: "The 'investment-backed expectations' that

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"application of the other Penn Central factors." *Id.* at 13 n.7.; *see also* Henry v. Jefferson County Planning Comm'n, 148 F. Supp. 2d 698, 706 (N.D. W.V. 2001) (citing *Lucas*, the court reasoned that the denial of all economically viable use is to be considered with the claimant's "reasonable, investment-backed expectations" and whether the regulations advanced a legitimate state interest.).

[195] Justice O'Connor concurred with the majority opinion but wrote separately to express her understanding of the partial takings issue. *See Palazzolo*, 121 S. Ct. at 2465 (O'Connor, J., concurring).

[196] *Id.*

[197] *Id.* at 2465-66.

[198] *Id.* at 2466.

[199] *Id.* at 2467. In her concurring opinion, Justice O'Connor expressed disagreement with Justice Scalia's concurring opinion. For example, Justice O'Connor stated, "Justice Scalia's inapt 'government-as-thief' simile is symptomatic of the larger failing of his opinion . . . ." *Id.* at 2467 n.1. Justice O'Connor's disagreement with Justice Scalia reflects her belief that there should be no bright-line rules for the Takings Clause; rather, she argues that the courts should carefully examine all circumstances and weigh the relevant considerations. *See id.* Justice Scalia, on the other hand, believes in bright-line rules as a means of preventing each decision from turning on the individual predilections of a particular court. *See generally* ANTONIN J. SCALIA, A MATTER OF INTERPRETATION (1997).

[200] Justice Scalia concurred with the majority opinion but wrote separately "to make clear that [his] understanding of how [the partial takings issue] must be considered on remand is not Justice O'Connor's." *Id.* (Scalia, J., concurring).

[201] *See id.* at 2468. Justice Scalia rejected the "windfall" argument posited by Justice O'Connor, stating that a perceptive—or simply lucky—developer, who realizes the unconstitutionality of a regulation, should not be forced to suffer under it merely because he took title after the restriction became effective. *See id.* at 2467-68.

the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional. Which is to say that a *Penn Central* taking, no less than a total taking, is not absolved by the transfer of title."[202] Under this view, a regulation must be as constitutional to the last purchaser as it is to the first.[203]

Calvert G. Chipchase[204]

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[202] *Id.* at 2468 (internal citations omitted).

[203] *See id.*

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Dividing the Catch: Natural Resource Reparations to Indigenous Peoples – Examining the Maori Fisheries Settlement

Ka pū te ruha, ka hao te rangatahi.
The old nets are worn out; the new nets go fishing.[1]

I. INTRODUCTION

Teetering piles of paperwork, fluorescent-lit negotiations and worn-down calculator buttons somehow must lead to the sea. Sean Kerrins rummages through papers in a sterile office of the Treaty of Waitangi Fisheries Commission, in government-laden Wellington, New Zealand. The office-pallid customary fisheries expert settles in front of a desk cluttered with documents, then jumps up, in a hurry to get more documents before his next meeting. Kerrins must constantly remind himself and his bosses, all Maori, of their goal to get the Maori people back to the sea – back to the fish.

"Maori managed this resource [marine fisheries] for centuries," Kerrins says.

> We brought in paua [abalone] to build sea gardens. If there were too many kina [sea urchins], we culled them. Europeans only think of gardens on the land, and the ocean as common property. Maori always had gardens, and certain fishing areas only they fish, marked by 'bookmarks,'[2] that they looked after. But those

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[1] Traditional Maori saying.

None of the Maori words in this Comment will be italicized, although that is the standard convention for "foreign" words. Many Maori words have been incorporated into common usage in New Zealand, or Aotearoa, as Maori call the nation. Therefore, the author has decided to honor that practice. Each Maori word will be defined the first time it is used, and a compiled glossary of Maori words can be found at the end of the article.

[2] *See* ELSDON BEST, FISHING METHODS AND DEVICES OF THE MAORI 4-5 (1986) (quoting J.L. NICHOLAS, NARRATIVE OF A VOYAGE TO NEW ZEALAND (1817)). Pre-colonialist Maori usually went to the same spot to fish. *Id.* Whether from a particular stone onshore or with a particular view of a mountain from the sea, the fishing spot was defined by Maori genealogy and where their tribal history allowed them to go. *Id.* These areas were marked, either by stakes and other manmade devices, or by the memory of the fishers, who would look for natural landmarks. *Id.* No one dared trespass onto another's fishing area, for that could mean personal violence that could escalate to fighting between iwi (tribe), hapu (sub-tribe), and whanau (extended family). *Id.*

> All fishing grounds, banks, and rocks had special names assigned to them, and such names are often met with in story, song, and proverb. Inasmuch as many fishing-grounds had no rock or part of their surface above water, it behoved [sic] the Maori fisherman to be careful in locating the *tohu*, or signs (landmarks), by means of which he located such grounds. He did so by lining . . . prominent rocks, trees &c [sic]. The *taunga ika*, or

rights belonged to the group rather than to the individual.[3]

How then, can such a community-oriented culture decide how to allocate fisheries resources and assets that were negotiated in a boardroom? How can ocean gardeners, who decided what to plant, when and how much to harvest, "based on geography of the area, biology of the fish, and their cultural relationship with all those things,"[4] pass on their knowledge and their culture, when another culture has put a price tag on their gardens and forced the gardeners indoors?

When creating natural resource settlements for indigenous peoples,[5] the needs of both the resources and the peoples must be taken into account. The resources cannot just be assigned a present monetary or quantitative value. Similarly, the peoples must be defined in a manner that both examines how they lived at the time of cultural impact and incorporates contemporary realities and desires. Past and present impacts on the resources and the peoples should not nullify the importance of cultural heritage and the preservation of a cultural future. Sustaining an indigenous culture often entwines with the sustainable management of a resource. A seafaring culture's bond with its fisheries resources is particularly invaluable.

Monetary or physical assets, as reparations, are complicated because of difficulties in deciding how and to whom to allocate them. Also, those assets are not sufficient.[6] Although both types of assets are important symbolically

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fishing ground, on the East Coast known as Kapuarangi was named after a prominent hill that served as one of the lining-in objects. This ground was located by observing four hills, two in one direction and two in another; when the two series were in line . . . this apex was the fishing ground.

Id. at 5.

[3] Interview with Sean Kerrins, Maori customary fisheries expert for the Treaty of Waitangi Fisheries Commission, Wellington, N.Z. (February 1995) (on file with author).

[4] *Id.*

[5] *Study of the Problem Against Indigenous Populations*, vol. 5, *Conclusions, Proposals and Recommendations*, U.N. Doc E/CN 4/Sub 2/1986/7 Add 4, ¶¶ 379 and 381 (1986). Special Rapporteur Martinez Cobo reported that his definition of "indigenous peoples" is:

> those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories . . . . They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

Id.

[6] Winona LaDuke, tribal member of Anishinaabeg, program director of the Honor the Earth Fund, founding director of the White Earth Land Recovery Project and the year 2000 vice presidential candidate of Ralph Nader in the Green Party, Address at the University of Hawai'i at Manoa (Mar. 12, 2001) (on file with author). "The only compensation for land is land, but

and to help sustain indigenous peoples into the future, in whatever manner each peoples may view that future for themselves, indigenous peoples also generally want to maintain their links to their past and to their culture.[7] One of the links should be the ability to be part of the management of the natural resources.[8] Although every place and group is different and each group should be allowed to negotiate how and for what they wish,[9] an international framework and/or forum for natural resource reparations is necessary.

This comment examines the various struggles of the Maori of New Zealand to reach commercial and customary fisheries rights settlements, using their experiences as a guide for other indigenous peoples. Part II summarizes Maori fishing and cultural history in New Zealand, from the Treaty of Waitangi through the present rush for deeds of settlement between Maori and the Crown. Both the commercial and customary aspects of the fisheries settlement are examined and explained. Part III analyzes the lessons learned from the Maori and general principles that can be extrapolated by other nations and peoples when negotiating and implementing their own natural resource settlements, while using the fora available to them. Part III also proposes a new international framework or court for indigenous peoples based on international principles, existing international laws, and examples of dispute settlement methods. Finally, Part IV examines the importance of recognizing indigenous people's links to the natural resources of their homelands, and the need to make restitutions that preserve the futures of both native resources and cultures by providing a link between the past and a successful future.

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you have to capitalize that. What is the value of the loss of life – of the hardship to these communities? We need the resources and the political resources to protect those resources, and we must have the political strength to keep those resources." *Id.*

[7] This is a common indigenous request. *Id.* "I come from a forest culture, and it's really hard to be a forest culture without a forest." *Id.*

[8] Benjamin A. Kahn, *The Legal Framework Surrounding Maori Claims to Water Resources in New Zealand: In Contrast to the American Indian Experience*, 35 STAN. J. INT'L L. 49, 51 (1999)(stating that "control over natural resources is vital to the continuing existence of communities that strive for independent political representation and economic sustainability"); *see also* Rio Declaration on Environment and Development U.N. A/CONF.151/26(Vol. I)(1992), Principle 22 (declaring that "Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development."). *Id.*

[9] *See* Jon M. Van Dyke et al., *Self-Determination for Nonself-governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawai'i*, 18 U. HAW. L. REV. 623, 632 (1996). "Indigenous peoples are found in many countries and have diverse cultures and historical situations, making it difficult and inappropriate to adopt a rigid or uniform approach to dealing with all such people." *Id.*

The Maori have taken charge of their past and their destiny. They have learned the New Zealand government's ("the Crown") methods and then fashioned those methods, and the Crown's legal and political language, for their own ends. For instance, in New Zealand, a special tribunal for treaty claims, the Waitangi Tribunal, has been established. The Maori treaty with the Crown and traditional resource management beliefs are incorporated in several national statutes and acts. Also, Maori are represented in Parliament, on commercial fishing industry boards, in customary fishery regulations, and at the bargaining table for a variety of reparations for their people. While some Maori have balked at the use of the Colonizer's voice, Maori have accomplished a great deal and are looked to as leaders in the field of fisheries settlement negotiation.[10]

For instance, to settle several Maori fishing rights claims based on the 1840 Treaty of Waitangi, the Maori treaty with Britain, the New Zealand government agreed in 1992 to spend NZ$150 million (US$81.5 million) to buy half of Sealord Products Limited, New Zealand's largest inshore fishing company,[11] for Maori and to incorporate Maori customary fishing rights into the national Fisheries Act.[12] Added to other Maori fishing quotas and interests, the 1992 Sealord Deal[13] made Maori owners of more than fifty percent of the New Zealand commercial fishing quota.[14]

Despite its seeming quantitative success, the Sealord Deal shows significant flaws upon close inspection of the words and evaluation of the subsequent impacts. This settlement potentially provided a manner for Maori to get re-involved and invested in a highly profitable commercial enterprise in which their roots had soaked, but from which problems could quickly sprout. For instance, if Sealord should fail commercially, Maori will not get the same

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[10] *See, e.g.*, Mark Valencia & David VanderZwaag, *Maritime Claims and Management Rights of Indigenous Peoples: Rising Tides in the Pacific and Northern Waters, in* 12 OCEAN AND SHORELINE MANAGEMENT 1, 125, 126 (1989).

[11] Sealord Products Limited is the largest company in the New Zealand fishing industry, owning twenty-seven percent of the country's available fishing quota. *See* Te Ohu Kai Moana Profile, http://www. tokm.co.nz/profiles_frmmain.htm (last updated Oct. 2, 2001). New Zealand's fishing industry harvests between NZ$1.1 and NZ$1.5 billion annually. *See* Information, Publications & Documents, http://www.fish.govt.nz/information/strategicplan.html (last visited Nov. 9, 2001).

[12] *See generally* Treaty of Waitangi (Fisheries Claim) Settlement Act, 1992 [hereinafter Fisheries Settlement].

[13] *See id.*

[14] FAO Fisheries Department, Fishery Country Profile – New Zealand, http://www.fao.org/waicent/faoinfo/fishery/FCP/FICP_NZL_E.ASP (last visited Nov. 21, 2001). "Following the comprehensive settlement of Maori fisheries claims against the Crown in 1992, and the passing of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992, Maori have become the biggest player in New Zealand's commercial fishing industry, controlling over half of all commercial fishing quota." *Id.*

money from the government to try again.[15] In fact, the Crown views this settlement as final, leaving Maori no opportunity to contest it in the future, even through the Waitangi Tribunal.[16] It is a one-time settlement involving significant risk. Equally, all customary treaty rights had to be codified into national regulations and legislation[17] – something that required negotiation between Maori and the Crown for something that Maori feel cannot be negotiated.[18]

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[15] *Her Majesty the Queen* and *Maori* Deed of Settlement (Sept. 23, 1992)[hereinafter Deed of Settlement], cl. 5.1.

> Maori agree that this Settlement Deed, and the settlement it evidences, shall satisfy all claims, current and future, in respect of, and shall discharge and extinguish, all commercial fishing rights and interests of Maori whether in respect of sea, coastal or inland fisheries (including any commercial aspect of traditional fishing rights and interests), whether arising by statute, common law (including customary law and aboriginal title), the Treaty of Waitangi, or otherwise, and whether or not such rights or interests have been the subject of recommendation or adjudication by the Courts or the Waitangi Tribunal.

Id.

[16] *See* Fisheries Settlement, *supra* note 12, at Part I, ¶ 9. "It is hereby declared that – . . . (c) All claims (current and future) in respect of, or directly or indirectly based on, rights and interest of Maori in commercial fishing are hereby fully and finally settled, satisfied, and discharged." *Id.*

[17] *See id.* Part I, ¶ 10.

> It is hereby declared that claims by Maori in respect of non-commercial fishing for species or classes of fish, aquatic life, or seaweed that are subject to the Fisheries Act 1983 – . . .
> (b) The Minister, acting in accordance with the principles of the Treaty of Waitangi, shall –
>
> (i) Consult with tangata whenua about; and
> (ii) Develop policies to help recognise – use and management practices of Maori in the exercise of non-commercial fishing rights; and
>
> (c) The Minister shall recommend to the Governor-General in Council the making of regulations pursuant to section 89 of the Fisheries Act 1983 to recognise and provide for customary food gathering by Maori and the special relationship between tangata whenua and those places which are of customary food gathering importance . . . , to the extent that such food gathering is neither commercial in any way nor for pecuniary gain or trade; but
> (d) The rights or interests of Maori in non-commercial fishing giving rise to such claims, whether such claims are founded on rights arising by or in common law (including customary law and aboriginal title), the Treaty of Waitangi, statute, or otherwise, shall henceforth have no legal effect, and accordingly –
>
> (i) Are not enforceable in civil proceedings; and
> (ii) Shall not provide a defence to any criminal,
>
> regulatory, or other proceeding, – except to the extent that such rights or interests are provided for in regulations made under section 89 of the Fisheries Act 1983.

Id.

[18] Interview with Dr. George Habib, principle advisor in the Ngai Tahu and Muriwhenua fisheries and land claims, Auckland, N.Z. (March 1995)(on file with author). "They are seeking to marry traditional claims into a permanent rights regime against a resource base that is quite variable, and hence will have a variable outcome." *Id.*

II. MAORI FISHING: FROM CANOES TO FACTORY TRAWLERS

The Polynesian demigod, Maui, fished Aotearoa[19] from the sea, and he and his waka[20] (canoes) populated the new land with a progeny of fishers.[21] Traditionally, when Maori fishing nets became ragged, some Maori would send an expert to the wild flax[22] fields, where he would pluck two blades of flax and look for ends that had already been nibbled by fish.[23] When the most tempting flax was found, the weaving was made tapu,[24] which forbade food, fire, and people not directly associated with the task from being allowed near the net.[25] Because many nets of Aotearoa's indigenous, pre-Colonial Maori were more than 1,000 yards long, the whole community would be somewhat involved, even if not allowed on the site.[26] And, in some traditions, when the net caught its first haul, the "first" fish would be returned to the sea in thanks and in hopes of that fish leading more to the net in the future. Of that catch, only one fish per person who had helped in the net's creation would be kept.[27] Through this ceremony, New Zealand's Maori thanked both the fish and everyone who had created the net and supported the community. Thus, Maori always knew the importance of respecting the resource as well as the people.

Maori today make up a steadily increasing minority of fifteen percent of New Zealand's population of 3.8 million.[28] New Zealand is small enough that

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[19] Aotearoa is the Maori name for New Zealand, meaning "land of the long white cloud." A.W. REED, AN ILLUSTRATED ENCYCLOPEDIA OF MAORI LIFE 13 (1963).

[20] A.W. REED, THE REED CONCISE MAORI DICTIONARY 91 (6th ed. 2001).

[21] MARGARET ORBELL, THE NATURAL WORLD OF THE MAORI 99 (1985).

[22] BEST, *supra* note 2, at 13. The scientific name for flax is *Phormium tenax*, or "harakeke" in Maori. *Id.*

[23] *Id.* at 14. Maori around the country had different traditions and methods for net building. *See generally id.* 10-33.

[24] REED, *supra* note 20, at 75. "[F]orbidden; inaccessible; not to be defiled; sacred; under restriction." *Id.* Often, the breaching of a tapu resulted in severe punishment, including death. *See* BEST, *supra* note 2, at 12-13. Certain important acts required the help of the gods, and those gods would only come to tapu areas and only deal with tapu people. *Id.*

[25] *Id.* This included any canoe paddling in front of the beach where the net was being made. *Id.*

[26] *Id.* at 10-33. "Captain Cook, in describing a Maori fishing-net wrote: 'It was five fathoms deep, and by the room it took up could not be less than three or four hundred fathom long.'" *Id.* at 10. A fathom equals six feet.

[27] *Id.* at 19.

[28] *See* Te Waka Hi Ika o Te Arawa v. Treaty of Waitangi Fisheries Comm'n, [1998] 1 N.Z.L.R. 285, 306. The 1996 census tallies 579,714 Maori. *Id.*; *see also* THE WORLD ALMANAC AND BOOK OF FACTS 2001, 827 (William A. McGeveran ed. 2001)(stating that the population of New Zealand was 3,819,762); *Million Maoris predicted*, THE PRESS (Christchurch), Jan. 14, 1998, at 10, *available at* LEXIS News Library, NZPA file (reporting that the proportion of Maori in New Zealand was projected to rise to twenty-one percent in

this indigenous group can be heard, and Maori are determined to be heard. Their problems are common among indigenous peoples elsewhere, but uncommon in that Maori are persistent and moderately successful in trying to solve them. Most Maori progress flows from the original Treaty of Waitangi, signed by Maori and the Crown on February 6, 1840.[29]

Maori claims of violations of the Treaty of Waitangi are heard both in federal courts and in the Waitangi Tribunal, created by the Treaty of Waitangi Act of 1975.[30] The Tribunal initially was charged with investigating Maori claims against government actions since 1975.[31] In 1985, the national

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2051, with almost a million Maori); "International Covenant on Civil and Political Rights Communication No. 547/1993: New Zealand" CCPR/C/70/D/547/1993 (Nov. 15, 2000), *available at*, http://www.unhchr.ch/tbs/doc.nsf/23a89bf90e6ccc125656300593189/ [hereinafter ICCPR Communication], ¶ 5.1 (stating that Maori have eighty-one iwi).

[29] *See* THE PATHS TO NATIONHOOD: GUIDE TO THE CONSTITUTION ROOM OF THE NATIONAL ARCHIVES 5, *available at*, the National Archives' Constitution Room, Wellington (on file with author). An assembly of about forty-five northern Maori chiefs signed the Treaty of Waitangi on February 6, 1840, after a full day of consultation. *Id.* Captain William Hobson, whose mandate as Lieutenant Governor of New Zealand depended upon successful negotiation with the Maori for their land's governance, drafted the Treaty and had it translated into Maori by missionary Henry Williams. *Id.* The translated treaty that the chiefs signed, and which traveled around Northland, was copied and taken to almost forty places on the North and South Islands for signatures of other chiefs. *Id.*

[30] The Treaty of Waitangi Act, 1975 (N.Z.). The Act states: "An Act to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendations on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty . . . ." *Id.*

On the recommendation of the Minister of Maori Affairs, the Governor-General appoints Waitangi Tribunal members for three-year, renewable terms, and the chair is the Chief Judge of the Maori Land Court. The Waitangi Tribunal Members, http://www.knowledge-basket.co.nz/waitangi/about wmembe.html (last visited Nov. 9, 2001). Usually there is an even split of Maori and Pakeha among the sixteen Tribunal members, which percentage is also usually followed in the selection of the three to seven members selected to hear specific claims. *Id.* The members generally work part time for the Tribunal, and are selected for their expertise in issues that will likely be brought before the Tribunal. Waitangi Tribunal. New Zealand, http://www.knowledge-basket.co.nz/waitangi/school/school.html (last visited Nov. 9, 2001).

[31] The Treaty of Waitangi Act, 1975 (N.Z.), § 6(1). The Tribunal has jurisdiction to hear claims

> [w]here any Maori claims that he or any group of Maoris of which he is a member is or is likely to be prejudicially affected ---
>
> (a) By any Act, regulations, or Order in Council, for the time being in force; or
>
> (b) By any policy of practice adopted by or on behalf of the Crown and for the time being in force or by any policy or practice proposed to be adopted by or on behalf of the Crown; or
>
> (c) By any act which, after the commencement of this Act, is done or omitted, or is proposed to be done or omitted, by or on behalf of the Crown . . . .

Id.

government allowed the Waitangi Tribunal to hear claims dating back to 1840.[32] The Tribunal reports its findings of prejudice against Maori and makes recommendations of compensation.[33] It has no enforcement capabilities, but by merely reporting its findings, it often influences all three branches of New Zealand government.[34]

The following sections describe and discuss fisheries claims arising from the Treaty. The first difficulty in analyzing the Treaty is determining the words' meanings and translations. The first section explains that because of differing interpretations, many Maori believe that the Treaty has never been honored by the Crown, and seek to remedy the subsequent injustices. The second section describes the legal and political history of fisheries issues that have led the way toward the first Pan-Maori settlement.[35] The final section in this Part is an analysis of the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992 and its impacts on Maori commercial and customary fishing.

A. Treaty Claims

The Tribunal agreed that Te Tiriti o Waitangi, the Maori name for the Maori version of the Treaty, differs from the English version.[36] The English language treaty cedes *sovereignty* to Britain, allowing the British the right of first refusal of lands that Maori wanted to sell.[37] It also guarantees full rights

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[32] Treaty of Waitangi Amendment Act, 1985 (N.Z.).

[33] Treaty of Waitangi Act, 1975 (N.Z.) at § 6(3). The Tribunal may "recommend to the Crown that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future." *Id.*

[34] *See* Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 71 (1999). Also, Treaty of Waitangi Act, 1975 (N.Z.), § 6(4) states: "A recommendation under subsection 3 of this section may be in general terms or may indicate in specific terms the action which, in the opinion of the Tribunal, the Crown should take." *Id.*

[35] *See* Annie Mikaere, *Settlement of Treaty Claims: Full and Final, or Fatally Flawed?*, 17 NEW ZEALAND U. L. REV. 425, 444 (1997).

[36] THE ROYAL COMMISSION ON SOCIAL POLICY, THE TREATY OF WAITANGI AND SOCIAL POLICY: DISCUSSION BOOKLET NO. 1, 4 (1988).

[37] The Treaty of Waitangi, Feb. 6, 1840, Eng. – Maori. (English text found in the Treaty of Waitangi Act, 1975) [hereinafter Treaty of Waitangi]:

> Article the First:
>
> The Chiefs of the Confederation of the United Tribes of New Zealand and the separate and independent Chiefs who have not become members of the Confederation cede to Her Majesty the Queen of England absolutely and without reservation all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess over their respective Territories as the sole sovereigns thereof.

Id.

> Article the Second:

of ownership of all lands and fisheries to the Maori, who became British subjects.[38] The Maori version, however, retained sovereignty for the Maori by using a different word for sovereignty. The Maori version gave the Crown "kawanatanga,"[39] or the right to make laws, and used the phrase "rino tino rangatiratanga,"[40] or the right to manage and control according to one's cultural traditions, for themselves. Therefore, Article II of the Maori version guaranteed sovereignty to the Maori signatories, not the Crown.[41]

The Waitangi Tribunal found that "rangatiratanga" means not just the right to own a resource, but the right to manage it per tribal customs.[42] Iwi (tribes)[43]

> [T]he Chiefs of the United Tribes and the Individual Chiefs yield to Her Majesty the exclusive right of Pre-emption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Id.

[38] The Treaty of Waitangi states:

> Article the Second:
>
> Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession . . . .

Id. Article the Third: "In consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects." *Id.*

[39] DIANE CRENGLE, TAKING INTO ACCOUNT THE PRINCIPLES OF THE TREATY OF WAITANGI: IDEAS FOR THE IMPLEMENTATION OF SECTION 8 RESOURCE MANAGEMENT ACT 1991 10 (1993). The Waitangi Tribunal found that "kawanatanga" means "the right to make laws for peace and good order and to protect Maori mana." *Id.*

[40] New Zealand courts and legal scholars concur that Maori exchanged sovereignty for the guarantee of rangatiratanga. *See generally* WAITANGI TRIBUNAL WAI-22, MURIWHENUA FISHING REPORT 182-190 (1988)(discussing analyses of the two treaties) [hereinafter MURIWHENUA FISHING REPORT].

[41] Te Tiriti o Waitangi, Feb. 6, 1840, Eng. – Maori. [Maori name for the Maori text of the Treaty of Waitangi] The Second [hereinafter Te Tiriti]: "The Queen of England agrees to protect the Chiefs, the Subtribes and all the people of New Zealand in the unqualified exercise of their chieftanship over their lands, villages and all their [whenua, kainga and taonga] treasures." From the Treaty of Waitangi Amendment Act, 1985, translated by Professor Sir Hugh Kawharu.

[42] CRENGLE, *supra* note 39, at 11; *see also* Treaty of Waitangi Act, 1975, Purpose of the Tribunal:

> [W]hereas the text of the Treaty in the English language differs from the text of the Treaty in the Maori language: And whereas it is desirable that a Tribunal be established to make recommendations on claims relating to the practical application of the principles of the Treaty and, for that purpose, to determine its meaning and effect and whether certain matters are inconsistent with those principles.

Id.

[43] REED, *supra* note 20, at 27.

have argued that point consistently. For example, in a large tribal settlement case, plaintiffs told the Waitangi Tribunal:

> . . . '[R]angatiratanga' and 'mana'[44] are inextricably related and . . . rangatiratanga denotes the mana not only to possess what one owns but, and we emphasise this, to manage and control it in accordance with the preferences of the owner. We thought that the Maori text would have conveyed to Maori people that, amongst other things, they were to be protected not only in the possession of the [taonga][45] but in the mana to control them in accordance with their own customs and having regard to their own cultural preferences.[46]

Indeed, resource values and management methods vary among different iwi, hapu (sub-tribes),[47] and whanau (extended families),[48] depending upon how they use the resource, and for what purpose they want to manage it.

In the Maori Tiriti, Maori were promised control over, *inter alia*, their taonga, or treasures.[49] Maori thought of their treasures as both tangible and non-tangible. While taonga has been roughly equated to "natural resources," that definition does not incorporate the full meaning of the term, which includes economic, spiritual, and cultural connections.[50] In essence, according to the Crown's version of the Treaty, Maori retained authority over their fisheries and other natural resources through the Treaty, but had lost their sovereignty – contradicting the Maori version and Maori definitions and understandings.[51]

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[44] Mana means "authority; influence; power; prestige." *See id.* at 41.

[45] Taonga means treasure, natural resources, tangible and non-tangible elements of the Maori world, including Te Reo Maori, the Maori language. NGAA TIKANGA TIAKI I TE TAIAO: MAORI ENVIRONMENTAL MANAGEMENT IN THE BAY OF PLENTY 25 (1993).

[46] *See generally*, WAITANGI TRIBUNAL WAI-27, NGAI TAHU 231 (1991).

[47] REED, *supra* note 20, at 20.

[48] *Id.* at 98.

[49] *Id.* at 74.

[50] MURIWHENUA FISHING REPORT, *supra* note 40, at 180.

> The Maori 'taonga' in terms of fisheries has a depth and breadth which goes beyond quantitative and material questions of catch volumes and cash incomes. It encompasses a deep sense of conservation and responsibility to the future which colours their thinking, attitude and behavior towards their fisheries.
>
> The fisheries taonga includes connections between the individual and tribe, and fish and fishing grounds in the sense not just of tenure, or 'belonging', but also of personal or tribal identity, blood and genealogy, and of spirit . . . . The fisheries taonga, like other taonga, is a manifestation of a complex physico-spiritual conception of life and life's forces. It contains economic benefits, but it is also a giver of personal identity, a symbol of social stability, and a source of emotional and spiritual strength.

Id.

[51] *Id.* at 164. "The Indian tribes [of the United States] are dealt with as domestic dependent nations, retaining a measure of sovereignty. In New Zealand the Maori tribes ceded sovereignty but retained the exclusive use of or full authority over their fisheries." *Id.* The Waitangi

Neither the New Zealand courts nor the Waitangi Tribunal have devised a firm set of principles explaining the Treaty or its meaning,[52] which could then be systematically applied to every circumstance. The courts have agreed that the spirit of the Treaty, not specific words in it, should be applied to questions and claims.[53] Such may be a tribute to an attempt to understand Maori values. For example, rangatiratanga cannot be understood without reference to individual Maori cultures.[54] Only those who hold mana whenua (customary rights and authority over land)[55] or mana moana (customary rights and authority over the sea)[56] over an area or resource can define and explain matters of rangatiratanga over those resources.[57]

Thus, only through consultation can tangata whenua (people of a given place; host people or tribe)[58] and a government agency find the true Treaty guarantees for each resource or area. Both Maori and Pakeha (Non-Maori, outsider, white colonialists)[59] representatives have declared this principle. For example, the Waitangi Tribunal, examining the Muriwhenua iwis' claim to wrest back control over their fishery resources, wrote, "it appears that the key to defining the principles of the Treaty is to be found in the idea of a partnership between Pakeha and Maori, and that cooperation is at the heart of the agreed relationship of the two partners."[60] And one Court of Appeals judge said, "The way ahead calls for careful research, for rational positive dialogue and, above all, for a generosity of spirit."[61]

Tribunal was referring to the United States Constitution, which says, "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution of Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

[52] *See, e.g.*, MURIWHENUA FISHING REPORT, *supra* note 40, at 193. (explaining that the Waitangi Tribunal found it, no more than the Court of Appeals, could not explain every principle of the Treaty in one claim, but would only try to focus on the principles applicable to the present claim).

[53] CRENGLE, *supra* note 39, at 9 (quoting WAITANGI TRIBUNAL WAI-9, OREKAI REPORT 149 (1987), which reads, "The essence of the Treaty transcends the sum total of its component written words and puts narrow or literal interpretation out of place," and quoting New Zealand Maori Council v. Attorney-General [1987] 1 N.Z.L.R. 641, 663, which reads, "The differences between the texts and shades of meaning do not matter for the purposes [of interpreting the principles of the Treaty]. What matters is the spirit").

[54] *Id.*

[55] *See generally* MASON DURIE, TE MANA, TE KAWANATANGA: THE POLITICS OF MAORI SELF-DETERMINATION, pp. 115-148 *infra* (1998).

[56] *Id.* at pp. 149-174 *infra*.

[57] CRENGLE, *supra* note 39, at 9.

[58] REED, *supra* note 20, at 74.

[59] REED, *supra* note 20, at 55.

[60] MURIWHENUA FISHING REPORT, *supra* note 40, at 190-191.

[61] CRENGLE, *supra* note 39, at 9 (citing a statement by Judge Richardson in N.Z. Maori Council v. Att'y Gen. [1987] 1 N.Z.L.R. 641, 673).

Many see the Treaty of Waitangi as the founding document for New Zealand,[62] and because the country does not have a constitution, that may be true.[63] The 1986 Constitution Act makes New Zealand official within its own shorelines, but unlike an overriding constitutional document, the same government branch that created this statute can easily alter it.[64] Also, of special concern to Maori, the 1986 Constitution Act has no "constitutional enforcement mechanism requiring adherence to treaties," so "there is no absolute guarantee that a treaty will be honored in New Zealand."[65] Increasingly, national statutes contain references to the Treaty, and Acts require recognition of Treaty principles, but that may not be enough.[66]

B. Maori Fisheries Claims

Many Maori would argue that the Treaty has never truly been honored in New Zealand. While Maori have taken to federal courts and the Waitangi Tribunal such diverse treaty claims as radio airwaves, language, sewage, and eels, most of these claims have been on a tribal basis.[67] Fisheries claims – inshore, offshore and freshwater – began with individual and tribal concerns, and graduated to the first Pan-Maori settlement.[68]

The vociferous contention can be traced to the 1960s, when government

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[62] Statutory Interpretation (20) Statutory Guides and Rules, Treaty of Waitangi (N.Z.). "Although the Treaty of Waitangi does not form part of New Zealand's domestic law as such, it has been described as 'part of the fabric of New Zealand society.'" *Id.*

[63] Kahn, *supra* note 8, at 95. The British Parliament passed the Constitution Act for New Zealand in 1852, which created a democratically elected Parliament, Provincial Councils, and a government separate from Britain's. *Id.* at 64. The 1852 Constitution Act also allowed Maori to govern themselves within native districts. *Id.* Quoting the Constitution Act:

> It may be expedient that the laws, customs, and usages of the aboriginal or native inhabitants of New Zealand, so far as they are not repugnant to the general principles of humanity, should for the present be maintained for the government of themselves, in all their relations to and dealing with each other, and that particular districts should be set apart within which such laws, customs, or usages should be so observed.

Id.

[64] *Id.* at 95.

[65] *Id.* This helps to explain a fear that this article's author heard expressed often by Maori: that if New Zealand becomes independent of Britain, the Treaty of Waitangi, which was signed with the Queen, will no longer be considered valid. Maori negotiators may be taking this into account when agreeing to make their treaty rights into statutory regulations, as seen in the case of the Fisheries Settlement.

[66] *See generally*, Statutory Interpretation (20) Statutory Guides and Rules, Treaty of Waitangi (N.Z.).

[67] *See generally* WAITANGI TRIBUNAL WAI-2, WAIAU PA POWER STATION (1978); WAITANGI TRIBUNAL WAI-11, TE REO MAORI (1986); WAITANGI TRIBUNAL WAI-17, MANGONUI SEWERAGE (1988).

[68] *See* Mikaere, *supra* note 35.

subsidies and loans to the fisheries industry, and the removal of rigid licensing restrictions caused a rapid expansion in the catching of fish.[69] Because the Maori economy was so depressed at the time,[70] few Maori had collateral for loans, and were further squeezed out of the industry.[71] New legislation in the early 1980s refused fishing licenses to those who did not earn at least eighty percent of their income from fishing.[72] This eliminated many Maori who often used fishing to supplement their income and their sustenance.[73] Fishers still in the business, however, depleted the inshore fishery with their subsidized

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[69] *See* RANGINUI WALKER, KA WHAWHAI TONU MATOU: STRUGGLE WITHOUT END 273 (1990); *see also* ICCPR Communication, *supra* note 28, at ¶ 5.3.

> The New Zealand fishing industry had seen a dramatic growth in the early 1960s with the expansion of an exclusive fisheries zone of nine, and later twelve miles. At that time, all New Zealanders, including Maori, could apply for and be granted a commercial fishing permit; the majority of commercial fishers were not Maori, and of those who were, the majority were part-time fishers.

Id.

[70] Jeffrey Sissons, *The Systematization of Tradition: Maori Culture as a Strategic Resource*, OCEANIA, Dec. 1993, at 97 (*available at* the Expanded Academic ASAP). Industrial expansion in New Zealand in the 1950s and 1960s attracted many Maori to cities with the promise of ready jobs in manual labor. *Id.* The proportion of Maori living in urban areas rose from 46 percent in 1961 to 70.2 percent in 1971. *Id.* As they continued to fill positions in mining, transportation, construction, and manufacturing, Maori also filled the unions. *Id.* They became union leaders, and the students became activists for the greater Maori cause. *Id.* They began to call attention to the ethnic inequalities in New Zealand. *Id.* Maori leaders pointed to their children's lower test scores, poorer Maori health, the higher rate of Maori incarceration and the emergence of Maori gangs as examples of the problem. *Id.*

[71] MIKE STEVENS, THE TREATY OF WAITANGI AND ECONOMIC DEVELOPMENT: MAORI COMMERCIAL FISHERIES 2 (1994).

[72] *Id.*; *see also* ICCPR Communication, *supra* note 28, at ¶ 5.3. "By the early 1980s, inshore fisheries were over-exploited and the Government placed a moratorium on the issue of new permits and removed part-time fishers from the industry. This measure had the unintended effect of removing many of the Maori fishers from the commercial industry." *Id.*

[73] WALKER, *supra* note 69, at 274.

> In practice, big companies got the lion's share of the quota. Smaller or individual part-time fishermen were phased out. The number of fishermen was virtually halved, as 1,500 to 1,800 were not given quota. In Northland, 300 of the 600 fishermen were phased out. This restructuring of the fishing industry resulted in the concentration of ITQs [Individual Transferable Quotas] in 18 companies that have 75 percent of the total allowable catch.

Id.; *see also* Interview with Margaret Mutu, member of Northland iwi and Professor of Maori Studies at the University of Auckland, Auckland, N.Z. (Feb. 4, 1995)(on file with author).

> In our tribe, we would not say we were poor as long as we can get fish. Very little land is left, with no services, but that little land is along the shore. You don't pay your rates, you don't get your services. Anywhere else in the world, you'd call it straight poverty. But Maori don't consider themselves poor if they have their own land, and can live on fish and gardens. But there is only poor land left, so we are only not poor as long as the area is not over-fished.

Id.

equipment, aided by the government's lax regulations.[74]

To bring fishing to a sustainable level, the New Zealand legislature enacted the Fisheries Amendment Act 1986[75] creating the Quota Management System ("QMS") for commercial fishing in New Zealand's exclusive economic zone ("EEZ"),[76] the 200-mile ribbon of ocean encircling the coastline of New Zealand. The Crown privatized the nation's fisheries by creating this QMS, which allocates individual fishing quotas out of a Total Allowable Catch ("TAC").[77] The Ministry of Fisheries subtracted recreational fishing and Maori customary, non-commercial fishing interests from the TAC to get the Total Allowable Commercial Catch ("TACC")[78] for one year for each fish species in each of the seven (now ten)[79] newly created management areas of New Zealand's EEZ.[80] Individual Transferable Quotas ("ITQs") were issued to qualifying fishers,[81] and those quotas could be sold or traded.[82] Maori were not consulted in this fisheries revolution.[83] Yet, they saw a taonga being

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[74] WALKER, *supra* note 69, at 273. "Snapper landings peaked to 18,000 tonnes in 1978, then declined to half that in 1983. This pattern was replicated with crayfish and other species." *Id.*

[75] Fisheries Amendment Act, 1996 (N.Z.), §§ 20 and 21, showing the 1986 amendment of the Fisheries Amendment Act 1983.

[76] New Zealand declared its Exclusive Economic Zone ("EEZ") in 1978, under the United Nations Convention of the Law of the Sea. Information, Publications & Documents, *supra* note 11. Its EEZ is about 1.3 million square miles, fifteen times the size of New Zealand's landmass, and the fourth largest in the world. *Id.*

[77] FAO Fisheries Department, Fishery Country Profile – New Zealand, *supra* note 14. Between 1978 and 1986, the catch from the domestic fishing fleet increased by 87% reaching 144,960 tonnes. Over the period this represents an annual increase of 9.7%. However, between 1986 and 1995, the catch from the domestic fleet increased by 157% reaching 372,536 tonnes – an annual increase of 17.4%. During this period total catches did not necessarily increase. The majority of the increased domestic catch resulted from the redistribution of catch from foreign licensed vessels to the growing New Zealand domestic fleet.

Id.

[78] Fisheries Amendment Act, *supra* note 75, at § 21.

[79] CLEMENT & ASSOCIATES LIMITED, NEW ZEALAND COMMERCIAL FISHERIES: THE ATLAS OF AREA CODES AND TACCS 1994/95, 3 (1993).

[80] WALKER, *supra* note 69, at 274.

[81] To qualify for Individual Transferable Quotas [hereinafter ITQs], one must be a national of New Zealand, have had a fishing permit for a full year, and keep records of the "eligible catch" to create a catch history of the particular species, on which the ITQ will be based. Fisheries Amendment Act, 1996, *supra* note 75, at Part IV (Quota Management System). "'[E]ligible catch' means the total weight of all the catch of the relevant stock lawfully taken and lawfully reported as landed or otherwise lawfully disposed of by a person eligible to receive provisional catch history . . . ." *Id.* at § 34(2).

[82] STEVENS, *supra* note 71, at 3.

[83] MURIWHENUA FISHING REPORT, *supra* note 40, at Appendix 1: The Muriwhenua Claim (245-254).

usurped by the national government.[84] Furthermore, Maori asserted that one of their treaty rights was being quantified, labeled, divided, and parceled out to the highest bidders, who, for the most part, were not Maori. As a result, they sought remedies in court and made a first attempt at a fisheries settlement.

1. Taking fisheries claims to the courts

Even before some Maori recognized the implications of the QMS for their fishing rights, others had seen the erosion of those rights begin and had started to fight back. The 1986 case of *Te Weehi v. Regional Fisheries Officer*[85] forced the New Zealand government to negotiate with Maori over their fishing rights.[86] A Maori fisher successfully used his Treaty and aboriginal rights as a defense in a prosecution for taking undersized paua,[87] which is a type of abalone, *Haliotis* species.[88] He invoked the Fisheries Act 1983, section 88(2), which stated that no part of the Act should be used to affect Maori fishing rights under the Treaty of Waitangi.[89] This decision alerted Maori that they had moral, political, and legal fishing rights, which could be used in the opposing party's court system.[90] In fact, the author of the *Te Weehi* opinion explicitly said that "[t]he customary right involved has not been expressly extinguished by statute and I have not discovered or been referred to any adverse legislation or procedure which plainly and clearly extinguishes it."[91]

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[84] *Id.*

[85] [1986] 1 N.Z.L.R. 680 (HC).

[86] *See generally* PAUL MCHUGH, THE MAORI MAGNA CARTA: NEW ZEALAND LAW AND THE TREATY OF WAITANGI 130-131 (1991).

[87] *Id.* Tom Te Weehi, a member of Ngati Porou, wanted to collect paua along Motunau Beach in North Canterbury. *Id.* To do so, he had to ask permission of the local Maori elder, which he did, and he received permission. *Id.* The Ministry of Fisheries subsequently arrested him for taking undersized paua and other seafood. *Id.*; *see also* MURIWHENUA FISHING REPORT, *supra* note 40, at 25. Maori resource management often differs from that of the Pakeha. "It was thought preferable to take the 'undersized' of some species and much more sensible to maintain the larger breeding stock." *Id.*

[88] REED, *supra* note 20, at 58.

[89] MCHUGH, *supra* note 86; *see also* Fisheries Act, 1983 (N.Z.), § 88(2)(stating, "Nothing in this Act shall affect any Maori fishing rights"). This has since been repealed by the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. *See* Fisheries Act 1996 (N.Z.), Part XVII, § 314 (entitled "Repeals of provisions of Fisheries Act 1983").

[90] P. G. McHugh, *Sealords and Sharks: The Maori Fisheries Agreement*, NEW ZEALAND L.J. 354, 355 (1992).

[91] Te Weehi v. Reg'l Fisheries Officer, [1986] 1 N.Z.L.R. 680, 692. This court-recognized immunity from regulation may have frightened the Crown because the Crown made sure to extinguish the customary right as soon as possible. *Id.*; *see also* Fisheries Settlement, *supra* note 12, at § 10(d)(i)(ii).

A barrage of cases followed *Te Weehi*, but the most prominent of them began in the Waitangi Tribunal. Matiu Rata, who is credited with establishing the Waitangi Tribunal while serving as Minister of Maori Affairs,[92] became the principal claimant for a consortium of Northland iwi named Muriwhenua.[93] Muriwhenua live in the far north of New Zealand, which neither has much arable land, nor much in the way of urban amenities like electricity or phones.[94] Most Muriwhenua lead a subsistence lifestyle, with most of their protein coming from the sea.[95] "A fishing ground could be of much greater value and importance to their existence than any equal portion of land."[96]

Muriwhenua brought the first major fisheries claim to the Tribunal in 1986,[97] and testimony was being heard at the same time that the Crown was initiating the implementation of QMS.[98] Although the Tribunal kept the then-Ministry of Agriculture and Fisheries[99] abreast of the claim, the ministry passed the Fisheries Amendment Act 1986[100] and began allocating

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(d) The rights or interests of Maori in non-commercial fishing giving rise to such claims, whether such claims are founded on rights arising by or in common law (including customary law and aboriginal title), the Treaty of Waitangi, statute, or otherwise, shall henceforth have no legal effect, and accordingly –

(i) Are not enforceable in civil proceedings; and

(ii) Shall not provide a defence to any criminal, regulatory, or other proceeding . . . .

Id.

[92] *Id.* at ix.

[93] MURIWHENUA FISHING REPORT, *supra* note 40, at 3. The Muriwhenua area includes five iwi: Ngati Kuri, Te Aupouri, Te Rarawa, Ngai Takoto and Ngati Kahu. *Id.* "As is usual amongst adjoining tribes, the five tribes of Muriwhenua are at once fiercely independent and inextricably interrelated." *Id.* at 4.

[94] Interview with Margaret Mutu, *supra* note 73. "Unemployment is an entrenched position by my tribe." *Id.*; *see also* MURIWHENUA FISHING REPORT, *supra* note 40, at xvii.

[95] MURIWHENUA FISHING REPORT, *supra* note 40, at 200.

[96] *Id.* "Fishing was important for all tribes, but the lack of comparable inland resources in Muriwhenua made the sea resource more important for them than for most others. Their dependence on the sea was greater. The sea resource was as important for their survival as the atmosphere they breathed." *Id.*

[97] *Id.* at xi. The northern tip of North Island is considered the tail of the fish that Maui pulled from the depths of the sea. *Id.* at x. The tail looks to the head, or southern tip of North Island, which holds Wellington, the government seat. *Id.*

Kia timata ra ano te hiku o te ika i te akiaki, i te upoko o te ika katahi ano ka tika te haere.

We knew then why the first major fishing claim had to come from the North; . . . when the tail of the fish moves, the rest of the fish is not lacking for direction.

Id.

[98] Te Ohu Kai Moana Profile, *supra* note 11.

[99] This ministry was split into Ministry of Fisheries and Ministry of Agriculture in 1995. *See* MAF History, http://www.maf. govt.nz/mafnet/profile/businesses/history.html (last visited Jan. 4, 2002).

[100] Fisheries Amendment Act, *supra* note 75, at §§ 20 and 21, showing the 1986 amendment of the Fisheries Amendment Act 1983.

quota.[101] Muriwhenua joined other iwi and brought its Waitangi Tribunal case before the High Court, seeking to enjoin the ministry from allocating the quota.[102] Muriwhenua alleged that the QMS breached their rights because it created a property right out of something that had been retained for Maori under the Treaty of Waitangi.[103]

Equally offensive to Maori, those property rights were sold to the very people whom Maori claimed were responsible for overfishing the resource because of the 1960s' subsidies – the Pakeha.

> These are people [Muriwhenua] who have always lived one foot on land, the other in the sea, but what is left to them of either is little enough indeed. And they complain. They object to what they see as their forced severance from the ocean life, the raiding of 'their' sea resources and now, the final blow, the 'sale' of what they claim as 'their' fisheries.[104]

The High Court, in 1987, granted an interim declaration against the ministry allocating any more fishing quota.[105] When the Tribunal issued its final, 370-page report in 1988, it followed the court's lead and chastised the Crown:

> The current inconvenience [the 1987 injunction] arises not from the Treaty's terms, but from the Crown's past failure to seek or provide for a reasonable settlement. Instead, Maori fishing rights were simply denied. The Crown cannot now profit from the inconvenience that arises from its own wrong.[106]

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[101] Te Ohu Kai Moana Profile, *supra* note 11.

[102] *See* Te Runaga o Muriwhenua Inc. v. Att'y Gen. [1990] 2 N.Z.L.R. 641, 644-46 (referring to the prior High Court case in which Muriwhenua and most other coastal Maori iwi sought an injunction of the QMS). When the Fisheries Amendment Act 1986 was passed, the Waitangi Tribunal had the Muriwhenua claim before it. *Id.* at 645. Although the Minister of Fisheries knew of the claim, he began allocating quotas. *Id.* The Tribunal sent the Ministry the preliminary finding that Muriwhenua had customary fishing rights to the sea surrounding their lands up to twelve miles out. *Id.* at 646. The Tribunal said that for the Minister to continue allocating quota would violate the Treaty of Waitangi. *Id.* The QMS injunctions then went before the High Court. *Id.*; *see also* TE OHU KAI MOANA PROFILE, *supra* note 11. Ngai Tahu, Tainui, and the New Zealand Maori Council joined Muriwhenua in taking the claim before the High Court that QMS violated national law and the Treaty. *Id.*

[103] MURIWHENUA FISHING REPORT, *supra* note 40, at xx. "The system, we find, is in fundamental conflict with the Treaty's principles and terms, apportioning to non-Maori the full, exclusive and undisturbed possession of the property in fishing that to Maori was guaranteed." *Id.*

[104] *Id.* at 16.

[105] *See Te Runaga o Muriwhenua*, 2 N.Z.L.R. at 642 (stating that on September 30, 1987, and November 2, 1987, High Court judges placed injunctions on the fisheries minister allocating any more quota).

[106] MURIWHENUA FISHING REPORT, *supra* note 40, at 211.

The Tribunal found that the QMS concept violated principles in both versions of the Treaty.[107] The Tribunal suggested, however, that because conservation was the purported purpose of the management system, that part of QMS did not violate the Treaty because conservation would be a benefit to both parties.[108] To remedy the wrongs to Muriwhenua, the Tribunal suggested that the Crown must negotiate with the claimants to find a settlement that protected both Maori customary and subsistence fishing, and restored them to a competitive spot in the commercial industry.[109]

Although the Court of Appeal later found that the Waitangi Tribunal's findings and recommendations were not binding on the Crown or the courts,[110] the Crown and Maori entered into settlement negotiations in 1987 based on the High Court's finding that the Tribunal's findings counted as *res judicata*.[111]

2. *First settlement attempt*

Part of the High Court's 1987 injunction against QMS included the establishment of a joint working group of Crown and Maori, four members from each side,[112] to report by June 1988 on how to answer Maori treaty fishing claims.[113] A national hui (meeting)[114] in Wellington mandated Maori fisheries negotiators to secure a just and honorable settlement with the Crown.[115] The negotiators had been told by their kaumatua (elders)[116] to settle for fifty percent or more of the fisheries because although the Treaty already guaranteed them 100 percent of the fisheries, in the spirit of fairness, they were to share the resource.[117] By June, an agreement had not been reached, and the Tribunal's Muriwhenua Fishing Report had been published, showing

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[107] *Id.* at 228.

[108] *Id.*

[109] *Id.* at 229.

> The Fishing Industry Board Act 1963 provides for the expenditure of large sums of public monies on the promotion of a fishing industry. It is inconsistent with the Treaty that large sums are not expended on the protection of the Maori fishing interest, or now, on the restoration of Maori to a proper place within the fishing industry.

Id.

[110] *See* Te Runaga o Muriwhenua Inc. v. Att'y Gen. [1990] 2 N.Z.L.R. 641, at 651.

[111] *See id.* at 654.

[112] *See* Te Waka Hi Ika of Te Arawa v. Treaty of Waitangi Fisheries Comm'n, [1998] 1 N.Z.L.R. 285, 312. The four Maori negotiators were Graham Latimer, Tipene O'Regan, Matiu Rata and Robert Te Kotahi Mahuta. *Id.*

[113] *Te Runaga o Muriwhenua*, 2 N.Z.L.R. at 647.

[114] *See* REED, *supra* note 20, at 24.

[115] DURIE, *supra* note 55, at 154.

[116] *See* REED, *supra* note 20, at 32.

[117] DURIE, *supra* note 55, at 154.

evidence of Maori customary commercial fishing and of fishing "offshore,"[118] which means fishing on New Zealand's continental shelf at depths of more than 200 meters.[119]

Unable to reach the mandated fifty percent on the first attempt,[120] the subsequent 1989 Maori Fisheries Act provided an interim settlement by creating the Maori Fisheries Commission ("MFC") to manage ten percent of the TACC for all species in the QMS and monetary compensation of NZ$10 million.[121] The Act expected half of the transferred quota to be available for lease by Maori fishers.[122] The other half would go to Aotearoa Fisheries, Ltd. for the transition period of four years.[123] Meanwhile, the injunctions remained in effect, as did section 88(2), as invoked by *Te Weehi*.[124] In 1990, the negotiators agreed to suspend pending court proceedings about fisheries claims while the QMS injunction continued, and agreed that negotiations toward a final settlement would move forward in good faith.[125]

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[118] MURIWHENUA FISHING REPORT, *supra* note 40, at 235-236.

[119] *Id.* at 111.

[120] Te Ohu Kai Moana Profile, *supra* note 11. The first attempt created the Maori Fisheries Bill, which proposed a transfer of fifty percent of inshore ITQ to Maori to be completed over twenty years. *Id.* The Crown set certain parameters on the grant of quota, however, and Maori wanted no strings attached. *Id.* The bill was defeated. *Id.*

[121] Maori Fisheries Act, 1989 (N.Z.); *see also*, ICCPR Communication, *supra* note 28, at ¶ 5.4 (stating that the Act also provided for customary fishing rights in that Maori could apply to manage certain areas of customary importance to their iwi or hapu); *see also*, Te Ohu Kai Moana Profile, *supra* note 11. Maori opposed this bill as well, and looked to the High Court for a definition of the "nature and extent" of Maori fishing rights, using the Tribunal's decisions in the Muriwhenua and Ngai Tahu claims as evidence. *Id.* Although hearings were to begin in 1991, both parties decided to first see how the Fisheries Act worked. *Id.*

[122] Maori Fisheries Act, 1989 (N.Z.).

[123] *See, e.g.*, Te Runaga o Muriwhenua Inc. v. Att'y Gen. [1990] 2 N.Z.L.R. 641, 649 (stating that Aotearoa Fisheries is an independent commercial company wholly owned by the MFC, which is now named the Treaty of Waitangi Fisheries Commission). *Id.*

[124] Michael Robinson, *The Sealord Fishing Settlement: An International Perspective*, 7 AUCKLAND U. L. REV. 557, 558 (1993).

[125] Fisheries Settlement, *supra* note 12, at Preamble (g).

> On the 27th day of February 1990, the Crown and Maori agreed that there should be discussions between them to ensure that the evolution of the quota management system, including the term of quota, met both conservation requirements and the principles of the Treaty of Waitangi and further agreed that all substantive court proceedings should stand adjourned *sine die* to allow discussions to continue, and the Crown agreed that no further species would be brought within the quota management system pending agreement or court resolution . . . ."

Id.

C. Treaty of Waitangi (Fisheries Claims) Settlement Act, 1992

When Sealord Products, the largest New Zealand fishing company,[126] went on the market, the Crown and some Maori saw an opportunity.[127] The Maori Fisheries Commission would gain a half share of Sealord, which owned twenty-seven percent of New Zealand's total quota, sharing ownership of the company with Brierley Investments Limited.[128] Added to the Commission's ten percent from the earlier negotiations, Maori then would have twenty-three percent of New Zealand's entire quota.

An August 27, 1992 Memorandum of Understanding between the Crown and Crown-selected Maori fisheries negotiators outlined the government's proposal for the fishery settlement[129] and was discussed at several hui around

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[126] *See supra* note 11.

[127] Doug Kidd, then Minister of Fisheries, Speech Introducing the Treaty of Waitangi (Fisheries Claims) Settlement Bill (Dec. 3, 1992) [hereinafter Minister of Fisheries Speech] (on file with author); *see also* ICCPR Communication, *supra* note 28, at ¶ 5.5. In February 1992, it became obvious that Sealord would probably be up for sale some time soon. *Id.* The Maori Fisheries Negotiators and the MFC, which included most of the same men, told the Crown that if the Crown provided funding for the purchase of Sealord for Maori, it would count as part of a fisheries settlement. *Id.* The Crown refused at first, but after the Waitangi Tribunal's August 1992 Ngai Tahu report on sea fishing, in which the Tribunal found that Ngai Tahu [the largest iwi from the South Island of New Zealand and the iwi of one of the major negotiators, Tipene O'Regan] had a customary commercial right to deep water fisheries and to inshore fisheries, the Crown decided to negotiate. *Id.*

[128] Te Ohu Kai Moana Profile, *supra* note 11.

[129] Fisheries Settlement, *supra* note 12, at Preamble (i).

> On the 26th and 27th days of August 1992, representatives of the Crown and Maori met to discuss their differences with a view to settling outstanding claims and Treaty grievances of Maori in relation to fisheries, and, therefore, the outstanding litigation; and, on the 27th day of August 1992, agreement was reached on a proposal for settlement . . . .

Id.; *see also* Memorandum of Understanding, Aug. 27, 1992. This memorandum lays out the responsibilities of both the Maori negotiators and the Crown that must be fulfilled before a legal agreement could be made. *Id.* at §§ 5 and 6. The Maori negotiators agreed, *inter alia*, to gain mandates allowing them to sign for all Maori (something that was not done, and remains a matter of contention for many Maori), to endorse the QMS, to obtain notices of dismissal from all Maori litigants with commercial fisheries claims, to agree that settlement of fisheries claims would be the first check written from what was later to be called the Fiscal Envelope (a set amount from which the Crown could withdraw to settle any and all Maori Treaty of Waitangi claims), and to agree that Maori could request the Crown to create policies and regulations recognizing "traditional use and management practices." *Id.* at § 5. The Crown agreed to provide NZ$150 million to purchase half of Sealord, to allocate twenty percent of all new quota for species added to the TAC to Maori, and to mandate that Maori participate in all "relevant statutory fishing management and enhancement policy benefits." *Id.* at § 6 (available as an appendix to Te Runanga o Wharekauri Rekohu Inc. v. Att'y Gen. [1993] 2 N.Z.L.R. 301).

the country.[130] Most of that memorandum was incorporated in the final Deed of Settlement ("the Deed"), which was signed on September 23, 1992, by six Maori negotiators,[131] as well as Minister of Justice Douglas Graham, Prime Minister James Bolger, and Minister of Fisheries Douglas Kidd.[132] According to the Deed, if at any time the rest of Sealord was to be sold, Maori would have the right of first refusal for the remaining shares.[133] The Deed also provided for twenty percent of any TAC quota added for new fish species to be immediately given to Maori,[134] and for Maori to be represented on all "Fishery Statutory Bodies so as to reflect the special relationship between the Crown and Maori."[135]

On September 29, 1992, less than a week after the Deed was signed, several Maori groups sued in *Te Runanga o Wharekauri Rekohu Inc. v. Attorney General* for an injunction to prevent the settlement.[136] After a negative judgment on October 12, 1992, Maori appealed to the New Zealand Court of Appeals, which heard their case from October 19 through 21, 1992.[137] "The speed with which this highly complicated litigation has been dealt with in both Courts probably needs no underlining. It reflects the national importance of the case and the urgency of a decision on the proposal embodied in the deed, the Sealord proposal."[138]

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[130] Te Runanga o Wharekauri Rekohu Inc. v. Att'y Gen. [1993] 2 N.Z.L.R. 301 (stating that the negotiators reported that fifty iwi and just over half the Maori population supported the settlement, so the Crown executed the Deed of Settlement based on that seeming ratification by Maori); *see also* ICCPR Communication, *supra* note 28, at ¶ 5.7.

[131] *See Te Runanga* [1993] 2 N.Z.L.R. 301 at Judgment para. 2. The negotiators were the Hon. Matiu Rata – leader of the runanga (council) of Muriwhenua who led the Muriwhenua Fisheries Claim and founder of the Waitangi Tribunal; Sir Graham Latimer – President of the Maori Council and one of the negotiators of the original fisheries claim; Robert Te Kotahi Mahuta; Sir Tipene O'Regan – Chairperson of the Ngai Tahu Trust Board; Whatarangi Winiata; and Richard Dargaville. *Id.*

[132] *Te Runanga* [1993] 2 N.Z.L.R. 301 (stating that the Deed had 110 signatories all together). Many Maori believe that those who signed did not have the authority to sign for their iwi, and they note that those iwi with major commercial fishing resources did not sign the Deed. *Id.* at Judgment para. 18; *see also* ICCPR Communication, *supra* note 28, at ¶ 5.9.

[133] Deed of Settlement, § 2.1.3.6.

> BIL [Brierley Investments Limited] has granted to Maori a valid enforceable first option (either expressed as an option to purchase or as a right of first refusal or both) to purchase or otherwise acquire from BIL its interest under the Maori/BIL Joint Venture agreement in Sealord or in the quota held under the QMS held by Sealord and/or on behalf of the Maori/BIL Joint Venture.

Id.

[134] *Id.* at § 3.2.

[135] *Id.* at § 3.3.

[136] [1993] 2 N.Z.L.R. 301 at Judgment para. 3.

[137] *Id.*

[138] *Id.*

Besides the commercial aspects, the Deed also made references to customary fishing rights. The court in *Te Runanga* noted that these references were confusing: "[The Deed] has apparently conflicting provisions about customary or traditional food gathering, some speaking of regulations to recognise and provide for this, others seeming to say that there will no longer be any legislative or regulatory recognition."[139] The court considers that these discrepancies may have been because several people wrote the document, but it also suggests that the Deed may have been purposefully obscure.[140]

The appellants were concerned that the Deed provided an investment interest but not a method of getting Maori back into fishing.[141] Several Maori objected to the fact that the Crown paid the Maori negotiators,[142] creating at

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[139] *Id.* at Judgment para. 13. The contradictory clauses of the Deed include clauses 3.5.1.1, 3.5.1.2, 3.6, and 5.2. *See* The Deed of Settlement and cl. 3.5.1, where the Crown agrees that it will introduce legislation:

> 3.5.1.1
>
> empowering the making of regulations recognising and providing for customary food gathering and the special relationship between the tangata whenua and those places which are of customary food gathering importance (including tauranga ika and mahinga mataitai) to the extent that such food gathering is not commercial in any way nor involves pecuniary gain or trade;
>
> 3.5.1.2
>
> Any further legislative provisions necessary to give effect to clauses 5.1 and 5.2 . . . .

Id. Clause 3.6 further explains that the Crown "will, after consultation with Maori, promulgate as soon as practicable regulations pursuant to" the above required legislation. *Id.* at cl. 3.6. Then, further in the Deed, one finds the contradictory provision that:

> The Crown and Maori agree that in respect of all fishing rights and interests of Maori other than commercial fishing rights and interests their status changes so that they no longer give rise to rights in Maori or obligations on the Crown having legal effect (as would make them enforceable in civil proceedings or afford defences in criminal, regulatory or other proceedings). Nor will they have legislative recognition. Such rights and interests are not extinguished by this Settlement Deed and the settlement it evidences. They continue to be subject to the principles of the Treaty of Waitangi and where appropriate give rise to Treaty obligations on the Crown. Such matters may also be the subject of request by Maori to the Government or initiatives by Government in consultation with Maori to develop policies to help recognise use and management practices of Maori in the exercise of their traditional rights.

Id. at cl. 5.2.

[140] *Te Runanga o Wharekauri Rekohu Inc. v. Att'y Gen.* [1993] 2 N.Z.L.R. 301 at Judgment para. 13.

[141] *Id.*

[142] Treaty of Waitangi (Fisheries Claims) Settlement Act, 1992 (N.Z.), Part I, ¶ 2 (listing the eight Maori Fisheries Negotiators: Sir Graham Latimer, Robert Mahuta, the Honourable Matiu Rata, Richard Dargaville, Tipene O'Regan, Cletus Maanu Paul, David Higgins, and Whatarangi Winiata).

least a perception of impropriety.[143] They also did not think that the negotiators were in a position to sign for all Maori,[144] particularly not something so major as to extinguish all further commercial fishing rights and claims of Maori.[145] The latter belief refers to a section of the Deed of Settlement entitled "Permanent Settlement of Commercial Fishing Rights and Interests."[146]

The Deed also included a clause entitled the "Treaty of Waitangi Settlement Fund," which was a direct copy of the same terms found in the Memorandum of Understanding.[147] In this clause, the Crown explained that the settlement, worth approximately NZ$150 million, would be the first payment from a settlement account that the Crown planned to create.[148] The account would

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[143] Fisheries Settlement, *supra* note 12, at Schedule 1A: Resolutions Adopted at Hui-a-Tau on 25 July 1992. Paragraph seven, entitled "Maori Fishery Negotiators (MFN) Budget," states, "this hui supports the continued funding of the MFN up to $350,000 for the next year on terms to be agreed by the MFC/MFN." *Id.* Besides the large sum of money, a concern was that the terms were to be negotiated by the MFC and the MFN, groups that shared principal members such as Sir Tipene O'Regan of Ngai Tahu, Robert Mahuta of Tainui and Sir Graham Latimer of the New Zealand Maori Council. Sir Robert Mahuta, *The Future of the Fish*, THE PRESS (Christchurch), Sept. 29, 1999.

[144] *See, e.g.*, Interview with Annette Sykes, Maori attorney and activist, Rotorua, N.Z. (February 1995)(on file with author).

> Maori make up about 512,000 people, 75 percent of whom are under 25. How many of these young people knew their future rights were being signed away by a few men? This cast a die for the types of discussions between Maori and the Crown as to who is contacted and the general rights of Maori given to bureaucrats riding both sides of the fence.

Id.

[145] *Te Runanga* [1993] 2 N.Z.L.R. 301 at Judgment para. 17.

[146] Deed of Settlement, cl. 5.1:

> Maori agree that this Settlement Deed, and the settlement it evidences, shall satisfy all claims, current and future, in respect of, and shall discharge and extinguish, all commercial fishing rights and interests of Maori whether in respect of sea, coastal or inland fisheries (including any commercial aspect of traditional fishing rights and interests), whether arising by statute, common law (including customary law and aboriginal title), the Treaty of Waitangi, or otherwise, and whether or not such rights or interests have been the subject of recommendation or adjudication by the Courts or the Waitangi Tribunal.

Id.

[147] *Id.* at cl. 4.6.

[148] *Compare id.* at cl. 4.6 (stating, "Maori recognise that the Crown has fiscal constraints and that this settlement will necessarily restrict the Crown's ability to meet from any fund which the Crown establishes as part of the Crown's overall settlement framework, the settlement of other claims arising from the Treaty of Waitangi.") *with* Memorandum of Understanding, ¶ 5(f) (stating, "[A]greeing that this settlement of fishing claims is a first call against any fund which the Government establishes as part of the Government's overall settlement framework for all Maori claims arising from the Treaty, which framework Maori acknowledge has fiscal limitations.").

thus limit the amount of all future settlements, of any sort. Maori began to call this the "Fiscal Envelope," and could not believe that their negotiators had signed such an agreement, especially when it was later made clear that the envelope only held NZ$1 billion.[149]

On November 3, 1992, the Court of Appeals found the Sealord purchase to be a requisite product of the Crown's fiduciary duty to Maori.[150] The court looked to its own precedent and to recent decisions in Canada and Australia as representations of Commonwealth nations' case law stating the fiduciary duty of a federal government to a nation's indigenous peoples.[151] The court explained that the Treaty of Waitangi created this fiduciary duty and that New Zealand's case law in the area is "part of widespread international recognition that the rights of indigenous peoples are entitled to some effective protection and advancement."[152] Thus, the court found buying shares of Sealord for Maori interests was consistent with the fiduciary duty, calling the opportunity "a tide which had to be taken at a flood."[153]

The court also looked to the principle of non-interference of the courts in Parliamentary proceedings.[154] The court found that the Deed did not bind non-signatories, and that, even though the Deed used legal terms, it really

> is a compact of a political kind, its subject-matter so linked with contemplated Parliamentary activity as to be inappropriate for contractual rights. At best the provisions for payments might be contractually enforceable, yet they are so associated with the rest of the deed that even that is doubtful.[155]

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[149] OFFICE OF TREATY SETTLEMENTS, CROWN PROPOSALS FOR THE SETTLEMENT OF TREATY OF WAITANGI CLAIMS SUMMARY 24 (1994).

[150] Te Runanga o Wharekauri Rekohu Inc. v. Att'y Gen. [1993] 2 N.Z.L.R. 301 at Judgment para. 14.

[151] *Id.* at Judgment paras. 7 and 14. In the lands case, New Zealand Maori Council v. Att'y Gen. [1987] 1 NZLR 641, the court of appeals found that nothing in the State-Owned Enterprises Act, 1986 (N.Z.) could allow the Crown to act inconsistently with the Treaty of Waitangi. *Id.* at Judgment para. 7. The court related the relationship between the Crown and Maori "to a partnership, each party accepting a positive duty to act in good faith, fairly, reasonably and honorably towards the other." *Id.*; *see also id.* at Judgment para. 14 (citing Mabo v. Queensland [No. 2] (1992) 107 ALR 1, 85-86 and R. v. Sparrow, [1990] 70 D.L.R. (4th) 385, 406-09). "The sui generis nature of Indian title, and the historic powers and responsibility assumed by the Crown constituted the source of such a fiduciary obligation." *Id.* (citing R. v. Sparrow, [1990] 70 D.L.R. (4th) 385).

[152] *Id.* at Judgment para. 15.

[153] *Id.* at Judgment para. 16. "A failure to take it might well have been inconsistent with the constructive performance of the duty of a party in a position akin to partnership." *Id.*

[154] *Id.* at Judgment para. 21.

[155] *Id.* at Judgment para. 25.

The court did not want to bind Parliament or the court's successors,[156] stating, "[a]ll that can be said now is that a responsible and major step forward has been taken."[157]

The next day, on November 4, 1992, the Waitangi Tribunal released its report on the Deed of Settlement.[158] Although criticizing the repeal of statutory recognition of Maori fishing rights and the proposed extinguishments of commercial fishing Treaty rights, the Tribunal found that the Deed should proceed because the Maori negotiators had acted reasonably.[159] But, it should only proceed if the above critical elements were removed.[160]

Parliament passed the Treaty of Waitangi (Fisheries Claims) Settlement Act ("Fisheries Settlement") in December 1992,[161] retaining the repeal of statutory recognition of Maori fishing rights, but without the explicit extinguishment of Treaty rights. Even so, the Act limits the Waitangi Tribunal's powers of inquiry into commercial fisheries claims, and states that all current and future claims about commercial fishing have thus been settled.[162]

While the Deed did not bind all Maori, the Act did, according to then-Minister of Fisheries Douglas Kidd.

> We should confirm that the deed was not entered into by all Maori, nor does it bind all Maori but this Bill will do that. It will do so because the Crown in

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[156] *Id.* at Judgment paras. 27-28.

[157] *Id.* at Judgment para. 28.

[158] *See*, WAITANGI TRIBUNAL WAI-307, FISHERIES SETTLEMENT REPORT (SEALORDS) 25 (1992).

[159] *Id.* at 21-22.

[160] *Id.* at 22-24.

> The Crown is obliged to actively protect the Maori fishing interest. This is not an obligation that can be extinguished, or got rid of at any one point in time. The most that can be said is that the Crown has acquitted itself well of its current obligation in the present circumstance.

Id. at 22.

[161] ICCPR Communication, *supra* note 28, at ¶ 5.12. The bill for the act was introduced on December 3, 1992. *Id.* "Because of the time constraints involved in securing the Sealords bid, the Bill was not referred to the competent Select Committee for hearing, but immediately presented and discussed in Parliament. The Bill became law on 14 December 1992." *Id.*

[162] Fisheries Settlement, *supra* note 12, at Part I, § 9 (b),

> The obligations of the Crown to Maori in respect of commercial fishing are hereby fulfilled, satisfied, and discharged; and no court or tribunal shall have jurisdiction to inquire into the validity of such claims, the existence of rights and interests of Maori in commercial fishing, or the quantification thereof, the validity of the Deed of Settlement referred to in the Preamble to this Act, or the adequacy of the benefits to Maori . . . .

Id.; *see also* § 9 (c), "All claims (current and future) in respect of, or directly or indirectly based on, rights and interest of Maori in commercial fishing are hereby fully and finally settled, satisfied, and discharged." *Id.*

> exercise of kawanatanga, or governance, and fulfillment of its treaty obligations to all Maori, must in the end act in the public interest as it sees that to be.[163]

Maori and Brierley Investments bought Sealord in a joint venture on January 6, 1993,[164] and the Crown explained away the expense by saying that this would allow New Zealand to get back into the fisheries market because it would end the injunction against adding more species to the QMS.[165] At this point, the Crown created the Treaty of Waitangi Fisheries Commission as the decision-making body to address the allocation of the quota.

1. Treaty of Waitangi Fisheries Commission and commercial fishing rights

The Fisheries Settlement Act replaced the MFC with the Treaty of Waitangi Fisheries Commission, which Maori call Te Ohu Kai Moana ("TOKM").[166] The Crown charged the new commission with, *inter alia*, allocating the quota and assets from the Deed of Settlement[167] and the pre-settlement assets transferred to Maori under the 1989 Maori Fisheries Act.[168] The Act required

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[163] Minister of Fisheries Speech, *supra* note 127.

[164] Post Settlement Assets (POSA), http://www.tokm.co.nz/ allocation/alloc_mainframe.htm (last updated Oct. 26, 2001). The official joint owners were called Te Ika Paewai Ltd., which included Brierley Investments Ltd. and the current Treaty of Waitangi Fisheries Commission subsidiary Te Waka Unua. *Id.*

[165] Minister of Fisheries Speech, *supra* note 127:

> If the Government wanted to move further to develop our vital fishing industry it had to get the matter out of the courts, and to do that it had to resolve the Maori fishing claims. The way will now be clear to introduce sustainable management across all our fisheries, which will assure the future of those fisheries and result in export earnings that will, over time, far outweigh the cost of settlement of these claims. The deal is therefore good for all New Zealanders.

Id.

[166] Fisheries Settlement, *supra* note 12, at Part II, § 14.

[167] *Id.* at Part II, § 15. "The development of a procedure for identifying the beneficiaries and their interests under the Deed of Settlement, in accordance with the Treaty of Waitangi, and a procedure for allocating to them, in accordance with the principles of the Treaty, the benefits from the Deed of Settlement." *Id.*

[168] *Id.* at Part II, § 17 (stating, "the scheme providing for the distribution of the assets held by the Commission before the Settlement Date defined in the Deed of Settlement and being the assets referred to in clause 4.5.2 of that deed."); *see also* Deed of Settlement, cl. 4.5.2:

> The Treaty of Waitangi Fisheries Commission is to consider how best to give effect to the resolutions taken at the annual general meeting of the Maori Fisheries Commission in July 1992 and will be empowered to allocate assets held by the Maori Fisheries Commission at the day before the Settlement Date.

Id.

that an allocation proposal for the pre-settlement assets be brought before the Crown within ninety days of the passing of the Act.[169]

After the Act was passed, the newly formed TOKM tried to follow the Maori tradition of open discussion to build consensus.[170] It immediately began holding meetings at each iwi's and hapu's marae (meeting houses)[171] across the country, taking oral and written testimony for many years beyond its mandated ninety days.[172] Under pressure from the Crown and Maori, the TOKM has developed several allocation plans, all of which have angered some group: inland and coastal iwi, populous and small iwi, urban and rural Maori, and Pakeha.[173]

After eleven years, the value of the quota has grown from approximately NZ$200 million to NZ$800 million under management by the TOKM,[174] but Maori have seen little of that money or quota. The allocation process for the pre-settlement has yet to be finalized and remains contentious, with the quota from the Settlement Act being leased at a discount to Maori until an allocation method is determined.[175] Thus, for eleven years, in different forms, the Commission has been managing quota and assets for Maori, and debating how to get the benefit to the proper beneficiaries.

The last allocation model, created after five years of negotiations, would have divided the inshore fish stocks among coastal iwi, based on the length of their coastlines.[176] The deepwater stocks would be split evenly between iwis' percentage of coastline and percentage of population.[177] Upon submission of the plan to iwi in 1998, Te Arawa (a landlocked iwi on the North Island) sued, claiming that the allocation favored coastal iwi, particularly powerful Ngai

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[169] Fisheries Settlement, *supra* note 12, at Part II, § 15, "Within 90 days after the commencement of this paragraph, to propose for consideration by Maori provisions and a process for the Commission's accountability to Maori," and "to report to the Minister on the matters referred to in this paragraph." *Id.*

[170] *Allocation Model Likely to Be 'Composite,'* TE REO O TE TINI A TANGAROA (Treaty of Waitangi Fisheries Commission), Dec. 1994, at 3.

[171] REED, *supra* note 20, at 42.

[172] *Allocation Model Likely to Be 'Composite,' supra* note 170.

[173] Tipene O'Regan, *Chairman's Report*, HUI-A-TAU, July 30, 1994, at 5-7.

[174] *New Fisheries Commission Chief*, WAIKATO TIMES (HAMILTON), Aug. 30, 2000 (estimating the fisheries assets to be worth NZ$846 million).

[175] *See* TREATY OF WAITANGI FISHERIES COMMISSION/TE OHU KAI MOANA, ANNUAL REPORT (1994) (stating that the TOKM leases quota to Maori on a yearly basis at an average forty percent discount, and provides scholarships for Maori who want to learn the business of the fishing industry).

[176] Angela Gregory, *Fisheries Mess Calls for Miracle Worker*, THE NEW ZEALAND HERALD (Auckland), Sept. 4, 2000, *available at* http://www.nzherald.co.nz/storydisplay.cfm?thesection=news&thesubsection=&storyID=150066&reportID=51006.

[177] *Id.*

Tahu of the South Island.[178] The same plan established that Maori with no tribal ties, including mainly urban Maori, would have a percentage of a NZ$10 million development fund.[179] Urban Maori also sued, arguing that the mandate of the Fisheries Settlement Act to allocate assets to iwi included them, even though they no longer identified with traditional iwi.[180]

In a resulting case, *Te Waka Hi Ika o Te Arawa v. Treaty of Waitangi Fisheries Comm'n* ("*Te Waka*"), the High Court investigated whether "iwi" included only traditional tribes.[181] The Urban Maori Authorities ("UMAs") contended that Maori society had changed dramatically since 1840[182] and that the traditional iwi system could no longer properly distribute the settlement's benefits to all those who deserved them.[183] Even if urban Maori knew to which iwi they belonged and they associated with that iwi, the iwi would find it difficult to distribute the benefits to all its distant members.[184] Also, because the Treaty of Waitangi included all Maori,[185] UMAs argued that allocation to Maori should go to individual Maori, whether or not they officially associated with a traditional Maori iwi.[186]

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[178] *Te Arawa Action on Hold*, THE PRESS (Christchurch), Sept. 12, 2001, at 12, *available at* LEXIS, News Library, NZPA File.

[179] Gregory, *supra* note 176.

[180] Te Runaga o Muriwhenua v. Te Runanganui o Te Upoko o Te Ika Ass'n Inc. [1996] 3 N.Z.L.R. 10, 15.

[181] Te Waka Hi Ika o Te Arawa v. Treaty of Waitangi Fisheries Comm'n [1998] 1 N.Z.L.R. 285.

[182] *Id.* at 306. "Eighty-one per cent of Maoridom now lives in urban areas. One-third of Maoridom lives outside any tribal influence and these are often the most disadvantaged of Maori people." *Id.*; *see also* Sissons, *supra* note 70. With their own problems and concerns, many urban Maori felt disconnected from their home iwi. *Id.* Some iwi even broke ties with those who left the traditional rohe region. *Id.* And some urban Maori tried to disassociate themselves from their rural roots to be better accepted by Pakeha. *Id.* Gangs and larger urban community groups formed to replace the iwi but to maintain a communal setting. *Id.*

[183] Annie Mikaere & Stephanie Milroy, *Maori Issues*, NEW ZEALAND L. REV. 353, 365 (1999).

[184] R.P. Boast, *Maori Fisheries 1986-1998: A Reflection*, 30 VICTORIA U. OF WELLINGTON L. REV. 111, 126 (1999)(citing Te Waka Hi Ika o Te Arawa v. Treaty of Waitangi Fisheries Comm'n [1998] 1 N.Z.L.R. 285, at 34-35). "Patterson J referred to the 1996 census which showed a total of 597,414 Maori, 70% of whom lived outside tribal territories (rohe); 112,566 people identifying as Maori indicated that they did not know which iwi they belonged to and another 40,917 did not specify their iwi." *Id.*

[185] Maori have no blood quantum requirements. Treaty of Waitangi Act, 1975 (N.Z.), at §2 (stating that the Treaty of Waitangi Act, 1975 (N.Z.) created the Waitangi Tribunal, which decides, *inter alia*, the legal meaning of words in the Treaty). *Id.* "'Maori' means a person of the Maori race of New Zealand; and includes any descendant of such a person." *Id.*

[186] Mikaere & Milroy, *supra* note 183, at 368.

The High Court held that a traditional iwi "includes all persons who are entitled to be a member of it because of kin links and genealogy."[187] The links must be genealogical even if the people no longer live in the same region, and the iwi must have been recognized as legitimate by other iwi.[188] Therefore, the court found that UMAs do not constitute iwi, and that the only way their members could claim shares of the settlement was through their specific, genealogical iwi.[189] The Court of Appeals in Wellington upheld the High Court's decision on October 18, 1999.[190] The UMAs vowed to appeal to the Privy Council in London within a year.[191]

In September 2000, however, the Crown appointed seven new TOKM commissioners, keeping only four of the original eleven, to negotiate an allocation system for both settlements,[192] giving them two years to do so.[193] Two of the new appointees are major players among the UMAs: June Jackson, chief executive of the Manukau Urban Maori Authority;[194] and June Mariu, chairwoman of the Waipareira Trust.[195] Also, retired District Court Judge Ken Mason has been well received because of his prowess in conflict resolution.[196] Removed from the Commission were several of the original Settlement negotiators, including Sir Tipene O'Regan of Ngai Tahu,[197] who

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[187] Te Waka Hi Ika o Te Arawa v. Treaty of Waitangi Fisheries Comm'n, [1998] 1 N.Z.L.R. at 329.

[188] *Id.*

[189] *Id.* at 330; *see also id.* at 329. "The allocation may be to bodies representing 'iwi' but those bodies are trustees of the hapu and individual members of the hapu and the people of the tribes who have had their commercial fishing rights abrogated." *Id.*

[190] Te Waka Hi Ika o Te Arawa v. Treaty of Waitangi Fisheries Comm'n [1999] 1 N.Z.L.R. 285.

[191] Tara Ross, *Group to Halt Fish Appeal*, THE PRESS (Christchurch), Aug. 24, 2000, at 7, *available at* LEXIS, News Library, NZPA file.

[192] Gregory, *supra* note 176.

[193] *Horomia Fishes for Solutions*, THE DOMINION (Wellington), Apr. 9, 2001, at 2, *available at* LEXIS, News Library, Dominion file.

[194] Interview with June Jackson, chief executive of Manukau Urban Maori Authority, Auckland, N.Z. (March 1995)(on file with author).

> I don't really care about the money; I just want them to open their minds a little wider and to acknowledge that urban Maori exist . . . . You cannot force people to turn to their tribes . . . . When the Treaty was signed, there weren't any urban Maori . . . . Now we make up the population model.

Id.

[195] Gregory, *supra* note 176.

[196] *Fresh Faces on Fisheries Commission Get Their Orders*, THE NEW ZEALAND HERALD (Auckland), Aug. 23, 2000, *available at* http://www.nzherald.co.nz/storydisplay.cfm?thesection=news&thesubscription= &storyID=148722.

[197] Interview with Sir Tipene O'Regan, chief negotiator for Ngai Tahu and first chairman of the Treaty of Waitangi Fisheries Commission, Christchurch, N.Z. (February 1995)(on file with author).

had been the only Commission chair and chair of Sealord.[198] The UMAs subsequently announced that they planned to withdraw their appeal to the London Privy Council because the new commission members had restored their confidence.[199]

Meanwhile, the other half of Sealord went on the market, and, in accordance with the Fisheries Settlement Act, the TOKM received the first option.[200] The Commission shared the NZ$208 million price tag with a Japanese company, Nissui, purchasing it on December 4, 2000.[201] Nissui now holds fifty percent of the shares of Sealord with TOKM, but the Commission owns all of Sealord's fishing quota, which is twenty-six percent of New Zealand's total fishing quota.[202] Added to the rest of the Commission's quota, TOKM's total is now more than fifty percent of the national total.[203]

As the amount of assets accrued, UMAs found that they were not appeased. They brought their case to the Privy Council in London, now the highest court of appeal for New Zealand,[204] in May 2001.[205] The Privy Council dismissed the claim two months later, saying that courts could not solve a political problem, and that perhaps the settlement should be revised.[206] New Zealand Parliament ministers have since demanded that Parliament decide the dispute over the fisheries assets, while the High Court has before it a claim that the

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> The main point is that there is a huge amount of merit in having traditional Maori rights in legislation. I think I achieved more in 1992 than the Canadians have ever done . . . . I want to get the allocation of Maori fisheries off my list because it forces my people to fight on two fronts instead of one . . . . [The main Ngai Tahu issue at the time was land.] I'm not confident; they're just battles that you fight.

Id.

[198] *O'Regan Sounds Warning*, THE PRESS (Christchurch), Aug. 29, 2000, *available at* LEXIS News Library, NZPA file (stating that many people felt that O'Regan had too much of a conflict of interest, because Ngai Tahu would have done very well by the proposed allocation model). *Id.*

[199] Ross, *supra* note 191.

[200] *See supra* note 133.

[201] *Sealord Deal Approved*, THE PRESS (Christchurch), Jan. 17, 2001, *available at* LEXIS News Library, NZPA file. The deal was subject to New Zealand's Overseas Investment Commission approval. *Waitangi Fisheries and Japan's Suisan Kaisha Buy Sealord*, THE PRESS (Christchurch), Dec. 5, 2000, *available at* LEXIS News Library, NZPA file.

[202] *Id.*

[203] FAO Fisheries Department, Fishery Country Profile – New Zealand, *supra* note 14.

[204] New Zealand's government has said they want to create their own highest court and stop taking the independent country's cases to London. Editorial, *Privy Council's Days Are Up*, THE PRESS (Christchurch), June 4, 2001, at 4, *available at* LEXIS News Library, NZPA file. Maori are concerned that this may be the start of an unraveling of the connection between them and their Treaty-signing partners. *Id.*

[205] *Law Lords' Hearing 'Waste of Money,'* THE PRESS (Christchurch), May 25, 2001, at 3, *available at* LEXIS News Library, NZPA file.

[206] *Id.*

TOKM was biased toward such traditional iwi as Ngai Tahu.[207] TOKM has responded to the discontent by entering dispute resolution with three parties[208] and preparing a proposal to all Maori to combine the pre-settlement and post-settlement assets in an allocation plan.[209] A variety of options will be presented in hopes of meeting Maori Affairs Minister Parekura Horomia's deadline of August 2002 for the allocation of the assets.[210]

2. *Customary rights*

Although Maori remain divided about allocation of commercial fishing assets and rights, they are unified in the need to ensure their customary fisheries rights. During the fisheries settlement negotiations, the Crown expected that any future Maori customary fishing regulations would take into account the interests of Maori, the Crown, and other users, both commercial and recreational.[211] The Crown also expected that the regulations would allow Maori to create their own guardian system over certain areas that they would identify and manage, authorizing Maori to fish for customary, non-commercial uses.[212] Until these regulations were finalized, the Settlement Act provided that the existing tangihanga (funeral)[213] and hui regulations of the Fisheries (Amateur Fishing) Regulations be modified.[214]

Non-commercial fishing issues could still give rise to Treaty of Waitangi claims,[215] and those rights would be officially recognized in the form of

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[207] Kelly Andrew and Jonathan Milne, *Maori Get a Month to Make Deal*, THE PRESS (Christchurch), July 4, 2001, at 3, *available at* LEXIS News Library, NZPA file.

[208] Commission to Put Forward Allocation Scenarios, http://www.tokm.co.nz/allocation/alloc_mainframe.htm (last updated Oct. 2, 2001). Dispute resolution continues with Te Arawa and Urban Maori. Both parties have since suspended their court actions against the TOKM in a show of good faith for the dispute resolution process. *Id.*; *see also Te Arawa Action on Hold*, *supra* note 178; and *Maori Suspend Challenge*, THE DOMINION (Wellington), Sept. 29, 2001, *available at* LEXIS News Library, NZPA file.

[209] *Bid to Break Fisheries Assets Deadlock*, THE PRESS (Christchurch), July 21, 2001, at 8, *available at* LEXIS News Library, NZPA file.

[210] Commission to Put Forward Allocation Scenarios, *supra* note 208.

[211] *See* Minister of Fisheries Speech, *supra* note 127.

[212] *Id.*; *see also* Fisheries Settlement, *supra* note 12, at § 34(2) (stating that regulations made under the provisions allowing for customary fishing may include the right to create taiapure-local fisheries and mataitai reserves).

[213] REED, *supra* note 20, at 74.

[214] Fisheries (Amateur Fishing) Regulations 1986, Regulation 27 (allowing for taking fishery resources for "hui, tangi or traditional non-commercial fishing use" with authorization).

[215] Fisheries Settlement, *supra* note 12, at Part I, § 10(a) (stating that non-commercial Maori fishing rights "shall, in accordance with the principles of the Treaty of Waitangi, continue to give rise to Treaty obligations on the Crown").

national regulations.[216] As the Deed of Settlement provided, however, non-commercial fishing claims no longer have any legal effect in civil or criminal proceedings.[217] The Fisheries Settlement Act allowed for the creation of customary fishing regulations, intimating that the only way Maori could officially retain their customary fishing rights was to make sure they included every possible element in what would become Crown regulations.[218] The Crown also stated in the Act that it only had to "consult" with Maori in making these regulations.[219] Thus, by these terms, the Fisheries Settlement Act emasculated much of the fisheries element of the Treaty of Waitangi.

Maori recognized the problem and forced the Crown to negotiate with them about the regulations. From August 1993 to February 1994, TOKM attended twenty-three regional hui to determine which of their customary fishing rights

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[216] *Id.* at Part I, § 10.

> . . .
> (b) The Minister [of Fisheries], acting in accordance with the principles of the Treaty of Waitangi, shall –
> (i) Consult with tangata whenua about; and
> (ii) Develop policies to help recognise – use and management practices of Maori in the exercise of non-commercial fishing rights.
> (c) The Minister shall recommend to the Governor-General in Council the making of regulations pursuant to section 89 of the Fisheries Act 1983 to recognise and provide for customary food gathering by Maori . . . .

Id.

[217] *Id.* at Part I, § 10 (d).

> The rights or interests of Maori in non-commercial fishing giving rise to such claims, whether such claims are founded on rights arising by or in common law (including customary law and aboriginal title), the Treaty of Waitangi, statute, or otherwise, shall henceforth have no legal effect, and accordingly –
> (i) Are not enforceable in civil proceedings; and
> (ii) Shall not provide a defence to any criminal, regulatory, or other proceeding, – except to the extent that such rights or interests are provided for in regulations made under section 89 of the Fisheries Act 1983.

Id.

[218] *See* Fisheries Settlement, *supra* note 12, at Part I, § 10; *see also* Tina Nixon, *Fishing Regulations Cause Concern*, THE SOUTHLAND TIMES (Nelson), July 29, 1997, at 4, *available at* LEXIS News Library, Southland Times file (reporting Maori customary fisheries negotiator Maui Solomon's explanation that "the regulations must be robust enough to protect the customary fishing rights because there is no fall back position").

[219] Fisheries Settlement, *supra* note 12, at §10(b)

> The Minister [of Fisheries], acting in accordance with the principles of the Treaty of Waitangi, shall –
> (i) *Consult* with tangata whenua about; and
> (ii) Develop policies to help recognise – use and management practices of Maori in the in the exercise of non-commercial fishing rights.

Id. (emphasis added).

iwi and hapu wanted to codify.[220] Maori made clear that the right to manage the resource and the right of access were equally important.[221] At the May 28, 1994 Hui-a-Iwi (meeting of iwi), Maori agreed to a two-tier system for the Maori negotiators, whereby kaumatua would mandate four Maori representatives to work with four Crown representatives.[222] The kaumatua were called Paepae/Taumata 1 (PP/TT 1), and their representatives were called Paepae/Taumata 2 (PP/TT 2).[223] The PP/TT 2 could not make any changes to the draft regulations, which were based on the Treaty of Waitangi and customary practice of resource management, without conferring with PP/TT 1. On the other end of the spectrum, the Crown sent only junior executives with no authority to negotiate; thus, nothing useful was accomplished.[224]

The PP/TT 1 draft regulations included methods for appointing kaitiaki (resource managers, and spiritual assistants of the gods)[225] for a tribal rohe[226] (region).[227] These kaitiaki could authorize the taking of seafood, create the bylaws for the rohe, and work with the Ministry of Fisheries to maintain records and to prove sustainability of the resource by whatever methods the local iwi or hapu traditionally required.[228] Iwi wanted all disputes and all powers of kaitiaki to remain within the rohe.[229] But the Ministry could not agree because the Crown did not want to hand over that much authority.[230]

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[220] Traditional and Customary Fisheries Position Paper of Paepae/Taumata 2, § 2 (September 1994) (unpublished manuscript, on file with author).

[221] *Id.*

[222] *Id.* at § 3.

[223] Interview with Dr. Margaret Mutu, Maori Studies Professor at Auckland University, in Auckland, N.Z. (February 1995)(on file with author). Dr. Mutu, one of the representatives, remembered the conversation when she was told to negotiate for her tribe:

> I came to a tangi and was told, 'You've had an instruction.' I said, 'I'm the academic, you're the fisherman. I'm hopeless at catching fish. I can't even go out on a boat without getting seasick.' But they said, 'We're not asking you to catch fish; we're asking you to write regulations. You know how our fishing grounds are marked, how we fish, when to go out for what species. Your husband fishes.'

Id.

[224] *Id.*; *see also* TRADITIONAL AND CUSTOMARY FISHERIES POSITION PAPER OF PAEPAE/TAUMATA 2, *supra* note 220.

[225] REED, *supra* note 20, at 29.

[226] *Id.* at 69.

[227] *See* TRADITIONAL AND CUSTOMARY FISHERIES POSITION PAPER OF PAEPAE/TAUMATA 2, *supra* note 220, at § 5.

[228] *See id.* at § (5)(c).

[229] *See id.* at § (5)(b).

[230] Nixon, *supra* note 218. The main seven issues about which the two sides could not agree:

> [1] That customary regulations should take precedence over commercial and recreational fishing and be stated in fishing regulations[;]

In April 1998, six years after negotiations began, and after representatives from both sides had left the process in frustration,[231] the South Island Customary Fishing Regulations[232] went into effect.[233] The regulations for the North Island,[234] which mirror the South Island's regulations, became effective on February 1, 1999.[235]

These regulations, however, have yet to be codified in the Fisheries Act. Upon reading the newest version of the Act, the same wording remains since the Fisheries Settlement Act.[236] Instead, the regulations are codified in

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[2] Ability to make bylaws must be included in legislation[;]

[3] A Treaty of Waitangi reference be included in regulations[;]

[4] The Crown wants Mataitai reserves to be small and discreet[;]

[5] Public consultation[;]

[6] Enforcement and compliance with the regulations[; and]

[7] Maori terminology in the regulations.

Id.

[231] Te Anga Nathan, *Plan Recipe for Chaos*, WAIKATO TIMES (Hamilton), Jan. 14, 1998, at 1, *available at* LEXIS News Library, Waikato Times file (stating that the four members of PP/TT 2 – Dr. Margaret Mutu, Maui Solomon, Caren Wickliffe, and Rakiihia Tau – resigned in December 1997 out of frustration with the Crown); *see also* E-mail from Miranda Cassidy, Customary Fisheries Consultant, to author (Mar. 13, 2001, 17:22:07 HST) (on file with author). Miranda Cassidy, who worked for the Ministry of Fisheries and was one of the Crown's negotiators in the customary fisheries negotiations, grew so aggravated with those negotiations, or lack thereof, that she left the country for two years. *Id.* She returned in 1997, and found no progress had been made. Id.

> The tribes of the South Island had grown so frustrated by the process that they had withdrawn from the national process and were attempting to go it alone with negotiating with the Crown . . . . Ngai Tahu approached me to head their negotiations. What an opportunity – to be on the 'other side' of the same negotiations! I took it and within 6 months we had agreed to a set of customary regulations. It certainly helped that all parties – Crown and Maori knew each other and there were no secrets etc. After all – these were my old colleagues and I knew they had good intent. Great for breaking down negotiation barriers.
>
> The result of all this was the South Island customary regulations. These were followed some months later by the North Island customary fishing regulations.

Id.

[232] Fisheries (South Island Customary Fishing) Regulations 1998, *available at* http://www.rapaki.ngaitahu.iwi.nz/customaryfish.htm (last visited Nov. 20, 2001).

[233] Ministry of Fisheries, an Introduction to Customary Fishing, http://fish.govt.nz/customary/introduction.html (last visited Nov. 9, 2001).

[234] Fisheries (Kaimoana Customary Fishing) Regulations 1998, *available at* http://www.tokm.co.nz/customary_rights/northregs.htm (last visited Nov. 20, 2001).

[235] *Kaimoana Customary Fishing Regulations Are Here*, HI IKA NEWSLETTER, Dec. 2, 1999, *available at* http://www.fish.govt.nz/ customary/hiika2.html (last visited Nov. 9, 2001).

[236] Fisheries Act 1996, Part IX, at § 186:

> Regulations relating to customary fishing
>
> (1) The Governor-General may from time to time, by Order of Council, make regulations recognizing and providing for customary food gathering by Maori and the special

Regulation 27 of the Fisheries (Amateur Fishing) Regulations 1986, which is called "*Interim Rules* for Customary Fishing (Effective 10 February 1998)" (emphasis added).[237] The bare-bones rules of Regulation 27 provided the framework for both the North and South Islands' regulations, which are virtually interchangeable. While the customary regulations follow the structure of the Maori draft proposal, all regulations and disputes must come before the Ministry,[238] a requirement that has not likely been approved by the PP/TT 1, per their original requirements.[239]

The regulations have also met with contention from non-Maori recreational fishers. These fishers submitted their concerns to the Crown during testimony for the Fisheries Bill that led to the 1996 Fisheries Act.[240] They never trusted Maori to let Pakeha on their rohe or to manage the resources properly.[241] Even now, when the regulations allow Maori to grant permission to Pakeha to fish in their rohe, Pakeha recreational fishers feel discriminated against by their government and by Maori.[242] Pakeha recreational fishers are calling for joint management of all inshore fishery resources, both to heal a division between

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relationship between tangata whenua and places of importance for customary food gathering.

Id.

[237] *See* Customary Fishing, http://www.fish.govt.nz/customary/regulation27.html (last visited Nov. 9, 2001). "Until new and comprehensive regulations are implemented, Regulation 27 of the Fisheries (Amateur Fishing) Regulations 1986, will apply to all customary fishing." *Id.*

[238] Fisheries (Amateur Fishing) Regulations, 1986 (N.Z.), Regulation 27, *available at*, http://www.fish.govt.nz/customary/regulation27.html (last visited Nov. 20, 2001).

[239] *See supra* note 224.

[240] Interview with Max Hetherington, then Secretary/Treasurer of the New Zealand Recreational Fishing Council, Wellington, N.Z. (February 1995) (on file with author).

[241] *Id.* Different fishing philosophies cause Pakeha to think Maori are able to flaunt the law and rape the resource. *Id.* For example, Maori take the smaller animals, while Pakeha must only take the larger size, according to fisheries regulations. *Id.* "They should enforce the same bag and size limits for iwi as for recreational fisheries. They need to get a permit before fishing like everybody else, instead of getting a marae-permit after collecting fish." *Id.*; *see also* MURIWHENUA FISHING REPORT, *supra* note 40, at 25; *supra* at note 87; and Interview with Daryl Sykes, rock lobster fishery expert for the New Zealand Fishery Industry Board, Wellington, N.Z. (February 1995)(on file with author) (stating, "You don't win over people by taking large numbers of small rock lobsters in areas commercial fishermen can't.").

[242] Rochelle Warrander, *Moratti Makes Plea for Unity in Management of NZ Fisheries*, THE DAILY NEWS (New Plymouth), Mar. 14, 2001, at 4, *available at* LEXIS News Library, Daily News (New Plymouth) file. Taranaki Recreational Fishers' Association Chair Kevin Moratti said, "The issuing of customary permits is becoming more common now and some of these have been nothing short of downright rape and pillage of our reefs." *Id.*

Maori and Pakeha fishers[243] and, they claim, to help protect the resource.[244]

Currently, to protect both the resource and Maori custom, New Zealand national law allows for two categories of Maori customary fishery reserves: taiapure (local fisheries)[245] and mataitai (traditionally important fishing areas) reserves.[246] Maori have established few taiapure because of the lengthy procedure of creating the potentially large littoral.[247] The Fisheries Settlement

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[243] *See id.* "To fail to do so is to divide our country to such a degree that there will be no recovery." *Id.* "The commercial sector has got their own fishing management. The rest might as well work together and be one." *Id.*

[244] *Id.* "The methods by which customary take can be gathered can be by any method which is written on the permit. For example, paua [abalone] can be collected using scuba gear, and size is not relevant as long as the size is written on the permit." *Id.*

[245] MINISTRY FOR MAORI DEVELOPMENT, NGA KAI O TE MOANA: CUSTOMARY FISHERIES 25 (1993). "Taiapure are local fishery areas, in estuarine or littoral coastal waters, which are of special significance to hapu or iwi." *Id.* Maori were intended to create advisory committees that would look after hapu and iwi interests for the fisheries, while also advising the Minister of Fisheries how to regulate the sustainable management of the taipure. *Id.*

[246] *Id.* Mataitai reserves are areas of traditional importance to tangata whenua. *Id.* They can exist within taiapure. *Id.* Mataitai are managed by committees nominated by tangata whenua and approved by the Minister of Fisheries. *Id.* These committees can make by-laws specific to the local community. *Id.* Seasonal or temporary rahui (closures) provide an example of how the regulations might apply. *Id.* at 26. The committees could consider creating by-laws to compel those other than local tangata whenua to obey rahui. *Id.* Mataitai reserves may be areas where both tikanga Maori and modern resource management techniques are used in a complementary way. *Id.*

[247] Boast, *supra* note 184, at 132 and 132 n.64. The latest amendments to the Fisheries Act, however, have streamlined the process somewhat. Fisheries Act 1996, Part IX, at § 174:

> The object of sections 175-185 of this Act is to make, in relation to areas of New Zealand fisheries waters (being estuarine or littoral coastal waters) that have customarily been of special significance to any iwi or hapu either ---
>
> (a) As a source of food; or
>
> (b) For spiritual or cultural reasons,---
>
> better provision for the recognition of rangatiratanga and of the right secured in relation to fisheries by Article II of the Treaty of Waitangi.

Id. A hapu or iwi must notify the Minister of Fisheries that it has a traditional relationship with the estuarine area; establish that historical relationship, its extent, boundaries, species, and impacts on other users; open the application to public comment from other users, including Crown fishery management agencies, and commercial and recreational fishers; go before the Maori Land Court for a public inquiry, from which any party can appeal to the High Court; and if the applicants get ministerial approval, they then must create the taiapure's management committee, which will be in charge of creating regulations for the taiapure. *See id.* at §§ 175-84.

> No regulations made [for the taiapure] shall provide for any person ---
>
> (a) To be refused access to, or the use of, any taiapure-local fishery; or
>
> (b) To be required to leave or cease to use any taiapure-local fishery, ---
>
> because of the colour, race, or ethnic or national origins of that person or of any relative or associate of that person.

Id. at § 185 (5).

Act 1992 provided for the simpler formation of mataitai reserves, which are generally small and can be in coastal and inland waters,[248] yet only two are now in existence.[249]

As can be seen by the above examination of the Fisheries Settlement, as extensive and revolutionary as it may appear in the world of indigenous peoples' negotiations, many problems and concerns remain for both parties. Indeed, the Fisheries Settlement is more of a cautionary tale for other indigenous peoples and their respective colonizing governments. The next section examines methods for negotiating future settlements, and assuring that recognition of the indigenous peoples' culture and natural resource management authority is included in any reparations and restitutions.

III. INTERNATIONAL NEGOTIATING METHODS FOR NATURAL RESOURCE SETTLEMENTS

Because Maori customary and commercial fishery resource negotiation did not include such conciliatory components as apologies, comprehensive listings of wrongs and historical needs, and complete communication, the Fisheries Settlement has not felt settled to anyone. Instead, many Maori and Pakeha feel railroaded into a government solution, and anger remains on both sides.[250] A need for understanding remains. A domestic solution may or may not be

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[248] Boast, *supra* note 184, at 132.

[249] "Second Mataitai Reserve Set Up," (Mar. 8, 2001), *available at* Current Issues: Press Releases and Speeches, http://www.fish.govt. nz/current/press/pr080301.htm (last visited Nov. 9, 2001). The two include Koukourarata (Port Levy)(gazetted on Dec. 15, 2000) and Rapaki (gazetted in December 1988), both on Banks Peninsula on the South Island, and gazetted under the Fisheries (South Island Customary Fishing) Regulations 1998.

[250] The following interviews represent some of a series the author did during a journalism fellowship in New Zealand in 1995, when the author first began studying Maori fishing rights. *See* Interview with Max Hetherington, *supra* note 240. "My ancestors go back to 1840 in Wellington. What about my family? What rights do they [Maori] have that I don't?" *Id.*; *see also* Interview with Mike Smith, Maori activist who chain-sawed the historic tree on One Tree Hill, Auckland, in Rotorua, N.Z. (February 1995) (on file with author). "We want guaranteed cultural values. Ours are more highly evolved than theirs – 150 years compared to Maori values that are 1,000 years old – and more refined and balanced." *Id.*; *see also* Interview with Peter North, Pakeha commercial fisher in Havelock, Marlborough, and Polaris Sounds, Havelock, N.Z. (February 1995) (on file with author). "I wasn't alive 150 years ago when this was all worked out." *Id.* "We got a lot of quota taken off of us by the government, for conservation and historic rights, and it's gone for life." *Id.*; *see also* Interview with Hana Morgan, member of Ngai Tahu, Bluff, N.Z. (March 1995) (on file with author). "The [orange roughy] stocks are almost depleted. And they have been wiped out with the consent of the Ministry of Fisheries, which sets the quota. They have ignored scientists' recommendations under pressure of the industry. And they say we're bad managers." *Id.*; *see also* Interview with Daryl Sykes, *supra* note 241. "There has been no attempt to include us [the commercial fishing industry] in the process." *Id.*

available. Keeping the discussions local can force both sides to remain active in national debates, and a nation's history generally is more accessible to those living in it. This idealistic view of domestic solutions may be why many international courts and tribunals require an honest attempt at local solutions before accepting a nation's claims.[251] Yet, if one side is overpowered by another's methods and manners, no matter the pretense,[252] a settlement can never be satisfying.[253]

An inequality of bargaining power can be seen in many modern settlements,[254] including those of Maori, Alaskan Natives, and Canadian Natives.[255] Indigenous peoples have been forced into "take it or leave it" situations,[256] and often the dominant colonial government chooses the native negotiators and the negotiating forum.[257] Although negotiations are required, whether domestically or internationally, face-to-face negotiations do not seem to be the answer, court decisions vary with the politics of the time and place, and quick solutions do not leave any side satisfied. This section analyzes existing options available to indigenous peoples to negotiate and litigate for recognition, restitution, and preservation of their culture and environment. The first section describes dispute settlement ideals. The second section analyzes the lessons that can be learned from the Maori fisheries negotiations. Finally, the third section presents international forums that may or may not be available to indigenous peoples.

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[251] *See* Elizabeth Evatt, *Individual Communications Under the Optional Protocol to the International Covenant on Civil and Political Rights*, *in* INDIGENOUS PEOPLES, THE UNITED NATIONS AND HUMAN RIGHTS 86-115 (Sarah Pritchard, ed., Zed Books Ltd, 1998). "[D]omestic remedies must be exhausted. This diminishes the interference by international bodies in local affairs. Remedies given by national courts are also more effective as they are easier to enforce." *Id.* at 98.

[252] *See* Sissons, *supra* note 70 (referring to the Crown's adoption of Maori symbolism but not understanding the meaning behind the symbolism).

[253] *See* Evatt, *supra* note 251, at 98-99. The U.N. Human Rights Committee provided that "a claim cannot be rejected as inadmissible on the ground of failure to exhaust domestic remedies unless the remedies are not only available but also effective, that is, offer a reasonable prospect of success." *Id.* at 99.

[254] *See, e.g.*, Winona LaDuke, Address at the University of Hawai'i at Manoa (Mar. 12, 2001). She commented on the argument that indigenous people have just as much chance as anyone else to pull themselves up by their bootstraps: "I can't pull up my bootstraps. You guys hold the boots." *Id.*

[255] *See* Mikaere, *supra* note 35, at 451.

[256] *Id.*

[257] *Id.* at 452.

A. General Notions of Dispute Settlement

When trying to settle disputes between indigenous peoples and a dominant culture, a number of considerations must be made on both sides.[258] First, both sides must learn, recognize and honor each other's history, politics, economics, processes of decision-making, and cultural values.[259] History holds particular relevance because it can be a hidden, but foundational, motivator.[260] That history can be ancient and recent. For example, Maori history with their natural resources and with Aotearoa extends back thousands of years. At the same time, their history with Pakeha overfishing of their inshore waters can be traced to 1963 regulations that removed fishing licensing requirements.[261]

Next, an apology should be offered to openly recognize that a wound exists and some responsibility accrues, which serves to begin the healing process.[262] That apology, however, must not be just empty words that circle back to continued oppressive actions, but must foster future reconciliation by building a bridge between the two cultures.[263] For example, the two Maori iwi that received formal apologies, Tainui[264] and Ngai Tahu,[265] presently have the closest working relationship with the Crown and have created stable, independent tribal governments. Equally, the conflict leading to the apology also can be important for the healing process and for providing a means for often-marginalized indigenous peoples to be heard and recognized.[266] Thus,

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[258] *See generally* Michael Mirande, *Sustainable Natural Resource Development, Legal Dispute, and Indigenous Peoples: Problem-Solving Across Cultures*, 11 TUL. ENVTL. L.J. 33 (1997).

[259] *Id.* at 56.

[260] *Id.*

[261] MURIWHENUA FISHING REPORT, *supra* note 40, at xviii.

[262] *See* ERIC K. YAMAMOTO, INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA 51 (1999).

[263] *See id.* at 195 (explaining that "[b]ecause of th[e] risk of manipulation, a meaningful group apology is tied to a commitment to make amends for past wrongs and to action on that commitment).

[264] Shona Geary, *Queen's Royal Assent Returns Maori Land*, INTER PRESS SERVICE (Christchurch), Nov. 3, 1995, *available at* LEXIS Law Library, Inter Press Service file. "Queen Elizabeth II signed an historic bill returning confiscated land to New Zealand's indigenous groups today, remedying with the flourish of her pen a past wrong resulting from British colonial rule." *Id.* "The legislation contains a fulsome apology from the government for the invasion and confiscation of Tainui lands last century." *Id.*

[265] *PM Says Sorry to Ngai Tahu*, THE DOMINION (Wellington), Nov. 30, 1998, at 1, *available at* LEXIS News Library, NZPA file. New Zealand Prime Minister Jenny Shipley gave an official apology to Ngai Tahu on Onuku marae. *Id.*

[266] Mirande, *supra* note 258, at 57. "For aboriginal groups striving for a sense of self, dispute can be the vehicle for self-definition and a galvanizing force in a divided tribe." *Id.*

the discussions should not be hurried to get to a pat result, as they were in the Maori fisheries settlement.

On the other hand, one should not automatically assume that conflict resolution policies are the answer. Conflict resolution traditionally tries to find neutral points of intersection, and neutrality has no place in a settlement dispute between divergent cultures that must learn to understand each other. As one multicultural dispute resolution expert explains, "[o]perating in the realm of 'pure process,' [conflict resolution] does not seek to advance understandings of deeper intergroup grievances or the dynamics of sustained intergroup healing."[267]

To truly understand the grievances, parties must both investigate and account for them.[268] Itemizations often give a sense of reality to claims. Also, actively shining a light on past and present abuses allows the injured to gain confidence that nothing remains hidden and that the injurer has been forced to face the magnitude of the injury, never to repeat it.[269] Only by itemizing the violations can one begin to assess what full restitution means. While complete reparation is virtually impossible, only through a process of discovery and open communication can construction of any bridge of trust begin.

Once a tenuous bridge has been built between cultures, the cultures must find ways to strengthen the bridge's girders. The eventual acts of reparation must foster continued trust between both sides and "material changes in the structure of the relationship (social, economic, political) to guard against 'cheap reconciliation,' in which healing efforts are 'just talk.'"[270] Such trust was and is lacking between the Maori and the Crown, as discussed below.

B. Lessons Learned from Maori Fisheries Negotiations

The results of Maori fishery negotiations suggest that upon reaching the settlement creation stage, parties should not limit their focus to monetary assets to be allocated to indigenous peoples.[271] That kind of compensation is not equitable to the kinds of losses that indigenous peoples often experience:

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[267] YAMAMOTO, *supra* note 262, at 36.

[268] *See* Jon M. Van Dyke, *The Fundamental Human Right to Prosecution and Compensation*, *in* INTERNATIONAL LAW, HUMAN RIGHTS, AND THE WELL BEING OF REFUGEES AND DISPLACED PERSONS (Marsalla, Liu, Tehranian and Ditzler eds. forthcoming) (manuscript at 11, on file with author).

[269] *Id.* at 16.

[270] YAMAMOTO, *supra* note 262, at 175. "Reparations . . . complement an apology. Reparatory work covers a range of acts aimed at restoring those harmed financially and psychically and repairing damaged social relationships." *Id.* at 196.

[271] Mirande, *supra* note 258, at 57. "In formulating ideas about settlement currency, do not emphasize cash, and consider with the utmost care and skepticism lump-sum payments designed to be distributed per capita." *Id.*

social, cultural, and psychological.[272] For example, when Muriwhenua asked for redress for its fishery resources from the Crown, they told the Waitangi Tribunal:

> It is the restoration of the tribal base that predominates amongst the Muriwhenua concerns. Any programme would be misdirected if it did not seek to re-establish their ancestral association with the seas, providing for their employment, the development of an industrial capability, the restoration of their communities and the protection of their resource.[273]

Maori do not necessarily want to go back in time, or to live in the Pakehas' present. They want to be in control of their resources, to manage and use them as they see fit, based on a hereditary knowledge of those resources.[274] The Tribunal saw that, and its recommendations to the Crown included stipulations that the Crown take into account the Maori need for a future in fishing and the specific needs of particular iwi, such as Muriwhenua, who have very strong subsistence needs for access to and management of their fisheries.[275]

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[272] YAMAMOTO, *supra* note 262, at 156.

> Legal justice's primary remedial emphasis on monetary compensation focuses on material redistribution and embraces the notion of commensurability; that is, monetary damages are commensurate with human loss. That remedy, however, may not address what most concerns those harmed – dignity, emotional relief, participation in the social polity, or institutional reordering .... What legal doctrine, remedies, and procedure overlook is the psychological healing of harmed individuals and groups. The law misses the repairing of individual bodies, minds, and spirits and, equally important, the rejuvenation of denigrated group identities and restoration of broken relationships.

Id.

[273] MURIWHENUA FISHING REPORT, *supra* note 40, at xxi.

[274] *See* Moana Jackson, *Indigenous Law and the Sea*, *in* FREEDOM FOR THE SEAS IN THE 21ST CENTURY: OCEAN GOVERNANCE AND ENVIRONMENTAL HARMONY 41-48 (Jon M. Van Dyke et al. eds., 1993).

> For the Maori people, te tikanga o te moana, or the law of the sea, is predicated on four basic precepts deeply rooted in Maori cultural values. First, the sea is part of a global environment in which all parts are interlinked. Second, the sea, as one of the taonga, or treasures of Mother Earth, must be nurtured and protected. Third, the protected sea is a koha, or gift, which humans may use. Fourth, that use is to be controlled in a way that will sustain its bounty.

Id. at 46.

[275] MURIWHENUA FISHING REPORT, *supra* note 40, at 239-240.

> Very substantial relief to the claimants is required in respect of past breaches and to restore their fishing economy to what it might have been. There can be no once-and-for-all settlement in Muriwhenua without a long-term programme of rehabilitation to restore their ancestral association with the seas.
>
> Special account must be taken of the Muriwhenua dependence on the seas, the small land area available to them, the lack of alternative industries in the district and the need to rebuild their communities.

Id.

Notably, the Tribunal reinforced the collective rights of Maori as a whole, not of Maori individuals. An individual cannot possess an entire culture; culture is a group possession.[276] Indigenous peoples generally believe that individuals "are born into a closely integrated network of family, kinship, social and political relations. One's clan, kinship and family identities are integral parts of one's identity; rights and responsibilities exist only within these networks."[277] Thus, such broad concepts as cultural, political, economic, and legal rights belong to a group and cannot be self-executing by an individual. In fact, the above rights include the ability to name representative groups; the government currently in power should not create those representatives. When the Crown selected the fisheries negotiators, for example, it violated Maori tradition, which never had a central authority.[278]

Similarly, efforts to preserve or resurrect elements of native cultures must be aimed at the collective group, not at a series of individuals in the form of divisible assets from a lump sum payment. For example, the Deed of Settlement's monetary boundaries caused many problems, especially because the boundaries went beyond that of the Fisheries Settlement and created the Fiscal Envelope, or Treaty settlement fund of NZ$1 billion. The set amount brought with it a flurry of iwi claims, as Maori watched the envelope's contents dwindle. The Fisheries Settlement alone took NZ$150 million, and, three years later, Tainui settled its land claims for NZ$170 million, even though the resources involved were valued at NZ$12 billion at the time of settlement.[279] Ngai Tahu, the prominent South Island tribe, also settled for NZ$170 million in 1997.[280] Iwi are racing other iwi to reach the envelope before it is empty, and the Crown has successfully reduced Treaty claims to property rights.[281] "There is currently only one bag of gold available for distribution, and everyone wants to get into it," said one Maori negotiator.[282]

While the Treaty of Waitangi symbolizes Maori aboriginal title over the natural resources, various tribal settlements are eroding that title.[283] "The Crown is asking us to equate mana with money," says one Maori attorney and

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[276] Wiessner, *supra* note 34, at 121.

[277] *Id.*

[278] Edward Taihakurei Durie, *Will the Settlers Settle? Cultural Conciliation and Law*, 8 OTAGO L. REV. 449, 450 (1996).

[279] Mikaere, *supra* note 35, at 448.

[280] *Id.* at 450.

[281] *Id.* at 449.

[282] Interview with Sir Tipene O'Regan, *supra* note 197.

[283] The common law doctrine of aboriginal title originates in the concept of private property rights, but "can be lost or affected . . . by statutory extinguishments, or voluntary relinquishment by the indigenous owners. Where no such extinguishments or giving-up can be found, the property rights remain legally intact." MCHUGH, *supra* note 86, at 97.

activist.[284] "They only talk about monetary implications, not the spiritual ones."[285] The small size of those settlements in proportion to the value of what has been taken, however, may allow future generations to reopen the claims because they will be seen as illegal.[286]

Finally, settlements are not quick projects. "Real settlements take an inordinate amount of time and flexibility. They require a process that is designed to endure, adapt and evolve as circumstances change. Do not set yourself up for failure by anticipating or requiring a prompt result achieved through a completely pre-planned process."[287] For example, a Maori attorney who sat in on the final negotiations of the Fisheries Settlement Deed argued in 1995, "They've [the Crown] had 155 years to rip us off; why talk about a short time frame to compensate?"[288] Indigenous peoples should not be forced to settle, but should realize that they have other options, some of which will be described below.

C. International Rights that Exist for Indigenous Peoples

When domestic resolutions reach an impasse, instead of being forced to accept insulting terms, indigenous peoples should access international fora. For example, indigenous peoples' rights are included in multiple international treatises, are part of State laws, are itemized in treaties between indigenous peoples and colonial governments, can be read into several international human rights conventions, and have been specified in more encompassing conventions.[289] Taken together, these elements form evidence of a growing

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[284] Interview with Annette Sykes, *supra* note 144.

[285] *Id.*

[286] Mikaere, *supra* note 35, at 453.

[287] Mirande, *supra* note 258, at 58.

[288] Interview with Annette Sykes, *supra* note 144.

[289] *See e.g.*, Universal Declaration of Human Rights U.N.G.A. Res. 217A, 3 U.N. GAOR, at 71, art. 2, U.N. Doc. A/810 (1948).

> Everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
>
> Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Id.; *see also, e.g.*, *Draft Declaration on the Rights of Indigenous Peoples*, at art. 1, U.N. Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994). Reprinted in 34 I.L.M. 541 (1995) [hereinafter the U.N. Declaration]. "Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law." *Id.*

consensus and, therefore, an international customary norm.[290] The following section explores this norm. First, it examines how other commonwealth countries have dealt with indigenous peoples' natural resource claims. Next, it incorporates indigenous peoples' concerns into some international covenants and conventions. Finally, this section will explain indigenous peoples' access to existing international tribunals and the work of various groups striving to create new international fora to address the rights of indigenous peoples.

1. Court rulings by former commonwealth countries on indigenous claims

Despite problems associated with negotiations between indigenous peoples and colonial governments, the fact that these negotiations are occurring on a more regular basis is a sign of the heightened awareness of indigenous peoples' rights and of the creation of international customary law. Because many nations use courts as their negotiating fora, one method of examining international treatment of indigenous peoples includes investigating recent court decisions.[291] In addition, because international customary law looks to State practice for obligations to protect indigenous peoples, these court rulings are further examples of the creation and enforcement of international customary law.[292] This comment centers on New Zealand, whose courts have

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[290] S. James Anaya, *International Developments Regarding Indigenous Peoples*, Address at the World Bank Lawyer's Forum II 11 (Nov. 4-5, 1999) (on file with author).

> The existence of norms of customary international law is significant in that states generally are bound by them, including those states that have not ratified relevant treaties. As a general matter, norms of customary law arise when a preponderance of states and other authoritative actors converge upon a common understanding of the norms' content and generally expect future behavior in conformity with the norms. The traditional points of reference for determining the existence and contours of customary norms are the relevant patterns of actual conduct on the part of state agencies.

Id.

[291] Cathy Robinson & David Mercer, *Reconciliation in Troubled Waters? Australian Oceans Policy and Offshore Native Title Rights*, *in* MARINE POLICY 24, 349-360, at 349 (2000). "In large measure the political pressure represented by various international initiatives and court rulings is coming from Indigenous people themselves as they become increasingly well-organized globally and much more politically astute within specific national settings." *Id.*

[292] *See generally* Sarah Pritchard, *The Significance of International Law*, *in* INDIGENOUS PEOPLES, THE UNITED NATIONS AND HUMAN RIGHTS 2-17, 14 (Sarah Pritchard, ed., Zed Books Ltd., 1998). "In determining whether an alleged rule has gained the status of customary international law, it is necessary to consider whether there is sufficient evidence of both State practice and the subjective acceptance of an obligation so to act (opinio juris)." *Id.*; *see also* Wiessner, *supra* note 34, at 125-26.

> Beyond international law's own structures of enforcement, domestic legal systems should be looked at as the main engines of enforcing international law . . . . Customary international law is seen as a standard of federal common law to be used by the courts

consistently exemplified this notion of an international, indigenous customary law by basing many of their fisheries rights decisions on cases from Canada, Australia, and the United States.[293] The latter three countries' court decisions have forced their respective governments into creating processes for negotiating and settling indigenous peoples' claims,[294] and, as seen below, many of their indigenous rights cases also revolved around the right to fishing resources.[295]

Canadian courts began officially recognizing their nation's fiduciary duty to its indigenous peoples, with whom Canada has several treaties, in *R. v. Sparrow*.[296] Ronald Sparrow, a Musqeam, won the right to fish in a closed stream with a driftnet that was larger than federally allowed because of a national act requiring the government to recognize treaty rights.[297] In 1997, the Canadian Supreme Court decided, in a case involving rivers flowing with salmon, that native title includes the right to resource use and to management of programs impacting indigenous traditional territories.[298]

> either on the same level of normative strength as acts of Congress, or on a level just below. Courts in the United States, as well as in other domestic systems, therefore, remain important battlegrounds for the enforcement of international indigenous rights.

Id.

[293] *See, e.g.*, Te Waka Hi Ika o Te Arawa v. Treaty of Waitangi Fisheries Comm'n [2000] 1 N.Z.L.R. 285; Te Runaga o Wharekauri Rekohu Inc. v. Attorney-General [1993] 2 N.Z.L.R. 301; Te Runaga o Muriwhenua v. Attorney-General [1990] 2 N.Z.L.R. 641; New Zealand Maori Council v. Attorney-General [1987] 1 N.Z.L.R. 641 (CA); and Te Weehi v. Regional Fisheries Officer [1986] 1 N.Z.L.R. 680.

[294] CAREN WICKLIFFE, INDIGENOUS CLAIMS AND THE PROCESS OF NEGOTIATION AND SETTLEMENT IN COUNTRIES WITH JURISDICTIONS AND POPULATIONS COMPARABLE TO NEW ZEALAND'S 10 (report for Parliamentary Commissioner for the Environment, 1994).

[295] *See* Robinson & Mercer, *supra* note 291, at 349.

> Global and domestic attention is focusing increasingly on the recognition of Indigenous people's rights and interests in coastal and marine areas. Yet while native title rights, as well as environmentally sustainable development, are high on many government agendas, limited work has been done on how these two related policy areas interact in the coastal-marine zone.

Id.

[296] [1990] 1 S.C.R. 1075.

> [T]he Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and the aboriginal peoples is trust like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

Id. at 1108.

[297] *Id.*; *see also* Constitution Act 1982, R.S.C., § 35(1)(1982)(Can.) (stating, "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.").

[298] Delgamuukw v. British Columbia [1997] 75 S.C.R. 1010. Gitksan and Wet'suwet'en chiefs claimed separate native title over portions of 58,000 square kilometers of salmon-rich land in northwest British Columbia. *Id.* at ¶ 1.

Getting indigenous peoples involved in the management of natural resources can protect both the resources and the culture, as well as foster a mutual respect and educational experience between the indigenous peoples and the colonial government.

> [R]esearchers have found that co-management encourages alliances between resource users and between governments and local communities. In many cases, agreements have become an essential mechanism for reconciliation between Indigenous and non-Indigenous people who have used co-management to establish common goals to work towards the ecologically sustainable use of shared resources.[299]

Indeed, Canada's indigenous peoples have been using this co-management theory for the past two decades. The Department of Fisheries and Oceans helps to train indigenous peoples within the federal system so they can explain it to other indigenous peoples and also be respected by that federal system when they give input to plans and allocation processes.[300] District and municipal governments also work with indigenous communities before implementing fisheries management decisions to ensure that they do not negatively impact the communities.[301] Not only is cooperation good policy, but according to *R. v. Sparrow*, it is mandated policy.[302]

> The exclusive right to use land is not restricted to the right to engage in activities which are aspects of aboriginal practices, customs and traditions integral to the claimant group's distinctive aboriginal culture. Canadian jurisprudence on aboriginal title frames the 'right to occupy and possess' in broad terms and, significantly, is not qualified by the restriction that use be tied to practice, custom or tradition. The nature of the Indian interest in reserve land which has been found to be the same as the interest in tribal lands is very broad and incorporates present-day needs. Finally, aboriginal title encompasses mineral rights and lands held pursuant to aboriginal title should be capable of exploitation. Such a use is certainly not a traditional one.

Id.

[299] Robinson & Mercer, *supra* note 291, at 351.

[300] *See* Maxine Bruce, *Aboriginal Guardian Program*, ABORIGINAL FISHERIES JOURNAL, April 2000, at 4, *available at* http://www.bcafc.org/docs (last visited Nov. 9, 2001).

[301] David Wiwchar, *RAMS: Building Bridges and Working Together in the Fisheries Sector*, ABORIGINAL FISHERIES JOURNAL, March 1999, at 4, *available at* http://www.bcafc.org/docs (last visited Nov. 9, 2001).

[302] R. v. Sparrow, [1990] 1 S.C.R. 1075, 1114; *see also* THE BRITISH COLUMBIA ABORIGINAL FISHERIES COMMISSION (BCAFC), http://www.bcafc.org/. For example, the British Columbia Aboriginal Fisheries Commission was formed in 1984 "to protect and enhance the aboriginal fishing rights of the First Nations of B.C." and "to act as a communication focal point and a facilitator for the government to government interaction." *Id.*; *see also* Bruce, *supra* note 300, at 4. Equally, the Kwakiutl Territorial Fisheries Commission began in 1987 "to advance aboriginal interests in fisheries and marine resources. It is devoted to the development of an approach to fisheries use and management based on the principle of sharing and co-existence." *Id.*

In Australia, which holds no treaties with the indigenous peoples of that continent,[303] Aboriginal Native title was not recognized under the colonial system until the 1992 case of *Mabo v. The State of Queensland [No. 2]*.[304] Five years later, however, the High Court decided that if the government wished to appropriate aboriginal land, it could do so without compensation.[305] What progress there has been in Australia has been steady, mainly because of the efforts of the Torres Strait Islanders.[306] In February 2001, a district court acquitted two Torres Strait Islanders of stealing fish from a commercial fishing vessel on the ground that the fish came from their traditional waters.[307] Then, impatient about a more than three-year federal court delay to decide whether to create a native sea claim title, the Torres Strait Regional Authority passed a resolution over the weekend of April 14-15, 2001, to ban all commercial fishing from their waters.[308] An appeal now before the High Court could extend indigenous rights over the seas from subsistence-only rights to include the right of resource management.[309]

The United States has also allowed for joint natural resource management in some areas. For example, because of a landmark federal court decision, popularly known as the Boldt Decision after its deciding judge,[310] Western Washington's Treaty Tribes co-manage and share an even split of fisheries allocation with non-Native Washington State residents.[311] The even

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[303] WICKLIFFE, *supra* note 294, at 13.

[304] (1992) 66 ALR 408, 410 per Mason C.J; McHugh J., 429, 441, 454-456 per Brennan J; and 484 per Toohey J. In this case, the Australian High Court made the principle of "terre nullius," or "land belonging to no one," a legal falsity, and it created separate land tenure systems for Aborigines and Colonials. *Id.* at 422 per Brennan, J., 426 per Dawson J.

[305] Newcrest Mining (WA) Ltd. v. Commonwealth of Australia (1997) 147 A.L.R. 42. The High Court decision found that a mining company could be compensated for the loss of income from not being able to use cyanide leaching in a fragile environment, but Aborigines could not gain compensation from the government's taking that same land from them for conservation uses. *Id.* at 129. Whether the government will ever owe Aborigines for a land taking remains open, as the issue was not directly before the court. *Id.* at 48, 81, 112-13, 129.

[306] *See* Barbara Adam, *Mabo's People Lose Patience with Legal Struggle*, AAP NEWSFEED (Brisbane), Mar. 30, 2001, *available at* LEXIS News Library, AAP Newsfeed file. The 6,000 Torres Strait Islanders who still inhabit the islands north of the Australian continent continue to survive mainly on seafood. *Id.*

[307] *Id.*

[308] *Id.*

[309] *Id.*; *see also* Harris v. Great Barrier Reef Marine Park Auth. (2000) 173 A.L.R. 159 (claiming 840 square kilometers that include Fitzroy and Little Fitzroy Islands, other islets and the surrounding reefs and waters).

[310] *See* United States v. Washington, 384 F.Supp. 312, at 328 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976)(federally recognizing twenty-four Indian tribes in Western Washington)[hereinafter the Boldt Decision].

[311] *See* Boldt Decision, 384 F.Supp. at 343; *see also*, Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) (upholding the Boldt

distribution of the catch, which happens only after deducting conservation and tribal needs,[312] was based on the treaty language of the right to take fish "*in common* with all citizens of the territory."[313]

Fourteen treaties with the United States government provided the foundation for the Boldt Decision.[314] Those treaties secured customary fishing rights for the tribes, both on and off their reservations.[315] Without those treaties, the United States' court system may not have recognized the tribes' right to co-management of their resources.[316] The treaties did not grant newly created "treaty rights" of the Indians, but merely reserved rights held before colonization.[317] Often the rights memorialized in treaties are those held most dear by the indigenous peoples, like the right of the Treaty Tribes to fish: "It was the one thing above all that the tribes wished to retain during treaty negotiations."[318]

The Indians also wanted to maintain management of their precious resource. In a system similar to that created by New Zealand for Maori customary fishing regulations, only tribes with certain qualities may independently manage their fishery resources. The mandatory criteria include responsible leaders and organized governments, native representatives to monitor the regulations, tribal scientific fisheries experts, and a method for identifying tribal members and certifying them to fish.[319] To co-manage the salmon and

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Decision and acknowledging that the tribes' fifty percent share of the fisheries includes both on and off reservation fishing for commercial and non-commercial purposes); *see also, e.g.*, United States v. Washington, 157 F.3d 630, 643 (1998) (including the right to take an even share of shellfish as well).

[312] Boldt Decision, 384 F.Supp. at 343.

[313] *Id.* at 355.

[314] *Id.* at 327 nn.1 & 2.

[315] *Id.* at 350; *see also* United States v. Washington, 157 F.3d at 643. The Ninth Circuit applied three treaty construction principles in the latter case: treaties must be construed in favor of Indian rights, any ambiguities must be resolved in favor of the Indians, and liberal construction is based on the trust relationship between the Indians and the United States. *Id.*

[316] *See, e.g.*, Boldt Decision, 384 F.Supp. at 364 (recognizing the Makah treaty right to whale and seal fisheries); *see also* Amoco Production Co. et al. v. Vill. of Gambell et al. 480 U.S. 531 (1987). The U.S. Secretary of the Interior proposed to lease part of the Outer Continental Shelf for oil exploration, and Alaska Native villages tried to enjoin him. *Id.* They were unsuccessful, as the court found that there was no recognized Alaskan subsistence three miles beyond the coast. *Id.*; *see also*, Rice v. Cayetano, 528 U.S. 495 (2000). Not only could the court not find a treaty with the Native Hawaiians, but it also labeled them a race instead of a tribe because Native Hawaiians had not been officially recognized by the federal government as a tribe. *Id.* at 519-520. One way to prove tribal status is to show a treaty. *Id.* The U.S. did, however, have four treaties with the Kingdom of Hawai'i. Jon M. Van Dyke, *The Political Status of the Native Hawaiian People* 17 YALE L. & POLICY REV. 95, 102 and n.41 (1998).

[317] Boldt Decision, 384 F.Supp. at 331.

[318] *Id.*

[319] *Id.* at 340-41.

corresponding ecosystem resources, the tribes regulate their members on reservation lands without state supervision.[320] Today, not only do most of the Western Washington Treaty Tribes have their own management teams, but nineteen of them also have created the Northwest Indian Fisheries Commission.[321]

Thus, treaty rights exemplify or enumerate aboriginal title.[322] Through customary international law, aboriginal title cannot be removed by statute.[323] To extrapolate, even with the Fisheries Settlement Act, Maori have not lost their aboriginal rights to their fisheries, commercial or customary, because the Fisheries Settlement Act cannot abrogate Maori customary fishing rights or resource titles.[324] The next section will examine general principles of international law that recognize, add to, and help to prove aboriginal title as an international customary norm. The growing acceptance of these principles provides further support for the right of indigenous peoples to manage and preserve their cultural and natural resource rights.

2. *Expanding* opinio juris *about indigenous peoples*

To prove international customary law, one must prove that there is an almost uniform practice among States, and that this practice is continued out of a sense of legal, not moral, duty.[325] The latter is *opinio juris*.[326] The recognition of indigenous peoples' claims arising under domestic treaty obligations, and based on government relations to and court decisions in favor of indigenous peoples elsewhere in the world, are examples of *opinio juris*.

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[320] *Id.* at 340.

[321] *See* Northwest Indian Fisheries Commission, Tribal Fisheries Management, http://www.nwifc.wa.gov/pdf_public/2001_fishman.pdf (last visited Nov. 9, 2001).

[322] Michael A. Burnett, *The Dilemma of Commercial Fishing Rights of Indigenous Peoples: A Comparative Study of the Common Law Nations*, 19 SUFFOLK TRANSNAT'L L. REV. 389, 399 (1996).

[323] *See* Kahn, *supra* note 8, at 158.

[324] *See* Te Runanga o Wharekauri Rekohu Inc. v. Att'y Gen. [1993] 2 N.Z.L.R. 301 at Judgment para. 26 (noting that, should such an act be passed, as the Fisheries Settlement Act was, "[w]hatever constitutional or fiduciary significance the treaty may have of its own force, or as a result of past or present statutory recognition, could only remain.").

[325] *See* DAVID HUNTER, JAMES SALZMAN AND DURWOOD ZAELKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 224-225 (1998).

[326] *Id.* To be customary international law, a State practice must "follow[] from a sense of legal obligation (*opinio juris sive necessitatus*), rather than from a sense of moral obligation or political expediency." *Id.* at 225. To prove *opinio juris*, one examines factual evidence such as diplomatic correspondence, State policy manuals, press releases, legal advisors' statements, legislation, State court decisions, etc. *Id.*

The negotiated formation of international treaties can also help create customary international law.[327]

For example, Maori aboriginal rights can be found in the International Covenant on Civil and Political Rights (ICCPR)[328] because New Zealand is a party to the covenant.[329] Article 27 of the ICCPR states,

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.[330]

The Fisheries Settlement Act, 1992 arguably violated this article because the Act limited cultural fishing uses to those statutorily enacted by the Crown.[331] For instance, the United Nations Human Rights Commission found in *Ominayak, Chief of the Lubicon Lake Band of Cree v. Canada* that when Canada allowed leases for resource development and exploration in ancestral tribal lands, it violated Article 27 of the ICCPR.[332] Thus, not only are New Zealand's fishing quota leases vulnerable, but the very fact that the Fisheries Settlement Act limits Maori commercial fishing to the rules of the QMS may constitute a violation of Article 27 because the Article has been found to include economic rights that are culturally based.[333]

Four days before the Fisheries Settlement Act became law, nineteen individual Maori brought a complaint before the U.N. Human Rights Committee,[334] which was established by Article 28 of the ICCPR.[335] Although the Maori filed under several articles, the court only recognized a valid claim under Article 27.[336] The applicants cited *Ominayak* and claimed that the

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[327] *Id.* at 228 (giving an example of the years of consultations that developed the U.N. Law of the Sea Convention and that created the customary norm of the 200-mile EEZ along national coasts even before the concept was ultimately promulgated in the U.N. Law of the Sea Convention, Part V).

[328] International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (Dec. 9, 1966) [hereinafter ICCPR].

[329] *See* ICCPR Communication, *supra* note 28, at ¶ 1. New Zealand became a party on Dec. 28, 1978, and the ICCPR came into force for that country on March 28, 1979. *Id.*

[330] ICCPR, *supra* note 328, at art. 27.

[331] Robinson, *supra* note 124, at 558.

[332] Anaya, *supra* note 290, at 8 (citing Ominayak, Chief of the Lubicon Lake Band of Cree v. Canada, Communication No. 167/1984, Hum. Rts. Comm'n A/45/40, Vol. II, annex IV.A, ¶ 32.2).

[333] *See id.* (citing Kitok v. Sweden, Communication No. 197/1985, Hum. Rts. Comm'n, A/43/40, annex VII.G (1988)(finding that art. 27 includes economic actions "where that activity is an essential element in the culture of an ethnic community")).

[334] *See generally* ICCPR Communication, *supra* note 28.

[335] *See* ICCPR, *supra* note 328, at art. 28.

[336] *See* ICCPR Communication, *supra* note 28, at ¶ 3.

Fisheries Settlement impermissibly limited their traditional fishing right to that determined by the Crown's laws.[337]

The Crown maintained that Maori did not have standing and defended the Fisheries Settlement.[338] The Crown contended that the Article 27 claims were based on Article 1[339] claims, which had been recognized to be collective, and therefore, could only be raised by sovereign nations.[340] Furthermore, the Crown stated that it had agreed to the deal after being assured of Maori backing.[341] The Crown pointed out that Maori currently control most of the deep-sea fishing fleet as well as close to fifty percent of the nation's overall quota.[342] Explaining that it has a fiduciary duty toward all its nationals and their resources, the Crown argued that the QMS met the Crown's duty to conserve and manage the resource for everyone.[343]

Eight years later, on October 27, 2000, the Human Rights Committee published its report. The Committee found that Maori had standing to bring a complaint under Article 27,[344] and under the Optional Protocol,[345] which New Zealand ratified in 1989, and that Article 1 "may be relevant in the interpretation of other rights protected by the Covenant, in particular Article 27."[346] The Crown received credit for all its efforts of negotiation and consultation with Maori, but the Committee still found reason to investigate whether the Maori contesting the ratification of the Deed had their rights unjustifiably limited.[347] Upon such investigation, the Committee found that, so far, the Crown has lived up to the expectations and requirements of Article 27, however, the Committee reminded the Crown that it must continue to do

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[337] *Id.* at ¶ 6.2.

[338] *Id.* at ¶¶ 7.1-7.9.

[339] ICCPR, *supra* note 328, at art. 1(1). "All peoples have the right of self-determination." *Id.*

[340] ICCPR Communication, *supra* note 28, at ¶ 7.6.

[341] *Id.* at ¶ 7.4.

[342] *Id.* at ¶ 7.1.

[343] *Id.* at ¶ 7.5.

[344] *Id.* at ¶ 9.2.

> It is undisputed that the authors are members of a minority within the meaning of article 27 of the Covenant; it is further undisputed that the use and control of fisheries is an essential element of their culture. In this context, the Committee recalls that economic activities may come within the ambit of article 27, if they are an essential element of the culture of a community. The recognition of Maori rights in respect of fisheries by the Treaty of Waitangi confirms that the exercise of these rights is a significant part of Maori culture.

Id.

[345] *See* Evatt, *supra* note 251, at 87 (explaining that the First Optional Protocol of the ICCPR creates the "individual complaints procedure").

[346] ICCPR Communication, *supra* note 28, at ¶ 9.2.

[347] *Id.* at ¶ 9.6.

so.[348] Thus, although the Committee ruled against the Maori petitioners, it found that Article 1's right to self-determination has the potential to be used by indigenous peoples, while reinforcing indigenous peoples' ability to make claims against their colonial governments under Article 27.

In another instance of international recognition of aboriginal rights, the United Nation's International Labor Organization ("ILO") in 1989 drafted the Convention Concerning Indigenous and Tribal Peoples in Independent Countries ("ILO Convention No. 169"), which New Zealand did not sign.[349] Nevertheless, the convention, in articles 13-15, provides what has arguably become an international customary norm:[350] Indigenous peoples are entitled to a continuing cultural and spiritual relationship with natural resources, including the right to "use, management and conservation of these resources."[351] Also, ILO Convention No. 169 contains natural resource rights articles that recognize indigenous peoples' roles in managing those resources.[352] For example, Article 15 assures that natural resource rights will be "specially safeguarded"[353] and that States will at least consult indigenous peoples before they impact those natural resources.[354]

A major instance of State consultation with indigenous peoples began in 1982, when the United Nations Economic and Social Council created a "Working Group," including indigenous peoples, which developed the 1993 Draft Declaration on the Rights of Indigenous Populations ("U.N. Declaration").[355] The U.N. Declaration recognizes, *inter alia*, indigenous

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[348] *Id.* at ¶¶ 9.8, 9.9.

[349] Convention Concerning Indigenous and Tribal Peoples in Independent Countries, International Labor Organization Convention 169, June 27, 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1991)[hereinafter ILO Convention No. 169].

[350] *See supra* note 288.

[351] ILO Convention No. 169, *supra* note 349, at art. 15(1).

[352] *Id.* at arts. 13-15. Article 13 states, "governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories . . . which they occupy or otherwise use . . . ." *Id.* at art. 13.

[353] *Id.* at art. 15(1).

[354] *Id.* at art. 15(2).

> In cases in which the State retains the ownership of mineral or subsurface resources or rights to other resources pertaining to lands, governments shall establish . . . procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programs for the exploration or exploitation of such resources . . . .

Id.

[355] The U.N. Declaration has more validity with indigenous peoples than ILO Convention No. 169 because they were allowed to actively participate in the former instead of just observe. *See* SHARON HELEN VENNE, OUR ELDERS UNDERSTAND OUR RIGHTS: EVOLVING INTERNATIONAL LAW REGARDING INDIGENOUS PEOPLES 89 (1998).

peoples' right to self-determination;[356] to assert and maintain their cultural identity;[357] to have their treaties enforced;[358] and to own, manage, and control their traditional territories, including the right to restitution or fair compensation for any non-consensual use or taking of that territory.[359] The U.N. Declaration's preamble not only notes the present and historical dispossessions of indigenous peoples' connections to their ancestral resources and the need for their return, but also expresses the belief that indigenous management of those resources would help preserve and strengthen cultural and natural environments.[360]

The U.N. Declaration's Working Group also developed the idea of a Permanent Forum for Indigenous Peoples,[361] and on April 28, 2000, passed a resolution to establish the forum.[362] The resolution called for sixteen members, eight nominated by State governments and elected by the Economic and Social Council ("Council"), and eight appointed by the president of the Council after consultation taking into account the geographical and cultural diversity of the world's indigenous peoples.[363] The forum will not be adjudicative, but will "serve as an advisory body to the Council with a mandate to discuss indigenous issues within the mandate of the Council relating to economic and social development, culture, the environment,

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[356] U.N. Declaration, *supra* note 289, at art. 3 (stating that "indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development").

[357] *Id.* at art. 8 (stating that "the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such").

[358] *Id.* at art. 36.

[359] *Id.* at arts. 25-27.

[360] *Id.* at chapeau.

> Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs.
>
> Recognizing also that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment . . . .

Id.

[361] U.N. Declaration, *supra* note 289, at 123 (citing *Discrimination Against Indigenous Peoples, Report of the Working Group on Indigenous Peoples on its 14th Session* (Geneva, 29 July-2 August 1996) at 31-33, 40, U.N. Doc. E/CN.4/Sub.2/1996/21 (1996)[hereinafter 1996 Working Group Report]).

[362] Resolution 2000/87: Establishment of a Permanent Forum on Indigenous Issues, E/CN.4/L.11/Add.8.

[363] *Id.*

education, health and human rights."[364] The forum's first meeting will be held in 2002.[365]

For the most part, State governments have been supportive of the idea, but indigenous peoples and other critics have warned against simply creating a forum of discussion, which would be little or nothing more than the existing Working Group.[366] State governments typically fear a forum that would intrude too much into their sovereignty, while indigenous peoples seek a forum with uncontested jurisdiction.[367] Indigenous peoples have said they want the forum to be modeled after the sustainable development ideals of *Agenda 21*,[368] reaffirming indigenous peoples' interest in the intersection of the environment with their culture and the future.

The Organization of American States ("OAS") drafted a document similar to the U.N. Declaration. The OAS fast-tracked the proposal, with drafting beginning in 1991 and approval from the Inter-American Commission for Human Rights coming in 1997.[369] The OAS General Assembly heard the Proposed American Declaration on the Rights of Indigenous Peoples ("OAS Declaration") the same year.[370] In June 1999, the General Assembly created a working group of indigenous peoples and States to continue considering the Draft.[371] The working group's first meeting was not decisive, so the General Assembly renewed the group in June 2000,[372] and again in 2001.[373]

Deeming treaties "subject[s] of international law,"[374] the OAS Draft Declaration, like the U.N. Declaration, recommended that disputes unable to be settled in local arenas be sent to "competent bodies."[375] The OAS proposal, however, included no stipulation of what those bodies would be. The OAS Declaration offers similar protections to indigenous peoples as the U.N.

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[364] *Id.* at ¶ 2.

[365] Working Group on Indigenous Populations and the International Decade Resolution 2001/59.

[366] U.N. Declaration, *supra* note 289, at 124.

[367] *Id.* at 124-25.

[368] *See* Pritchard, *supra* note 292, at 59; *see also generally Agenda 21* U.N. Doc. A/CONF.151/26, which is considered a world plan for sustainable development.

[369] Wiessner, *supra* note 34, at 105.

[370] Organization of American States, Second Summit of the Americas: Indigenous Populations *at* http://www.oas.org (updated June 7, 2001).

[371] *Id.*

[372] *Id.*

[373] American Declaration on the Rights of Indigenous Peoples, OEA/Ser.P AG/RES. 1780(XXX1-O/01)(June 5, 2001)(Resolution adopted at the third plenary session).

[374] Weissner, *supra* note 34, at 105 (citing Proposed American Declaration on the Rights of Indigenous Peoples, Inter-American C.H.R., 1333d sess., OEA/Ser/L/V/II.95, Doc. 6 (Feb. 26, 1997), preamble, at 7).

[375] *Id.* at 106.

Declaration, calling for greater rights and recognitions of treaties.[376] Despite obvious international interest, however, no permanent dispute resolution forum yet exists for indigenous peoples.

D. Indigenous Peoples' Arbitration Forum

The above contention over a permanent forum exemplifies a common problem for indigenous peoples: How and where do indigenous peoples file claims for reparations, settlements, and grievance disputes, even when they would seem to have standing via international covenants, treaties, and customary norms? Finding satisfactory redress in their home nation is nearly impossible because, except for the example of the Waitangi Tribunal, such redress must take place in the colonizing governments' courts or legislative bodies, using the colonizers' languages and laws. Even the Waitangi Tribunal can only give recommendations to the Crown.[377] Because indigenous peoples are not recognized as States in the international arena, they do not have access to the International Court of Justice, nor are they parties to or signatories of international treaties, covenants or declarations that would give redress under the respective methods of mediation, arbitration or dispute awards. Only such self-executing covenants as the Universal Declaration of Human Rights and the ICCPR open their doors to non-State actors.[378] Non-State actors, refered to as Non-Governmental Organizations ("NGOs"), have a mixed history of success before international bodies.[379]

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[376] *Id.*

[377] Bernard Orsman, *Judge Sees Aborigine Way as One Solution*, THE NEW ZEALAND HERALD (Auckland), Feb. 8, 1995, at 1. Chief Judge Eddie Durie, chair of the Waitangi Tribunal, said that the settlement negotiation system in New Zealand gave most of the power to the Crown, frustrating Maori. *Id.* "'[T]he tribunal can't resolve all these questions,'" he said. *Id.* "'I think Maori people have been looking for some time for a structure that would need Government assistance in funding and in statute whereby they can develop their own policies and could negotiate those policies with the Government.'" *Id.*

[378] *See, e.g.*, Universal Declaration of Human Rights U.N. G.A. Res. 217A, 3 U.N. GAOR, U.N. Doc. A/810, at 71 (1948). "All are equal before the law and are entitled without any discrimination to equal protection of the law." *Id.* at art. 7; *see also id.* at art. 8. "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." *Id.*; *see also, e.g.*, ICCPR, *supra* note 328, at art. 28 (creating the Human Rights Committee); and art. 2(3)(a) ("ensur[ing] that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy"). *Id.*

[379] Traditionally, only States have rights and responsibilities under public international law, while non-governmental actors [hereinafter NGOs] such as special interest groups, industry and subnational governments are not subject to international law and cannot bring claims under it. *See* HUNTER, *supra* note 325, at 422. Recently, however, NGOs have been participating in international negotiations as part of official delegations, bringing their expertise to the

This section will show that the international debate over granting indigenous peoples the right of self-determination makes it unlikely that the latter avenues of dispute settlement – such as domestic and international courts and tribunals – will be open to them any time soon. Currently, the one court open to indigenous peoples is the Permanent Court of Arbitration in The Hague, Netherlands. But, indigenous peoples can only bring an action there if the other party consents to the court's jurisdiction. Indigenous peoples must have their inherent right to self-determination recognized, and if they do not receive that, there should be a binding world court to address indigenous peoples' needs and concerns, modeled after present institutions, but not driven by westernized methods and understandings.

1. Permanent Court of Arbitration

The first multilateral Peace Conference, called by Czar Nicholas II of Russia in 1898, established the Permanent Court of Arbitration ("PCA") at The Hague.[380] Parties, which may include States, private parties, and intergovernmental organizations, must agree to be before the court.[381] Whether a State would agree to have natural resource settlements or other disputes with indigenous peoples decided by the PCA is unlikely or uncertain at best.

Nevertheless, the PCA possesses many good features worthy of discussion. For example, its bylaws allow non-States to be parties.[382] This instantly opens the doors to indigenous peoples. Also, the bylaws allow each party to select the arbitrators, which helps justify each party's required agreement to be bound by the ultimate award.[383] The bylaws further allow the tribunal to request that the parties divide the costs up front, demand that each side observe full disclosure, and let both parties decide what, if anything, is

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bargaining table, sometimes acting as legal representation for a State party, helping to promote accountability to international institutions, and bringing science to policymakers. *See generally id.* at 427-434 (describing recent NGO accomplishments).

[380] Synopsis of Lance Paul Larsen v. The Hawaiian Kingdom, Permanent Court of Arbitration, The Hague, *at* http://alohaquest.com/arbitration/synopsis.htm (last visited Nov. 9, 2001). Representatives of twenty-six nations attended the first conference, and at the second conference, in 1907, forty-four nations' representatives clarified the court's role, which had been defined by the Convention for the Pacific Settlement of International Disputes adopted on July 29, 1899. *Id.*

[381] Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One Is a State (effective July 6, 1993), *available at* http://www.pca-cpa.org/1stateeng.htm (last visited Nov. 9, 2001).

[382] *Id.*

[383] *Id.* at arts. 6-8.

publicized.[384] These latter features provide the parties with assurances that both sides will be able to state their case fully, without monetary concerns and without fear of persecution in the press. A further feature that requires a complete researching into the history of the claims[385] fulfills the parties' need to be understood from an historical perspective.[386] Finally, the bylaws require that each party have the burden of proof on all assertions made by it.[387] This attempts to eliminate the possibility of the court accepting any presumptions of historical "truths."

A major difficulty with the PCA, however, is that it will not hear a case if both parties do not consent to the arbitration.[388] That requirement makes redress unlikely, because a colonial government would not likely agree to allow indigenous peoples to bring it to court.[389] In addition to not wanting to be bound by international law relating to the rights of indigenous peoples, States do not want to weaken their sovereignty or borders, as seen by their strong vehemence against any allowance of self-determination to indigenous peoples.[390]

2. *The need for recognition of the right of self-determination in the international legal arena*

The right to self-determination brings with it the right of peoples to select their "social, economic, political and cultural future without external

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[384] *Id.* at arts. 41, 24 & 32, respectively.

[385] *Id.* at arts. 18 & 19.

[386] *See generally*, Mirande, *supra* note 258, at 56-57 (explaining the relevance of an understanding of history as a motivator and as a partial definition of a people before a current communication and reparation can have any value); and Yamamoto, *supra* note 262, at 170 (stating, "group healing requires some combination of acknowledgment of the humanity of the other and of the sources of the conflict (including joint historical and contemporary analyses of mutual grievances underlying present conflicts)").

[387] *See* Permanent Court of Arbitration Optional Rules for Arbitrating Disputes Between Two Parties of Which Only One Is a State, *supra* note 381, at art. 24, ¶ 1.

[388] *Id.* at art. 1, ¶¶ 1 & 2.

[389] *See, e.g.*, Lance Paul Larsen v. The Hawaiian Kingdom, 2001 P.C.A., *available at* http://www.pca-cpa.org/PDF/LHKAward.PDF (holding that because the United States was an indispensable party that did not consent to the proceedings, the tribunal did not have jurisdiction to hear the claims).

[390] *See, e.g.*, Memorandum from Executive Secretary Robert A. Bradtke of the National Security Council to the U.S. Dept. of State, Dept. of Justice, the Dept. of the Interior, and a Rep. of the U.S. to the U.N. at 1 (Jan. 18, 2001)(on file with the author)(describing the U.S. position on the definition of indigenous peoples). The U.S. position is that indigenous peoples can have "internal self-determination" and may "negotiate their political status within the framework of the existing nation-state," but that "does not include a right of independence or permanent sovereignty over natural resources." *Id.* at 2.

interference."[391] When the ILO was developing its Convention No. 169, the decision whether to use "populations" or "peoples" when referring to indigenous groups caused much contention.[392] "Peoples" was seen as too broad; large countries containing indigenous groups within their borders foresaw an opportunity for an uprising of sovereignty claims.[393] Thus, the wording in ILO Convention No. 169 reads: "the use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law."[394]

The U.N. Working Group on Indigenous Populations has been equally stymied with its intended use of the word "peoples."[395] In 1995, some government members of the U.N. Commission on Human Rights argued about the concept of self-determination for indigenous peoples, but did not make any changes to the document.[396] The following year, the second session of the Commission provided for more vocal opposition.[397] The U.N. General Assembly, hoping for some settlement of the issue, requested that the U.N. Declaration be adopted by 2004, the end of the International Decade of the World's Indigenous People.[398] Meanwhile, the OAS Declaration avoided this contentious issue altogether by simply failing to define the term "indigenous people."[399]

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[391] Rudolph C. Ryser, *Sovereignty Symposium XII: To Face the Future: Between Indigenous Nations and the State: Self-Determination in the Balance*, 7 Tulsa J. Comp. & Int'l L. 129, 129 (1999).

[392] *Id.* at 147.

[393] S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 48 (1996).

> As in other international contexts in which indigenous rights have been discussed, advocates pressed for use of the term *peoples* over *populations* to identify the beneficiary groups. The former is generally regarded as implying a greater and more positive recognition of group identity and corresponding attributes of community. State governments, however, resisted use of the term *peoples* because of its association with the term *self-determination* (e.g., the phrase "self-determination and equal rights of peoples" of the U.N. Charter) which in turn has been associated with a right of independent statehood.

Id.

[394] ILO Convention No. 169, *supra* note 349, at 1387.

[395] *See* Mick Dodson, *Comment*, *in* INDIGENOUS PEOPLES, THE UNITED NATIONS AND HUMAN RIGHTS 62-64 (Sarah Pritchard ed., 1998). "The Working Group on Indigenous Populations . . . is not called the Working Group on Indigenous Peoples. That is deliberate, because in international law it is peoples who have a right to self-determination, not populations." *Id.* at 62.

[396] Wiessner, *supra* note 34, at 104.

[397] *Id.*; *see also supra* note 390 for the 2001 U.S. position for the OAS and U.N. Declarations.

[398] Wiessner, *supra* note 34, at 104.

[399] *Id.* at 105.

"The aim of Indigenous Peoples is not to be assimilated into the state that has colonized and dispossessed them, but to persist as Indigenous Peoples within their territories."[400] To do so, indigenous peoples must be able to negotiate their own rights, which requires internationally recognized self-determination. The first step toward that goal is to get the nomenclature correct. "Peoples" are deigned "respect for the principle of equal rights and self-determination," according to the U.N. Charter.[401] "Populations," on the other hand, are traditionally non-State actors and minorities. The U.N. Declaration's Working Group "is striving to incorporate the right of self-determination for Indigenous Peoples into an international instrument."[402] Once that right has been established, indigenous peoples will have greater access to international fora for reparations.

3. *Mandatory dispute settlements*

Among the types of international fora that may be available to indigenous peoples are mandatory dispute settlement systems. For example, the 1982 Convention on the Law of the Sea ("UNCLOS") created a new dispute settlement system that included multiple options for settling disputes.[403] Since the inception of UNCLOS, a variety of international dispute settlement fora have been created. Some scholars feel that these fora are diluting international law by taking it out of the central location of the International Court of Justice.[404] On the other hand, more fora for dispute settlements make it more likely that more disputes will be settled. By adding to the body of international law, and by upholding international precedents, not only will international law gain in strength, but more people will have access to the international human rights promulgated by the U.N. Charter.

The mandatory dispute settlement provisions of UNCLOS provide four options to the 137 member States, including New Zealand.[405] Each disputing

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[400] VENNE, *supra* note 355, at 95.

[401] U.N. CHARTER art. 1, para. 1.

[402] VENNE, *supra* note 355, at 96.

[403] *See generally* United Nations Convention on the Law of the Sea, Dec. 10, 1982, U.N. A/CONF. 62/122 [hereinafter UNCLOS], Part XV.

[404] Jonathan I. Charney, *The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea*, 90 AM. J. INT'L L. 69, 69 n.3 (1996) (citing Shigeru Oda, *The International Court of Justice from the Bench*, 244 RECUEIL DES COURS 9, 139-55 (1993 VII); *and* ELIHU LAUTERPACHT, ASPECTS OF THE ADMINISTRATION OF INTERNATIONAL JUSTICE 21 (1991)).

[405] *See* Division for Ocean Affairs and the Law of the Sea, *Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements as at 27 August 2001 available at* http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm (last updated Sept. 24, 2001).

State must agree to the chosen forum, whether it be the International Tribunal for the Law of the Sea, the International Court of Justice, a five-member arbitral tribunal created specifically for an issue requiring scientific or specialized expertise, or a relevant international arbitral tribunal already in existence.[406] If the States cannot agree to a forum, they still must submit to arbitration.[407] Thus, a State of any size or wealth could arguably have an equal chance at swaying some arbitral body.[408] However, not only are indigenous peoples not considered State actors, but several indigenous peoples' natural resource disputes would not be covered by these settlement requirements. For example, complicated issues of sovereignty and sea boundaries mixed with fishery disputes are exempt from the requirements of the mandatory dispute settlement provisions.[409] Also, to maintain coastal States' customary oversight of their coastal fisheries, UNCLOS does not mandate dispute resolution on arguments about methods of coastal resource management or allocation within a State's EEZ.[410] These two exemptions help to illustrate the contention of some scholars that UNCLOS' "provisions exclude [indigenous peoples], and many provisions are inconsistent with developing norms of international law regarding indigenous people's human rights."[411] International Tribunal of the Law of the Sea President Chandrasekhara Rao says there is nothing in UNCLOS that would allow indigenous peoples access to the Tribunal; the only special protections created by the Tribunal are for the prompt release of vessels and crew.[412] Even in

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[406] *See* UNCLOS, *supra* note 403, at art. 287(1).

[407] *See id.* at art. 287(5).

[408] *See* Jon M. Van Dyke, *Louis B. Sohn and the Settlement of Ocean Disputes*, 33 GEO. WASH. INT'L L. REV. 31, 35 (2000).

[409] *See* UNCLOS, *supra* note 403, at art. 298(1)(a); *see also* LOUIS B. SOHN & KRISTEN GUSTAFSON, THE LAW OF THE SEA IN A NUTSHELL 243-44 (1984).

[410] *See* UNCLOS, *supra* note 403, at art. 297, ¶¶ 2,3; *see also* SOHN & GUSTAFSON, *supra* note 409, at 242-243.

> [C]ertain disputes relating to fisheries will be completely excluded from the dispute settlement system due to the broad discretionary powers of the coastal state with respect to several aspects of coastal fisheries; some other fishery disputes which involve the possibility of arbitrary actions of the coastal state will be subject to compulsory conciliation (resort to an international commission which can present a report on the facts and the law, which is not binding on the parties to the dispute but with which the parties usually comply).

Id.

[411] Elizabeth Pa Martin & John Kekoa Burke, *Ocean Governance Strategies: Governance in Partnership with Na Keiki o ke Kai, the Children of the Sea, in* 3 L. SEA INST. SPEC. PUB. 188 (Thomas A. Mensah, Program Chairman, 1995). Indigenous peoples were not involved in the drafting of UNCLOS, nor have they agreed to be bound by its provisions. *Id.*

[412] Interview with Chandrasekhara Rao, President of the International Tribunal for the Law of the Sea, in Hamburg, Germany (July 31, 2001) (on file with author). *See generally*

prompt release cases, he said, UNCLOS gives preference to domestic remedies, like most international conventions.[413]

New Zealand created its own indigenous peoples' domestic remedy in the form of the Waitangi Tribunal. Maori have gone before the U.N., however, arguing that the Waitangi Tribunal is not enough, and that the Tribunal was only the New Zealand government's attempt to remove Treaty claims flooding the regular adversarial courts.[414] When the Tribunal was created, New Zealand's court system had yet to decide how to interpret the Treaty; did not have a solid grasp on Maori history, needs, and claims; did not speak the Maori language, either literally or figuratively; and moved too slowly.[415] Waitangi Tribunal Chief Judge Edward Durie said the adversary system, in contrast with the Tribunal's inquisitorial system, "is slower, more costly, not exhaustive of native issues and unempowering of the people aggrieved."[416]

The Tribunal, however, also proceeded slowly. Soon after the Tribunal could hear land claims going back to 1840, huge land claims were made by prominent tribes,[417] and a series of little claims, totaling about 120, sought to strangle the Tribunal's good intentions, which operated at a pace of four or five claims per year.[418] To remedy this, the Tribunal began a massive research project to be used by all historic claims.[419]

Considering the troubles involved in managing a non-binding tribunal in a small country that has only one group of indigenous peoples, the ramifications

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UNCLOS, *supra* note 403, at art. 292 (explaining the process).

[413] *See* Interview with Rao, *supra* note 412. Rao said there is "a growing sort of need for additional specialized [tribunal] bodies" in the international arena, but suggested that indigenous peoples, and anyone else, "go slow and make sure that you have the infrastructure available first." *Id.*

[414] *See* Nganeko Kaihau Minhinnick, Submission to The United Nations Working Group on Indigenous Populations, Geneva, 1988.

> The government claims that setting up the Treaty of Waitangi Tribunal to hear the peoples' grievances is a way of honouring the Treaty. In fact, it is simply recognition that the Treaty has not been honoured. The Treaty of Waitangi Tribunal is not a form of self government – it is a palliative. Furthermore, the Tribunal is seriously under-funded and under-resourced even after recent increases.

Id.

[415] *See* Edward Taihakurei Durie, Chief Judge of the Waitangi Tribunal, speech during a conference entitled, "Indigenous Peoples: Rights, Lands, Resources, Autonomy International Symposium and Trade Show," at the Vancouver Trade and Convention Centre, British Columbia, Canada (March 20-22, 1996), *available at* http://webnz.com/tekorero/waitangi/durie2.html (last visited Nov. 9, 2001).

[416] *Id.*

[417] The prominent tribes that have since settled individually with the Crown are Ngai Tahu and Tainui. *See supra* notes 262 and 263.

[418] WALKER, *supra* note 69, at 254-55 (1990).

[419] *See* Durie, *supra* note 415. The project is called Rangahaua Whanui Research Project. *Id.*

for a world tribunal having full knowledge of a great variety of indigenous peoples with a myriad of cultures, backgrounds, needs, and concerns appears overwhelming at first glance.[420] Nevertheless, the International Court of Justice, the International Tribunal for the Law of the Sea, and the U.N. Human Rights Commission manage well and have been accepted by several States.[421] States may continue to feel threatened by the idea of an international court challenging sovereignty within their borders and the resources therein. By giving parties the opportunity to choose their forum and their panel's members, however, both the parties and observers can feel more confident about the objectivity and specific expertise of each panel's member.[422] Likewise, by being outside the domestic sphere, decisions will less likely be tainted by domestic politics or social atmospheres of the time, and no one party is likely to have an enormous advantage through money, language, or education.

IV. CONCLUSION

Indigenous peoples' integral links with fisheries and other natural resources do not allow for formulaic reparations. Each group of indigenous peoples has different needs and may desire different negotiation or arbitration methods. Each indigenous group should feel confident that it is getting a real chance to explain itself and to work through the necessary steps of apology, itemization, communication, and reparation, especially in the sphere of natural resources because natural resources help define many indigenous peoples by being integral to indigenous peoples' location, subsistence, religion, and cultural heritage. "Translated into practical everyday techniques, the strong spiritual and cultural values of the Maori people provide a blueprint for the management of a resource which will enrich future generations."[423] Natural resource conservation and management must be a part of any indigenous

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[420] *See, e.g., Law Lords' Hearing 'Waste of Money,' supra* note 205.

[421] Wiessner, *supra* note 34, at 125. Wiessner suggests that States might accept a new forum for indigenous peoples as long as it had "the power to receive complaints, to investigate them, to make findings of fact, and to attempt to bring about a friendly solution to the issues raised." *Id.*

[422] The lack of expertise of the highest court of appeal (the Privy Council in London) was a big complaint by June Jackson, chief executive of Manukau Urban Maori Authority, who appealed the Urban Maori claim to the New Zealand fisheries assets to the Privy Council. *Law Lords' Hearing 'Waste of Money,' supra* note 205. "I don't think that Law Lords can learn in three days about a race of people, our differences, our culture, how we think, how we feel." *Id.* Jackson said the court costs of the Urban Maori claims had cost her a personal total of about NZ$600,000, and that she would have preferred, "and I still prefer, that we settle it back home, in Aotearoa." *Id.*

[423] MINISTRY FOR MAORI DEVELOPMENT, *supra* note 245, at 26.

peoples' reparations if their culture is to survive with their environment. As Maori and Western Washington Treaty Tribes' have found through management of their respective commercial and non-commercial fisheries, managing natural resources also provides the opportunity to create a culturally-based means for economic development, which is an essential element of true self-determination.[424]

From the ability to garden the nearshore to the respect and attraction for the mysterious vastness and power of the ocean, coastal people have forged particularly strong links to the sea. Maori, for example, have clearly articulated their spiritual and physical relationship with the sea: "It encompasses a deep sense of conservation and responsibility to the future which colours their thinking, attitude and behaviour towards their fisheries."[425] What indigenous peoples know about managing fishing resources can only help in a struggle to save the world's over-exploited fisheries.[426] As one scholar writes, "Mutual understanding and cooperation is essential, and the respective parties should abandon the battlefield of the courtroom and focus on comprehensive negotiations to decisively determine where native fishing rights fit into the troubled fishing industry."[427]

Options exist on the international stage for indigenous peoples to claim human rights violations. Recognition that the ability of indigenous peoples to use and nurture their natural resources is a human right is an international standard of growing weight. Thus, until the creation of an international forum for all indigenous peoples, whether recognized as State actors or not, indigenous peoples will continue to build on international customary law. Maori, for instance, will continue working toward a fisheries settlement that is more than a decade in the making, as evidenced by their continued negotiations and filings with the Crown, United Nations, federal courts, and Waitangi Tribunal.[428]

Although many indigenous peoples are known for their patience and for being more concerned about the world their grandchildren will inherit,[429] they

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[424] *See supra* notes 356 and 390.

[425] MURIWHENUA FISHING REPORT, *Supra* note 40, at 180.

[426] MICHAEL BERRILL, THE PLUNDERED SEAS 2 (1997). "The [U.N. Food and Agriculture Organization] also reports that fully two-thirds of the world's fish stocks are now either overexploited and are in dangerous decline or are fished to capacity, unable to withstand any increase in fishing pressure without also declining." *Id.*

[427] Burnett, *supra* note 322, at 434.

[428] Interview with Hana Morgan, *supra* note 250. "That fishing argument could take years. We'll be lucky to see anything settled by the year 2000. Nothing bothers us like that. We waited 150 years; what's another few going to matter?" *Id.*

[429] *See, e.g.*, WINONA LADUKE, ALL OUR RELATIONS: NATIVE STRUGGLES FOR LAND AND LIFE 198 (1999)(quoting a Six Nations Iroquois Confederacy teaching that states, "In each deliberation, we must consider the impact on the seventh . . . generation from now."). Similarly,

are also known for their proactive response to immediate needs. When a fishing net begins to wear, a new net is created. If the traditional resources no longer exist, the net still must be made. Thus, new resources are discovered, and those resources may require new methods of weaving and knotting. In the case of the Maori, their flax nets can no longer be used over thousands of yards, because flax and fish are not as prevalent, and Maori can no longer "go out for a feed," whenever their hapu requires it. Instead, the new net involves stacks of documents, court cases, boardrooms, and calculator buttons. New net-builders in the form of the TOKM and regulation-created kaitiaki observe new ceremonies and provide for their people in new, yet-to-be-determined ways. Yet the goal remains the same: that both the resource and Maori get the respect and sustenance they deserve and require.

The goal also remains the same for other indigenous peoples around the globe. Use and management of the natural resources that help define their traditional territories, cultures, religions, and economics are prerequisites for lasting and meaningful reparations. When domestic remedies have been denied or are impractical, indigenous peoples' valid claims, based on internationally recognized customary norms, must be addressed by an international forum or tribunal vested with the power to hear and adjudicate such claims. Maori, perhaps unintentionally, have assisted in providing the requirements for developing such a forum. In keeping with tradition, Maori have freed the ika whakataki (first fish) so that it will guide other fish back to the net.[430] Upon catching a fisheries settlement for their people, Maori have liberated the ika whakataki; they have provided valuable lessons for all indigenous peoples interested in regaining control of their natural resources.

Heidi Kai Guth[431]

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the Maori, when marching on Waitangi for Waitangi Day (national holiday celebrating the signing of the Treaty of Waitangi) demonstrations, Feb. 6, 1995, sang: "Maori land not for sale; Maori moana [sea] not for sale; Maori whenua [land] not for sale; Maori mokopuna [grandchildren] not for sale; Treaty rights not for sale." (Author's notes, on file with author).

[430] BEST, *supra* note 2, at 19.

[431] Class of 2002, William S. Richardson School of Law. This comment originally was written for visiting Prof. Alison Rieser's Second Year Seminar class at the William S. Richardson School of Law; I owe tremendous gratitude to her, Prof. Jon Van Dyke and Le'a Kanehe for their support and assistance. The Billings family and their Harry and Patricia Billings Fellowship at the University of Montana School of Journalism allowed me to begin studying Maori fishing rights in Aotearoa. And the inspiration of the Maori people – especially those who took me into their marae, homes and lives – wrote these pages. May Maori mokopuna be forever proud of their intelligent and generous grandparents.

APPENDIX – Glossary of Commonly Used Maori Words in This Comment

Note: No "s" exists in Maori; hence, all singular and plural spellings of nouns are the same.

Aotearoa – Land of the Long White Cloud; Maori name for New Zealand
Hapu – sub-tribe
Hui – meeting
Hui-a-Iwi – meeting of iwi
Hui-a-Tau – annual meeting
Ika whakataki – first fish caught
Iwi – tribe
Kai moana – seafood
Kainga – eat
Kaitiaki – resource managers
Kaumatua – elders
Kawanatanga – right to make laws for good, for order, and to protect Maori mana
Kina – sea urchin
Koha – gift
Mahinga mataitai – cultivation of seafood
Mana – spiritual power
Mana whenua – customary rights and authority over land
Mana moana – customary rights and authority over the sea
Marae – traditional meeting place
Mataitai – small, traditionally important fisheries
Moana – sea
Mokopuna – grandchildren; future generations
Muriwhenua – a consortium of Northland iwi
Ohu – working volunteer
Pakeha – outsider; non-Maori
Paua – type of abalone
Rahui – closures
Rangatiratanga – customary right to own and manage a resource
Rino tino rangatiratanga – sovereignty, including management
Rohe – region
Runanga – council
Taiapure – local, coastal fisheries
Tangata whenua – people of the land
Tangi – funeral
Taonga – treasure, natural resource, tangible and non-tangible
Tapu – sacred; forbidden

Taunga ika – fishing ground
Te reo Maori – the Maori language
Tikanga Maori – Maori law
Tiriti – treaty
Tohu – signs; landmarks
Waitangi – town on the northwest coast of N.Z.'s North Island, on the Bay of Islands, where the 1840 Treaty of Waitangi was first signed by Crown and Maori.
Waka – canoe
Whanau – extended family
Whenua – land

Mortgagor Protection Laws: A Proposal for Mortgage Foreclosure Reform in Hawai'i

I. INTRODUCTION

Freedom from deficiency judgments would have been a blessing for many Hawai'i homeowners who purchased personal residences during the booming real estate market, and who subsequently lost both jobs and homes during the economic decline of the 1990s.[1] During the real estate boom in the late 1980s and early 1990s,[2] many middle- and lower-income wage earners, lured by the profitable market[3] and federal policies encouraging home ownership,[4] purchased single-family dwellings.[5]

Foreign investors,[6] particularly the Japanese,[7] purchased or financed tens of billions of dollars of United States property on expectations of sharply rising rents and real property value during the real estate boom.[8] The Japanese

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[1] *See Bankruptcy, Foreclosure Filings Decline*, ASSOCIATED PRESS NEWSWIRES, July 12, 2000. The economic decline was deeply felt by Hawai'i residents from 1990 to 1998. 1999 was the first year "since 1990 that Hawai'i did not post a record for total bankruptcy filings." *Id.*

[2] Jeanne Pinder, *Japanese Banks Feel Real Estate Bust*, JOURNAL RECORD, June 4, 1993; *Hawaii's Economy Stammering the Effects of a Hurricane, Recession and Fare Wars Damage the 50th State's Tourism Industry*, ORLANDO SENTINEL, Feb. 28, 1993, at F6 (stating that Japanese investment in Hawai'i was at an all time high of $4.4 billion in 1989).

[3] Real estate prices "seemed as if they could go nowhere but up." Donald Breed, *Sun Sets on Investment by Japan in New England*, PROVIDENCE JOURNAL-BULLETIN, Mar. 28, 1993, at 1, 1993 WL 3157623.

[4] *See* Jane Kaufman Winn, *Lien Stripping After* Nobelman, 27 LOY. L.A. L. REV. 541, 579-80 (1994). The federal government has pursued a broad-based policy of encouraging home ownership in the United States since the 1930s. Providing "tax incentives such as the home mortgage interest deduction for taxpayers, deposit insurance for savings and loans and banks, [and] mortgage insurance to holders of mortgages that conform to federal guidelines" are some examples of encouraging home ownership. *Id.* at 580.

[5] *See* Thomas Kaser, *Hawaii Foreclosures Skyrocket*, HONOLULU ADVERTISER, June 29, 1996, at A1. Many homebuyers bought houses at inflated prices. *Id.*

[6] *See* Thomas Kaser, *Caught in a Squeeze: Cash Flow, Lawsuits Plague Developer Bruce Stark*, HONOLULU ADVERTISER, Jan. 28, 1996, at E1, 1996 WL 9407980. In the 1960s and early 1970s, U.S. mainlanders, Canadians, and Japanese made significant purchases of real property in Hawai'i. *Id.* In the 1970s, Hong Kong Chinese bought real property in Hawai'i before moving on to Canada. *Id.* In 1987, the Japanese, New Zealanders and Australians bought real property, which continued for three years. *Id.*

[7] *See Japanese Rethinking S.D. Real Estate Investments, Seeking Higher Returns*, SAN DIEGO DAILY TRANSCRIPT, Apr. 19, 1994, at 1, 1994 WL 3160714. Hawai'i is a Japanese favorite and one of their premier resort destinations. *Id.*

[8] *See* Mitchell Pacelle, *Japanese Investors Pulling Up Stakes After Costly Forays Into U.S. Market*, PITTSBURGH POST-GAZETTE, June 18, 1995, at J8, 1995 WL 3388696. "Between 1985 and 1991, Japanese companies invested about $77 billion in the U.S. property markets, much

financed $18.8 billion on premium purchases of resorts, golf courses, and residential properties in Hawai'i alone.[9] By the early 1990s, investors either owned or financed almost every four- and five-star resort in Hawai'i.[10] Not surprisingly, these big-ticket purchases increased most real estate prices in Hawai'i.[11]

The real estate boom, however, was short-lived. Recession in the United States[12] and Japan[13] quickly followed. Fewer people traveled and real estate values in Hawai'i slumped.[14] Visitor counts and spending plummeted.[15] Low occupancies made it virtually impossible for numerous hotels to break even on operations.[16] Consequently, many hotels slashed jobs and reduced employee work hours.[17] Since tourism represented as much as one-third of Hawai'i's economy,[18] low visitor counts and spending significantly weakened Hawai'i's economic well-being. In 1992, rising unemployment rates and mortgage foreclosures earned Hawai'i a rating as one of the ten worst states for economic performance in the nation.[19] Hawai'i homeowners set record

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of it in California, Hawai'i and New York." *Id.*

[9] *See generally Japanese Rethinking S.D. Real Estate Investments, Seeking Higher Returns*, *supra* note 7, at 1.

[10] Pacelle, *supra* note 8, at J8.

[11] *See* Kaser, *supra* note 5, at A1. "When Japanese buyers came, they inflated most real estate prices." *Id.*

[12] *Business Failures Up 44 Percent in '91*, THE HERALD, Feb. 21, 1992, at 6B, 1992 WL 3883881. U.S. business failures hit record levels in 1991. "Unpaid debts of defunct businesses totaled $108.8 billion [in 1991], a gain of 95.9 percent from 1990." *Id.*

[13] Japanese stock and real estate prices collapsed in 1992. By the end of 1992, "the Nikkei index had fallen 60 percent from its 1989 peak." Breed, *supra* note 3, at 1. "Estimates of Japanese banks' nonperforming loans range from $210 billion to $425 billion." *Id.* Since then, "values of all kinds of U.S. real estate have fallen." *Id.*

[14] *Maruko Proves Bankruptcy Can Be More Civil, Less Litigious*, BANKR. CT. DECISIONS, Jan. 20, 1994, at 5. Hawai'i real estate values were not the only ones deeply affected. "U.S. commercial real estate has shed more than $1 trillion of value since 1989, when the purchase prices of skyscrapers, raw land, industrial complexes and shopping centers reached historic highs – thanks mostly to Japanese investors." Thom Calandra, *Not a Profitable Real Estate Year*, SAN FRANCISCO EXAMINER, Dec. 27, 1992, at E1, 1992 WL 7603582.

[15] *See* Lisa Ishikawa, *Redefining Paradise: A Humbling Slump is Raising Immediate and Far-Reaching Questions for Hawaii Tourism*, HAWAII BUSINESS, Jan. 1, 1994, at 15, 1994 WL 3109281. "Since December 1990, visitor counts and spending have plummeted." *Id.*

[16] *Id.*

[17] *Id.* "Local 5, the dominant hotel [employees] union in Waikiki, report[ed] a decrease in worker hours." *Id.*

[18] *Hawaii's Economy Stammering the Effects of a Hurricane, Recession and Fare Wars Damage the 50th State's Tourism Industry*, *supra* note 2, at F6.

[19] *Isle Economy Rated 42nd in U.S.*, THE HONOLULU ADVERTISER, Sept. 25, 1992, at A26; *see also* Jonathan Marshall, *Past Successes Created Unrealistic Expectations: How California's Economy Fell So Far So Fast*, SAN FRANCISCO CHRONICLE, Oct. 23, 1992, at A1, 1992 WL 6286397. Hawai'i was in the bottom ten on economic performance based on the following

highs on foreclosure filings each year between 1990 and 1998.[20] As a result of job loss or reduced pay, many homeowners could not make mortgage payments on time and were forced to go along with the mortgagee's foreclosure action.

These homeowners soon realized that putting their houses in foreclosure was just the beginning of their misfortune. The mortgagee, usually the only bidder at the auction sale, could buy the property at the "foreclosure sale for an artificially low price, realize a profit on the resale of the property, and still have the right to pursue the borrower for the deficiency set by the purchase price at the sale."[21] At the expense of the financially burdened homeowner,[22] the mortgagee gets the benefit of a "double recovery" of profiting from a deficiency judgment against the homeowner and from the resale of the homeowner's house.[23] Although numerous states have enacted some form of mortgagor protection laws designed to prevent the "more egregious forms of mortgagee manipulation"[24] in the foreclosure process, Hawai'i has not enacted any mortgagor protection legislation to protect its homeowners.[25]

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indicators: "employment growth, home sales, mortgage delinquencies, mortgage foreclosures and unemployment rates." *Id.*

[20] *See* THE DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM, THE STATE OF HAWAII DATA BOOK 1995: A STATISTICAL ABSTRACT Table 21.35 (1996); THE DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM, THE STATE OF HAWAII DATA BOOK 1998: A STATISTICAL ABSTRACT 616 (1999). In 1990 there were 680 foreclosures and the numbers have risen steadily since then. Using 1990 as the base year, foreclosure filings rose about twenty percent in 1991, fifty-seven percent in 1992, 111 percent in 1993, 132 percent in 1994, 188 percent in 1995, 312 percent in 1996, 363 percent in 1997, and 433 percent in 1998. 1999 was the first in a decade to not set a record high in foreclosure filings. *Recovering Economy Still Has 'Hangover'*, HONOLULU ADVERTISER, Sept. 3, 2000, at A1. However, foreclosures may "have risen overall as creditors and debtors opt for less expensive, non-judicial methods." *Id.*

[21] Winn, *supra* note 4, at 593.

[22] *See* James B. Hughes, Jr., *Taking Personal Responsibility: A Different View of Mortgage Anti-deficiency and Redemption Statutes*, 39 ARIZ. L. REV. 117, 125 (1997). A homeowner sustains two financial blows when a significant difference exists between the outstanding balance of the homeowner's indebtedness and the proceeds realized from a foreclosure sale of the property: 1) Financial loss of having the property sold to pay the borrower's defaulted indebtedness; and 2) Possibility that the lender would obtain a deficiency judgment against the homeowner for the unsatisfied portion of the indebtedness. *Id.* "Thus, after losing title to his property, all of his remaining assets were potentially exposed to sale or levy to satisfy the deficiency judgment." *Id.*

[23] Ronald Goldstein, *Reforming the Residential Mortgage Foreclosure Process*, 21 REAL EST. L.J. 286, 294 (1993).

[24] Winn, *supra* note 4, at 593.

[25] Non-judicial foreclosure (power of sale foreclosure) is available under Hawai'i Revised Statutes section 667-5 and is generally preferred by most lenders because of its inexpensive and quick process. Since this option bypasses the court system, power of sale foreclosure has been under attack on the ground that the statutory notice requirements do not satisfy constitutional

This Comment investigates a more equitable approach to the foreclosure process by examining mortgagor protection laws, namely anti-deficiency legislation and the statutory right of redemption, and exploring whether these laws should be enacted in Hawai'i. Part II briefly describes the general procedure of mortgage foreclosure. Part III examines the principles of mortgagor protection laws and the criticisms leveled against those laws. Part III also analyzes mortgagor protection laws in California and the Uniform Land Security Interest Act. Part IV analyzes the bases for and implications of instituting mortgagor protection laws in Hawai'i. With the goal of establishing a more equitable foreclosure procedure, Part V concludes that 1) the Hawai'i state legislature should enact an anti-deficiency judgment legislation that would protect homeowners, and 2) the statutory right of redemption is inefficient and fails to provide sensible relief to a majority of Hawai'i homeowners and, therefore, should not be enacted.

II. AN OVERVIEW OF MORTGAGE FORECLOSURE PROCEDURE

"Foreclosure is the process by which a debt secured by a mortgage is satisfied from the proceeds of a forced sale of the property."[26] The standard foreclosure procedure is as follows: "following a default by the borrower, and after appropriate notice and opportunity for the borrower to proffer the outstanding balance to the lender, the lender may proceed to a public sale of the subject real estate."[27] The foreclosure sale may be court supervised in a judicial sale or may be conducted by an agent of the mortgagee in a power of sale.[28]

Another alternative, strict foreclosure, permits a lender to retain absolute ownership of the property in satisfaction of the debt in the event that a

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requirements for procedural due process. *See, e.g.*, Roberts v. Cameron-Brown Co., 410 F. Supp. 988 (S.D. Ga. 1975) (holding that mortgagors' due process rights were violated by nonjudicial foreclosure sale absent any waiver of such rights in the deed to secure debt); Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975) (holding that the North Carolina statutory non-judicial foreclosure sale provision violated mortgagors' due process rights for failing to assure notice and an opportunity to be heard prior to foreclosure conducted pursuant thereto); Ricker v. United States, 417 F. Supp. 133 (D. Me. 1976) (holding that the Secretary of Department of Agriculture, Farmers Home Administration violated mortgagors' due process rights when it failed to offer mortgagors an opportunity for hearing before their mortgage was foreclosed). Consequently, this option conceivably provides less protection to homeowners than judicial foreclosure.

[26] Nicholas C. Dreher, *Chapter 14 Default and Lenders' Remedies*, HAWAII REAL ESTATE FINANCING MANUAL 14-1, 14-17 (1990).

[27] *See* Winn, *supra* note 4, at 591.

[28] *Id.*

mortgagor fails to make payment in full within a certain period.[29] Strict foreclosure is viewed as unduly harsh on the mortgagor because the mortgagee could be acquiring land far more valuable than the mortgage debt.[30] Currently, strict foreclosure is available in Connecticut.[31] This Part discusses the pros and cons of the two main foreclosure methods: judicial foreclosure and power of sale foreclosure.

A. Judicial Foreclosure

Judicial mortgage foreclosure is the predominant remedy for the vast majority of lenders holding real property security.[32] Every state, including Hawai'i,[33] allows mortgagees to bring an action in court to foreclose on mortgage liens.[34] The lawsuit is against the homeowner and any others who may hold interests in the property the mortgagee seeks to extinguish.[35] After the complaint is filed, the mortgagor must file an answer within a certain number of days[36] or the court will automatically issue a notice of default in favor of the lender.[37]

In Hawai'i, if the mortgagor answers the complaint, the lender usually files

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[29] *See* Pamela Giss, *An Efficient and Equitable Approach to Real Estate Foreclosure Sales: A Look at the New Hampshire Rule*, 40 ST. LOUIS U. L.J. 929, 939 (1996).

[30] Basil H. Mattingly, *The Shift from Power to Process: A Functional Approach to Foreclosure Law*, 80 MARQ. L. REV. 77, 91 (1996) (noting that strict foreclosure is unduly harsh because it does not protect a borrower's equity in the property).

[31] 31 CONN. GEN. STAT. ANN. § 49-15 (West 2001) ("Any judgment foreclosing the title to real estate by strict foreclosure may . . . be opened and modified . . . upon such terms as to costs as the court deems reasonable; but no such judgment shall be opened after the title has become absolute in any encumbrancer.").

[32] *See* Mattingly, *supra* note 30, at 93 (noting that all states have statutes governing judicial foreclosure proceedings).

[33] "Once the pleadings [are] completed, the [mortgagee] normally files a motion for summary judgment and interlocutory decree of foreclosure [in accordance with] Rule 56 [of the Hawai'i Rules of Civil Procedure]." Dreher, *supra* note 26, at 14-36. "Such a motion should be granted by the court unless there exists a disputed issue of material fact which relates to the lender's right to foreclose." *Id.*

[34] Michael H. Schill, *An Economic Analysis of Mortgagor Protection Laws*, 77 VA. L. REV. 489, 492 (1991).

[35] Mattingly, *supra* note 30, at 93.

[36] In Hawai'i, the mortgagor and other defendants have twenty days to answer. HAW. R. CIV. P. 12(a)(1) (West 2001) ("A defendant shall serve an answer within 20 days after being served with a summons or complaint . . .").

[37] In Hawai'i, after a notice of default has been entered, a summary judgment and interlocutory decree of foreclosure follows. *See* SIDNEY A. KEYLES, FORECLOSURE LAW AND RELATED REMEDIES: A STATE-BY-STATE DIGEST 136 (1995).

a motion for summary judgment[38] and an interlocutory decree of foreclosure.[39] The mortgagor may defend against the motion by showing any "matter in legal or equitable avoidance of the mortgage."[40] If summary judgment is denied, the mortgagee will usually proceed to trial to obtain a decree of foreclosure. At trial, both parties may present evidence with respect to the mortgagor's default, the amount of the unpaid balance, and any defenses of the mortgagor.[41] The trial can be a very time–consuming, expensive, and complex undertaking. A trial requires written pleadings, discovery, personal service, courtroom proof, judicial supervision of sale, and payment of lawyers' fees, and court costs.[42] Ultimately, after months or possibly years,[43] if the court finds that the mortgagor has defaulted under the terms of the loan, the court will order the public sale of the property to foreclose on the lien.[44] Upon such court order, a sheriff or a court appointed official conducts the foreclosure sale.[45]

At any time prior to the sale of the property, the mortgagor may exercise her equitable redemption[46] by paying the remaining principal balance plus accrued

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[38] *See id.*

> In routine foreclosures, the motion for summary judgment is supported by an affidavit from the mortgagee stating the relevant terms of the loan documents and mortgage, the event of default, the amount of the debt, and the means by which the demand that the default be cured was made upon the mortgagor.

Id. at 136.

[39] *Id.*

[40] HAW. REV. STAT. ANN. §.667-4 (Michie 1999).

[41] *See* Schill, *supra* note 34, at 492. Facts which are material in a Hawai'i court would include: "whether a default has occurred; whether the lender has given all required notices, grace periods and opportunities to cure required by the mortgage documents; whether some event has occurred which should prevent the lender from enforcing the mortgage documents against the borrower." *See* Dreher, *supra* note 26, at 14-36.

[42] John Mixon & Ira B. Shepard, *Anti-deficiency Relief for Foreclosed Homeowners: ULSIA Section 511(b)*, 27 WAKE FOREST L. REV. 455, 478 (1992).

[43] Mattingly, *supra* note 30, at 93. In Hawai'i, a judicial foreclosure usually takes at least nine months and costs thousands of dollars. *See* Rob Perez, *Selling Yourself Short*, HONOLULU STAR-BULLETIN, May 19, 1997, at D1 (noting that lenders prefer agreeing to a power of sale than going through a lengthy judicial foreclosure).

[44] Schill, *supra* note 34, at 492.

[45] Mattingly, *supra* note 30, at 93; *see also* KEYLES, *supra* note 37, at 135 (stating that the court in Hawai'i appoints a "commissioner" and charges that person with the obligation of taking possession of and selling the mortgaged property).

[46] Equitable redemption should not be confused with statutory right of redemption. Every state permits equitable redemption, which allows the borrower to redeem his title to the property anytime prior to foreclosure by paying off the mortgage to the lender. Statutory right of redemption, on the other hand, allows more time for the borrower after the foreclosure sale to secure alternative financing to redeem his title to the property. *See* James S. Hering, *Real Property Foreclosure in Texas: What is Deficient about the Texas Deficiency Judgment Statute?*, 37 S. TEX. L. REV. 377, 405-06 (1996).

interest, penalties, late charges, attorney's fees, advertising, and court costs.[47] If the mortgagor fails to exercise her equitable redemption, the property will be sold to the highest bidder at a public sale.[48] The proceeds of a foreclosure sale are distributed to the lender to satisfy the balance of the debt, and then to any junior lien holders to whom the debtor is in default.[49] If the sale results in a surplus, that residual is returned to the mortgagor.[50] Capturing a bid in excess of the mortgage debt is unusual, however, because a homeowner can ordinarily have the property sold in a private sale that avoids foreclosure if the property value is more than the mortgage debt.[51]

B. Power of Sale

Another method of mortgage foreclosure is the mortgagee's exercise of the "power of sale" contained in the collateral document.[52] This non-judicial method permits a mortgagee, in compliance with state foreclosure law, to sell the debtor's property shortly after default to the highest bidder in a public sale.[53] More than one-half of the states allow at least some form of non-judicial foreclosure.[54]

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[47] *See* Schill, *supra* note 34, at 492. Hawai'i has no statute giving redemption rights to a mortgagor. KEYLES, *supra* note 37, at 137. Hawai'i courts, however, almost invariably allow a mortgagor to reinstate a loan and enforce mortgage provisions allowing a mortgagor to reinstate. *Id.* at 138.

[48] In Hawai'i, the court instructs the commissioner to reopen the auction in the hall outside of the courtroom to entertain bids that are at least five percent higher than the auction sales price. KEYLES, *supra* note 37, at 137. At the end of the reopen auction, the court confirms the results to the highest bidder. *Id.*

[49] Generally, the foreclosing mortgagee will name all parties in its foreclosure proceeding. To be assured of good title, the mortgagee will wish to eliminate from title every lien, claim or encumbrance which can possibly be eliminated and will wish to liquidate amounts owing to all others who have a right in or against the mortgaged property. *See* Nicholas C. Dreher, *Chapter Thirty-Two: Default and Bankruptcy, in* HAWAII INSTITUTE FOR CONTINUING LEGAL EDUCATION, HAWAII STATE BAR ASSOCIATION, HAWAII REAL ESTATE LAW MANUAL, 32-21 (1997).

[50] *See* Mixon & Shepard, *supra* note 42, at 480.

[51] *Id.*

[52] To exercise power of sale in Hawai'i, a mortgage agreement must contain power of sale as a foreclosure method upon a breach of the condition. HAW. REV. STAT. ANN. § 667-5 (Michie 1999).

[53] Mattingly, *supra* note 30, at 94.

[54] For a list of jurisdictions that allow some form of power of sale foreclosure see Mattingly, *supra* note 30, at 94 n.82. These jurisdictions include: Alabama, Alaska, Arizona, Arkansas, California, Colorado, District of Columbia, Georgia, Guam, Hawai'i, Idaho, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nevada, New Hampshire, North Carolina, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, and Wyoming. *Id.*

Under the Hawai'i Revised Statutes ("HRS"), mortgagees are authorized to undertake a non-judicial foreclosure sale after publishing notice of their intention to foreclose and notice of the sale in a local newspaper.[55] The notice may be made once each week for three consecutive weeks, the last publication to be not less than fourteen days before the day of the sale.[56] The mortgagee must file copies of the notice with the state director of taxation, and post copies on the premises not less than twenty-one days before the day of the sale.[57] Although the HRS is silent on the reinstatement rights of the mortgagor, Hawai'i courts typically allow the mortgagor to reinstate a loan, at least until right before the mortgaged property is sold at the foreclosure sale.[58]

The mortgagee or its agent conducts the non-judicial foreclosure sale,[59] during which it may credit-bid[60] on the property.[61] Within thirty days after selling the property through the power of sale, the mortgagor must file a copy of the notice of sale and the mortgagee's affidavit disclosing what actually occurred at the sale.[62]

Despite its simplicity and speed, the power of sale foreclosure was not a popular way to foreclose on a mortgage in Hawai'i.[63] Title companies were reluctant to insure title obtained by way of a non-judicial foreclosure because of a concern that the statutory notice requirements did not satisfy the constitutional requirements of procedural due process.[64] Once title companies indicated they would issue title insurance on property acquired through non-judicial foreclosure, mortgagees began to foreclose non-judicially.[65]

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[55] HAW. REV. STAT. ANN. § 667-5 (Michie 1999).

[56] *Id.*

[57] *Id.* The HRS does not make clear how many copies are needed for posting on the premises, nor does it make clear where copies of the notice should be posted. Consequently, evasive publication is possible. *Cf.* Carter v. Koolau Kaikainahaole, 17 Haw. 528, 534 (1906) (concluding that the possibility of evasive publications under a statue would not be grounds for invalidating the statute).

[58] KEYLES, *supra* note 37, at 137-38.

[59] *See* Wailuku Sugar Co. v. Dean, 8 Haw. 108 (1890) (holding that the mortgagee or someone on its behalf is authorized to foreclose on the mortgaged property).

[60] Unlike a third party bidder who must essentially make an all-cash purchase of the foreclosed property, a mortgagee can "credit" bid (that is, make no cash payment). *See* Alex M. Johnson, Jr., *Critiquing the Foreclosure Process: An Economic Approach Based on the Paradigmatic Norms of Bankruptcy*, 79 VA. L. REV. 959, 995 (1993); Richard S. Fries, *Amendment to RPAPL Article 14 Allows Nonjudicial Foreclosure of Commercial Mortgages*, 70-DEC N.Y. ST. B.J. 50, 51 (1998).

[61] Usually the mortgagee credit bids up to the loan amount outstanding, and not in proportion to the value of the property. *See* Mattingly, *supra* note 30, at 101.

[62] HAW. REV. STAT. ANN. § 667-5 (Michie 1999).

[63] Dreher, *supra* note 49, at 32-18.

[64] *Id.*; *see also supra* note 25.

[65] KEYLES, *supra* note 37, at 138.

C. Judicial Foreclosure vs. Power of Sale

The public sale is intended to provide competitive bidding to protect the mortgagor's equity interest,[66] and eliminate the mortgagor's "equity of redemption" by way of a court-supervised or private sale of the mortgaged property.[67] In determining which foreclosure method best satisfies these objectives, this Part analyzes the advantages and disadvantages of judicial and non-judicial foreclosures, and examines the current standard foreclosure procedure in Hawai'i.

A defaulting homeowner who values the freedom to dispute the lender's attempt to foreclose on the property will generally prefer judicial foreclosure. This freedom, however, is expensive due to the high cost associated with the judicial system and the time lapse between the actual default and the time of sale.[68] If the action is uncontested and there is no congestion in the court's calendar, the time frame to complete a judicial foreclosure can be nine months.[69] Otherwise, depending upon the complexity of the issues involved, a foreclosure action can take years to resolve. Such an extended time frame and high costs render judicial foreclosure less popular among lenders and even among some borrowers, though this option is intended to protect borrowers.[70]

In contrast, power of sale is relatively quick and inexpensive. It does not require a lengthy time period between the notice of default and foreclosure sale,[71] and does not require court costs and legal fees associated with discovery and drafting of pleadings.[72] Despite its simplicity, the power of sale foreclosure is criticized for giving the mortgagee greater opportunity for a double recovery. Because the mortgagee conducts and oversees a power of

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[66] Johnson, *supra* note 60, at 988.

[67] *Id.* at 989.

[68] *See* Goldstein, *supra* note 23, at 288. "The judicial sale process is generally a time-consuming and expensive process." *Id.*

[69] *See* Perez, *supra* note 43.

[70] In Hawai'i, a typical court-supervised foreclosure runs from $8,000 to $11,000. *See* Susan Hooper, *Easier Foreclosures Sought*, HONOLULU ADVERTISER, Apr. 16, 1997, at B10. A financially burdened homeowner will typically opt to reduce costs to the extent possible, rather than incurring costs in a legal battle.

[71] The time frame to complete a power of sale is between fifteen days and six months depending on the non-judicial foreclosure procedure of the state. In Hawai'i, "the minimum time for a non-judicial foreclosure is one month." KEYLES, *supra* note 37, at 137.

[72] Legal fees are generally limited to the drafting of the notice of default, service, and other incidental costs.

sale foreclosure,[73] the mortgagee may bid at an unreasonably low price, and create a large deficiency that constitutes a personal liability to the borrower.

Justification for judicial foreclosure is that "a court-supervised sale is less likely to produce an unfair deficiency than a [non-judicial] foreclosure in which the lender is the only bidder and therefore sets the amount of deficiency unilaterally."[74] This justification assumes that competitive bidding is more likely realized in a court-supervised sale than in a private sale.

In both a judicial and power of sale foreclosure, the mortgagee is typically the successful, if not the only, bidder.[75] The mortgagee usually has the successful bid because both judicial foreclosure and non-judicial foreclosure "converge at the point of sale."[76] Therefore, the foreclosure process, whether or not it is court-supervised, fails to produce true competitive bidding.[77]

To realize true competitive bidding, a sale must attract bidders. These bidders, however, do not appear at the foreclosure sale absent a diligent effort on the part of the lender (in a power of sale foreclosure) or court-appointed official (in a judicial foreclosure) to advertise the property to the general public.[78] What material information is required for potential bidders to make suitable bids? The availability,[79] physical condition,[80] and state of legal title of property being foreclosed[81] are all important. Without such material information, potential bidders cannot effectively assess the property for sale. A way to illustrate this is to first consider the steps a prospective buyer takes to purchase a home in a non-foreclosure setting.

In a non-foreclosure setting, a prospective purchaser usually obtains information about the availability of property for sale through a variety of

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[73] *See* Giss, *supra* note 29, at 940 (noting that the debtor is both vulnerable to and dependent upon the foreclosing lender to use its best efforts to insure a fair sale).

[74] Mixon & Shepard, *supra* note 42, at 480.

[75] *See* Mattingly, *supra* note 30, at 95 n.88, citing Robert K. Lifton, *Real Estate in Trouble: Lender's Remedies Need an Overhaul*, 31 BUS. LAW 1927, 1937 (1976) (noting that the lender is the successful bidder at 99% of the foreclosure sales).

[76] *See, e.g.*, Mattingly, *supra* note 30, at 92-104 (noting that the current foreclosure process, both judicial and non-judicial, fails to provide material information necessary for competitive bidding); *see also* Scott B. Ehrlich, *Avoidance of Foreclosure Sales as Fraudulent Conveyances: Accommodating State and Federal Objectives*, 71 VA. L. REV. 933, 961 (1985) (arguing that "foreclosure procedures in many states inhibit rather than encourage competitive bidding and maximization of the sales price").

[77] *See* Ehrlich, *supra* note 76, at 977 (noting that notice of the foreclosure sale never reaches the real estate market, and few bidders appear at the sale).

[78] Since foreclosure sales are not designed to produce the best possible price for the property, the purpose of the foreclosure sale is the transfer of ownership of the property from a borrower to the lender and little more. Mattingly, *supra* note 30, at 95.

[79] *Id.* at 97.

[80] *Id.*

[81] *Id.*

sources: real estate brokers,[82] advertisement,[83] on-site "For Sale" signs,[84] and the Internet.[85] The prospective purchaser then "gathers information about the home's physical condition by making arrangements to view and inspect [the property], by speaking with and asking questions of the seller, and often by employing a professional inspector to assist her in determining the home's physical condition."[86] In addition, "the potential purchaser obtains information regarding the title of the property, usually by hiring an attorney to search the real property records and by obtaining title insurance."[87]

Finally, homebuyers generally borrow money from lending institutions to buy real property.[88] Loan processing begins when a potential purchaser submits an offer to purchase.[89] If the offer is accepted, the purchaser gathers financial information to submit to the lender for the lender's analysis and verification.[90] In addition, before committing to make a loan, the lender will likely require an appraisal and survey of the subject property.[91] Successfully obtaining funds to purchase a home requires a great deal of time, effort and money.

In contrast, bidders at a foreclosure sale do not have material information necessary to make a fair assessment of the property being foreclosed. Property posted for foreclosure does not involve a real estate agent who can alert her customers and other agents to the availability of the property or make arrangements to have the property listed in the multiple listing service.[92] Advertisement of the sale is usually restricted to the legal notices in the "Homes" section of the local newspaper and no real estate agent or homeowner arranges to have a "For Sale" sign placed on the property. In short, little is done to entice potential bidders to the sale. Rather, any

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[82] *Id.* at 96.

[83] *Id.*

[84] *Id.*

[85] The worldwide web is replete with real estate advertisements. A typical real estate search on the Google search engine (http://www.google.com) results in over 2,400,000 websites purporting to sell homes.

[86] Mattingly, *supra* note 30, at 96-97.

[87] *Id.* at 97.

[88] *See id.* at 100.

[89] In Hawai'i, the homebuyer and seller typically enter a Deposit Receipt Offer and Acceptance Agreement, which expressly requires the purchaser to obtain adequate financing to complete the purchase.

[90] Mattingly, *supra* note 30, at 100.

[91] PAUL GOLDSTEIN & GERALD KORNGOLD, REAL ESTATE TRANSACTIONS: CASES AND MATERIAL ON LAND TRANSFER, DEVELOPMENT AND FINANCE 404 (3d ed. 1997).

[92] Mattingly, *supra* note 30, at 97. "A multiple listing service is a service through which member realtors exchange real estate listings with each other, and thereby increase their mutual chances of matching real estate buyers with real estate sellers." Richard C. Stanley, *Antitrust Law*, 36 LOY. L. REV. 665, 668 (1990).

interested buyer must search for the information herself by making special trips to the courthouse to read the foreclosure notices posted on the bulletin board, or by studying the legal notices in local newspapers.[93]

Bidders will also be interested in obtaining information regarding the physical condition of property improvements.[94] They may contact the lender (or its attorney) or the commissioner listed in the notice of sale and attempt to arrange for the inspection of the property.[95] Inspection of the property may not be a problem if the property is already vacant. The challenge arises when the borrower is still in possession of the property. Although a potential bidder could attempt to arrange with the borrower a time to inspect the property, the borrower will not likely welcome "providing home tours to potential purchasers of the very home the borrower does not want to be sold."[96] Similarly, "attempts to elicit information from the borrower are likely to be unsuccessful and the existence of an inspection report from a professional inspector" is rather uncommon.[97] "Potential bidders must resign themselves to gathering information about the property's physical condition by driving past the property and viewing it from the street."[98]

In addition to these limitations on a prospective bidder's ability to obtain key information and inspect the premises, the high bidder typically must be able to pay at the sale, in cash.[99] Needless to say, very few parties have adequate resources to pay the purchase price up front.[100] While it is not impossible to arrange financing before the sale, doing so is impractical for the vast majority of bidders for several reasons. First, potential bidders are generally unwilling to expend the "time and expense associated with obtaining a loan commitment without some reasonable assurance of purchasing the property."[101] Second, "even if the potential bidder wanted to expend the time

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[93] These legal notices are usually posted with minimal property description and without any pictures.

[94] Mattingly, *supra* note 30, at 98.

[95] In Hawai'i, the lender or commissioner usually has two open house sessions on two separate days whereby interested bidders may view the physical condition of the foreclosing property. Telephone interview with Trevor A. Brown, Esq., Starn, O'Toole, Marcus & Fisher (Oct. 30, 2001). Before the first open house, the lender or commissioner would have already obtained a writ of possession pursuant to section 666-11 of the Hawai'i Revised Statutes to remove the homeowner from the property. *See* HAW. REV. STAT. ANN. § 666-11 (Michie 2000) (noting that a writ of possession shall be issued to a sheriff or police officer, commanding the sheriff or police officer to remove all persons from the premises, if it is proved that the plaintiff (mortgagee) is entitled to the possession of the premises).

[96] Mattingly, *supra* note 30, at 99.

[97] *Id.*

[98] *Id.*

[99] *Id.* at 100.

[100] *See id.* at 95.

[101] *Id.* at 100.

and funds on the chance that she would be the high bidder, it is highly unlikely that any lender would lend without the opportunity to inspect, appraise, and survey the property."[102] Even if the potential bidder could obtain a loan commitment, the time constraints may render the process impracticable.[103] The notice of sale from which potential bidders learn of the sale is often not posted until three or four weeks before the sale.[104] This generally does not allow potential bidders enough time to secure funds.[105]

"It should be no surprise that the majority of foreclosure sales occur without an observer, much less an actual bidder other than the lender, and true competitive bidding rarely occurs."[106] Even in the foreclosure sales that manage to attract a handful of bidders, the lack of adequate information and availability of financing options stunts true competitive bidding.[107] The absence of competitive bidding generally results in inadequate sale proceeds obtained at the foreclosure sale.[108]

Accordingly, as far as achieving competitive bids is concerned, it makes no difference whether a neutral third party (in a judicial foreclosure) or the mortgagee (in a non-judicial foreclosure) conducts the foreclosure sale. The final consideration then, especially for lenders, is the weighing of the legal costs involved in a judicial foreclosure and the possibility of a procedural due process challenge from a non-judicial foreclosure sale.[109] The next Part examines mortgagor protection laws intended to boost foreclosure sale prices as a remedy to the problem of deficiencies or inadequate sale proceeds derived from the absence of competitive bidding.

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[102] *Id.* at 100-01.

[103] *Id.* at 101.

[104] *Id.* In a non-judicial foreclosure sale in Hawai'i, notice must be posted at least twenty-eight days before the sale. *See* HAW. REV. STAT. ANN. § 667-5 (Michie 1999).

[105] Mattingly, *supra* note 30, at 101. A Honolulu homebuyer completed a purchase of his home from a foreclosure sale through an unconventional financing method. The ultimate buyer sought the assistance of his father, who obtained title to the foreclosed property by an all-cash purchase of the note and mortgage from the lender. After the ultimate buyer obtained financing from a bank, he purchased the foreclosed property from his father. Telephone interview with Mr. Brown, *supra* note 95.

[106] Mattingly, *supra* note 30, at 101.

[107] *Id.*

[108] *Id.* Because the mortgagee is usually the only bidder in a judicial or non-judicial sale, it can make a bid lower than the amount owed.

[109] A procedural due process challenge may result in a non-judicial foreclosure sale with respect to the sales method and sale price. If the property title is uncomplicated and the mortgagee decides to forego the recovery of any deficiency, non-judicial foreclosure is generally preferred by most mortgagees. *See* Dreher, *supra* note 49, at 32-19.

III. MORTGAGOR PROTECTION LAWS

Mortgagor protection laws, particularly anti-deficiency legislation and statutory right of redemption, are by-products of the Great Depression that began in 1929.[110] During the 1930s, when property values of American homes plummeted[111] and home foreclosures soared,[112] Americans became aware of the shortfalls in foreclosure procedures.[113] Homeowners criticized creditors for not conducting foreclosure sales fairly or for not using their best efforts to secure an adequate price for the property.[114] Consequently, many states enacted statutes designed to protect mortgagors from the "more egregious forms of mortgagee manipulation."[115]

This Part discusses the principles of anti-deficiency legislation and statutory right of redemption. To better understand these mortgagor protection laws, this Part examines a few jurisdictions that have enacted anti-deficiency judgment legislation and statutory right of redemption. In particular, California's mortgagor protection laws are closely examined for two important reasons: 1) they set the standard by which several states have modeled their own statutory schemes,[116] and 2) California's experience with a real estate boom and subsequent economic decline closely parallels Hawai'i's.

This Part also examines the mortgagor protection provisions set forth in the Uniform Land Security Interest Act ("ULSIA"). In August 1985, the National Conference on Uniform State Laws approved and recommended the ULSIA for enactment in all states.[117] Although not one state adopted the entire ULSIA,[118] ULSIA's underlying policy justifications for its mortgagor protection provisions[119] are noteworthy.

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[110] *See* Johnson, *supra* note 60, at 961.

[111] *See* Giss, *supra* note 29, at 944 (noting that property values fell dramatically during the depression).

[112] Joseph E. Gotch, Jr., *Creditors' vs. Debtors' Rights under Alaska Foreclosure Law: Which Way Does the Balance Swing?*, 14 ALASKA L. REV. 77, 82 (1997).

[113] *See* Giss, *supra* note 29, at 944.

[114] During the depression, mortgagees were "making foreclosure purchases at low prices and were then frequently using those low prices as the basis to vigorously pursue deficiency judgments against mortgagors. This practice was perceived as an injustice [to homeowners]." Steven Wechsler, *Through the Looking Glass: Foreclosure by Sale as De Facto Strict Foreclosure – An Empirical Study of Mortgage Foreclosure and Subsequent Resale*, 70 CORNELL L. REV. 850, 861 (1985).

[115] *See* Winn, *supra* note 4, at 593.

[116] Gotch, *supra* note 112, at 79.

[117] James M. Pedowitz, *Mortgage Foreclosure Under ULSIA*, 27 WAKE FOREST L. REV. 495 (1992).

[118] Mixon & Shepard, *supra* note 42, at 477.

[119] *See* George M. Platt, *The Uniform Land Security Interest Act: Vehicle for Reform of Oregon Secured Land Transaction Law*, 69 OR. L. REV. 847, 849 (1990) (stating that the

A. Anti-deficiency Judgment Legislation

Anti-deficiency judgment legislation "limits the right to recover deficiency judgments for the amount the debt exceeds the value of the security."[120] It is designed to, among other things, "protect the mortgagor from the double loss that results from losing his property to a mortgagee for less than its worth and facing a deficiency judgment based on that depressed price."[121] In some states, anti-deficiency statutes cannot be waived, because they are designed for the benefit of the general public.[122]

Where some states prohibit deficiency when a particular type of foreclosure process is utilized, most commonly a power of sale foreclosure,[123] others prohibit deficiency if the mortgagor used the loan proceeds to purchase residential real estate.[124] The rationale for limiting anti-deficiency judgments to residential property is that homebuyers do not typically purchase real estate for the purpose of making a profit.[125] Commercial mortgagors, on the other hand, purchase real estate for that very purpose and, therefore, are better equipped to take the risks of deficiency judgments.[126]

Some states require that mortgagees seek deficiency judgments at the same time they foreclose on the mortgage.[127] Others limit the amount of the

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ULSIA is a skillfully drafted statute that provides a reasonably inexpensive and efficient system for lenders and borrowers).

[120] Cadle Co. II v. Harvey, 100 Cal. Rptr. 2d 150, 154 (2000) (citation omitted).

[121] Wechsler, *supra* note 114, at 863-64.

[122] *See, e.g.*, Chem. Bank v. Belk, 255 S.E.2d 421 (N.C. App. 1979) (holding that execution of an estoppel certificate by defendant did not deprive him of his right to assert the statute in his defense to a deficiency proceeding, since a purchaser cannot, by his action or by contract, deny to himself the protection afforded him by the legislature in its enactment of the antideficiency statute).

[123] *See, e.g.*, CAL. CIV. PROC. CODE § 580(d) (West 2001) (prohibiting a deficiency judgment when the property is foreclosed under a power of sale); ALASKA STAT. § 34.20.100 (Michie 2000) (prohibiting a deficiency judgment when the trustee sells the property pursuant to the deed of trust without a court action on the obligation secured by the deed of trust).

[124] *See, e.g.*, ARIZ. REV. STAT. ANN. § 33-814(G) (West 2000) (prohibiting deficiency judgments when the trust property is 2.5 acres or smaller and is used as a one or two family residence); CAL. CIV. PROC. CODE § 580(b) (West 2001) (prohibiting deficiency judgments when a purchase money mortgage or deed of trust is secured by a dwelling for more than four families); OR. REV. STAT. § 86.770(2)(b) (1999) (prohibiting deficiency judgments under a judicial foreclosure of a residential trust deed).

[125] G. Stephen Diab, *North Carolina Extends its Anti-Deficiency Statute:* Merritt v. Edwards Ridge, 67 N.C. L. REV. 1446, 1456 (1989).

[126] "Traditionally a commercial mortgagor . . . who speculated in land for profit, bore the entire risk of his business investment." *Id.*

[127] *See, e.g.*, MONT. CODE ANN. § 71-1-222 (1989) (permitting one action for recovery on debt secured by a mortgage); NEV. REV. STAT. ANN. § 40.430 (Michie 2001).

deficiency judgment to the difference between the mortgage indebtedness and the reasonable value of the mortgaged property, as opposed to the foreclosure sale price.[128]

1. California's anti-deficiency legislation

California's anti-deficiency statutes are designed, as a matter of public policy, to promote the public welfare by protecting homeowners from oppression by creditors.[129] California's statute attempts to meet three goals: 1) to discourage vendors from overvaluing their security; 2) to prevent aggravation of economic downturn resulting from defaulting purchasers who are also burdened with personal liability; and 3) to prevent creditors from buying property for a nominal sum, after a debtor's default, and then holding the debtor liable for a large deficiency judgment.[130] With these goals in mind, California's statutory scheme has evolved into "intricate provisions for deficiency judgments that depend upon the remedy sought by the creditor."[131]

California's anti-deficiency legislation contains three important features. First, no deficiency is available after foreclosure if the property being foreclosed upon is a dwelling for not more than four families and the debtor incurred the debt to pay all or part of the purchase price.[132]

Second, a deficiency judgment is prohibited if the creditor wishes to exercise the power of sale provision contained in the mortgage or deed of trust.[133] This provision is intended to remedy the evil of double recovery because if a creditor desires to pursue a deficiency judgment, it must choose judicial foreclosure, and the sale would be subject to statutory redemption rights.[134] On the other hand, if the creditor does not want redeemable title

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[128] *See, e.g.*, IDAHO CODE § 6-108 (2000) (stating that the court determines reasonable value of the mortgaged property); N.Y. REAL PROP. ACTS. LAW § 1371 (McKinney 2001) (stating that the court determines market value); S.C. CODE ANN. §§ 29-3-660 to -740 (Law. Co-op 2001) (stating that the defendant may request appraisal).

[129] *See* California Bank v. Stimson, 201 P.2d 39 (Cal. 1949).

[130] *See* Union Bank v. Anderson, 283 Cal. Rptr. 823 (1991).

[131] Gotch, *supra* note 112, at 87.

[132] CAL. CIV. PROC. CODE § 580(b) also provides that no deficiency judgment shall be permitted "under a deed of trust or mortgage on a dwelling for not more than four families given to a lender to secure repayment of a loan which was in fact used to pay all or part of the purchase price of that dwelling occupied, entirely or in part, by the purchaser." *Id.*

[133] CAL. CIV. PROC. CODE § 580(d) (West 2001). In other words, a deficiency judgment is only permitted when the sale is from a judicial foreclosure.

[134] Under a judicial sale, the mortgagor may redeem the property from the purchaser at the foreclosure sale for a period of one year after the sale. *See* CAL. CIV. PROC. CODE § 729.010 (West 2001). After exercise of a power of sale, however, the mortgagor has no statutory right of redemption and the lender is prohibited from recovering a deficiency judgment. Citicorp Real Estate, Inc. v. Smith, 155 F.3d 1097 (Cal. 1998).

after a sale, it must forgo the right to a deficiency judgment and choose non-judicial foreclosure.[135]

Third, if a creditor wishes to pursue a deficiency judgment against a debtor, California limits the deficiency to the "difference between the amount for which the real property or estate for years therein was sold and the entire amount of the indebtedness secured by the mortgage or deed of trust."[136] Under section 726(b) of the California Code of Civil Procedure, the court, after determining the fair value of the mortgaged property, "shall render a money judgment against the [mortgagor] for the amount by which the amount of the indebtedness with interest and costs of levy and sale and of action exceeds the fair value" of the mortgaged property as of the date of sale.[137] The purpose of the fair-value limitation is to prevent creditors from realizing double recovery; that is, buying the property at their own sale at deflated prices or below the fair value, then reselling the property at or above the property's fair value, and still holding the debtor liable for the deficiency.[138]

California's legislature enacted its first anti-deficiency judgment legislation in 1872.[139] Since then, the California legislature has amended existing anti-deficiency laws and added new provisions to ensure that homeowners receive adequate protection during unexpected disruptions of the local economy.[140] One unexpected disruption occurred as a result of the dramatic increase in real estate prices in the late 1980s and the beginning of the 1990s.[141] During this period, Japanese investors purchased high profile California resorts, office buildings, and golf courses.[142] In 1992, for instance, seventy-seven percent of the entire investment by the Japanese was in Hawai'i and California.[143]

When most United States property values dropped to only a fraction of the prices paid for them during the recession in the early 1990s,[144] Japanese banks

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[135] *See* CAL. CIV. PROC. CODE § 729.010 (West 2001) (stating that redemption is available only where the judgment creditor is seeking a deficiency judgment); *see also id.* § 729.030 (stating that if the proceeds of sale are insufficient to satisfy the secured indebtedness the property may be redeemed until one year after the sale; if the secured indebtedness is satisfied by the sale, the redemption period is three months).

[136] CAL. CIV. PROC. CODE § 726(b) (West 2001).

[137] *Id.*

[138] Roseleaf Corp. v. Chierighino, 378 P.2d 97, 99 (Cal. 1963).

[139] CAL. CIV. PROC. CODE §§ 580 ("[e]nacted 1872"), 726 ("[e]nacted 1872") (West 2001).

[140] *See, e.g., id.*

[141] *See generally*, Pinder, *supra* note 2. "[F]rom 1985 to 1992, the Japanese put $76.6 billion into U.S. real estate, mostly in California, New York and Hawaii." *Id.*

[142] One of the high-profile properties that the Japanese bought was Pebble Beach, a California waterfront golf course. Breed, *supra* note 3, at 1.

[143] *Id.*

[144] California was one of the states hardest hit by the recession. *See* Marshall, *supra* note 19, at A1. As of August 1992, California's unemployment rate was 9.8 percent, the third highest in the nation. *Id.* California ranked behind only the District of Columbia in the growth

were forced to foreclose on mortgages, write down loans, and acknowledge grave losses.[145] Widespread layoffs and falling property values affected many middle- and lower-income California homeowners, who involuntarily defaulted on their mortgages.[146] Foreclosure filings were at an all-time high.[147] By the end of the third quarter of 1992, California's economy ranked the fourth weakest in the nation.[148]

In less than six years, however, California catapulted out of recession.[149] While a number of factors may be involved, perhaps one can look to California's anti-deficiency judgment laws as a contributing factor. It is very plausible that California's unique anti-deficiency laws helped stunt a downward trend toward what could have become a hopeless recession.[150]

2. *Uniform Land Security Interest Act Section 511(b)*

As its name suggests, the Uniform Land Security Interest Act[151] ("ULSIA") is a uniform act dealing solely with real estate finance transactions. The

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of the number of delinquent real estate loans from the second quarter of 1991 to the same period in 1992. *Id.*

[145] Pinder, *supra* note 2. Of course, the Nikkei stock market collapse in 1992 only worsened the downward trend. *See* Breed, *supra* note 3, at 1.

[146] *See* Marshall, *supra* note 19, at A1.

[147] The fourth quarter of 1992 witnessed 26,235 home foreclosures. The highest foreclosure numbers were seen in the first quarter of 1996, when 44,885 notices of default were sent to delinquent borrowers. *See Foreclosures Down in California and Expected to Drop Even More*, NAT'L MORTGAGE NEWS, Dec. 14, 1998, 1998 WL 18767816.

[148] *See* Marshall, *supra* note 19, at A1. Rank was based on employment growth, home sales, mortgage delinquencies, mortgage foreclosures, and unemployment rates. *Id.*

[149] *See* Mark Glover, *California Foreclosure Rate Decreases in Third Quarter*, KRTBN KNIGHT-RIDDER TRIBUNE BUS. NEWS, Nov. 3, 1998, 1998 WL 16346054. The third quarter of 1998 witnessed "a lot of growth in home prices and a lot of home sales." Home values in California grew at a seven to eight percent annual rate, and October 1998 regained the overall value lost during the recession of 1992-1995. *Id.*; *see also Foreclosures Down in California and Expected to Drop Even More*, *supra* note 147. "Foreclosure activity in California dropped 15% in the third quarter of 1998 compared with year-earlier figures, and continues to decrease as home prices rise." *Id.*; *see also State Economy Helps Bolster Fannie Mae*, SAN DIEGO UNION-TRIBUNE, Oct. 25, 1998, at H3, 1998 WL 20055772 (stating that Fannie Mae's third quarter growth was fueled by California's improving economy and record-low interest rates).

[150] Because California is the most populated state in the nation (nearly one of every eight Americans resides there), California's economic well-being plays a large role in the U.S. economy. Marshall, *supra* note 19, at A1. If California is unable to cure its own ills, it will likely weaken prospects for recovery from an economic downturn. *Id.*

[151] The ULSIA is an outgrowth of the Uniform Land Transaction Act (ULTA). Curtis J. Berger, *ULSIA and the Protected Party: Evolution or Revolution?*, 24 CONN. L. REV. 971, 995 (1992).

motive behind ULSIA is to improve collection in cases of default through efficient and cost effective means.[152]

Under ULSIA section 511(b),[153] a protected party is not liable for a deficiency if the obligation secured is a purchase money security interest.[154] ULSIA section 113 defines "protected party" as an individual who entered into a security agreement for the purchase of residential real estate, all or part of which the individual occupies or intends to occupy as a residence.[155] "Residential real estate" means any real estate containing not more than three acres, not more than four dwelling units, and no nonresidential uses for which the protected party is a lessor.[156] Therefore, section 113 would allow the protected owner of a residential four-plex, for example, to rent out the three units she was not occupying herself, but the protection would disappear if she leased one of the units as professional or commercial space.[157]

Although judicial sale survives as an option under ULSIA,[158] the Act also authorizes lenders to include power of sale in the security agreement and to use it instead of judicial foreclosure in the event of default.[159] The ULSIA drafters determined that nonjudicial foreclosures were more efficient than judicial foreclosures followed by statutory right of redemption.[160] Justification for judicial foreclosure is that it provides a neutral third party sale after full notice and an opportunity for the borrower to redeem. Ideally, the sale will produce the highest possible sale price due to competitive bidding.

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[152] *See id.* The history and motivation of the ULSIA will not be addressed here. For a comprehensive review of the ULSIA see *id.*; *see also* Platt, *supra* note 119, at 847; Mixon & Shepard, *supra* note 42, at 455.

[153] ULSIA § 511(b), 7A U.L.A. 468 (1999).

[154] Purchase money security interest is defined in ULSIA section 111(18), and includes all security interests that enable the debtor to acquire the collateral, whether the interest is taken by the seller under section 111(18)(i) or by a third party cash lender under section 111(18)(ii). ULSIA § 511 cmt. 2, 7A U.L.A. 469 (1999). Section 511(b) provides, "[A] person who owes payment of an obligation secured is liable for any deficiency. *If that person is a protected party and the obligation secured is a purchase money security interest, there is no liability for a deficiency, notwithstanding any agreement of the protected party.*" ULSIA § 511(b), 7A U.L.A. 468 (1999) (emphasis added).

[155] ULSIA § 113(a)(1), 7A U.L.A. 425 (1999).

[156] *Id.* § 113(b).

[157] *Id.* The protected party may herself operate business or professional premises that are located upon the residential real estate. *Id.* § 113 cmt. 3. It is unclear under ULSIA whether partial professional or commercial use of a dwelling unit that the protected party has rented out would end the lessor's protected status.

[158] ULSIA section 510(a) provides, "[a] security interest may be foreclosed in a judicial proceeding directing a judicial sale of the real estate that is subject to the security interest." ULSIA § 510(a), 7A U.L.A. 466 (1999).

[159] *See id.* §§ 507(c), 509.

[160] Mixon and Shepard, *supra* note 42, at 479.

In almost all cases, however, a judicial foreclosure does not produce a surplus.[161] Another justification for judicial foreclosure is that a court-supervised sale is less likely to produce an unfair deficiency than an unsupervised power of sale foreclosure where the lender is the only bidder and therefore sets the amount of deficiency unilaterally. If deficiencies are eliminated, this objection to non-judicial foreclosure disappears.

3. Critiquing anti-deficiency judgment legislation

Critics of anti-deficiency judgment legislation raise three objections. First, critics argue that anti-deficiency legislation may raise the cost of credit, which ultimately creates higher priced mortgage credit for consumers.[162] Second, critics contend that anti-deficiency laws may encourage undesirable behavior by homeowners just prior to the declaration of default, thereby generating "moral hazards."[163] Finally, critics argue that anti-deficiency laws do not encourage higher bid prices.[164] This Part examines each of these objections. It concludes that these criticisms are outweighed by other considerations and do not provide a basis for denying homeowners protection against deficiency liability and potential abuses by creditors.

First, critics argue that anti-deficiency judgment legislation will raise the cost of credit because restricting lenders from going after defaulting homeowners for deficiencies will result in spreading the cost of credit to other homebuyers. Although an increase in the cost of credit is possible,[165] critics fail to establish that an interest rate increase resulting from an anti-deficiency legislation[166] outweighs the conceivable adverse impact of bankruptcy filings by unprotected homeowners.

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[161] This is because competitive bidding rarely occurs. *See generally supra* Part II.C.

[162] Mattingly, *supra* note 30, at 105-06.

[163] *Id.* at 105.

[164] *Id.*

[165] Most banks in Hawai'i calculate the interest rate by looking at two major components: 1) the buy or market price and 2) profit margin. Telephone interview with Jeff Bamer, First Hawaiian Bank (Oct. 31, 2001). Secondary market lenders, whose principal members are the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation, determine the buy or market price. *Id.* Banks generally determine the profit margin by considering competition, expenses, and risk of lending. *Id.*

[166] A comparison of interest rates for single-family home purchases under $275,000 between states that have enacted anti-deficiency judgment legislation, e.g. California and Arizona, and states that have not, e.g. Hawai'i, suggests that anti-deficiency legislation does not necessarily increase interest rates for homebuyers. Compare Hawai'i's interest rate of 6.75% for a fixed thirty years home purchase loan (under $275,000) with California's interest rate of 6.625% and Arizona's interest rate of 6.75%. *See* Countrywide, *Today's Rates October 17, 2001, at* http://www.countrywide.com/rates/LoanSelection.asp.

In states where homeowners do not have anti-deficiency protection, like Hawai'i, anticipation of overwhelming deficiency judgments could force homeowners into bankruptcy.[167] An increase in bankruptcy filings "will increase interest rates for all consumers and will cause lenders to scrutinize credit more closely and discriminate among borrowers."[168] In 2000, more than 1.25 million individuals in the United States filed for bankruptcy, and of these filings, over ninety-seven percent were consumer filings.[169] That is over a sixty-nine percent increase from ten years preceding 2000 and 419 percent increase over twenty years.[170] Given present trends, personal bankruptcy filings "can be expected to spiral out of control, dramatically affecting the availability of credit and aggravating economic problems"[171] if no reform is made to reduce the number of bankruptcy filings.

In bankruptcy, a defaulting homeowner may file a Chapter 7 liquidation petition or a Chapter 13 adjustment of debt petition.[172] The twin pillars of bankruptcy law are fair distribution and fresh start.[173] In Chapter 7 a debtor's assets, including her home, become the bankruptcy estate and her debt freezes.[174] The debtor keeps assets within the exemption limits in section 522(d) of the Bankruptcy Code[175] and turns the excess over to the trustee in bankruptcy for sale and distribution to her creditors.[176] In most cases, the debtor has so few assets of any significant monetary value that unsecured creditors receive little or no distribution from those assets.[177] Secured creditors, on the other hand, are generally entitled to receive the entire amount of their secured claims, albeit after some delay.[178]

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[167] Mixon & Shepard, *supra* note 42, at 463.

[168] Edith H. Jones, *Testimony of Honorable Edith H. Jones, Fifth Circuit U.S. Court of Appeals Judge and National Bankruptcy Review Commissioner, Before the House Judiciary Subcommittee on Commercial and Administrative Law, March 10, 1998*, 52 CONSUMER FIN. L.Q. REP. 176, 177 (1998).

[169] American Bankruptcy Institute, *U.S. Bankruptcy Filings 1980-2000 (Business, Non-Business, Total)*, http://www.abiworld.org/stats/1980annual.html.

[170] There were 718,107 consumer bankruptcy filings in 1990 and 287,570 in 1980. *Id.*

[171] Jones, *supra* note 168, at 176.

[172] ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, THE LAW OF DEBTORS AND CREDITORS: TEXT, CASES, AND PROBLEMS 317 (4th ed. 2001).

[173] *Id.* at 177.

[174] *Id.*

[175] 11 U.S.C.A. § 522(d) (West 2001).

[176] WARREN & WESTBROOK, *supra* note 172, at 317.

[177] Irving A. Breitowitz, *New Developments in Consumer Bankruptcies: Chapter 7 Dismissal on the Basis of 'Substantial Abuse'*, 5 J.L. & COM. 1, 23 (1984). The average repayment rate to creditors in Chapter 7 bankruptcy is about one percent. Michelle J. White, *Why Don't More Households File for Bankruptcy?*, 14 J.L. ECON. & ORG. 205, 209 (1998).

[178] Julia P. Forrester, *Bankruptcy Takings*, 51 FLA. L. REV. 851, 860 (1999). Filing for bankruptcy delays secured creditors from foreclosing. White, *supra* note 177, at 209.

A debtor who does not wish to liquidate her assets, including her home, may choose to file a Chapter 13 petition instead.[179] In Chapter 13, the debtor keeps all assets, regardless of whether the assets exceed exemption levels.[180] In return, the debtor must agree to turn over a portion of all future income for at least three years[181] in accordance to the "plan"[182] under section 1322.[183] Because the debtor's homestead is a significant asset subject to a security interest, the debtor's plan is often structured to satisfy the legal requirements for retaining the home and to structure a new payment schedule.[184] Consequently, as in Chapter 7, a secured creditor in Chapter 13 enjoys substantially better protection than the unsecured creditor.[185] In most instances, debtors in a Chapter 13 bankruptcy pay only a small fraction, if any, of liabilities when they file for bankruptcy.[186] Some commentators believe that discharging most of debtors' debts inflicts further damage on struggling economies because the amount paid to cure and maintain their home mortgages will mostly leave their states,[187] contributing "little money to creditors' purses and impos[ing] severe emotional trauma and moral stigma on innocent victims caught up in regional economic decline."[188]

A secured creditor who seeks to control its collateral and to "cut" the borrower out of the title picture as soon as possible,[189] will not find Chapter

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[179] Chapter 13 is intended for debtors who earn regular incomes. White, *supra* note 177, at 210.

[180] WARREN & WESTBROOK, *supra* note 172, at 317.

[181] 11 U.S.C.A. § 1322(d) (West 2001) ("The plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years.").

[182] A debtor filing Chapter 13 must file a plan. *Id.* § 1321.

[183] Section 1322(a) sets forth three mandatory requirements of the plan. The plan must: 1) include a submission of the debtor's future income to the trustee in bankruptcy; 2) pay all priority claims in full, unless claimant agrees to other treatment; and 3) provide the same treatment for each claim within a particular class if the plan classifies claims. 11 U.S.C.A. § 1322(a)(1)-(3) (West 2001).

[184] WARREN & WESTBROOK, *supra* note 172, at 321-22.

[185] *Id.* at 322.

[186] Michelle J. White, *Personal Bankruptcy Under the 1978 Bankruptcy Code: An Economic Analysis*, 63 IND. L.J. 1, 1 (1987).

[187] Most Hawai'i banks repackage their home mortgage loans to secondary market lenders, for example, Federal National Mortgage Association and Federal Home Loan Mortgage Corporation, that are located on the mainland. Telephone Interview with Mr. Bamer, *supra* note 165.

[188] Mixon & Shepard, *supra* note 42, at 463. Professors John Mixon and Ira Shepard argue that our credit-based economy could potentially collapse if millions of Americans come to view bankruptcy as an acceptable alternative to paying their ordinary debts. *Id.* at 473.

[189] *Cf.* Mattingly, *supra* note 30, at 101 (stating that lenders foreclose to control their collateral, to cut the borrower out of the title picture, and not as a means of disposing of the collateral).

13 favorable. When the debtor files for Chapter 13, the debtor is essentially requesting the amount owed to the lender to remain in the property until the debtor catches up on the past-due arrearage while making current payments as they come due. For some lenders, extended delays in cutting the debtor's title will limit the funds available to prospective borrowers and, hence, result in higher interest rates to other borrowers.[190]

Another important cost of bankruptcy is the demoralizing effect likely exerted on debtors who actually use it. A debtor who declares bankruptcy breaks her promises to pay back what she owes.[191] For obvious reasons, our credit-based economy cannot function if it becomes widely acceptable to use bankruptcy as "just another tool of financial management."[192] In addition, to "regress from a norm in which contracts are enforceable threatens the foundation" of that which permitted our economic freedom to flourish.[193]

In sum, the possibility of an increase in interest rates resulting from anti-deficiency judgment legislation seems negligible compared to the social and economic costs of bankruptcy filings. Accordingly, the critics' argument against anti-deficiency judgment legislation for fear of the possibility of an increase in interest rates is unpersuasive.

The second argument against anti-deficiency legislation is that anti-deficiency laws generate moral hazards.[194] Critics argue that "property owners whose property is fully leveraged would have little economic incentive to continue servicing the debt or expending money to maintain and repair the property."[195] The flaw in this argument is that it assumes that jurisdictions permitting deficiency judgments do not have the same problems of moral hazards. This criticism is unpersuasive because a debtor having no deficiency protection may be more inclined to file for bankruptcy and attempt to discharge both its deficiency judgment and other debts. The danger is that "once the bankruptcy barrier is breached, there is no reason to hold back or

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[190] For example, GE Capital, a Hawai'i residential (and commercial) lender, does not sell its loans to secondary market institutions. Instead, it makes loans to homebuyers with its available funds. As such, any delay in cutting a debtor's title will ultimately impact the cost of credit to other GE Capital borrowers. Telephone interview with GE Capital credit analyst in Honolulu (Oct. 29, 2001).

[191] Jones, *supra* note 168, at 177.

[192] *Id.* at 176.

[193] *Id.* at 177.

[194] *See* Mattingly, *supra* note 30, at 105. Moral hazard is a "form of post-contractual opportunism that arises because actions that have efficiency consequences are not freely observable and so the person taking them may choose to pursue his or her private interests at others' expense." Dorothy Golosinski & Douglas West, *Double Moral Hazard and Shopping Center Similarity in Canada*, 11 J.L. ECON. & ORG. 456, 456 (1995) (citations omitted).

[195] Mattingly, *supra* note 30, at 106.

work extra hours in order to pay any debt that can be extinguished."[196] Consequently, the moral hazards associated with filing for bankruptcy are stupendous and cannot be ignored.

Finally, critics argue that anti-deficiency judgment legislation does not encourage higher bid prices at a foreclosure sale.[197] Such assertion, however, is unsound. Because anti-deficiency judgment legislation gives lenders an incentive to obtain the best price possible at the foreclosure sale,[198] lenders will likely attempt to ameliorate the many defects that accompany a typical sale.

As noted earlier, the current foreclosure process–judicial or power of sale foreclosure–lacks competitive bidding.[199] How may a foreclosure sale attract bids? One way of achieving competitive bids is by advertising the foreclosing property to the general public and making material information about the property readily available.[200] The lender can start by improving the advertisement and notice requirements to attract more potential buyers to the auctions.[201] The lender can advertise property foreclosures in the same manner as ordinary real estate, such as placing a "For Sale" sign on the front yard or near the lobby of a condominium building. Lenders can also place advertisements with property descriptions and photographs with other real estate advertising. Advertisements of this kind are certainly not restricted to the legal page of the "Homes" section. These advertisements may also appear on the Internet and in real estate magazines that interested homebuyers may pick up in newsstands.[202]

In addition to improvements in advertising, a lender can allow more time for the bidder to seek financing by increasing the amount of time between the

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[196] Mixon & Shepard, *supra* note 42, at 474.

[197] *See, e.g.*, Mattingly, *supra* note 30, at 105. Professor Basil Mattingly conclusively stated that anti-deficiency is not a remedy to increase bid prices because the incentive for the lender to maximize proceeds "would only exist if the lender was prohibited from bidding at the sale and purchasing the property." *Id.*

[198] Schill, *supra* note 34, at 496.

[199] *See generally supra* Part II.C.

[200] Material information includes the availability, physical condition, and state of legal title of property being foreclosed. *See* Mattingly, *supra* note 30, at 97.

[201] *See id.* at 95 (indicating that the statutory requirements of notice are inadequate to produce competitive sale bids because prospective bidders have little information about the foreclosed property).

[202] If anti-deficiency legislation were enacted in Hawai'i, a mortgagee would be encouraged to try these advertising methods to achieve competitive bids for the foreclosed property, which provides more notice than what the statutory requirements currently permit. *See* HAW. REV. STAT. ANN. § 668-14 (Michie 1999) (stating that the commissioner shall publish notice of the foreclosure sale "with a brief description of the property to be sold, in at least one newspaper published in the State . . . at least once in each of four successive weeks, the first publication to be not less than thirty days prior to the date of sale.").

first notice and the sale date and between the sale and the time when the bidder must pay for the property. By allowing more time to obtain financing, a greater pool of bidders will likely be added, thereby increasing bid prices.

The first step to realizing these improvements is to provide lenders with incentives to do a better job in advertising the property and making the foreclosure procedure more accommodating to potential bidders. The lenders are best able to improve the foreclosure sale process given their strong influence in setting the bid prices. Contrary to unpersuasive assertions that anti-deficiency judgment legislation does not encourage higher bid prices, such legislation, in fact, seems to be the missing link that transforms the foreclosure sale from a "meaningless ceremony"[203] to a meaningful sale.

B. Statutory Right of Redemption

Under statutory right of redemption, the mortgagor and other persons with an interest in the property are permitted, for a specific period of time after the foreclosure sale, to redeem or buy back the property by paying the purchaser the amount of his winning bid.[204] Statutory right of redemption also provides the mortgagor the post-foreclosure right of continued possession of the mortgaged property.[205] The right to statutory redemption varies between seventy-five days[206] and two years[207] after the foreclosure sale. Regardless of possession, the mortgagor is not required to pay the unpaid balance of the debt originally secured by the foreclosed mortgagee.[208] However, the mortgagor must pay the purchaser the foreclosure sale price and any taxes and other costs paid by the purchaser due to the sale.[209]

Statutory rights of redemption have been justified on two grounds. First, allowing the mortgagor to redeem, in theory, will encourage the mortgagee and other bidders at the foreclosure sale to bid reasonable prices.[210] If the

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[203] Wechsler, *supra* note 114, at 884 (noting that foreclosure by sale is not achieving its objectives of providing competitive bidding and fair prices, but rather, it "functions as a meaningless ceremony").

[204] *See id.* at 860.

[205] Hughes, *supra* note 22, at 120.

[206] *See, e.g.*, COLO. REV. STAT. ANN. §§ 38-38-302(1), (3) (West 2001) (stating that the owner of the property or any person liable after the foreclosure sale for the deficiency may redeem the property within seventy-five days after the date of the sale unless the subject property is "agricultural real estate," which may be redeemed within six months).

[207] TENN. CODE ANN. § 66-8-102 (2000) (stating that a mortgagor may redeem from purchaser two years after the sale).

[208] This is true even if that unpaid balance exceeds the foreclosure sale purchase price. Hughes, *supra* note 22, at 131.

[209] Gotch, *supra* note 112, at 82.

[210] Schill, *supra* note 34, at 496.

bidders fail to do so, the purchase is more susceptible to redemption.[211] Second, the redemption right gives mortgagors who may have encountered temporary financial difficulties the chance to marshal their resources and regain title to their property.[212]

Nearly one-half of the states in the United States currently have the statutory right of redemption.[213] Some of these states permit the mortgagor to redeem the property after the sale if it is connected to a judicial foreclosure.[214] Others allow the mortgagor to redeem even after a private sale.[215]

1. California's statutory right of redemption

In California, a debtor may exercise a statutory right to redeem the property after the foreclosure sale whenever a creditor retains a right to a deficiency judgment.[216] A creditor may retain the right to a deficiency judgment only if the foreclosure sale was court supervised.[217] Accordingly, California's statutory right of redemption is limited to borrowers whose homes were sold

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[211] Johnson, *supra* note 60, at 984. Because a mortgagee is typically prohibited from seeking a deficiency judgment if the borrower subsequently redeems, a mortgagee will likely bid up to the amount of the debt at the foreclosure sale to establish a redemption price. *Id.*

[212] Hughes, *supra* note 22, at 133.

[213] *See, e.g.*, ALASKA STAT. § 09.35.250 (Michie 2000); ARIZ. REV. STAT. ANN. § 12-1282(B) (West 2000); ARK. CODE ANN. § 18-49-106 (Michie 1999); CAL. CIV. PROC. CODE § 729.030 (West 2001); COLO. REV. STAT. ANN. §§ 38-38-302(1), (3) (West 2001); IDAHO CODE § 11-402 (Michie 2000); 735 ILL. COMP. STAT. ANN. §§ 5/15-1603(b)(1), 5/15-1603(b)(2) (West 2001); IOWA CODE ANN. § 628.3 (West 2001); KAN. STAT. ANN. §§ 60-2414(a), 60-2414(m) (2000); KY. REV. STAT. ANN. § 426.530(1) (Banks-Baldwin 2001); ME. REV. STAT. ANN. tit. 14, § 6204 (West 1999); MICH. COMP. LAWS ANN. § 600.3140 (West 2001); MINN. STAT. ANN. §§ 580.23 (Subd. 1), 580.23 (Subd. 2) (West 2001); MO. ANN. STAT. § 443.410 (West 2001); MONT. CODE ANN. § 25-13-802 (2001); NEV. REV. STAT. ANN. § 21.210 (Michie 1999); N.D. CENT. CODE § 28-24-02 (2001); N.M. STAT. ANN. § 39-5-18(A)(1) (Michie 2001); OR. REV. STAT. § 23.560(1) (1999); S.D. CODIFIED LAWS § 15-19-23 (2001); TENN. CODE ANN. § 66-8-102 (2000).

[214] *See, e.g.*, CAL. CIV. PROC. CODE §§ 729.010, 580(d) (West 2001) (stating that a debtor may exercise a statutory right of redemption when the lender retains a right to a deficiency judgment, which is available in a judicial foreclosure only); IDAHO CODE § 11-401 (Michie 2000); KAN. STAT. ANN. §§ 60-2414(a), 60-2414(m) (2000); NEV. REV. STAT. ANN. § 21.210 (Michie 1999), N.M. STAT. ANN. § 39-5-18 (Michie 2001); OR. REV. STAT. § 23.560(1) (1999).

[215] *See, e.g.*, MICH. COMP. LAWS ANN. § 600.3240(5) (West 2001) (stating that the right of redemption includes redemption of a senior lien from a nonjudicial foreclosure); IOWA CODE ANN. § 628.3 (West 2001) (stating that the debtor may redeem real property at any time within one year from the day of sale).

[216] CAL. CIV. PROC. CODE § 729.010(a) (West 2000) ("If the decree of foreclosure of a mortgage . . . determines that a deficiency judgment may be ordered against the defendant, the real property . . . shall be sold subject to the right of redemption.").

[217] *Id.* § 580(d); *see also supra* Part III.A.1.

at a judicial foreclosure, not through a power of sale. If the proceeds of sale are insufficient to satisfy the secured indebtedness thus giving the mortgagee the right to a deficiency judgment, the property may be redeemed by the borrower anytime within one year after the sale.[218] If the proceeds of the sale satisfy the indebtedness, the mortgagor still has up to three months after the date of sale to buy back the property.[219]

Only the owner of the property or its successor in interest may redeem from the purchaser at the foreclosure sale.[220] The price required to be paid is the total of: 1) the amount paid by the purchaser at the foreclosure sale; plus 2) the costs paid by the purchaser for taxes, fire insurance, maintenance, upkeep, and repairs; plus 3) any amounts paid by the purchaser on senior liens on the property to protect the purchaser's interest; plus 4) interest on the above amounts; plus 5) the amount of the purchaser's lien and interest if the purchaser was a junior lienor on the property; less 6) any rents and profits received by the purchaser from the property.[221]

California's statutory right of redemption does not apply if the mortgaged property is foreclosed by power of sale.[222] The idea is that if the mortgagee has no right to a deficiency judgment in non-judicial foreclosure, the mortgagor should not have a right of redemption following a power of sale.[223]

2. *Uniform Land Security Interest Act*

The ULSIA eliminates statutory right of redemption.[224] The rationale is that lenders have inexpensive and speedy non-judicial foreclosure, without redemption after sale.[225] In exchange, ULSIA § 511(b) "frees borrowers from deficiency following foreclosure of purchase price mortgages on individual residences."[226]

3. *Critiquing statutory right of redemption*

Statutory right of redemption, like anti-deficiency judgment legislation, has been harshly criticized. Critics argue that such legislation heightens

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[218] *Id.* § 729.030(b).

[219] *Id.* § 729.030(a).

[220] *Id.* § 729.020.

[221] *Id.* § 729.060.

[222] Berger, *supra* note 151, at 999.

[223] CAL. CIV. PROC. CODE §§ 726(e), 716.020 (West 2001).

[224] *See* ULSIA § 513 cmt. 1, 7A U.L.A. 471-72 (1999) ("Under this Act there is no right of redemption after sale.").

[225] *See* Mixon & Shepard, *supra* note 42, at 480-81.

[226] *Id.* at 481.

uncertainty in the foreclosure process thereby depressing bid prices and deterring third party bidding altogether.[227] Critics contend that statutory right of redemption increases potential waste of the foreclosing property.[228] Finally, critics assert that there is little empirical evidence that debtors are able to marshal enough resources to redeem the property during the redemption period.[229]

Upon close examination of these criticisms and evaluation of the objectives of foreclosure sale, it becomes clear that the criticism of the statutory right of redemption is warranted because the negative impact of redemption after foreclosure sale outweighs the positive impact of added time for the debtor to reclaim property.

First, statutory right of redemption heightens uncertainty surrounding a foreclosure sale.[230] Potential bidders are unlikely to bid the fair market value of properties when they cannot take control of the property until the end of the redemption period, sometimes two years later, and when they must bear the risk that their purchase will be unraveled later.[231] A majority of states that allow statutory right of redemption also allow defaulting mortgagors to remain in the home until the end of the redemption period.[232] When assessing an appropriate bid in these states, potential bidders must take into account the chance that the property will be redeemed and that they will not be able to utilize the property until the redemption period expires.

While the right of redemption may appeal to those who believe that property rights in a homestead enjoy special status, the right places an unnecessary burden on the lender or purchaser. An undue burden may even fall on the general public because the right of redemption "prevents the lender from converting foreclosed property to cash quickly,"[233] which could increase the cost of borrowing.

Second, redemption laws permitting mortgagors to remain in possession of the property during the redemption period heighten the risk of waste.[234] Instead of generating income from the use of the property, such legislation typically allows the debtor to remain in the property rent-free. "The purchaser

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[227] *See* Schill, *supra* note 34, at 497-98 (stating that statutory rights of redemption would "probably chill, rather than promote, bidding at foreclosure sales because of uncertainty over whether or not the mortgagor will redeem the property"); Giss, *supra* note 29, at 950 (noting that statutory rights of redemption tend to discourage bidders "from participating in the sale due to the lack of stability in the title").

[228] Mixon & Shepard, *supra* note 42, at 479.

[229] *Id.*

[230] *See* Goldstein, *supra* note 23, at 295.

[231] *See* Schill, *supra* note 34, at 534.

[232] *Id.* at 495.

[233] Mixon & Shepard, *supra* note 42, at 479.

[234] Schill, *supra* note 34, at 534.

must not only endure the lack of return on its investment and the risk of market declines during this period, but must rely on the defaulting borrower to properly maintain and not abuse the property during the redemption period."[235] As a result, such legislation further exacerbates the disincentives to purchase the property and reduces the bidding price.[236] Indeed, the enactment of such legislation will undermine any sincere efforts to improve the foreclosure sale and eliminate the problem of inadequate bids.

Third, redemption laws are not justifiable because mortgagors are rarely able to marshal sufficient financial resources during the redemption period to regain title of the property.[237] To redeem the property, the debtor must arrange funds equal to the bid amount plus interest and costs.[238] Since the mortgagor was the one who defaulted, she would not likely have adequate funds necessary to redeem the property in cash.[239] Although there may be enough time to obtain financing during the redemption period, a mortgagor's "ability to obtain a loan may prove to be an insurmountable task given that the borrower's credit history would now list a recent default and foreclosure."[240]

IV. IMPLICATIONS AND PROPOSALS FOR REFORM

Currently, Hawai'i has neither an anti-deficiency statute nor a statutory right of redemption. When compared to the majority of states that have enacted these mortgagor protection laws, Hawai'i can certainly be viewed as more favorable to lenders.

Why might Hawai'i homeowners need protection? First, loan arrangements put the "creditor in a superior bargaining position, which can easily result in creditor abuses."[241] These abuses include a situation where the lender acquires the property for pennies on the dollar, sells the property at the open market at a much higher price, and then sues the borrower for the deficiency. Second, home values may be negatively "affected by the total number of foreclosure properties on the market and the prices those properties command at foreclosure sales."[242] For example, a forced sale of a home at twenty

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[235] Mattingly, *supra* note 30, at 108.

[236] *Id.*

[237] *Id.* at 109.

[238] *Id.* at 108-09.

[239] *Id.* at 109.

[240] *Id.*

[241] *See* Gotch, *supra* note 112, at 105 (noting that creditors are in a superior bargaining position due to the nature of the loan arrangements).

[242] *See id.* at 106 (noting that there is a strong political motivation to protect borrowers because of this negative effect on appraisal values).

percent below its $300,000 market value may significantly decrease the appraisal value of nearby homes.[243]

As discussed earlier, anti-deficiency judgment legislation, but not statutory right of redemption, will adequately meet the dual objectives of improving the foreclosure sale and protecting homeowners' interests.[244] Statutory right of redemption fails to protect homeowners' interests because most homeowners who default will not redeem.[245] Furthermore, statutory right of redemption fails to improve the foreclosure sale.[246] Instead, it encourages waste and heightens uncertainty surrounding a foreclosure sale, therefore chilling bid prices.[247]

In contrast, anti-deficiency legislation protects the mortgagor from a deficiency judgment after the forced sale of her home and reduces the likelihood of a double recovery by the lender.[248] Anti-deficiency judgment legislation also enhances foreclosure sales by providing lenders, as influential and formidable parties, with incentives to improve bid prices.[249] Accordingly, the challenge for the Hawai'i legislature is to craft an anti-deficiency legislation that best suits Hawai'i's economy.

Currently, about 200,000 people work in Hawai'i's eleven billion dollar visitor industry.[250] Given the large number of wage-earners in one industry, an unexpected disruption to tourism could be detrimental to Hawai'i's economic well-being.[251]

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[243] According to Rick Stellmacher, a Hawai'i state certified appraiser, residential appraisers will not likely rely on foreclosure sale prices for purposes of appraising home values if the number of foreclosure sales is relatively small as compared to non-foreclosure sales in a residential district. However, if the number of foreclosure sales is relatively large as compared to non-foreclosure sales, appraisers will generally use the foreclosure sale prices as the market value of homes within that residential district. As an example, Mr. Stellmacher stated that Oahu homes in Ewa experienced a relatively high foreclosure rate, which adversely impacted home appraisal values there. Telephone interview with Richard Stellmacher, MAI, CRE, Stellmacher & Sadoyama Ltd. (Oct. 26, 2001). Another Hawai'i state certified appraiser, James Hallstrom, echoed Mr. Stellmacher's comment that appraisers will not likely consider foreclosure sales as potential comparables unless they are relatively large as compared to nonforeclosure sales in a residential district. Telephone interview with James Hallstrom, MAI, CRE, Hallstrom Group Inc. (Oct. 26, 2001).

[244] *See generally supra* Part III.

[245] *See generally supra* Part III.B.3.

[246] *Id.*

[247] Schill, *supra* note 34, at 497-98.

[248] *See generally supra* Part III.A.

[249] *See generally supra* Part III.A.3.

[250] Kevin Dayton & Robbie Dingeman, *State Scrambles to Aid Economy*, HONOLULU ADVERTISER, Sept. 20, 2001, at A1.

[251] The aftermath of the September 11, 2001 terrorist attacks on America illustrates this point well. The terrorist attacks in New York, Washington, D.C., and Pennsylvania have resulted in many states "bracing for an economic downturn through higher unemployment, reduced

Unlike many of her sister states, Hawai'i does not afford its homeowners the benefit of anti-deficiency judgment legislation. As a result, many unfortunate but honest debtor-homeowners may file for bankruptcy protection to avoid the anticipation of deficiency judgments, thus creating a lengthier economic slump.[252]

Hawai'i legislators can prevent aggravation of economic decline by crafting an anti-deficiency statute similar to the one in California, which protects homeowners of residential dwellings. A well-tailored legislation will take into account Hawai'i's dependency on tourism and Hawai'i's geographic and urban population. For example, legislation that prohibits deficiency if the debt was incurred to pay all or part of the purchase price of a single-family dwelling would be well-tailored because it protects homeowners[253] in economic hardship and reduces their incentives to file for bankruptcy.[254] Because a majority of Hawai'i homeowners live in homes substantially less than one acre,[255] ULSIA's protection of homeowners against deficiency liability on property "containing not more than three acres" is overly broad. Instead, Hawai'i's legislation should protect homeowners against deficiency liability if their private residences contain less than one acre.[256]

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spending, and lost revenue." Conor O'Clery, *Shockwaves Ripple Across Economy*, IRISH TIMES, Sept. 20, 2001, 2001 WL 27064433. In a matter of days, car sales, home sales, tourism, business travel, and other major segments of the economy all became extremely vulnerable. *Analysts See Tough Economy but Potential for Comeback*, TULSA WORLD, Sept. 19, 2001, at 1, 2001 WL 6941867.

According to Hawai`i Governor Benjamin Cayetano, "Hawai'i is confronting the most severe economic crisis in its history." Dayton & Dingeman, *supra* note 250, at A1. Hawai'i hotels reported a forty percent drop in business soon after the September 11 attacks, as Hawai'i faced a "massive decline in visitors" coming from the mainland and Japan. *Id.* More than 1,000 Hawai'i workers from the tourism industry filed unemployment claims in just two days during the week of September 20, 2001–"nearly as many as filed claims during the entire week before the attacks." *Visitor Industry Unemployment Soars*, HONOLULU ADVERTISER, Sept. 20, 2001, at A1.

[252] *See generally supra* Part III.A.3.

[253] Homeowners should have protection because they do not typically purchase homes for the purpose of making a profit, and therefore, are not typically equipped to take the risks of deficiency judgments. Diab, *supra* note 125, at 1456.

[254] Over ninety-seven percent of all bankruptcy filings in 2000 were consumers. American Bankruptcy Institute, *supra* note 169.

[255] For example, single family homes in Oahu are predominantly between 1,200 to 3,000 living square feet. Telephone interview with Catherine Fan, Century 21 real estate agent in Honolulu (Nov. 16, 2001). The most common and desirable lot size in Hawai'i is 5,000 square feet. *Id.*

[256] Since most homes in Hawai'i are less than 3,000 living square feet, the Hawai'i legislature can certainly limit the size of the lot for purposes of anti-deficiency judgment protection further to ensure protection to the most needy homeowners. *See supra* note 255.

Another consideration for Hawai'i legislators is efficiency. Legislators may promote efficiency by encouraging power of sale over judicial foreclosure. In this respect, the ULSIA provides an insightful provision that Hawai'i legislators should consider. ULSIA section 511(b) provides that there is no liability for a deficiency, notwithstanding any agreement, after foreclosure of a mortgage property bought for individual use as a personal residence.[257] Therefore, if the mortgage property is a personal residence, regardless of whether the mortgagee uses a power of sale or judicial foreclosure, deficiency judgments are prohibited. Without the option of a deficiency judgment, the parties will opt for the less expensive and less time-consuming power of sale foreclosure.

Compared to ULSIA section 511(b), California's exclusion of deficiency protection in power of sale foreclosures is inefficient. Under section 580(d) of the California Code of Civil Procedure, no deficiency judgment is allowed if the mortgaged property is sold in a power of sale foreclosure.[258] A mortgagee who prefers to have the option of collecting on a deficiency judgment must, therefore, resort to the expensive and time-consuming judicial foreclosure.

In sum, anti-deficiency judgment legislation will benefit the people of Hawai'i. California's anti-deficiency judgment legislation is reasonable to the extent that it protects homeowners of residential dwellings. However, California's limitation of anti-deficiency judgment protection to only power of sale foreclosures[259] impedes efficiency. A mortgagee who wishes to retain the right to a deficiency must choose the more expensive and time-consuming judicial foreclosure alternative. Because ULSIA section 511(b) does not restrict deficiency protection to any particular foreclosure alternative, parties are encouraged to use the more efficient sale of foreclosure procedure. Accordingly, Hawai'i should adopt a provision similar to ULSIA section 511(b), not limiting homeowners from deficiency protection as a result of any particular foreclosure method.

V. CONCLUSION

Over the past ten years, Hawai'i has experienced a dramatic slump in real estate prices and a variable increase in the unemployment rate. Although most states catapulted out of recession by the end of 1998, Hawai'i remained in the doldrums of record high foreclosure and bankruptcy filings. Is Hawai'i

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[257] *See generally supra* Part III.A.2. The practical effect of ULSIA section 511(b) is to "outlaw virtually all deficiency judgments against protected parties except in cases where the borrower's obligation is being refinanced." ULSIA § 511(b) cmt. 2, 7A U.L.A. 469 (1999).

[258] CAL. CIV. PROC. CODE. § 580(d) (West 2001).

[259] *Id.*

missing something good? It is very possible that an anti-deficiency judgment statute might be what Hawai'i residents have been missing. Hawai'i should join the majority of states that have already enacted mortgagor protection laws to protect financially burdened homeowners and prevent the aggravation of economic downturn. This Comment examined two mortgagor protection laws—anti-deficiency judgment legislation and statutory right of redemption--with the goal of achieving the dual principal objectives of improving the foreclosure sale and protecting homeowners' interests. Only a well-crafted anti-deficiency judgment legislation, but not statutory right of redemption, will protect the interests of financially burdened homeowners and, at the same time, enhance foreclosure bid prices.

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The Defense of Marriage Act: Sex and the Citizen

"There is no subject on which more dangerous nonsense is talked and thought than marriage."[1]

I. INTRODUCTION

Anticipating the legalization of same-sex marriage in Hawai'i,[2] Congress hastily[3] enacted the federal Defense of Marriage Act ("DOMA"), which allows states to disregard marriage licenses issued to same-sex couples by another state.[4] DOMA defines marriage as "a legal union between one man and one woman as husband and wife,"[5] and defines "spouse" as a person of the opposite sex.[6] One of the more alarming and perhaps most vulnerable aspects of DOMA is its normative assumption concerning "male" and "female." The sexual dimorphism evidenced in the Act results in the deprivation of the fundamental right of marriage[7] to the intersexed,[8] persons

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[1] George Bernard Shaw, *in* THE COLUMBIA WORLD OF QUOTATIONS (1996), http://www.bartleby.com/66/61/53661.html.

[2] Baehr v. Lewin, 74 Haw. 530, 580, 852 P.2d 44, 67 (1993). In *Baehr*, the Hawai'i Supreme Court held that prohibitions on same-sex marriage would be subject to strict scrutiny as a sex-based classification under Article I, section 5 of the Hawai'i Constitution. However, on April 29, 1997, the Hawai'i legislature approved an amendment to the Hawai'i Constitution stating "[t]he legislature shall have the power to reserve marriage to opposite-sex couples." H.B. 117 § 2, 19th Leg., 1997 Haw. Sess. Laws (Haw. 1997). This amendment was ratified by the electorate in November 1998. HAW. CONST. art. I, § 23.

The marriage amendment placed Hawaii Revised Statutes section 572-1 [hereinafter H.R.S.] outside the scope of the equal protection clause of the Hawai'i Constitution and rendered the challenge to the statute prohibiting same-sex marriage moot. Baehr v. Miike, 92 Hawai'i 634, 994 P.2d 566 (1999).

[3] 142 CONG. REC. H7485 (daily ed. July 12, 1996) (statement of Rep. Harman).

> This bill reflects a calculated political judgment that wedge issues can be used to paint individuals in our society, as well as Members of this Chamber. This bill's accelerated consideration in this House was, unfortunately, part of that political agenda . . . This is a sad day when partisan political considerations once again upstage careful deliberations designed to address the Nation's important challenges.

Id.

[4] 28 U.S.C.A. § 1738C (West 2001).

[5] 1 U.S.C.A. § 7 (West 2001).

[6] *Id.*

[7] Zablocki v. Redhail, 434 U.S. 374, 386 (1978).

[8] Anne Fausto-Sterling, *The Five Sexes, Revisited*, THE SCIENCES (July/August 2000), http://www.nyas.org/membersonly/sciences/sci0007/fausto_body.html.

> The concept of intersexuality is rooted in the very ideas of male and female. In the idealized, Platonic, biological world, human beings are divided into two kinds: a perfectly dimorphic species . . . . Less well known is the fact that, on close inspection, absolute

who do not fit neatly into the categories of "male" and "female" due to variations in chromosomes, gonads, hormones, and genitalia.[9]

DOMA's narrow definitions deprive individuals in state-sanctioned unions[10] of federal marriage-related benefits. In addition, DOMA affects hundreds of federal statutes and regulations that include references to "marriage" and "spouse."[11] Proponents of DOMA support the Act despite its negative impact on sexual minorities, and, in some instances, because of this very effect.[12] This intent is evidenced in the two stated purposes of the Act:

> [T]he Defense of Marriage Act[] has two primary purposes. The first is to defend the institution of traditional heterosexual marriage. The second is to protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions, free from any federal constitutional implications that might attend the recognition by one State of the right for homosexual couples to acquire marriage licenses.[13]

Essential to the two stated purposes of the Act are implicit assumptions concerning sex, gender, and the right to marry. By succumbing to the binary confines of "male" and "female," DOMA not only fails to recognize the

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dimorphism disintegrates even at the level of basic biology. Chromosomes, hormones, the internal sex structures, the gonads and the external genitalia all vary more than most people realize. Those born outside of the Platonic dimorphic mold are called intersexuals. *Id.*

[9] *Id.*

[10] As of this writing, there are no states that legally recognize same-sex marriage. However, the Hawai'i legislature has enacted same sex partnership laws that provide many of the rights of marriage to same-sex couples. Similarly, the Vermont legislature enacted a "civil union" statute in April 2000, providing same-sex couples similar benefits and protections afforded to married opposite-sex couples. Harry D. Krause, *Marriage for the New Millennium: Heterosexual, Same Sex-Or Not at All?*, 34 FAM. L.Q. 271, 283 n.15 (2000).

Although the laws in thirty-five states now bar the recognition of same-sex marriage (essentially "mini-DOMAs"), nine states including Vermont have added "sexual orientation" to their laws prohibiting discrimination. Shannon P. Duffy, *Pushing the States on Gay Unions*, NAT'L L.J., Dec. 4, 2000, at A1.

[11] 142 CONG. REC. H7484 (daily ed. July 12, 1996) (statement of Rep. Sensenbrenner). "In fact, the word marriage appears more than 800 times in federal statutes and regulations, and the word spouse appears over 3,100 times. However, these terms are never defined in the statutes and regulations. This bill proposes to do so." *Id.*

[12] For some legislators, the negative impact of DOMA on same-sex couples was the goal, not a byproduct of the Act. 142 CONG. REC. H7487 (daily ed. July 12, 1996) (statement of Rep. Funderburk). "If homosexuals achieve the power to pretend that their unions are marriages, then people of conscience will be told to ignore their God-given beliefs and support what they regard as immoral and destructive." *Id.*

[13] H.R. REP. NO. 104-664 (1996).

existence of intersexuals,[14] but invites an incoherent application of the Act that results in an unconstitutional deprivation of fundamental rights.

Part II of this paper explores the fundamental right to marry and examines the gender and sex perceptions lawmakers may unwittingly institute in their legislation. The biological features of intersexuality as well as current medical practices in the diagnosis and treatment of intersexuality are discussed in Part III.

Part IV analyzes the effect of DOMA on intersexuals in the context of the equal protection clause of the Fourteenth Amendment and questions whether the Act unfairly discriminates on the basis of sex. The constitutionality of DOMA under a due process analysis is discussed in Part V, with particular emphasis on the fundamental right to privacy.

Part VI explores therapeutic jurisprudence as a means of examining legal culture's approach to sexual minorities and proposes the cognitive restructuring of the law's sexual and gender binarism. Part VII concludes that only through rethinking the law's approach to sexual minorities will legal culture regain integrity as a system of justice.

II. DEFENSE OF MARRIAGE ACT: DEFENDING WHAT FROM WHOM?[15]

Although the complete text of DOMA is brief, the consequences of enforcement are extensive.[16] The Act begins:

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[14] Intersexuals are persons born with biological features that are simultaneously male and female. Hazel Glenn Beh & Milton Diamond, *An Emerging Ethical and Medical Dilemma: Should Physicians Perform Sex Assignment Surgery on Infants with Ambiguous Genitalia?*, 7 MICH. J. GENDER & L. 1, 63 n.2 (2000).

[15] 142 CONG. REC. H7275-76 (daily ed. July 11, 1996) (statement of Rep. Johnston).

> Defending our country against enemies is certainly important, as is defending our children against poverty and ignorance. Defending the elderly against neglect is important, as is defending our families against crime and criminals. But defending marriage? Get real. Defending marriage against what? Against whom? . . . Everyone knows that the only true threat to marriage comes from within.

Id.

[16] Much of the criticism of DOMA has been specifically directed at its approach to full faith and credit between states. Critics of DOMA have urged that the purpose of the full faith and credit clause of Article IV was to promote national unity and assure citizens they could "move throughout the country without being stripped of their legal rights." Evan Wolfson & Michael F. Melcher, *Constitutional and Legal Defects in the "Defense of Marriage" Act*, 16 QUINNIPIAC L. REV. 221, 222 (1996).

Lawrence H. Tribe, Professor of Constitutional Law at Harvard Law School and noted constitutional scholar, expressed the following view:

> Congress possesses no power under any provision of the Constitution to legislate any such categorical exemption from the Full Faith and Credit Clause of Article IV. For Congress to enact such an exemption . . . would entail an exercise by Congress of a 'power() not delegated to the United States by the Constitution' . . . .

> No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.[17]

The second section of DOMA provides definitions of "marriage" and "spouse" applicable to all federal statutes and regulations:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.[18]

The very brevity of DOMA reveals its most prominent flaw. Implicit in the language of the Act is an assumption that people are either "male" or "female" and that a "husband" is oppositely sexed from a "wife." Although a binary sex paradigm is convenient when drafting legislation, it does not accurately reflect the biological realities of human sex differentiation. A recent study revealed that approximately seventeen out of every 1,000 children are born with various forms of intersexuality, ranging from "additional chromosomes to mixed gonads, hormones and genitalia."[19] The statistics approximate 1.7 percent of the population to be intersexed, which translates to about 4,784,172 United States citizens.[20]

Unconstitutionality of S. 1740, The So-Called Defense of Marriage Act, 142 CONG. REC. S5932 (daily ed. June 6, 1996) (statement of Lawrence H. Tribe, as printed into the Record by Sen. Kennedy).

Proponents of DOMA contend that both sections of DOMA "leave undisturbed the power of each state to define marriage for itself . . . . Thus, S. 1740 protects the crucial balance of federalism in our constitutional system, preserving the right of each state and of Congress to settle the same-sex marriage question for itself." *A More Perfect Union—Federalism in American Marriage Law: Hearing on S. 1740 Before the Senate Judiciary Comm.*, 104th Cong. (1996) (written statement of Professor Lynn D. Wardle).

While the full faith and credit debate over DOMA is the subject of extensive discussion, the focus of this paper is limited to equal protection and due process.

[17] 28 U.S.C.A. § 1738(C) (West 2001).

[18] 1 U.S.C.A. § 7 (West 2001).

[19] Fausto-Sterling, *supra* note 8. Anne Fausto-Sterling conducted the first systematic assessment of the available data on intersexual birthrates and arrived at 1.7 percent as a ballpark figure. Other estimates have ranged from one tenth of one percent to as high as four percent. *Id.*

[20] According to United States Census 2000, the nation's resident population on Census Day, April 1, 2000 was 281,421,906. U.S. Department of Commerce, U.S. Census Bureau, Table 2. Resident Population of the 50 States, the District of Columbia, and Puerto Rico: Census 2000 (April 1, 2000), http://blue.census.gov/population/cen2000/tab02.pdf (Internet Release date: Dec. 28, 2000).

Evidently, a substantial population falls outside the rigidly defined categories of "male" and "female." The fact that legislators overlooked this issue demonstrates the often unquestioned acceptance in law-making bodies of a binary sex paradigm. Ironically, legislators briefly touched on the topic in one of the heated House debates preceding enactment of DOMA:

> One of the most astounding things that I heard was in our committee, one member indicating that he did not really know the difference for legal purposes between a man and a woman or between a male and a female. I daresay, Mr. Speaker, that *we all know that.* And the fact of the matter is that marriage throughout the entire history of not only our civilization but Western civilization has meant the legal union between one man and one woman .... The American people demand this legislation.[21]

Despite the speaker's certainty that everyone knows the difference between "male" and "female," it is unlikely that legislators are informed of the frequency of sex differentiation and sexual ambiguity. Knowledge of these medical facts would not only have undermined much of the moral underpinnings of DOMA,[22] but also would have revealed the unconstitutionality of an Act that infringes upon the intersexual's fundamental right to marriage.

A. Right to Marry: Fundamental to "Me," Not "We"

The Supreme Court stated that a fundamental right is "implicit in the concept of ordered liberty,"[23] a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[24] The Court consistently recognizes the important role of marriage in society,[25] as evidenced in *Griswold v. Connecticut*:[26]

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being

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[21] 142 CONG. REC. H7275 (daily ed. July 11, 1996) (statement of Rep. Barr) (emphasis added).

[22] 142 CONG. REC. H7486 (daily ed. July 12, 1996) (statement of Rep. Buyer).

> Mr. Chairman, permit me to be theological and philosophical, for a moment. I believe that as a people, as a people, as a God-fearing people, at times, that there are what are viewed, what I believe are called depraved judgments by people in our society. They come in all forms of sin. We learn that early on.

Id.

[23] Palko v. Connecticut, 302 U.S. 319, 325 (1937).

[24] Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

[25] Maynard v. Hill, 125 U.S. 190, 205 (1888) (stating that marriage creates "the most important relation in life").

[26] 381 U.S. 479, 486 (1965).

> sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.[27]

Thus, the right to marry is a fundamental right, any infringement of which will be subject to the most exacting scrutiny. In *Loving v. Virginia*,[28] the Supreme Court struck down a Virginia statute that prohibited interracial marriages and stated that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[29] The denial of this "fundamental freedom"[30] constitutes a deprivation "of liberty without due process of law."[31] Furthermore, in *Zablocki v. Redhail*,[32] the Court recognized that a statute significantly interfering with the fundamental right of marriage "cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."[33]

But does the fundamental right to marry flow to the individual or does the right to marriage inure to the couple as a government-defined entity? While marriage undoubtedly requires at least two persons, the right to marry is an individual right that naturally precedes the union it creates. In *Loving*, the Court acknowledged that the "freedom to marry has long been recognized as one of the vital *personal* rights essential to the orderly pursuit of happiness . . . ."[34] Again emphasizing the individual's right to marry, the Court in *Cleveland Board of Education v. LaFleur*[35] declared that "freedom of *personal* choice in matters of marriage and family life"[36] was one of the liberties protected by the due process clause.[37] Clearly, marriage is a "personal" right that inures to the individual.[38]

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[27] *Id.*

[28] 388 U.S. 1 (1967).

[29] *Id.* at 12 (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)).

[30] *Id.*

[31] *Id.*

[32] 434 U.S. 374 (1978) (holding that a Wisconsin statute requiring residents with child support orders to obtain court approval before marrying unnecessarily impinges on the right to marry).

[33] *Id.* at 388.

[34] *Loving*, 388 U.S. at 12 (emphasis added).

[35] 414 U.S. 632 (1974) (holding that mandatory school board rules requiring pregnant school teachers to take unpaid maternity leave denied the teachers due process).

[36] *Id.* at 639 (emphasis added).

[37] As a federal statute, the Fifth Amendment's due process clause would apply to DOMA. U.S. CONST. amend. V. However, a parallel argument could apply to state legislation limiting marriage to "opposite-sexed" couples as a violation of the Fourteenth Amendment's due process clause. U.S. CONST. amend. XIV, § 1.

[38] *Loving*, 388 U.S. at 12.

Thus, a government-enforced limitation on the sex of an individual's marriage partner goes against the spirit of the fundamental right to marry.[39] By restricting the right to marry to oppositely-sexed couples, DOMA violates the protected civil rights of the individual. Additionally, the broad sweep of DOMA is not "closely tailored" to achieve important state interests,[40] as it fails to address the negative impact the Act has on intersexuals.

For better or for worse, modern regulation of marriage has become the "offering and withholding of . . . benefits."[41] A number of federal and state benefits accompany a legally recognized marriage. On the federal level, benefits include advantages in tax law, pension benefits, and social security benefits.[42] State benefits also figure prominently in advantages in state income tax, the rights of inheritance, control and division of property, the right to bring wrongful death actions, child custody and support, spousal support, and post-divorce rights.[43] By allowing states to disregard marriages based on the sex of the partners, and defining for federal purposes which marriages will be recognized, DOMA withholds benefits from tax-paying citizens who have rights to the same marriage benefits extended to the heterosexual and non-intersexed population.[44]

The binary sex paradigm perpetuated by DOMA not only fails to recognize the existence of intersexuals, it also prohibits the intersexed from engaging in legally recognized marriages, as any relationship an intersexual embarked upon would possess some element of a same-sex union. By neglecting to establish clear standards of "male" and "female," DOMA places the intersexual in inevitable conflict with the law:

> If the law chooses to regulate behavior based upon a person's sex, it must clearly define its terms. If it insists on clinging to a binary system, it must find a way to define male and female so that the rights and obligations of intersexuals are as

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[39] The right to privacy is also infringed. *See infra* Part V.

[40] Zablocki v. Redhail, 434 U.S. 374, 388 (1978).

[41] Brian H. Bix, *State of the Union: The States' Interest in the Marital Status of Their Citizens*, 55 U. MIAMI L. REV. 1, 29 (2000).

[42] Wolfson & Melcher, *supra* note 16, at 237.

[43] Baehr v. Lewin, 74 Haw. 530, 560-61, 852 P.2d 44, 59 (1993).

[44] Not all gays and lesbians share the view that legally recognized marriage is desirable. Nancy D. Polikoff expresses her concerns that the desire to marry in the lesbian and gay community "is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism." Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every Marriage*, 79 VA. L. REV. 1535, 1536 (1993).

Polikoff suggests that "[a]dvocating lesbian and gay marriage will detract from, even contradict, efforts to unhook economic benefits from marriage and make basic health care and other necessities available to all." *Id.* at 1549.

> clearly delineated as the rights and obligations of individuals who are not intersexed.[45]

If DOMA is to apply consistently, it cannot rely upon a binary system that assumes every person is "male" or "female," but must create a new paradigm that will not violate the constitutional rights of the intersexual.

B. Gender and Sex Identity: Beyond the "She" and "He"

Although the terms "sex" and "gender" are often used interchangeably by legislators and the courts, the words possess different meanings. "Sex" refers to biological or physical characteristics[46] of male and female, whereas "gender" refers to "cultural or attitudinal characteristics."[47] In other words, sex signifies the bio-physical aspects generally associated with "male" and "female," while gender represents the social constructions of "masculine" and "feminine."[48] The meanings of sex and gender, however, are often conflated, the law presuming that a person's gender is also their sex[49] and by extension, that every individual has only one identifiable sex.

A more biologically accurate model is one recognizing that sex and gender "range across a spectrum," with "male" and "female" at "the two ends of the poles."[50] This inclusive model acknowledges the intersexual, who possesses sexual characteristics typically associated with males and females.[51]

Critical gender theorists are at the forefront of research addressing the assumption that sex and gender are dimorphic,[52] questioning the widely accepted belief that every person fits into either a masculine or feminine gender category as determined by biological sex characteristics.[53] The

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[45] Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 327 (1999) [hereinafter Greenberg, *Defining Male and Female*].

[46] J.E.B. v. Alabama, 511 U.S. 127, 157 (1994) (Scalia, J., dissenting).

[47] *Id.*

[48] Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 3, 21 (1995).

[49] *Id.* at 12.

[50] Greenberg, *Defining Male and Female*, *supra* note 45, at 275.

[51] *Id.*

[52] *See generally* SUZANNE J. KESSLER, LESSONS FROM THE INTERSEXED (1998); ANNE FAUSTO-STERLING, SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY (2000) [hereinafter FAUSTO-STERLING, SEXING THE BODY].

[53] Terry S. Kogan, *Intersections of Race, Ethnicity, Class, Gender & Sexual Orientation: Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled "Other,"* 48 HASTINGS L.J. 1223, 1228 (1997).

discourse of intersexuals themselves[54] often substantiates the branch of gender theory which asserts that the construction of intersexuality is not a desirable end,[55] suggesting that the unique position of intersexuals may lead to a positive reevaluation of prevailing gender norms.[56] "Since intersexuals quite literally embody both sexes, they weaken claims about sexual difference."[57] This erosion of traditionally held norms is generally what proponents of DOMA hope to avert.[58] But the weakening of sex and gender constructions that accompanies the recognition of intersexuals comes not in the form of sexual orientation but in the reality of human biology.

The convergence of gender, sex, and sexual orientation in the interstices of DOMA reveals the punitive nature of an act that sprang primarily from animus against the gay and lesbian community.[59] By limiting the fundamental right of marriage to include only opposite sex couples, DOMA attempts to withhold marriage and its accompanying benefits from gays and lesbians. Like most measures motivated by election year zeal,[60] however, the Act's injurious effect far exceeds its objective, exposing DOMA as an unconstitutional legislative creation.

C. Binarism in the Law: The Power to Exclude

While DOMA's unconstitutional effect on intersexuals may be unintentional, the Act's negative impact on gays and lesbians was clearly intended.[61] To maintain that the flaws in DOMA were mere oversight on the part of lawmakers would be unduly generous, as congressional debate over the Act was rife with comments suggesting homophobia and intolerance of sexual

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[54] *See* Intersex Society of North America, *at* http://www.isna.org.

[55] KESSLER, *supra* note 52, at 120.

[56] *Id.*

[57] FAUSTO-STERLING, SEXING THE BODY, *supra* note 52, at 8.

[58] 142 CONG. REC. H7485 (daily ed. July 12, 1996) (statement of Rep. Seastrand).

> Traditional marriage, however, is a house built on a rock. As shifting sands of public opinion and prevailing winds of compromise damage other institutions, marriage endures, and so must its historically legal definition. This bill will fortify marriage against the storm of revisionism, so I urge all of my colleagues to support this very good bill, the defense of marriage act.

Id.

[59] *See generally* 142 CONG. REC. H7270 (daily ed. July 11, 1996).

[60] 142 CONG. REC. S10102 (daily ed. Sept. 10, 1996) (statement of Sen. Kennedy). "It is a cynical election year gimmick, and it deserves to be rejected by all who deplore the intolerance and incivility that have come to dominate our national debate." *Id.*

[61] 142 CONG. REC. H7494 (daily ed. July 12, 1996) (statement of Rep. Smith). "Those who seek to overturn our system of values are attempting to achieve not just toleration of their behavior, but full social acceptance as well. We should not undermine the standards that elevate civilization." *Id.*

minorities.[62] A sampling of the rhetoric directed against same-sex marriage reveals a deep-seated animus toward gays and lesbians and the presumed threat they present to heterosexual marriages.[63] Fear and bigotry[64] permeate the language,[65] with phrases like "stealth attack," "radical homosexual rights advocates," "aggressively destructive forces," and "militant homosexual rights activists."[66]

Why does the issue of same-sex marriage incite such impassioned discourse? Even avid proponents of DOMA concede that their own heterosexual marriages are not threatened by same-sex unions.[67] What appears to be at stake is the very binarism of the law itself. Limiting the complexity of legal issues to one of two possibilities creates uniformity. Whether phrased as right or wrong, black or white, male or female, straight or gay, or in the instant case, entitlement to marriage or its withholding, binarism

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[62] 142 CONG. REC. H7482 (daily ed. July 12, 1996) (statement of Rep. Barr). "The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundations of our society: the family unit." *Id.*

[63] Gary Bauer, former Republican presidential candidate and Campaign for Working Families founder, issued the following statement regarding the civil union vote in the Vermont State Senate: "Once Gov. Howard Dean signs this subversive bill into law, as he has promised, it will only be a matter of time before the radical homosexual activists appeal to the federal courts to compel other states to recognize Vermont's 'civil unions.'" *Bauer Says Vermont Civil Union Bill Undermines Marriage, Surrenders to Judicial Activism,* US NEWSWIRE, Apr. 19, 2000, at Nat'l Desk.

[64] CONG. REC. H7491 (daily ed. July 12, 1996) (statement of Rep. Studds). "Words have been thrown around . . . today I wrote down so far promiscuity, perversion, hedonism, narcissism, well, that may be in this House, depravity and sin. All, I regret to say, from the same side of the aisle." *Id.*

[65] Chuck Anderson, *Texas Legislature Must Act to Defend Marriage,* CORPUS CHRISTI CALLER-TIMES, Dec. 21, 2000, at A13. "The far left has targeted the institution of marriage as the next test in their social laboratory." *Id.*

[66] Richard Lessner, *American Renewal Calls on GOP to Protect Pro-Family Planks in Platform,* PR NEWSWIRE, July 10, 2000, at Nat'l Political News. "Republican convention delegates should not surrender the moral high ground to the politically correct demands of militant homosexual rights activists under the false pretense of making the party more inclusive or diverse. The American family, our nation's bedrock social institution, is under unprecedented assault from aggressively destructive forces." *Id.*

[67] 142 CONG. REC. H7278 (daily ed. July 11, 1996) (statements of Rep. Frank and Rep. Largent).

> Mr. Speaker, whose marriage does it threaten? . . . It threatens the institution of marriage the gentleman is trying to redefine . . . . It does not threaten the gentleman's marriage. It does not threaten anybody's marriage. It threatens the institution of marriage; that argument ought to be made by someone in an institution because it has no logical basis whatsoever.

Id.

allows society to maintain the status quo and cling to the societal norms to which it has grown accustomed.[68]

Throughout history, lawmakers have revealed their tendency to stigmatize and exclude minorities based on a binary paradigm.[69] In *People v. Hall*,[70] a white man convicted of murder upon the testimony of Chinese witnesses appealed the admissibility of their testimony. An existing law provided that "[n]o Black or Mulatto person, or Indian, shall be allowed to give evidence in favor of, or against a white man."[71] The Supreme Court of California, confronted with the dilemma of categorizing a "tawny" race,[72] came to the conclusion that the terms "Black," "Mulatto," or "Indian" used in this context meant the opposite of "white" and therefore excluded the testimony of "everyone [sic] who is not of white blood."[73] The court stated that the legislature's design was to "protect the white person from the influence of all testimony other than that of persons of the same caste,"[74] and shield the European white man from the "testimony of the degraded and demoralized caste."[75] The court declared that even if it were presented with a doubtful case, it would be impelled to the same decision on grounds of "public policy."[76] The court further stated:

> The same rule which would admit them to testify, would admit them to all the equal rights of citizenship, and we might soon see them at the polls, in the jury box, upon the bench, and in our legislative halls. This is not a speculation which exists in the excited and over-heated imagination of the patriot and statesman, but it is an *actual and present danger*.[77]

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[68] 142 CONG. REC. S10111 (daily ed. Sept. 10, 1996) (statement of Sen. Byrd). "Much of America has lost its moorings. Norms no longer exist. We have lost our way with a speed that is awesome." *Id.*

[69] Ozawa v. United States, 260 U.S. 178, 196, 198 (1922) (holding that appellant, a Japanese immigrant who had lived in the United States for over twenty years, was not eligible for naturalization, which was limited to "free white persons").

> It is sufficient to ascertain whom [the original framers] intended to include and having ascertained that it follows, as a necessary corollary, that all others are to be excluded . . . . The appellant . . . is clearly of a race which is not Caucasian and therefore belongs entirely outside the zone on the negative side.

Id.

[70] 4 Cal. 399 (1854).

[71] *Id.*

[72] *Id.* at 403.

[73] *Id.*

[74] *Id.*

[75] *Id.* at 402.

[76] *Id.* at 404.

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

It is no coincidence that much of the language of fear and bigotry present in *Hall* is now echoed by our lawmakers in their debates over same-sex marriage.[78] Although the issue has shifted from racial minorities to sexual minorities, a threat to binarism is a threat to heterosexual entitlement. Allowing "a distinct people, living in our community, recognizing no laws of this State, except through necessity . . . a people whom nature has marked as inferior"[79] to engage in the same marriage practices that have traditionally been restricted to opposite sex couples threatens the status quo of heterosexual entitlement.

Proponents of DOMA might suggest an amendment to the Act exempting medically certified intersexuals as a means of curing DOMA's unconstitutional defects. An amendment, however, would not remedy the normalized binarism evidenced in the Act. When the law fails to question its own normative assumptions, it effectively promulgates them. The institutionalized promulgation of norms allows society to indulge in an underlying animus toward sexual minorities which is not curable by merely acknowledging the oversight. Unquestioned assumptions often lead to onerous results, ultimately supporting more direct and oppressive agendas that sacrifice the rights of one sexual minority for a political agenda against another.

III. INTERSEXUALITY: BIOLOGICAL CHARACTERISTICS AND SEXUAL IDENTITY

Intersexuals are persons born with biological features that are simultaneously male and female.[80] While some intersexuals are detected at birth by the presence of ambiguous genitalia not identifiable as clearly male

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[78] Although the first of the following quotes concerns citizenship and the second concerns marriage, the misuse of tradition and legislative intent is apparent in both:

> It is inconceivable that a rule in force from the beginning of the Government, a part of our history as well as our law, welded into the structure of our national polity by a century of legislative and administrative acts and judicial decisions, would have been deprived of its force in such dubious and casual fashion.

Ozawa v. United States, 260 U.S. 178, 194 (1922) (holding that naturalization was limited to "free white persons").

"When Congress voted on Federal laws that conferred benefits on married persons, I do not think that Congress ever contemplated their application to same-sex couples. I do not think the American people did either." 142 CONG. REC. H7484 (daily ed. July 12, 1996) (statement of Rep. Sensenbrenner).

[79] People v. Hall, 4 Cal. 399, 404-05 (1854).

[80] Beh & Diamond, *supra* note 14, at 63 n.2.

or female,[81] others fall into one or more of over twelve categories of intersex.[82] Some common types of intersexuality include:[83]

1. Congenital Adrenal Hyperplasia (CAH): CAH is a genetically inherited malfunction of the enzymes that make steroid hormones. In XX children, it can result in mild to severe masculinization of the genitalia. The estimated frequency per 100 live births is 0.00779.

   Late onset CAH can cause masculinization at puberty. The estimated frequency per 100 live births is 1.5.

2. Androgen Insensitivity Syndrome (AIS): AIS is genetically inherited. The cell receptors fail to recognize testosterone. XY children are born with highly feminized genitalia. At puberty they develop breasts and a feminine body shape. The estimated frequency per 100 live births is 0.0076.

   Partial Androgen Insensitivity Syndrome. The estimated frequency per 100 live births is 0.00076.

3. Gonadal Dysgenesis: Individuals (primarily XY) whose gonads do not develop properly due to various causes, but whose features are heterogenous.

4. Hypospadias: The urethra does not run to the tip of the penis, but opens along the shaft or base. Causes vary, but it can result from alterations in testosterone metabolism.[84]

5. Turner Syndrome: This is a form of gonadal dysgenesis in females lacking a second X chromosome (XO).[85] The ovaries do not develop and there is a lack of secondary sex characteristics accompanied by short stature. Individuals are treated with estrogen and growth hormone. The estimated frequency per 100 live births is 0.0369.

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[81] *Id.*

[82] *Id.*

[83] FAUSTO-STERLING, SEXING THE BODY, *supra* note 52, at 52-53 (compiled from Table 3.1, *Some Common Types of Intersexuality*, and Table 3.2, *Frequencies of Various Causes of Nondimorphic Sexual Development*).

[84] *Id.*

[85] *Id.*

6. Klinefelter Syndrome: Males are born with an extra X chromosome (XXY) or variations thereof.[86] This is a form of gonadal dysgenesis causing infertility and at puberty there is often breast enlargement. Individuals can be treated with testosterone therapy. The estimated frequency per 100 live births is 0.0922.

7. Non-XX or non-XY (not Turner or Klinefelter's Syndrome): Chromosomal variations. The estimated frequency per 100 live births is 0.0639.

8. Vaginal Agenesis: Females are born with an absence of or failed development of the vagina.[87] The estimated frequency per 100 live births is 0.0169.

9. True hermaphrodites: Virtually all have a uterus and at least one oviduct in various combinations with sperm transport ducts. While most have XX chromosomes, variations exist chromosomally as well.[88] The estimated frequency per 100 live births is 0.0012.

10. Idiopathic: A condition of unknown cause.[89] The estimated frequency per 100 live births is 0.0009.

Although intersexuality affects a portion of the population,[90] most persons in the United States are labeled "male" or "female," a designation assigned by the medical birth attendant based on the appearance of the genitalia.[91] If the genitalia are ambiguous[92] but the child is chromosomally male (XY), doctors will determine whether the child has an adequate penis.[93] Often, the medical standard applied is whether young boys can urinate standing up and whether, as adult men, they will be capable of penetrating a female's vagina.[94] If the

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[86] *Id.*

[87] WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY 38 (2d ed. 1996).

[88] FAUSTO-STERLING, SEXING THE BODY, *supra* note 52, at 279 n.19.

[89] WEBSTER'S ENCYCLOPEDIC UNABRIDGED DICTIONARY 951 (2d ed. 1996).

[90] The average from a wide variety of different populations is 1.7 percent. FAUSTO-STERLING, SEXING THE BODY, *supra* note 52, at 53.

[91] This sight-based determination, which is often inadequate to detect other biological factors, is then recorded on the birth certificate. KESSLER, *supra* note 52, at 17.

[92] Not all intersex conditions result in ambiguous external genitalia. The occurrence of ambiguous external genitalia at birth in the United States is approximately one in 2,000, which is approximately 1,500 to 2,000 children born annually. Of those children, an estimated 100 to 200 undergo pediatric surgical sex reassignment. Beh & Diamond, *supra* note 14, at 17.

[93] *See* FAUSTO-STERLING, SEXING THE BODY, *supra* note 52, at 57.

[94] *Id.*

phallus appears to be adequate,[95] the child is labeled male. If the genetically XY child does not have an adequate penis, the doctor will surgically alter the child to be a female, even at the cost of sacrificing the child's reproductive possibilities as a male.[96] A genetically XX child, however, who is capable of reproduction will generally be assigned female in spite of the appearance of the child's external genitalia.[97] If the "phallus" is considered to be "too large" for a typical clitoris, it is surgically reduced, even if the child's capacity for future sexual satisfaction is destroyed.[98] Essentially, the current medical practice is to designate a child "male" based upon the ability to penetrate females, and to designate a child "female" based upon the ability to give birth.[99]

Naturally, serious criticism of these measures has resulted,[100] not the least by intersexed individuals themselves.[101] Some medical experts recommend waiting until the child is able to consent to procedures, as genital reconstruction is elective in nature and the intersexed condition is typically not life-threatening.[102] Concerned critics suggest a moratorium on infant sexual assignment surgery:

> Medical uncertainty, the infant's inability to consent to this life-altering treatment and the child's right to an open future suggest that a "moratorium" on infant surgery is the best course when surgery is solely intended to cosmetically change ambiguous genitals.[103]

Even if an intersexed child is designated "male" or "female," and the child's external genitalia are surgically altered to conform to the label, this does not necessarily create a "male" or "female." Sex variables can include: (1) genetic or chromosomal sex; (2) gonadal sex; (3) fetal hormonal sex; (4) internal morphologic sex; (5) external morphologic sex; (6) hypothalmic sex;

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[95] In a study of 100 newborn males, average infant penis length ranged from 2.9 to 4.5 centimeters. According to current medical standards, a phallus of less than 2.0 centimeters is considered questionable, while a phallus less than 1.5 centimeters long and 0.7 centimeters wide invariably results in a female gender assignment. *Id.*

[96] Greenberg, *Defining Male and Female*, *supra* note 45, at 272.

[97] *Id.*

[98] *Id.*

[99] *Id.*

[100] For an analysis of the legal issues involved in infant sex assignment surgery, see Beh & Diamond, *supra* note 14, at 1.

[101] Brief of Amicus Curiae Intersex Society of North America (Feb. 7, 1998), http://www.isna.org/colombia/brief.html.

[102] Beh & Diamond, *supra* note 14, at 43.

[103] *Id.* at 59.

(7) sex of assignment and rearing; (8) pubertal hormonal sex; (9) gender identity and role; and (10) procreative sex impairments.[104]

While these variables are congruent in the majority of persons, for the intersexed, one or more of these factors is incongruent or ambiguous.[105] The law must clarify which of the sexual variables will be determinative of sexual identity and whether any one or more will be dispositive for legal purposes.[106]

Some gender theorists argue that the legal approach to gender and sexual identity has been conceptualized too narrowly, perpetuating gender inequality.[107] Suggestions range from allowing individuals to "self identify their sex"[108] to adding additional categories to the laws that allow for more than two sexes.[109] This view is not embraced by all scholars, however, as some vehemently oppose deconstructing the binary sex paradigm.[110]

The creators of DOMA blithely disregarded complex questions of physiology, endocrinology, and sexual identity that baffle scientists and upon which there is little consensus. Consequently, intersexuals are in the untenable position of grappling with the creation of uninformed legislators.

IV. THE FOURTEENTH AMENDMENT: EQUAL PROTECTION OF THE LAWS

By enacting DOMA, the federal government deprives the intersexed population of the equal protection of the laws[111] and actively endorses unconstitutional state action. If DOMA is challenged in a court of law, two arguments can be presented on equal protection grounds. The first argument proposes that intersexuals constitute a suspect class. The second argument questions the constitutionality of legislation that unfairly discriminates on the

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[104] JOHN MONEY, SEX ERRORS OF THE BODY AND RELATED SYNDROMES: A GUIDE TO COUNSELING CHILDREN, ADOLESCENTS AND THEIR FAMILIES 4 (2d ed. 1994).

[105] Greenberg, *Defining Male and Female*, *supra* note 45, at 278.

[106] *Id.* at 279.

[107] FAUSTO-STERLING, SEXING THE BODY, *supra* note 52, at 8.

[108] Greenberg, *Defining Male and Female*, *supra* note 45, at 294.

[109] Kogan, *supra* note 53, at 1253.

[110] John Money, an influential researcher whose articles have shaped much of the modern medical approach to early genital surgery and childhood sex identity, would strongly oppose recognizing a polisexual structure. MONEY, *supra* note 104, at 6.

> It simply does not make sense to talk of a third sex, or of a fourth or fifth, when the phylogenetic scheme of things is two sexes. Those who are genitally neither male nor female but incomplete are not a third sex. They are a mixed sex or an in-between sex. To advocate medical nonintervention is irresponsible.

Id.

[111] Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (declaring that although the Fifth Amendment does not contain an equal protection clause, the concepts of equal protection and due process, both stemming from fairness, are not mutually exclusive).

basis of sex. Given the unique biological and social circumstances of intersexuals, both arguments possess particular relevance.

A. Suspect Classification: The (Un)Usual Suspects

If a court of law finds that intersexuals are a suspect class, DOMA will be examined under the strictest level of judicial scrutiny.[112] A suspect class is determined by the following factors:[113] (1) the group has experienced a history of past discrimination and oppression; (2) the group constitutes a small and powerless minority; (3) members of the group bear a visible distinguishing characteristic; (4) the characteristic is immutable and determined by the accident of birth; and (5) the characteristic frequently bears no relation to the group's ability to perform or contribute to society.[114]

A history of oppression closely attends reported incidents of intersexuality,[115] satisfying the first criterion for suspect class status.[116] Ironically, much of the worst oppression has occurred in recent years, due in large part to advances in medicine.[117] Only in the last few decades has the medical community been active in surgically altering intersexed infants in order to fit them into the physical appearance of one sex.[118] The popularity of genital reconstructive surgery is based upon the assumption that intersexed individuals would be rejected by society and would be emotionally traumatized if they were not unambiguously one sex.[119] However, case studies of intersexual children who grew up with visibly ambiguous genitalia often reveal well-adjusted individuals involved in satisfying sexual relationships.[120] Medical experts frequently advise parents to hide the truth from their

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[112] Frontiero v. Richardson, 411 U.S. 677, 686-88 (1973) (holding that a statute treating male and female members of the uniformed services differently for administrative convenience was in violation of the due process clause of the Fifth Amendment).

[113] *Id.*

[114] *Id.*

[115] FAUSTO-STERLING, SEXING THE BODY, *supra* note 52, at 35-36.

> Different countries and different legal and religious systems viewed intersexuality in different ways .... Nevertheless, all over Europe the sharp distinction between male and female was at the core of systems of law and politics .... And those who fell in between? Legal experts acknowledged that hermaphrodites existed but insisted they position themselves within this gendered system.

Id.

[116] *Frontiero*, 411 U.S. at 686-87.

[117] Greenberg, *Defining Male and Female*, *supra* note 45, at 325.

[118] *Id.*

[119] *Id.*

[120] FAUSTO-STERLING, SEXING THE BODY, *supra* note 52, at 94-106 (Tables 4.3 and 4.4).

intersexed child.[121] This alliance of secrecy not only increases the possibility of physiological harm to the intersexual,[122] but increases the chance of psychological harm as well.[123]

While some cultures accept the intersexed as part of their gender system,[124] legislation in the United States fails to recognize even the existence of intersexuals. This legislative silence maintains a binary sex and gender paradigm that is misleading and encourages discrimination against a group that has historically been marginalized and oppressed.

Clearly, intersexuals constitute a small and powerless minority, satisfying the second criteria for suspect class status.[125] Occasionally, intersexuals are unaware of their own intersexuality, hidden as it may be in the internal

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[121] *Id.* at 65. "In their suggestions for withholding information about patients' bodies and their own decisions in shaping them, medical practitioners unintentionally reveal their anxieties that a full disclosure of the facts about intersex bodies would threaten individuals—and by extension society's—adherence to a strict male-female model." *Id.*

[122] For example, a genetic male who was assigned female in infancy and had his testicles removed must take male hormones for the rest of his life to prevent osteoporosis if he chooses to reassign to male. Beh & Diamond, *supra* note 14, at 2.

[123] John Money, an influential researcher at the Johns Hopkins' Hospital, reported the case of an identical eight-month-old unambiguously male twin who lost his penis during a botched phimosis surgery. Money advised that the child be raised as female and receive sex reassignment surgery. The child, known as "John" would then be raised as "Joan." Beh & Diamond, *supra* note 14, at 6-13.

The parents were also counseled to keep the child's original sex a secret. Supposedly, "Joan" developed a female gender identity while her brother developed a male gender identity. Money heralded the success of Joan's sex reassignment and concluded that gender of rearing and genital appearance had a large influence on gender identity. *Id.*

Another researcher, Milton Diamond, published articles refuting Money's sex and gender theories. Diamond disagreed with the theories that persons are psychosexually neutral at birth and that healthy psychosexual development is related to the acceptable appearance of the genitals. Years later, it was discovered that "Joan" had rejected her sex assignment, had her breasts removed, a penis reconstructed and was married to a woman and helping rear her children as their father. FAUSTO-STERLING, SEXING THE BODY, *supra* note 52, at 66-70.

Although "John" eventually received social acceptance and success as a male, he is bitter and angry about the secrecy, the unnecessary confusion he experienced growing up, and his lost childhood. *Id.*

[124] FAUSTO-STERLING, SEXING THE BODY, *supra* note 52, at 108-09.

> Several Native American cultures, for example, define a third gender, which may include people whom we would label as homosexual, transsexual, or intersexual .... [There are also] the Hijras of India ... individuals whom we ... would label intersex, transsexuals, effeminate men, and eunuchs .... [T]he existence of other systems suggests that ours is not inevitable.

Id.

[125] Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

biology or by parental/medical concealment.[126] Much of the silence surrounding intersexuality, however, is due to a fear of societal stigma, apprehension forcing many persons to hide their intersexuality.[127] One reason intersexuality has not been a prominent issue confronting legislators is that intersexuals "pass" as the biological sex with which they gender-identify. Granted, not all intersexuals choose a gender identity of "male" or "female," nor is every intersexual capable of "passing" as one or the other. But those who do gender-identify and "pass" for "female" or "male" are generally not willing to reveal their intersexed status, especially in the current climate of intolerance for sexual ambiguity.

Intersexual activists like Cheryl Chase, an intersexed woman and founder of the Intersex Society of North America ("ISNA"), are attempting to change this invisibility. Dedicated to the cause of "asserting hermaphroditic identities and halting genital surgery on intersexed infants and children unless absolutely necessary for their physical health and comfort,"[128] ISNA has made inroads in reducing the shame and secrecy surrounding intersexuality through support groups and open discourse. In spite of the efforts of intersex activists, intersexuals as a group do not possess the political power their numbers warrant.

Although most intersexed persons identify with either "male" or "female," their physical appearance may be a combination of both. This physically distinguishing characteristic satisfies the third criteria for a suspect class.[129] If sexual ambiguity lies in the phenotype of the individual, it may manifest itself in an ambiguous sex and gender appearance. These individuals often appear to be what society deems "effeminate" men, or "masculine" women, a "badge of distinction" that generally invites discrimination.[130]

Some intersexuals publicly acknowledge their intersexuality and ask for the recognition of a third gender category.[131] Other intersexuals steer away from an additional category in favor of "intersexual" used as a modifier, as in

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[126] In addition to parental/medical concealment, some intersexed conditions are not detectable from the appearance of the external genitalia. *See supra* Part III. Instead, the variation exists in the chromosomes or internal gonads of the individual. *Id.*

[127] KESSLER, *supra* note 52, at 78 (quoting Cheryl Chase, an intersexual, and founder of Intersex Society of North America) ("Many intersexuals are . . . isolated, traumatized, and fearful.").

[128] *Id.* at 78.

[129] *Frontiero*, 411 U.S. at 686.

[130] KESSLER, *supra* note 52, at 88. "For some, gender has been problematic from the time of birth; others are irregularly gendered in a more cloaked manner—for example, they are chromosomal mosaics, neither completely XX nor XY." *Id.*

[131] *Id.* "Some intersexuals seem to be asking for the recognition of a third gender category, the basis for membership being the possession (or past possession) of other-than-typical genitals, gonads, or chromosomes." *Id.*

"intersexual man."[132] With current criticism directed at cosmetic genital surgery of infants, surgical modification will more likely occur when a child is at an age of consent.[133] If the practice of waiting becomes commonplace, some intersexuals may not choose to gender conform with "male" or "female," making the "badge of distinction" a more prominent issue.

The fourth criteria of a suspect class concerns immutability, a characteristic determined by the "accident of birth."[134] Although current medical technology makes it possible for surgery and supplementary hormones to create a more unified sexual appearance, the biology of the intersexed individual remains a mix of male and female sexual factors determined by birth. Even if an intersexual opts for surgery and supplementary hormones, the sexual ambiguity does not always lie in the phenotype.[135] Additionally, surgical results and hormone treatments are not always successful.[136] Whether lawmakers consider sexual identity mutable by surgery and hormone therapy will be a question of particular interest to post-operative transsexuals, whose sexual status for legal purposes currently varies from state to state.[137]

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[132] *Id.* at 89. "The adjective 'intersexual' would be coupled with femaleness or maleness much like 'diabetic man' or 'tall, blond woman.' The modifier would clue others to the current (or past) mixture of the person's gender markers and the particularity of this characteristic for whatever it suggested." *Id.*

[133] ISNA has been active in targeting the medical community, calling on physicians to "rethink the logic of genital surgery on infants who cannot give informed consent." *Id.* at 81.

Surgeons are also becoming more aware of the possible liability attached to infant sex assignment surgery. Beh & Diamond, *supra* note 14, at 1. Notably, the Lawson Wilkins Pediatric Endocrinology Society devoted presentations to the Neonatal Management of Genital Ambiguity. The specialists invited ISNA's Cheryl Chase to close the session with a presentation on "Sexual Ambiguity: The Patient-Centered Approach." Lawson Wilkins Pediatric Endocrine Society, *at* http://www.isna.org/pdf/pt-centered.pdf.

[134] *Frontiero*, 411 U.S. at 686.

[135] *See supra* Part III.

[136] KESSLER, *supra* note 52, at 75 (quoting Cheryl Chase, *'Corrective' Surgery Unnecessary: Reply to 'Is it a Boy or a Girl?'*, JOHNS HOPKINS MAG., Feb. 1994, at 6-7).

> Every generation of medical intersex specialists has characterized the work of the previous generation as terrible .... I have no doubt that, twenty years from now, the next generation of medical intersex specialists will be shaking their heads over the 'terrible' price that was exacted on intersexed children by the surgeries of the early 1990s.

Id.

> What emerges from these studies is that ... these surgeries are rarely successful and often risky. *First*, there are relatively high frequencies of post-operative complications leading to additional surgeries. At times the multiple surgeries cause significant scarring. *Second*, several authors emphasize the need for psychological reinforcement to allow patients to accept the operation. *Third*, overall success rates can be very disappointing.

FAUSTO-STERLING, SEXING THE BODY, *supra* note 52, at 87 (referring to vaginoplasty, one of the more common surgeries performed on intersexuals).

[137] In spite of Texas law prohibiting same-sex marriage, two Houston lesbians obtained a marriage license in September, 2000. These two women can legally get married because,

The fifth and last criteria for determining if intersexuals are a suspect class is whether the characteristic (being intersexed) bears any relation to the group's ability to perform or contribute to society.[138] According to a study performed on intersexuals with ambiguous phenotypes:

> Even proponents of early intervention recognize that adjustment to unusual genitalia is possible. Hampson and Hampson, in presenting data on more than 250 postadolescent hermaphrodites, wrote: "The surprise is that so many ambiguous-looking patients were able, *appearance notwithstanding*, to grow up and achieve a rating of psychologically healthy, or perhaps only mildly non-healthy."[139]

Clearly, there does not appear to be any relation between intersexuality and an individual's ability to contribute to society.[140] Although society's binary sex and gender construction may drive most intersexuals to hide their atypical sex configuration, their very lack of visibility unwittingly attests to their capacity to "perform" or contribute to society.

The unique situation of intersexuals appears to satisfy the five criteria of *Frontiero v. Richardson*[141] for the establishment of a suspect class. As a suspect class adversely affected by a federal statute, the intersexed can place the constitutionality of DOMA under the scrutiny of the courts.

B. Level of Judicial Scrutiny: Strictly Scrutinized

If intersexuals are found to be a suspect class, DOMA will be subject to the strictest judicial scrutiny.[142] The federal government will need to demonstrate that the Act achieves a compelling state interest while narrowly tailored to accomplish that interest.[143] Regarding a "compelling state interest," the two stated purposes of DOMA are to "defend the institution of traditional

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according to an opinion issued in *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999), chromosomes and sex of birth and not sex-change operations or outward gender characteristics determine a person's sex. Michele Kurtz, *Lesbian Wedding Allowed in Texas by Gender Loophole* (Sept. 7, 2000), http://seattlep-i.nwsource.com/national/marr07.shtml.

The resolution of the sexual identity of post-operative transsexuals will have a direct impact on the intersexed population's right to marry and may annul otherwise legal marriages. Julie A. Greenberg, *When is a Man a Man, And When is a Woman a Woman?*, 52 FLA. L. REV. 745, 746 n.7 (2000).

[138] *Frontiero*, 411 U.S. at 687.

[139] FAUSTO-STERLING, SEXING THE BODY, *supra* note 52, at 95 (quoting J.L. Hampson & J.G. Hampson, *The Ontogenesis of Sexual Behavior in Man*, *in* SEX AND INTERNAL SECRETIONS 1428-29 (W.C. Young & G.W. Corner eds., 1961)).

[140] *Id.*

[141] *Frontiero*, 411 U.S. at 686-88.

[142] *Id.* at 688.

[143] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995).

heterosexual marriage"[144] and to "protect the right of the States to formulate their own public policy regarding the legal recognition of same-sex unions."[145]

Although there are widely differing opinions in the ongoing debate over same-sex marriage, the central question is whether the state's interest in restricting marriage to heterosexual couples is compelling enough to deny the right to marry to the intersexed population. Even the most avid proponent of DOMA would have difficulty justifying the over-inclusive sweep of the Act. Prohibiting millions of Americans from marrying because they were born neither entirely "male" nor entirely "female" runs counter to legislative intent and offends public policy.

Assuming, arguendo, that DOMA embodies a compelling state interest, is the Act narrowly tailored to achieve this interest? By failing to clearly articulate what is "male" and "female," or what constitutes the "same" or "opposite" sex, the Act does not achieve its goal of defending heterosexual marriage through the least drastic alternative. Requiring the intersexed to prove they are "male" or "female" when no uniform legislative definition exists is unduly burdensome and violates "the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing."[146]

If Congress attempted to legitimize DOMA by shouldering the daunting task of weighing the various factors that make up human sexuality and drawing from those factors a meaningful definition of "male" and "female" for purposes of marriage,[147] the legislators could be faced with another type of equal protection challenge.

Although *Plessy v. Ferguson*[148] is better known for its "separate but equal" holding regarding accommodations for "colored" and "whites,"[149] the case contains another claim by Plessy that is analogous to the issue currently facing intersexuals. Plessy argued that since he was seven-eighths "Caucasian," he

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[144] H.R. REP. NO. 104-664 (1996).

[145] *Id.*

[146] Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972).

[147] If two intersexuals want to be married but they have sexual factors that are similar to the other's factors, assessing the "oppositeness" of their sexes might require a complex equation. Forget the minister, priest, or rabbi, bring the mathematician.

[148] 163 U.S. 537 (1896).

[149] A Louisiana statute required "equal but separate" train accommodations for the "white" and "colored" and made it a crime for passengers to violate the required segregation. *Id.* at 540.

Homer Adolph Plessy's ancestry was one-eighth African and seven-eighths European. He was prosecuted for refusing to leave the train compartment reserved for whites. The Supreme Court ruled that the Thirteenth Amendment was not violated by the statute. *Id.* at 541-42.

had a property interest in the privileges secured to members of the white race.[150] The Supreme Court stated:

> It is true that the question of the proportion of colored blood necessary to constitute a colored person, as distinguished from a white person, is one upon which there is a *difference of opinion in the different states*; some holding that any visible admixture of black blood stamps the person as belonging to the colored race; others, that it depends upon the preponderance of blood; and still others, that the predominance of white blood must only be in the proportion of three-fourths. *But these are questions to be determined under the laws of each state.*[151]

Being one-eighth fraction "colored" would render Plessy "colored" in one state, but "white" in another state depending on each state's determination of what amounted to "colored" or "white." Intersexuals face a similar struggle concerning their legally recognized sex. The consequences of the federal government's hasty sanctioning of DOMA can already be seen in the patchwork system of state-defined[152] "male" and "female" criteria[153] as evidenced by litigation surrounding post-operative transsexual legal sex identity. If intersexuals are prohibited from marrying their partner based on a court's definition of "male" and "female," it is conceivable they will be pressed to sue for their "maleness" or "femaleness," an absurd return to the injustice of *Plessy*. Since federal and state marriage benefits are also at stake, the federal government will likely be embroiled in a struggle with the states to establish a uniform, yet inoffensive definition of "male" and "female."

With the specter of mass litigation looming ahead, the government might maintain that it is unrealistic to accommodate the small minority of intersexuals, stressing the importance of administrative convenience. However, the Supreme Court has made it clear that "although efficacious administration of governmental programs is not without some importance,"[154] "the Constitution recognizes higher values than speed and efficiency."[155] Furthermore, a defense based on the relatively small size of the affected

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[150] *Id.* at 538.

[151] *Id.* at 552 (citations omitted) (emphasis added).

[152] The laws in thirty-five states now bar the recognition of same-sex marriage. These are essentially "mini-DOMAs" inspired by the federal DOMA. Duffy, *supra* note 10, at A1.

[153] This issue comes up primarily in decisions concerning post-operative transsexual legal sex identity. A New Jersey court, in M.T. v. J.T, 355 A.2d 204, 211 (N.J. 1976), held that if the genitalia conform with a person's gender identity, that will be the true sex for purposes of marriage. Other courts base legal sex on the sex of birth and chromosomes. *See* Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. App. 1999).

[154] Frontiero v. Richardson, 411 U.S. 677, 690 (1973). "And when we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality." *Id.*

[155] Stanley v. Illinois, 405 U.S. 645, 656 (1972).

population is unlikely to have any merit, as an unconstitutional statute will be declared invalid regardless of the modest number of citizens affected.[156]

Occasionally a balancing approach is preferred over traditional equal protection analysis.[157] In such instances, the character of the individual's interest is weighed against the government's purpose for the classification or burden.[158] If a balancing approach is applied to DOMA, the intersexed will likely prevail, as their right to and interest in marriage would probably outweigh the government's interest in heterosexual uniformity.

C. Classifications Based on Sex

An alternative way of approaching DOMA is to question the constitutionality of the Act's sex-based classifications. Although Congress had previously acknowledged the invidiousness of sex-based classifications,[159] DOMA, in fact, creates two related sex classifications. The first allows the states to consider an individual's sex before extending the protection of their laws, and the second enables the federal government to consider sex before extending the protection of federal law and the distribution of benefits.[160]

The Court in *Frontiero* concluded that classifications based on a person's sex are inherently suspect and subject to strict judicial scrutiny;[161] however, subsequent holdings indicate the current governing test under the Fourteenth Amendment is a standard between strict judicial scrutiny and a rational basis analysis.[162] If intermediate judicial scrutiny is applied to DOMA, then the Act

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[156] *Frontiero*, 411 U.S. at 681-82.

[157] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 452 (1985) (Stevens, J., concurring).

> In my own approach to these cases, I have always asked myself whether I could find a "rational basis" for the classification at issue. The term "rational," of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word "rational"—for me at least—includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially.

Id.

[158] *Id.* at 453.

[159] The Supreme Court noted Congress's previously cautious approach to sex-based classifications: "Thus, Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration." *Frontiero*, 411 U.S. at 687-88.

[160] Jon-Peter Kelly, *Act of Infidelity: Why the Defense of Marriage Act is Unfaithful to the Constitution*, 7 CORNELL J.L. & PUB. POL'Y 203, 240 (1997).

[161] *Frontiero*, 411 U.S. at 688.

[162] Craig v. Boren, 429 U.S. 190, 197 (1976); Califano v. Goldfarb, 430 U.S. 199, 210 n.8 (1977); Califano v. Webster, 430 U.S. 313, 316-17 (1977).

must serve important governmental objectives while substantially relating to the achievement of those objectives.[163]

Assuming, arguendo, that preserving traditional heterosexual marriage is an important governmental objective, DOMA fails under intermediate scrutiny for the same reasons it fails under strict scrutiny. By attempting to achieve uniform "male" and "female" marriages, DOMA harms intersexuals, who by nature of their birth do not fit into a binary system of sexual classification. As the Court stated in *Reed v. Reed*,[164] "dissimilar treatment for men and women who are . . . similarly situated" involves the "very kind of arbitrary legislative choice forbidden by the [Constitution] . . . ."[165]

V. DUE PROCESS AND THE RIGHT TO PRIVACY

The function of the Due Process Clause has been described as "an inquiry with a significant historical dimension,"[166] protecting citizens from "ill-considered or short-term departures from time-honored practices."[167] Due process represents the balance the nation strikes between individual liberty and the demands of organized society,[168] and protects the intersexual's right to marry[169] as part of the fundamental right of privacy implicit in the Constitution.[170]

One suggested method of simplifying the legal issue of due process as it concerns the intersexual is to determine sexual identity based on the birth certificate. As the first official document to indicate a person's sex, the designation on the birth certificate "usually controls the sex designation on all later documents."[171] Unfortunately, this method is considerably flawed, as an infant's sex may be misidentified at birth and the individual may subsequently identify with and conform their biology to another sex when they are older.[172]

According to *Littleton v. Prange*,[173] sexual identity for purposes of marriage is determined by the sex stated on the birth certificate, regardless of

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[163] *Craig*, 429 U.S. at 197.

[164] 404 U.S. 71 (1971).

[165] *Id.* at 76-77.

[166] Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1174 (1988).

[167] *Id.* at 1179.

[168] Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

[169] *See supra* Part II.

[170] Zablocki v. Redhail, 434 U.S. 374, 384 (1978).

[171] Greenberg, *Defining Male and Female*, *supra* note 45, at 309.

[172] If a mistake was made on the original birth certificate, an amended certificate will sometimes be issued if accompanied by an affidavit from a physician or a court order. *Id.*

[173] 9 S.W.3d 223 (Tex. App. 1999).

subsequent sexual reassignment.[174] If the reasoning in *Littleton* prevails,[175] intersexuals will be on the receiving end of a double portion of injustice. The initial injury of being sexually misidentified as an infant could lead to a subsequent inability to marry if their partner's sex is not the "opposite" of the sex identified on their birth certificate. With their sexual identity at issue, intersexuals could be compelled to undergo tests to prove they are sufficiently male or female enough to marry. A result this onerous is not as far-fetched as it may seem.

In Australia, an XX intersex born with an ovary and fallopian tube, a small penis, and a left testicle was reared as a male. In adulthood he had surgery to remove his breasts and masculinize his penis. His doctors agreed he should remain a male, as this was his psychosexual orientation. He later married, but the Australian courts annulled his marriage, ruling that in a legal system that required either "male" or "female" for purposes of marriage, he could be neither.[176] But for the protections found in the U.S. Constitution, this would be the logical outcome of DOMA.

While reasonable regulations that do not significantly interfere with the decision to enter into marriage may legitimately be imposed,[177] the right to privacy[178] concerning one's biology is implicit in the concept of ordered liberty.[179] To trade in the fundamental right of privacy for the fundamental right to marry is not only preposterous, but unconstitutional. "[A] governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."[180] Under a substantive due process analysis,[181] DOMA fails to demonstrate that society's

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[174] *Id.* at 231.

[175] Concurring judge Karen Angelini noted the difficulties that would arise if chromosomes, gonads, and genitals were not congruent. Having recognized this fact, the judge expressed no opinion as to how the law would view intersexuals with regard to marriage. *Id.* at 232.

[176] FAUSTO-STERLING, SEXING THE BODY, *supra* note 52, at 112.

[177] Zablocki v. Redhail, 434 U.S. 374, 386 (1978).

[178] The right to privacy emanates from the penumbras of the First, Third, Fourth, Fifth, and Ninth Amendments. Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (holding that married couples have a constitutional right to use birth control free from state interference).

[179] Palko v. Connecticut, 302 U.S. 319, 325 (1937); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[180] NAACP v. Alabama, 377 U.S. 288, 307 (1964).

[181] The two lowest standards of review do not merit discussion. The "rationally related" standard would require that DOMA be "rationally related to a legitimate state interest." City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 451 n.1 (1985) (Stevens, J., concurring). DOMA's effect on intersexuals is not legitimate, and questionable for that matter, as applied to gays and lesbians. *Id.*

DOMA would stand a better chance under the "rational basis" standard, which merely requires that the legislation not be arbitrary or capricious. This standard is met so long as "there

desire for uniform heterosexual marriage outweighs the intersexual's right to privacy and marriage.

VI. THERAPEUTIC JURISPRUDENCE IN THE DEVELOPMENT OF THE LAW

Therapeutic jurisprudence brings mental health insights into the development of the law through the study of the role of law as a therapeutic agent.[182] Therapeutic jurisprudence is described in the following statement:

> Legal rules, legal procedures, and the roles of legal actors (such as lawyers and judges) constitute social forces that, like it or not, often produce therapeutic or antitherapeutic consequences. Therapeutic jurisprudence proposes that we be sensitive to those consequences, and that we ask whether the law's antitherapeutic consequences can be reduced, and its therapeutic consequences enhanced, without subordinating due process and justice value .... Therapeutic jurisprudence does not itself purport to resolve the value questions; instead, it sets the stage for their sharp articulation.[183]

Although therapeutic jurisprudence originated in the context of mental health law,[184] therapeutic jurisprudence scholarship is transcending those borders, "setting the stage for cognitive restructuring"[185] of the current approach to law.

DOMA provides a good example of legislation suffering from two intertwined maladies, both of which could be remedied through a cognitive restructuring of the law. The first malady involves legislative reluctance to look beyond a sexually dimorphic paradigm in its policy and law-making capacity. Entangled with this reluctance, and possibly its source, is society's insistence on rigid sex and gender norms. The consequences of the conflation of sexual orientation, sex, and gender "causes the law to fail the society it serves by causing legal culture to violate the fundamental (self-professed) principles and aspirations that law is formally charged with upholding."[186] This failure consequently aggravates the status quo of sex and gender inequality.[187] Nowhere is the law's inability to see beyond its sexually dimorphic model more eloquently embodied than in the non-conforming biology of the intersexual.

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is any reasonably conceivable state of facts that could provide a rational basis for the classification." FCC v. Beach Communications, 508 U.S. 307, 313 (1993).

[182] David B. Wexler, *An Orientation to Therapeutic Jurisprudence*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 259, 259 (1994).

[183] *Id.* at 259-60.

[184] *Id.* at 261.

[185] *Id.*

[186] Valdes, *supra* note 48, at 27.

[187] *Id.*

Instead of embracing intersexuality as an indisputable symbol of sexual variation, and admitting the "social nature of our ideas about sexual difference,"[188] society has attempted to "police bodies of indeterminate sex"[189] through the use of invasive surgical techniques and questionable gender assumptions. "It is the social intolerance rather than individual pathology that is traumatic to an adolescent coming to terms with intersexuality."[190] Although therapeutic jurisprudence will not resolve questions of gender and sex, it can articulate to legislators the need for legislation that will not produce antitherapeutic consequences.

The future of intersexuals is in many respects the future of gender itself.[191] "Any revolution in thinking about gender hinges on understanding that there is no one best way to be a male or a female or any other gender possibility—not even in terms of what is between your legs."[192] Only by unlocking gender from genitals will society be able to subvert the power of gender to define lives.[193] The cognitive restructuring of the law begins with each individual's perception of sex and gender:

> We rightfully complain about gender oppression in all its social and political manifestations, but we have not seriously grappled with the fact that we afflict ourselves with a need to locate a bodily basis for assertions about gender. We must use whatever means we have to give up on gender. The problems of intersexuality will vanish and we will, in this way, compensate intersexuals for all the lessons they have provided.[194]

Through the vehicle of therapeutic jurisprudence, legal culture has the opportunity to rethink its approach to sexual minorities by cognitively restructuring the law's sexual and gender binarism. Ignoring the unique circumstances of intersexuals ultimately harms society as a whole, because it "undermines the law's institutional integrity as a system of justice, and . . . licenses divisive and mean-spirited biases that betray our self-professed norms and ideals."[195]

Although the issues attending intersexuality are often intricate as well as perplexing, law and policy-makers should see themselves "not only as constrained by real world demands but as *creators* of that world."[196]

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[188] FAUSTO-STERLING, SEXING THE BODY, *supra* note 52, at 54.

[189] *Id.*

[190] KESSLER, *supra* note 52, at 84.

[191] *Id.* at 131.

[192] *Id.*

[193] *Id.* at 132.

[194] *Id.*

[195] Valdes, *supra* note 48, at 27.

[196] KESSLER, *supra* note 52, at 120 (emphasis added).

VII. CONCLUSION

The Defense of Marriage Act presents the troubling face of sex and gender binarism at its worst, wreaking havoc on the twice-persecuted, non-conforming bodies of the intersexed. By succumbing to the binary confines of "male" or "female," and "opposite" or the "same," DOMA deprives the intersexed of the fundamental rights of marriage and privacy and violates their right to equal protection under the law.

Only by rethinking the law's approach to sexual minorities will legal culture regain some integrity as a system of justice. Instead of vainly attempting to achieve sexual uniformity with ineffective and mean-spirited legislation, accepting the reality of sexual diversity could evolve into a meaningful expansion[197] of sex and gender.

Kristine J. Namkung[198]

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[197] *Id.* at 131.

[198] Class of 2002, William S. Richardson School of Law, University of Hawai'i.

Navigating the E-Sign Nebula: Federal Recognition of Electronic Signatures and Impact on State Law

I. INTRODUCTION

The Internet has revolutionized the marketplace by developing into a new commercial transaction medium.[1] Electronic signature technology, which makes it possible to authenticate paperless transactions, has been a key component in the evolution of this new medium.[2] The extensive use of electronic signatures has created a need for laws that universally recognize them[3] on one hand and protect those who participate in electronic transactions on the other.[4] To meet this need, state legislatures have implemented their own versions of electronic signature legislation.[5] The National Conference of Commissioners on Uniform State Laws ("NCCUSL") also drafted a uniform model law, entitled the Uniform Electronic Transactions Act ("UETA"), in 1999.[6] The variation in state laws and the subsequent failure of states to adopt UETA in the intended manner resulted in a fractured legal landscape occupied by different state laws unique in both form and substance.[7] In response to this situation, and with the intent of achieving a uniform national standard for laws governing electronic signatures,[8] Congress passed the Electronic Signatures in Global and National Commerce Act ("E-Sign") in June 2000.[9]

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[1] *See* Edward D. Kania, *The ABA's Digital Signature Guidelines: An Imperfect Solution to Digital Signatures on the Internet*, 7 COMMLAW CONSPECTUS 297, 297 (1999).

[2] *Id.* at 298.

[3] *See* Kalama M. Lui-Kwan, *Recent Developments in Digital Signature Legislation and Electronic Commerce*, 14 BERKELEY TECH. L.J. 463, 471 (1999).

[4] Kania, *supra* note 1, at 313.

[5] *See generally* Lui-Kwan, *supra* note 3, at 471-74.

[6] UNIF. ELEC. TRANSACTIONS ACT, 7A U.L.A. (Supp. 2001) [hereinafter UETA].

[7] *See* S. REP. NO. 106-131, at 2-3 (1990).

> Presently, however, one of the greatest barriers to the growth of Internet commerce is the lack of consistent, national rules governing the use of electronic signatures. More than forty States have enacted electronic authentication laws, and no two of these laws are the same . . . . [T]he impending release of UETA confronts the Congress with a situation similar to that which arose when NCUSSL first released its Uniform Commercial Code . . . . [T]he UCC was not adopted everywhere simultaneously. There was a transition period in which commercial law remained unsettled as States reviewed the UCC, debated its merits, and enacted into law.

Id.

[8] *See id.*

[9] Electronic Signatures in Global and National Commerce Act, 15 U.S.C.S. §§ 7001-7006, 7021, 7031 (West Supp. 2001).

The most controversial aspect of E-Sign so far has been its preemption mechanism.[10] E-Sign's preemption provisions invalidate certain state laws and allow state laws that meet certain criteria to preempt portions of the federal law.[11] E-Sign, however, does not specify in detail the type of state law it preempts nor does it sufficiently identify its own provisions which may be preempted by state law.[12] Some have voiced concerns that E-Sign's preemption mechanism may override state laws which protect consumers as well as allow state laws to displace the federal law's own consumer protection provisions.[13]

The actual effect of E-Sign's preemptive mechanism, however, is minimal. E-Sign only preempts state laws that impose writing requirements[14] or limit legal recognition to electronic signatures created by a specific type of technology.[15] Thus, E-Sign preempts state law to the extent necessary for accomplishing its goal of achieving nationwide legal recognition of electronic signatures.[16] The effect of E-Sign's reverse preemption provisions is also limited and only permits state law to preempt its electronic contracting provisions; it does not affect the remainder of the law, including the disclosure provisions designed to protect consumers.[17]

This paper will examine E-Sign's preemption mechanism by analyzing the scope of both the standard preemption and reverse preemption provisions. It will begin with an overview, with Part II.A explaining what an electronic signature is and how they are generally defined. Part II.B through D will then outline the major provisions contained in E-Sign and other state electronic signature laws. Following this background material, Part III will analyze how E-Sign's preemption provisions operate. Part III.A through C will describe the ways in which the federal law preempts state law and the manner in which the reverse preemption provision allows states to partially displace E-Sign. Finally, Part III.D will discuss which state statutes survive as a result of the

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[10] *See infra* note 137.

[11] 15 U.S.C.S. § 7002 (2001).

[12] *See id.*

[13] *See* Margot Saunders & Gail Hillebrand, *E-Sign and UETA: What Should States Do Now?*, *at* http://www.consumerlaw.org/e_sign.html (last visited Feb. 25, 2002); Patricia Brumfield Fry, *A Preliminary Analysis of Federal and State Electronic Commerce Laws*, *at* http://rechten.kub.nl/simone/tekst.asp?Land=%5BAll+States%5D (last visited Feb. 25, 2002). *Contra* Raymond T. Nimmer, *Electronic Signatures in Global and National Commerce Act of 2000: Effect on State Laws*, at 7, *at* http://www.bmck.com/ecommerce/topic-esignatures.htm (last visited Feb. 25, 2002).

[14] "Writing requirement" refers to legal requirements, such as those found in the statute of frauds, which requires documents and signatures used in certain transactions to be in writing.

[15] *See infra* Part III; *see also* Nimmer, *supra* note 13, at 11.

[16] *See* Nimmer, *supra* note 13, at 11.

[17] *See infra* Part III.C.

federal enactment. The paper will conclude by emphasizing the relative freedom with which states are left to enact their own electronic signature laws under E-Sign and the necessity of having a federal law which sets a minimal national standard for the recognition of electronic signatures and records.

II. OVERVIEW

In any commercial transaction, whether on paper or in digital form, contracting parties need to authenticate the information embodying their agreement.[18] In the days prior to electronic commerce, the hand-written signature was an adequate and reliable mechanism that met this need.[19] Yet, in cyberspace, where merchants and consumers exchange contracts and other documents electronically, the conventional signature and the use of notaries are no longer a viable option for authenticating documents traveling over sophisticated communication networks[20] and dealing with problems such as false identification and message interception.[21] Consequently, electronic signatures have developed as the technological answer to this problem,[22] and electronic signature laws have emerged as the legal means to authorize and regulate this technology.[23] This section will explain what an electronic signature is as well as provide a synopsis of E-Sign and the various types of state electronic signature laws in existence.

A. What is an Electronic Signature?

When delivering a document from one party to another in the course of a commercial transaction, the document needs to be authenticated in two ways. First, the recipient needs to be able to confirm the identity of the person assenting to the terms of the document.[24] Second, the recipient must be assured that the content of the document has not been altered during the delivery process.[25] These processes are referred to as "signer authentication" and "document authentication," respectively.[26] In the case of paper documents, the signature identifies the sender while the paper serves to ensure

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[18] Kania, *supra* note 1, at 298-99.

[19] *See* David L. Gripman, *Electronic Document Certification: A Primer on the Technology Behind Digital Signatures*, 17 J. MARSHALL J. COMPUTER & INFO. L. 769, 773 (1999).

[20] *See id.*

[21] *See* Kania, *supra* note 1, at 299.

[22] *Id.* at 300.

[23] Lui-Kwan, *supra* note 3, at 472.

[24] Kania, *supra* note 1, at 299.

[25] *Id.*

[26] *Id.*

the content of the document has not been tampered with, to the extent that any traces of alteration can be detected by examining the document.[27]

According to E-Sign, an electronic signature can, but is not required to perform both authentication functions.[28] E-Sign defines an electronic signature as "an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record."[29] Thus, an electronic signature can be as simple as a person's name typed at the bottom of an electronic document or as sophisticated as a digitally encrypted code.[30] Depending on the method or technology used, an electronic signature may or may not perform both authentication functions. A digitally encrypted message, for example, satisfies both functions.[31] It can attest to the identity of the sender by virtue of the fact that it was encrypted by a specific mathematical formula possessed only by the sender.[32] It can also be used to verify the entactness of the document's content because only the recipient possesses the formula to decrypt the message.[33] A person's name typed at the end of an email, on the other hand, identifies the sender but does not verify the unchanged condition of the information. E-Sign recognizes the most simple device as an electronic signature, as long as it serves the purpose of identifying the signer or sender's intent to assent to the terms of the document, and does not require an electronic signature to perform document authentication[34] or dictate the type of security procedure an electronic signature should provide.

B. Electronic Signatures in Global and National Commerce Act

President Clinton enacted E-Sign in June 2000 with the goal of facilitating the use of electronic records and signatures in interstate and foreign commerce.[35] The law's primary effect is that it creates a nationwide standard which grants electronic records and signatures the same legal validity as paper documents and hand-written signatures.[36] E-Sign also includes disclosure

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[27] *Id.* at 300.

[28] *See* 15 U.S.C.S. § 7006(5) (2001).

[29] *Id.*

[30] *See* R. Jason Richards, *The Utah Digital Signature Act as "Model" Legislation: A Critical Analysis*, 17 J. MARSHALL J. COMPUTER & INFO. L. 873, 878-79 (1990). Other examples of electronic signatures include fingerprint and voice scans. *Id.* at 878.

[31] Kania, *supra* note 1, at 301.

[32] *Id.*

[33] *Id.*

[34] *See* 15 U.S.C.S. § 7006(5) (2001).

[35] *See generally* 15 U.S.C.S. §§ 7001-7006, 7021, 7031 (2001).

[36] Nimmer, *supra* note 13, at 2.

> [The Federal Act] is founded on a simple premise. Any requirement in law that a contract

requirements designed to protect consumers who engage in online transactions.[37] In addition, this statute contains a unique set of preemption provisions which enables a state law that is similar enough to the federal law to displace segments of the federal law and allows E-Sign to preempt burdensome state laws.[38] Despite E-Sign's seemingly broad impact on state laws, substantive aspects of contract law continue to be governed by state law.[39] Furthermore, E-Sign does not make it mandatory to conduct transactions in electronic form.[40]

E-Sign § 7001(a) contains the statute's key language making electronic records and documents the functional equivalent of hand-written signatures and paper documents.[41] Likewise, E-Sign allows merchants to satisfy state regulations requiring them to retain paper records for certain transactions by storing them electronically.[42] In order to do so, the merchant must maintain the accuracy of the information[43] and enable people having the legal right to access the information to do so.[44] Retaining a document electronically also satisfies any requirement for retaining the original version of a document, provided it complies with the aforementioned conditions which safeguard accuracy and accessibility.[45]

Another important element of E-Sign is its consumer protection provisions.[46] These provisions deal specifically with consent and disclosure requirements, which if followed, allow an electronic record to satisfy state regulations that require merchants and vendors to provide certain information to consumers in writing.[47] In order for an electronic document or record to satisfy this type of writing requirement, the consumer must consent to

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be signed or that a document be in writing can be met by an electronically signed contract or an electronic document. We are simply giving the electronic medium the same legal effect and enforceability as the medium of paper.

Id. (quoting 146 CONG. REC. H4352 (daily ed. June14, 2000) (statement of Rep. Bliley)).

[37] *See* 15 U.S.C.S. § 7001(c).

[38] *See* 15 U.S.C.S. § 7002.

[39] 15 U.S.C.S. § 7001(b). Aside from rules requiring that contracts or records be in writing, signed, or in non-electronic form, § 7001(b)(1) states that the "rights and obligations" of contracting parties derived from state law will not be affected by E-Sign. *Id.* at §7001(b)(1).

[40] *Id.* § 7001(b)(2).

[41] *Id.* § 7001(a). Subsection (a), in part, states: "[A] signature, contract, or other record relating to such transactions may not be denied legal effect, validity, or enforceability solely because it is in electronic form . . . ." *Id.*

[42] *Id.* § 7001(d)(1).

[43] *Id.* § 7001(d)(1)(A).

[44] *Id.* § 7001(d)(1)(B).

[45] *Id.* § 7001(d)(3).

[46] *Id.* § 7001.

[47] *Id.* § 7001(c)(1).

receiving the information electronically.[48] To obtain valid consent, the merchant must inform the consumer of the following: the right not to consent, the right to receive the information in paper form,[49] the right to withdraw consent,[50] and the procedure for obtaining the information in paper form after consenting.[51] In addition to confirming the consumer's willingness to receive the information electronically, the merchant must provide the proper hardware and software requirements for accessing and retaining the information.[52] Lastly, the consumer must consent electronically, in a manner that reasonably demonstrates that the consumer can access the information.[53]

As previously mentioned, E-Sign contains two categories of preemption provisions.[54] Section 7002 explains how a state may regulate, modify, limit, or supersede a segment of E-Sign.[55] This is known as E-Sign's reverse preemption provision.[56] A state may preempt § 7001 by adopting the version of UETA approved by the NCCUSL in 1999[57] or by passing its own legislation consistent with the federal statute, which makes specific reference to the federal statute if enacted after it.[58] Alternatively, E-Sign may preempt state law if the state law is inconsistent with E-Sign[59] or if it imposes technological standards for electronic signatures and records.[60]

Despite E-Sign's applicability to most commercial transactions, certain areas are exempt from its effect.[61] These areas primarily include transactions that are "intrastate" in nature.[62] Areas unaffected by E-Sign and, thus, left to the discretion of state legislatures include: laws governing wills and trusts, family law, court orders and notices, product recall notices, documents accompanying hazardous materials, certain provisions related to rental agreements, and cancellation of services, such as utilities and health insurance.[63] These exceptions, however, may be modified by Congress, within three years of E-Sign's enactment, following a report by the Department of

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[48] *Id.* § 7001(c)(1).
[49] *Id.* § 7001(c)(1)(B)(i)(I).
[50] *Id.* § 7001(c)(1)(B)(i)(II).
[51] *Id.* § 7001(c)(1)(B)(iv).
[52] *Id.* § 7001(c)(1)(C)(i).
[53] *Id.* § 7001(c)(1)(C)(ii).
[54] *Id.* § 7002.
[55] *Id.*
[56] Saunders & Hillebrand, *supra* note 13.
[57] 15 U.S.C.S. § 7002(a)(1).
[58] *Id.* § 7002(a)(2).
[59] *Id.* § 7002(a)(2)(A)(i).
[60] *Id.* § 7002(a)(2)(A)(ii).
[61] *Id.* § 7003.
[62] *See* David Colton, *Digital Signature Legislation S. 761: Summary and Analysis*, at 3-4, *at* http://www.itaa.org/software/EsignMemo.pdf (last visited Feb. 25, 2002).
[63] 15 U.S.C.S. § 7003(a)-(b).

Commerce.[64] Other federal agencies may also modify the list of exceptions by publishing findings demonstrating that the proposed modifications will not increase the material risk of harm to consumers.[65] The federal government, therefore, may expand E-Sign's scope as technology improves and reduces the risks associated with conducting certain transactions electronically.[66]

C. The Uniform Electronic Transactions Act (UETA)

Prior to the passage of E-Sign by Congress, the NCCUSL attempted to create a national legal standard for the recognition of electronic signatures and documents by passing UETA in 1999.[67] While E-Sign is a federal statute binding on all states upon enactment, UETA is a model law which all fifty states must individually adopt before uniformity can be achieved.[68] UETA, however, like E-Sign, operates by overriding state laws requiring documents used in commercial transactions to be in writing or be retained in paper form.[69] While the two laws include overlapping provisions, UETA is more comprehensive and includes provisions not found in E-Sign.[70]

UETA is similar to its federal counterpart in that it mainly deals with the procedural issue pertaining to the legal validity of electronic signatures and records and defers to state law, for the most part, for substantive contract law.[71] UETA states that records, signatures, and contracts cannot be denied

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[64] *Id.* at § 7003(c)(1).

[65] *Id.* at § 7003(c)(2).

[66] The remaining sections of the federal act are not directly relevant for the purposes of this paper and will, therefore, only be briefly described here. Section 7004 explains how the law applies to federal and state government bodies. Section 7005 contains provisions requiring periodic studies to be conducted by the Secretary of Commerce and the Federal Trade Commission. The studies are to evaluate the effectiveness of electronic record delivery to consumers and the efficacy of the consent requirements contained in § 7001(c). Sections 7006, 7021, and 7031 address definitions, applicability of the law to transferable records (the electronic version of negotiable instruments), and the principles to be followed when dealing with electronic transactions in the international context, respectively. *See generally* 15 U.S.C.S. §§ 7001-7006, 7021, 7031 (2001).

[67] *See generally* Sen. Spencer Abraham, *What Features of an E-Sign Bill Will Most Effectively Impact E-commerce? Jobs, Prosperity Depend on E-Sign Act*, ROLL CALL, Mar. 27, 2000, LEXIS, Legislative News Stories.

[68] *Id.*

[69] Fry, *supra* note 13.

[70] *Id.*

[71] UNIF. ELEC. TRANSACTIONS ACT § 3(d), 7A U.L.A (Supp. 2001) ("A transaction subject to this [Act] is also subject to other applicable substantive law."). There are a number of other "savings clause" provisions, similar to section 3(d) that stress UETA's narrow scope and the continuing effectiveness of state laws. Section 5(a), for example, specifies that the law does not require electronic documents and signatures to be used in any commercial transaction. *Id.* § 5(a). Moreover, the policies of UETA are outlined in subsection 6(1), which states: "This [Act]

legal effect or enforceability merely because they are in electronic form.[72] As in E-Sign, this principle is effectuated through provisions that allow electronic records and signatures to satisfy state writing requirements.[73] UETA also affects state laws that require information to be provided, sent, delivered,[74] or retained in written form, in the same manner.[75]

Although UETA requires parties to consent before being able to engage in a valid electronic transaction, it does not include the detailed consumer disclosure provisions found in E-Sign.[76] UETA's consent provision merely states: "Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct."[77] The only other provision pertaining to consent states that a consumer who has already consented to one transaction has the right to refuse to conduct subsequent transactions electronically.[78]

UETA also contains a number of major provisions not found in E-Sign.[79] For example, UETA contains a provision that helps determine how an electronic signature or record is attributed to a person or machine engaged in a transaction.[80] Rules and responsibilities that apply when changes or errors

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must be construed and applied: (1) to facilitate electronic transactions consistent with other applicable law; (2) to be consistent with reasonable practice concerning electronic transactions and with the continued expansion of those practices . . . ." *Id.* § 6(1). These provisions are similar to the language contained in E-Sign subsection 7001(b). *Compare* UNIF. ELEC. TRANSACTIONS ACT §§ 5(a), 6(1) *with* 15 U.S.C.S. § 7001(b) (2001).

[72] UNIF. ELEC. TRANSACTIONS ACT §§ 7(a)-(b).

[73] *Id.* §§ 7(c)-(d).

[74] *Id.* § 8(a). Both UETA and E-Sign require information sent electronically to be sent in a manner enabling the recipient to retain such records. E-Sign's retention requirement is found in subsections 7001(c)(1) and (c)(2). 15 U.S.C.S. § 7001(c)(1)-(2). UETA's provision, however, goes a step further and specifies that a record is not capable of retention if the recipient is not able to print or store the record or if the sender inhibits the recipient's ability to do so. UNIF. ELEC. TRANSACTIONS ACT § 8(a). Furthermore, section 8(c) invalidates any electronic record not capable of being stored or printed. *Id.* § 8(c).

[75] UNIF. ELEC. TRANSACTIONS ACT § 12(a).

[76] *Compare id.* § 5(b) *with* 15 U.S.C.S. § 7001(c)(1).

[77] UNIF. ELEC. TRANSACTIONS ACT § 5(b).

[78] *Id.* § 5(c). This provision is similar to E-Sign § 7001 (c)(1)(B)(ii), which requires a merchant to inform the consumer whether the consent about to be given applies only to the particular transaction or also to future transactions during the course of the business relationship. *Compare id.* § 5(c) *with* 15 U.S.C.S. § 7001(c)(1)(B)(ii).

[79] *See generally* Fry, *supra* note 13.

[80] UNIF. ELEC. TRANSACTIONS ACT § 9(a). Subsection 9(a) ensures existing laws regarding attribution apply to electronic records and signatures. It states that an electric record or signature is attributable to a person if it was the "act of the person." *Id.* According to the official comments, a person's "act" includes action taken by the person as well as those taken by a human or electronic agent. *Id.* § 9 cmt. 1. This means that a transaction conducted by a computer will be ascribed to the person operating or programming the machine, rather than to

occur in an electronic record during transmission is another issue addressed by UETA but not by E-Sign.[81] Finally, UETA contains default rules regarding when an electronic record is sent and received.[82]

There is also a loophole provision in UETA giving states the discretion to pass laws requiring a record to be posted or displayed, sent, communicated, transmitted, or formatted, in a certain manner.[83] This provision would theoretically enable states to deny certain transactions to be conducted electronically through regulations which would not be classified as a per se writing requirement.[84] In practice, however, the circumvention of E-Sign based on this provision is specifically prohibited by a provision found in E-Sign.[85]

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the machine itself. *Id.* Similarly, subsection (b) states that once an electronic signature or record is attributed to a person, its legal effect is determined by existing laws. *Id.* § 9(b).

[81] *Id.* § 10(1). Subsection 10(1) specifically deals with instances where both parties have agreed to use a security procedure for detecting changes or errors. If an error or mistake occurs, but only one party has conformed to the agreed security procedure, the conforming party can avoid the effect of the changed or erroneous record. This is true only if the non-conforming party would have detected the error or change had she also conformed to the agreed to procedure. *Id.* Subsection 10(2) applies to situations where an individual is involved in an automated transaction. This provision allows an individual to avoid the effect of a self-induced error if the electronic agent did not provide an opportunity to prevent or correct the error and if several other conditions are satisfied at the time the individual learns of the error. *Id.* § 10(2). The latter provision's condition is satisfied if the individual:

> (A) promptly notifies the other person of the error and that the individual did not intend to be bound by the electronic record received by the other person; (B) takes reasonable steps, including steps that conform to the other person's reasonable instructions, to return to the other person or, if instructed by the other person, to destroy the consideration received, if any, as a result of the erroneous electronic record; and (C) has not used or received any benefit or value from the consideration, if any, received from the other person.

Id.

[82] *Id.* § 15 cmt. 1. According to subsection 15(a) there are three main elements that determine whether a message has been sent. First, the message must be properly addressed to an information processing system, designated or used by the recipient, for the purpose of receiving such messages from which the recipient is able to retrieve the message. Second, the information must be capable of being processed by that system. Third, the message must enter an information processing system outside the control of the sender or enter a region of the information processing system designated by and under the control of the recipient. *Id.* § 15(a). Conversely, subsection 15(b) outlines conditions for receiving electronic information, which are the same as the first two conditions circumscribed by 15(a). *Id.* § 15(b). The physical location where messages are considered sent to and received from is determined by the parties' place of business or residence rather than the information processing system's location. *Id.* § 15(d).

[83] *Id.* § 8(b).

[84] *See* Fry, *supra* note 13.

[85] 15 U.S.C.S. § 7002(c) (2001).

D. State Electronic Signature Laws

There are other state laws, aside from UETA, which regulate electronic signatures and records.[86] While some state laws only recognize the legal authority of electronic signatures for conducting specific transactions with the state government, other laws recognize an array of private and public communication.[87] For the purposes of this paper, the types of electronic signature laws that will be discussed here will be those that deal solely with commercial transactions. Although most of these state laws are unique in one way or another, they can be divided into three general categories.[88] The first category of state statutes is known as the "prescriptive" model which only recognizes electronic signatures that utilize technology prescribed by law.[89] The Washington statute is one type of prescriptive model statute.[90] The "criteria-based" model is another type of state statute.[91] Some criteria-based model statutes only recognize electronic signatures that meet specified evidentiary standards.[92] Others, like the one found in the Illinois code, recognize electronic signatures generally but create a separate category for electronic signatures that meet certain evidentiary standards and are attributed certain evidentiary presumptions.[93] The final category of electronic signature law is referred to as the "signature enabling approach," as illustrated by the Massachusetts law which provides recognition to all electronic signatures and records.[94]

Under the prescriptive model, the only kinds of electronic signatures that are legally binding are those which use dual key encryption technology and third parties to certify the issuance of encryption keys.[95] The Washington statute deals with licensing of certification authorities ("CA") as well as the

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[86] MICHAEL RUSTAD & CYRUS DAFTARY, E-BUSINESS LEGAL HANDBOOK 449 (2001).

[87] Lui-Kwan, *supra* note 3, at 473.

[88] RUSTAD & DAFTARY, *supra* note 86, at 452. The three categories of electronic signature laws were designated by the Internet Law and Policy Forum ("ILPF"). *Id.*

[89] *Id.* at 452.

[90] *See id.* at 453.

[91] RUSTAD & DAFTARY, *supra* note 86, at 453.

[92] *See id.* An example of the more limited criteria-based model, which only recognizes electronic signatures that meet certain evidentiary standards, is the California statute. *Id.*

[93] Fry, *supra* note 13. *See generally* Electronic Commerce Security Act, 1998 Ill. Legis Serv. 3073 (West) (codified in scattered sections of 5 ILL. COMP. STAT. § 175).

[94] RUSTAD & DAFTARY, *supra* note 86, at 454. *See generally* Massachusetts Electronic Records and Signatures Act [draft] (Apr. 12, 1998), *at* http://www.magnet.state.ma.us. The Massachusetts law is model legislation not yet enacted. RUSTAD & DAFTARY, *supra* note 86, at 454.

[95] *See* Fry, *supra* note 13.

liability of parties involved in a transaction.[96] In order to be licensed as a CA, numerous requirements must be fulfilled.[97] Some examples of these requirements include: having access to a reliable system, offering proof that one has sufficient capital to operate as a CA, retaining an office in the state or having an established agent for purposes of service of process in the state.[98] A CA must also submit to a yearly audit whose results are published in a disclosure record.[99] By being licensed, any document or record certified by a CA will be self–authenticating.[100]

Unlike the prescriptive model, the criteria-based model does not limit the recognition of electronic signatures to those using digital encryption.[101] As mentioned earlier, the Illinois statute recognizes all electronic signatures while providing certain evidentiary presumptions to electronic records and signatures that meet certain criteria.[102] By meeting these criteria, an electronic record or signature is deemed to have been created using a "qualified security procedure."[103] The Illinois statute also includes provisions pertaining to the issuance of certificates, certificate revocation, and duties of subscribers, which were inserted in order to encourage CAs to conduct business in the state.[104]

Among the various types of state electronic signature statutes, the signature enabling approach is known as the minimalist model.[105] The Massachusetts Electronic Records and Signatures Act recognizes any kind of electronic method employed to write or sign a contract which parties agree to as being

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[96] John P. Tomaszewski, *The Pandora's Box of Cyberspace: State Regulation of Digital Signatures and the Dormant Commerce Clause*, 33 GONZ. L. REV. 417, 436-37 (1997). A certification authority is a third party institution that validates digital signatures. *Id.* at 421. Once a certification authority validates the digital signature, the signature's owner receives a certificate that attaches to the signature, which others can rely on to verify the sender's identity. *Id. See generally* David L. Gripman, *Electronic Document Certification: A Primer on the Technology Behind Digital Signatures*, 17 J. MARSHALL J. COMPUTER & INFO. L. 769, 773 (1999).

[97] *See* Tomaszewski, *supra* note 96, at 437.

[98] *Id.*

[99] *Id.*

[100] *Id.* at 437-38.

[101] *See* RUSTAD & DAFTARY, *supra* note 86, at 453.

[102] *See supra* note 80 and accompanying text.

[103] R.J. Robertson, Jr. & Thomas J. Smedinghoff, *Illinois Law Enters Cyberspace: The Electronic Commerce Security Act*, ILL. B.J., June 1999, *available at* http://www.illinoisbar.org/Member/june99lj/p308htm. The Illinois law recognizes two types of qualified security procedures. The first type is any security procedure the parties previously agreed to use. The second type is any security procedure certified by the Illinois Secretary of State. *Id.*

[104] *Id.*

[105] RUSTAD & DAFTARY, *supra* note 86, at 453.

valid and binding on themselves.[106] It does not contain language that applies to certification authorities or authentication criteria.[107] The Massachusetts law was also influential on the NCCUSL in its process of drafting UETA.[108]

III. E-SIGN'S PREEMPTIVE AUTHORITY

E-Sign raises questions regarding its preemptive effect vis à vis existing state laws as well as future laws state legislatures may decide to enact.[109] Besides determining which state laws are preempted by the federal act, E-Sign's reverse preemption provision introduces an additional variable to consider when analyzing the preemption issue.[110] Thus, in order to comprehend fully E-Sign's effect on state law, one must not only learn how the federal act overrides existing state law but also understand how and when certain state laws, including UETA, can override portions of E-Sign.[111]

As a result of inadequate guidance concerning preemption provided by E-Sign, varying interpretations have been offered for untangling this nebula of federal and state laws. While some construe E-Sign's preemption authority broadly,[112] which would leave states with very few options,[113] others have argued that the federal legislation provides states with considerable alternatives.[114] Likewise, different theories have been offered regarding how much of E-Sign can be substituted by state law.[115] Although E-Sign's exact preemptive impact will not be known until courts begin to rule on these issues, this paper will extrapolate the most reasonable interpretation of E-Sign's preemption provisions based on the statutory language and other legislative materials, as well as the existing literature on the subject.

A. Preemption of Non-Electronic Signature Laws

The traditional framework for conducting commercial transactions has required agreements to be in writing and be accompanied by a signature.[116] Such requirements will be preempted in part by E-Sign § 7001, given that they

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[106] Tomaszewski, *supra* note 96, at 439.

[107] *Id.* at 439 n.177.

[108] *Id.* at 454.

[109] *See generally* Fry, *supra* note 13; Nimmer, *supra* note 13; Colton, *supra* note 62.

[110] *See* Nimmer, *supra* note 13, at 6.

[111] *Id.*

[112] Colton, *supra* note 62, at 1.

[113] *See id.* at 6.

[114] *See* Nimmer, *supra* note 13, at 4.

[115] *Compare* Saunders & Hillebrand, *supra* note 13 *and* Fry, *supra* note 13, *with* Nimmer, *supra* note 13, at 7.

[116] *See* Tomaszewski, *supra* note 96, at 419.

are not categories listed under the exceptions carved out in § 7003.[117] This means existing statute of frauds and similar requirements are preempted to the extent they deny legal effect to electronic forms of signatures and contracts.[118] State laws and regulations aside from requirements that impose non-electronic forms of writing or signature, however, are not affected.[119]

B. The "Reverse Preemption" Provision

The preemptive effect of E-Sign on electronic signature laws must be examined in the context of § 7002's "reverse preemption" provision[120] or what is otherwise known as the "back-in rule."[121] This mechanism enables a state enactment to displace E-Sign if it comports with the conditions described in the federal law.[122] These conditions include adopting UETA as drafted by the NCCUSL or passing a state law similar to E-Sign.[123] Thus, theoretically, this provision makes E-Sign an interim law, which would only exist until an appropriate state law is adopted.[124] This point was emphasized by several federal lawmakers, including Senator Lieberman, who stated that "[E-Sign] preempts state law only until the states enact their own statutes and standards as provided for by the Uniform Electronic Transaction Act (UETA)."[125] Despite this simple characterization of § 7002's reverse preemption provision, there are several unresolved issues. The initial question is to what extent can

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[117] *See* Nimmer, *supra* note 13, at 4.

> The statutory rules are premised generally on the simple policy premise that any "requirement in law that a contract be signed or that a document be in writing can be met by an electronically signed contract or an electronic document." State laws that conflict with or frustrate *that* policy and that are not authorized by the Federal Act itself are preempted.

Id.

[118] *See id.*

[119] 146 CONG. REC. H4357 (daily ed. June 14, 2000) (statement of Rep. Dingell).

> This savings clause makes clear that existing legal requirements that do not involve the writing, signature, or paper form of a contract or other record are not affected by Title I. Thus, for example, a transaction into which a consumer enters electronically is still subject to scrutiny under applicable State and Federal laws that prohibit unfair and deceptive acts and practices.

Id.

[120] *See* Saunders & Hillebrand, *supra* note 13.

[121] Nimmer, *supra* note 13, at 6.

[122] 15 U.S.C.S. § 7002(a) (2001) ("A State statute, regulation, or other rule of law may modify, limit, or supersede the provisions of section 101 [15 U.S.C.S. § 7001] with respect to State law only if . . . .").

[123] *Id.* § 7002(a)(1)-(2).

[124] 145 CONG. REC. S3585 (daily ed. Apr. 12, 1999) (statement of Sen. Abraham).

[125] 145 CONG. REC. S14888 (daily ed. Nov. 18, 1999) (statement of Sen. Lieberman).

a state opt-out of E-Sign by adopting its own law? Furthermore, what must a state law look like in order to serve as a permissible replacement for E-Sign?

C. States' Ability to Opt Out of E-Sign

There is room for interpretation regarding how much of E-Sign can be displaced or be "reversely preempted" by a state enactment. The language of § 7002 clearly allows state law to displace § 7001.[126] Nevertheless, the statute does not clarify to what extent § 7001 would be displaced by UETA or other state laws.[127] The major concern, especially on the part of consumer groups, would be the survival of the detailed consumer consent provisions that appear in E-Sign, which are not found in UETA.[128] One commentator states that a state enactment under § 7002 displaces E-Sign's "electronic contracting provisions," which appears to be a reference to § 7001 in its entirety, including the consumer protection provisions.[129] This view is implicitly supported by another commentator who characterizes the federal policy with respect to UETA as "a narrow deference to state sovereignty on matters involving electronic records and signatures."[130] On the other hand, consumer advocacy groups are optimistic that § 7001's consumer protection provisions would not be automatically preempted, absent a clear legislative intent to do so.[131]

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[126] 15 U.S.C.S. § 7002(a).

[127] *See* 15 U.S.C.S. § 7002.

[128] *See* Saunders & Hillebrand, *supra* note 13 (writing for the National Consumer Law Center and Consumers Union).

[129] *See* Fry, *supra* note 13 ("Finally, it is important to point out that the savings provisions of E-Sign [§ 7002] apply only to the electronic contracting provisions of the statute. They do not apply to the other titles of the statute . . . .").

[130] Nimmer, *supra* note 13, at 8.

> Congress elected to permit adoption of a uniform state law, even though it differs significantly from the Federal Act in important ways. This presents a significant policy choice to the states: a state may rely on the enabling rules of the Federal Act or exclude and replace them by adopting UETA in pure form . . . . As it relates to preemption, however, the choice centers only on modifying, limiting, or superseding [§ 7001] of the Federal Act.

Id.

Neither Fry nor Nimmer explicitly states whether a state enactment may displace § 7001's consumer protection provisions. *See id.*; Fry, *supra* note 113. The fact that neither of them makes a distinction between the consumer protection provisions and the remainder of § 7001, however, implies that they believe § 7001 may be preempted in its entirety.

[131] Saunders & Hillebrand, *supra* note 13.

> A reasonable interpretation of the federal law's optional displacement provision, also referred to here as a "reverse preemption" provision, is that the consumer protection provisions in the federal E-Sign continue to apply in a state which has passed UETA unless the state law enacting UETA states an express intent to displace E-Sign's consumer protection provisions.

Id.

However, even they propose that states consider a supplemental consumer protection bill accompanying UETA to ensure the continued existence of those safeguards.[132]

The legislative history contains different sets of statements supporting both interpretations of this issue. During a discussion regarding the adoption of the Senate's conference report, Senator Leahy is quoted as saying, "[A] state may enact UETA to incorporate the consumer consent procedure set forth in section [7001(c)]."[133] This statement strongly implies that if UETA is enacted, the consumer disclosure provisions of E-Sign are not automatically retained. Instead, according to Senator Leahy's statement, the legislature would have to specifically intend to preserve E-Sign's consumer protection provisions in order for them to survive. This would presumably be done by amending UETA. The same record, however, states:

> Of course, the rules for consumer consent and accuracy and retainability of electronic records under this Act shall apply in all states that pass the Uniform Electronic Transactions Act or another law on electronic records and signatures in the future, unless the state affirmatively and expressly displaces the requirements of federal law on these points.[134]

The different interpretations are, furthermore, supported by the statute's two distinct policy goals. If E-Sign's consumer disclosure provisions are to survive UETA or another state enactment permissible under § 7002(b), that would be consistent with providing consumer protection, a primary goal of the final version of E-Sign.[135] Another aim of E-Sign, emphasized earlier on in the bill's drafting process, is its role as an interim measure that gives deference to UETA or appropriate state laws once they are enacted.[136] If this

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[132] *Id.*

[133] 146 CONG. REC. S5221-22 (daily ed. June 15, 2000) (statement of Sen. Leahy).

[134] 146 CONG. REC. S5230 (daily ed. June 15, 2000) (statement of Sens. Hollings, Wyden, and Sarbanes). The remainder states:

> [A] state which passed UETA before the passage of this Act could not have intended to displace these federal law requirements. These states would have to pass another law to supersede or displace the requirements of section 101. In a state which enacts UETA after passage of this Act, without expressly limiting the consent, integrity and retainability subsections of 101, those requirements of this Act would remain in effect.

Id.

[135] 146 CONG. REC. S5219 (daily ed. June 15, 2000) (statement of Sen. Leahy) ("[T]he conference report is a solid and reasonable consensus bill that will establish a Federal framework for the use of electronic signatures, contracts, and records, while preserving essential safeguards protecting the Nation's consumers.").

[136] 145 CONG. REC. S3584 (daily ed. Apr. 12, 1999) (statement of Sen. Abraham).

> Mr. President, let me stress that this Federal preemption of State law is designed to be an interim measure. It provides relief until the States enact uniform standards which are consistent with those contained in the Uniform Electronic Transactions Act and this

latter policy objective is to be satisfied, it would be reasonable to assume that § 7001 would be displaced by UETA entirely.

Although both interpretations are supported by the legislative history and the statute's broader policy goals, the weight of the evidence favors the reading that a state law does not displace the consumer disclosure provisions found in § 7001(b). Senators Hollings, Wyden, and Sarbanes's statement that a legislature must affirmatively and expressly displace the requirements of federal law in order to exclude the remainder of § 7001 appears to be unequivocal in its meaning.[137] Conversely, the segment of the legislative history that supports the alternative interpretation is not as definitive.[138] Towards the latter part of the legislative history, the emphasis on consumer protection eclipses the importance placed on deference to state law.[139] Furthermore, the policy of making E-Sign an interim measure until UETA is adopted appears rather hollow, as will be seen in the subsequent discussion of § 7002(a)(2).[140] Thus, the likely outcome is that the adoption of UETA or other similar laws displaces E-Sign minimally and does not affect the consumer protection provisions. The proposition that E-Sign is not merely an interim law which defers to state law is evidenced by the fact that there are strict requirements a state law must meet not to be preempted by E-Sign, as explained in the following section.

D. Permissible State Enactment Under the Reverse Preemption Provision

Section 7002 provides states with two options for circumventing E-Sign through the enactment of a state law.[141] One option is by adopting the version of UETA approved by the NCCUSL,[142] or what some refer to as a "clean enactment" of UETA.[143] The other is by a state law that "specifies the

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legislation. Simply put, once States enact the UETA or other legislation governing the use of electronic signatures which is consistent to the UETA, the federal preemption is lifted.

Id. See generally 106 S. Rep. No. 106-131 (1999).

[137] *See* 146 CONG. REC. S5230 (daily ed. June 15, 2000) (statement of Sens. Hollings, Wyden, and Sarbanes).

[138] *See* 146 CONG. REC. S5221-22 (daily ed. June 15, 2000) (statement of Sen. Leahy).

[139] *See generally* 146 CONG. REC. S5281-5289 (daily ed. June 16, 2000); 146 CONG. REC. E 1071 (daily ed. June 21, 2000).

[140] *See infra* Part III.D.

[141] 15 U.S.C.S. § 7002(a)(1)-(2) (2001).

[142] 15 U.S.C.S. § 7002(a)(1).

[143] Nimmer, *supra* note 13, at 8 ("These variant statutes do not meet the requirement of a *clean* enactment of UETA and, thus, do not fall within the first standard for modifying the effect of the Federal Act."). Even the "clean" version of UETA, however, is not unaffected by E-Sign. E-Sign § 7002(c) specifically limits the ability of state legislatures to pass certain kinds of laws under UETA subsections 3(b)(4) and 8(b)(2). *See supra* Part II.B.

alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts, or other records . . . ."[144] These options, however, are limited by two important stipulations.[145] First, any permissible state enactment must be consistent with E-Sign[146] and second, such a law must not afford greater legal status or effect to a specific type of technology.[147]

One thing the statute is clear about is that a state may pass the official NCUSSL version of UETA, without fear of preemption.[148] The unanswered issue pertaining to UETA is the fate of modified or amended forms of UETA under E-Sign.[149] UETA most likely will not be automatically preempted by § 7002(a)(1) merely because it is not identical word for word to the official version.[150] Instead, its survival would be based on whether its substance meets the conditions set out in § 7002(a)(2).[151] There are differing views about whether such a law would be evaluated under both §§ 7002(a)(1) and (2) (that is, where the portions identical to the NCUSSL version would pass under (a)(1) while the balance of the law would be separately evaluated under (a)(2)) or under (a)(2) only.[152] The legislative history indicates that the modified versions of UETA would be evaluated under subsection (a)(2) only.[153] This would mean that modified versions of UETA will be treated in the same manner as other state electronic signature laws.

Section 7002(a)(2) may be described as the "gateway" through which all state electronic signature laws, barring the model version of UETA, must pass in order to avoid preemption.[154] Subsection 7002(a)(2)(A)(i) is the first preemption pillar. It is based on the principle that a state law may not be inconsistent with any provision included in E-Sign § 7001,[155] the same principle that preempts statute of frauds and other state writing

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[144] 15 U.S.C.S. § 7002(a)(2)(A) (2001).

[145] *Id.*

[146] *Id.* § 7002(a)(2)(A)(i).

[147] *Id.* § 7002(a)(2)(A)(ii).

[148] *Id.* § 7002(a)(1).

[149] *See* Fry, *supra* note 13.

[150] *See id.* ("Certainly changes to conform to legislative drafting protocols should not result in the entire package of legislation being preempted.").

[151] *Id.* ("On the other hand, provisions on consumer assent represent substantive additions to UETA which could be inconsistent with the consumer provisions of E-Sign.").

[152] *Compare id. with* Nimmer, *supra* note 13, at 8.

[153] 146 CONG. REC. H4353 (daily ed. June 1, 2000) (statement of Rep. Bliley) ("Any variation or deviation from the exact UETA document reported and recommended for enactment by NCCUSL shall not qualify under subsection (a)(1). Instead, such efforts and any other effort may or may not be eligible under subsection (a)(2).").

[154] *See* 15 U.S.C.S. § 7002(a) (2001).

[155] *See id.* § 7002(a)(2)(A)(i).

requirements.[156] The second preemption pillar, § 7002(a)(2)(A)(ii), is specifically designed to target a certain aspect of state electronic signature laws.[157] It preempts any state electronic signature law that is not technologically neutral.[158]

The more controversial and uncertain of these preemption provisions is this second pillar.[159] Subsection 7002(a)(2)(A)(ii) states that a state law may:

> [E]stablish the legal effect, validity, or enforceability of contracts or other records if such alternative procedures or requirements do not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communication, or authenticating electronic records or electronic signatures . . . .[160]

Opinions differ regarding the exact interpretation of this provision.[161] The provision's troublesome language is the phrase "greater legal status."[162] If this language is interpreted broadly its impact will likewise be broader and a greater number of states will have their electronic signature laws preempted.

Among the three general types of state laws described in the previous section,[163] it is clear, and commentators agree, that prescriptive model statutes will be preempted[164] while signature enabling statutes will not.[165] The signature enabling model operates similarly to E-Sign and UETA by providing legal recognition to electronic records and signatures, regardless of what technology is used,[166] and, therefore, does not conflict with either of E-Sign's

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[156] *See id.* § 7001(a)(1).

[157] *See id.* § 7002(a)(2)(A).

[158] *Id.*

[159] *See* Fry, *supra* note 13; Nimmer, *supra* note 13, at 8-10; Saunders & Hillebrand, *supra* note 13.

[160] 15 U.S.C.S. § 7002(a)(2)(A)(ii) (2001).

[161] *See* Fry, *supra* note 13; Nimmer, *supra* note 13, at 8-10; Saunders & Hillebrand, *supra* note 13.

[162] Nimmer, *supra* note 13, at 9.

[163] *See supra* Part II.D.

[164] *See* Fry, *supra* note 13 ("Digital signature statutes on the model of the Utah statute do precisely that, according greater legal status or effect to records or signatures to which dual key encryption has been applied. Thus it appears that such statutes are preempted."); Nimmer, *supra* note 13, at 5 ("*A state law provides that electronic records and signatures will be recognized only if they use a particular type of technology.* This is a 'mandatory digital signature law.' Is that preempted? Yes.").

[165] *See* Colton, *supra* note 62, at 8 ("Our analysis at present is that this pre-emption would not void the portions of the underlying statute or regulation that are in compliance with S. 761."); Nimmer, *supra* note 13, at 5 ("*A state law provides that a statute of frauds rule can be met by either a signed writing or an authenticated electronic record.* Does the Federal Act preempt? No.").

[166] *See* Tomaszewski, *supra* note 96, at 439.

preemption pillars. On the other hand, the preemptive model clearly conflicts with E-Sign's second preemption pillar because it gives legal effect to electronic signatures only if they are digital signatures certified by a licensed CA.[167] The uncertainty arises when examining the criteria-based model which is not as restrictive as the prescriptive model but not as laissez-faire as the signature enabling approach.[168]

Commentators clearly disagree on whether a criteria-based statute will be preempted by E-Sign.[169] A commentator who interprets the provision broadly argues that, by designating certain types of electronic signatures as secure electronic signatures and providing them evidentiary presumptions not attributed to other types of electronic signatures, based on technological differences, the state provides secure electronic signatures heightened legal effect.[170] An opponent of this view, who favors a narrower interpretation of 7002(a)(2)(A)(ii), counters this argument by limiting the definition of "legal effect."[171] This commentator maintains that the term "legal effect" in this context is limited to whether the state legally recognizes or validates an electronic signature based on technological characteristics of the signature and not whether it is given additional evidentiary presumptions.[172] Because the Illinois type criteria-based model statute, for example, provides legal recognition to any type of electronic signature and only discriminates between certain types of signatures when dealing with the issue of attribution, the proponent of this latter view would contend that the law does not provide heightened legal effect to electronic signatures based on their technological characteristics, within the meaning of the statute.[173]

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[167] *See* Nimmer, *supra* note 13, at 5.

[168] *See generally* RUSTAD & DAFTARY, *supra* note 86, at 451-54.

[169] *See* Fry, *supra* note 13 ("The second model of State law may be found in the statute enacted in Illinois, which contains articles generally approving electronic signatures and others specifying that secure electronic signatures and records receive heightened legal effect .... [I]t would seem that it, too, may be unable to stand under [§ 7002(a)(2)]."); Nimmer, *supra* note 13, at 9.

> Thus, the argument goes, the Federal Act precludes and preempts any state law that, through certification or other means, gives enhanced effect to any particular technology whether that effect extends to satisfying a writing or signature requirement, to establishing in law the identity of a party (attribution), to creating or foreclosing obligations on the part of a service provider, or any other issue.

Id.

[170] *See* Fry, *supra* note 13.

[171] Nimmer, *supra* note 13, at 9 ("A state cannot enact a law that validates only a particular type of technology. That is preempted. But the requirement of neutrality on its face goes no further.").

[172] *Id.*

[173] *Id.* at 10 ("Statute 2, however, also goes beyond adequacy and other [§ 7001] issues, and establishes a presumption about the attribution of a signature or message. The Federal Act does

This narrower reading of the second pillar, as it applies to a criteria based model, is premised on its statutory context.[174] The commentator in favor of this reading reasons that, because § 7002 only discusses how a state statute can alter the effect of § 7001, the prohibited "greater legal effect" is likewise limited to the scope of the former section.[175] According to this interpretation, because the issue of attribution is beyond the scope of § 7001 (or of E-Sign for that matter), it likewise should be beyond the scope of § 7002's preemptive authority.[176] Thus, based on this argument, states should not be prohibited from discriminating between different types of electronic signatures regarding the issue of attribution, as long as their statute legally recognizes the validity of all electronic signatures.[177]

This interpretation, in context of the statutory language, is more convincing than a reading of subsection 7002(a)(2)(A)(ii) in isolation. Furthermore, the interpretation that the technological neutrality rule only applies within the scope of § 7001 is supported by language in other parts of the legislative history:

> [I]nclusion of the "or accord greater legal status or effect to" is intended to prevent a state from giving a leg-up or impose an additional burden on one technology or technical specification that is not applicable to all others, and is not intended to prevent a state or its subdivisions from developing, establishing, using or certifying a certificate authority system.[178]

An analysis of E-Sign's preemption provision indicates that states still have latitude in designing their own legislation. The federal law only prohibits the states' ability to pass their own electronic signature law to the extent that such a law imposes writing requirements for electronic signatures and records or restricts the recognition of electronic signatures to those created with a certain type of technology. Under E-Sign, states may still enact laws which provide more sophisticated types of electronic signatures with evidentiary presumptions or laws which encourage the development of systems using certification authorities, as long as they do not interfere with the underlying goal of providing all electronic signatures with the equivalent legal status as conventional signatures. In this way, states can safeguard those engaged in paperless transactions by encouraging the use of technology that provides a

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not deal with this issue. So long as the attribution rule does not modify the basic rule in [§ 7001], the Federal Act does not apply.").

[174] *Id.* ("But the comments must be read in context of the language and effect of the statute itself.").

[175] *Id.*

[176] *Id.*

[177] *See id.* at 9-10.

[178] 146 CONG. REC. S5285 (daily ed. June 15, 2000) (statement of Sen. Abraham).

high level of security. Furthermore, E-Sign provides consumer disclosure rules of its own, which are a permanent fixture of the federal law, regardless of whether states decide to adopt their own electronic signature law.

IV. CONCLUSION

E-Sign's limitation on the states' ability to preserve or enact certain types of laws is justified in light of the consequences that would arise without a uniform standard created by Congress. If the law establishes different standards and thresholds for authenticating electronic transactions in each state, the new medium would cease to function. Because the borders of today's marketplace exist outside the perimeters of individual states,[179] a universal standard for authentication is essential.[180] Yet, waiting for the states to synthesize their laws without federal involvement would delay the growth of electronic commerce.[181]

Some may think it premature to afford electronic signatures the same legal effect as traditional signatures, especially without minimum technological standards with which to ensure security. No system, however, can be totally safe. Without experimentation, it will be impossible to predict or simulate the dangers and problems that may arise from the use of this technology. Thus, only the market will be able to determine what types of safety measures are necessary and what type of technology is the safest and most convenient. Under the new national regime, although states may not discriminate on the basis of technology, they are still left with other legal alternatives with which to protect their consumers. With the passage of E-Sign, the federal government has not usurped lawmaking power from the states. Rather, it has merely constructed a stage on which electronic commerce can be conducted by eliminating legal barriers that would have provided legal authority to some kinds of electronic signatures while denying the same effect for others. It remains up to the states to guide and manage the process so that this new medium may operate smoothly, safely, and efficiently.

Andrew D. Stewart[182]

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[179] *See* Kania *supra* note 1, at 297.

[180] *Id.* at 299.

[181] *See id.* at 304-05.

[182] University of Hawai'i, William S. Richardson School of Law, Class of 2002. I would like to thank my editor Chris Kempner and the entire editorial staff of the University of Hawai'i Law Review for their hard work and support. My appreciation also goes out to Professor Danielle Conway-Jones for her guidance and insight, and to the firm of Damon Key Leong Kupchak Hastert's e-Business Group for inspiring me to write this paper.

Legal Services Corporation v. Velazquez: A Correct Application of the U.S. Supreme Court's First Amendment Limited Public Forum Analysis

I. INTRODUCTION

The First Amendment,[1] and its protection against the abridgement of free speech, stands at the forefront of our Bill of Rights.[2] Its pre-eminence is based upon the belief that through the free expression of ideas and vigorous debate, the truth will emerge and a more perfect system of government will result.[3] To this end, the First Amendment prevents the government from using viewpoint as the basis for discrimination.[4] This fundamental principle demands that courts strictly review any suspect governmental action implicating either private speech or speech occurring within a government-created public forum.[5]

In *Legal Services Corporation v. Velazquez*,[6] the United States Supreme Court returned to the fundamental rule of strictly reviewing viewpoint-based discrimination, even in the context of government subsidy programs.[7] The

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[1] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

[2] *See* ARCHIBALD COX, FREEDOM OF EXPRESSION 1 (1981). Cox adjudges the primacy of "freedom of conscience and expression" among U.S. Constitutional values because of the First Amendment's numerical position in the Bill of Rights. *Id.*

[3] Cohen v. California, 403 U.S. 15, 24 (1971).

> The Constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity . . . .

Id.

[4] *See* Nicole B. Casarez, *Public Forums, Selective Subsidies, and Shifting Standards of Viewpoint Discrimination*, 64 ALB. L. REV. 501, 581 n.9 (2000) (illustrating how the Supreme Court has consistently upheld viewpoint neutrality as a "fundamental First Amendment precept").

[5] *See* Paula E. Berg, *Lost in a Doctrinal Wasteland: The Exceptionalism of Doctor-Patient Speech Within the Rehnquist Court's First Amendment Jurisprudence*, 8 HEALTH MATRIX 153, 160 (1998) (noting that "no viewpoint based and virtually no content-based restriction of speech has ever survived strict scrutiny review").

[6] 531 U.S. 533 (2001).

[7] *See* Casarez, *supra* note 4, at 521. Viewpoint discrimination is recognized as speech regulation restricting "expression representing a particular perspective by a speaker or class of speakers." *Id.* at 512.

Court held that a funding restriction of the Legal Services Corporation Act ("LSC Act"), which prohibited the Legal Services Corporation ("LSC") from funding any organization that represented indigent clients on statutory or constitutional claims against established welfare laws, was unconstitutional because it discriminated based upon the particular viewpoint being represented by the LSC attorney.[8] This note argues that the Court correctly applied a strict doctrinal analysis of its First Amendment jurisprudence to protect speech within a government subsidy program. In the process, the Court issued a strong warning to Congress that it would not be allowed to overstep "accepted separation-of-powers principles"[9] by protecting its legislations from judicial scrutiny.

Section II discusses the LSC Act and relevant cases pertaining to the Court's First Amendment public forum jurisprudence. Section III recounts the relevant facts and procedural history of *Legal Services Corp.*, as well as the analysis employed by the majority and dissenting opinions. Section IV argues that the Court correctly found that the speech of LSC's attorneys, particularly when representing their clients before a court of law, constituted private speech, even though federally funded. Finally, section V concludes by arguing that because the speech at issue was private, and not one promoting a governmental message within a circumscribed program, LSC was distinguishable from *Rust v. Sullivan*.[10]

II. BACKGROUND

A. The Legal Services Corporation Act

Based upon Congressional findings that indicated: (1) providing legal assistance to those who face economic barriers will best serve the ends of

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[8] *Legal Servs. Corp.*, 531 U.S. at 538.

> None of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity . . . that initiates legal representation or participates in any other way, in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system, except that this paragraph shall not be construed to preclude a recipient from representing an individual, eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of the representation.

Omnibus Consolidated Rescissions and Appropriations Act, § 504(a)(16), Pub. L. No. 104-134, 110 Stat. 1321 (1996).

The Supreme Court addressed only the "exception" portion of section 504(a)(16) as the Court of Appeals upheld the restriction pertaining to "litigation, lobbying, or rulemaking," finding the restriction prohibited grantees from participating in these three activities regardless of which side of the issue they advocated. *Legal Servs. Corp.*, 531 U.S. at 539.

[9] *Id.* at 546.

[10] 500 U.S. 173 (1991) (holding that the funding restrictions at issue were permissible constructions of Title X not violative of the First Amendment).

justice; and (2) the availability of legal services reaffirms faith in our Government of laws,[11] Congress, in 1974, enacted the LSC Act to provide "financial support for legal assistance in noncriminal proceedings or matters to persons financially unable to afford legal assistance."[12] The Act established the Legal Services Corporation ("LSC") as a private, District of Columbia nonprofit corporation to increase access to America's courts.[13] The LSC distributes federal funds to grantee organizations for the purpose of representing indigent clients on a limited variety of legal issues, including welfare benefit claims.[14] Grantees hire and supervise attorneys to represent indigent clients on a prescribed set of issues.[15]

In 1996, as part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996 ("OCRAA"), Congress enacted section 504(a)(16), which prohibited LSC grantees from representing clients with claims that challenged the constitutionality or statutory validity of state or federal welfare laws.[16] In other words, LSC grantees were permitted to represent clients on welfare benefit claims, as long as those claims do not include an attempt to reform or change the underlying welfare statute.[17]

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[11] 42 U.S.C.A. § 2996(3-6) (West 2001).

[12] *Legal Servs. Corp.*, 531 U.S. at 536 (quoting the Legal Services Corporation Act, 42 U.S.C. § 2996b(a)).

[13] The Legal Services Corporation provides legal assistance in civil matters through 216 offices nationwide to people earning up to 125 percent of the federal poverty level, approximately $22,063 for a family of four in 2001. Elizabeth Amon, *Bush Holds the Line on Aid to Poor*, NAT'L L.J. (Apr. 23, 2001).

[14] *Legal Servs. Corp.*, 531 U.S. at 536. The Court recognized that the LSC Act, since its inception, restricted funding of certain types of activities, such as "litigation involving nontherapeutic abortions, secondary school desegregation, military desertion, or violations of the Selective Service statute." *Id.* at 537; *see* 42 U.S.C.A. §§ 2996f(b)(8)-(10) (West 2001). The Omnibus Consolidated Rescissions and Appropriations Act of 1996 imposed additional funding restrictions prohibiting legal representation of "certain" aliens, incarcerated individuals, and persons being evicted from public housing on charges of drug distribution and/or associated drug-related activities. Pub. L. No. 104-134 § 504 (1996).

[15] *Legal Servs. Corp.*, 531 U.S. at 537.

[16] *Id.* at 538. In 1995, under a Republican majority in the House of Representatives, several conservative lawmakers called for the abolishment of the Legal Services Corporation Act, asserting Legal Services lawyers were practicing "left wing politics." Efforts were made to reduce funding to the LSC and to impose new restrictions on LSC grantees and strengthen existing prohibitions. Section 504(a)(16) of the OCRAA was the result of this conservative effort to limit an LSC-funded attorney's scope of representation. Amon, *supra* note 13.

[17] *Legal Servs. Corp.*, 531 U.S. at 538. Under the challenged funding restriction, an LSC-grantee is permitted to represent a welfare claimant on a claim the agency made an error in interpreting the statute or in calculating a benefit amount, but not one seeking to reform or challenge the validity of the underlying law. *Id.*

B. The Supreme Court's Public Forum Analysis

The Supreme Court's First Amendment public forum analysis identifies three types of government-created forums for speech—traditional public forum, limited public forum, and nonpublic forum—each subject to its own First Amendment rules.[18] Running consistently throughout the Court's public forum analysis, however, is the ban against viewpoint discrimination.[19] By extension, the Court has applied this line of reasoning to government subsidy programs.[20] Speech within a limited public forum,[21] such as those created by government-funded subsidy or benefit programs, has presented a dilemma for traditional First Amendment analysis.[22] In the past, the Court has upheld viewpoint-based restrictions in situations where the affected speech was characterized as government speech, and viewed as a permissible means to preserve the boundaries of the government program.[23]

In situations where the government is promoting its own message through a subsidy program, the speech of private actors working within that program is not private, but rather government speech, subject to government control.[24]

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[18] *See* Casarez, *supra* note 4, at 521. Public forums have been described as a spectrum, ranging from the traditional public forum, such as public streets, where the government has the least leeway in restricting private speech, to the limited public forum, such as government subsidy programs, in which the government must live up to traditional forum standards, and the nonpublic forum, a class of government property where the government enjoys the most leeway to regulate speech. *Id.* at 521 n.144. Even within a non-public forum, however, the government cannot impose viewpoint discrimination. *Id.* at 521 n.145.

[19] *See* Casarez, *supra* note 4, at 521.

[20] *See, e.g., Legal Servs. Corp.*, 531 U.S. at 544 (noting that while limited forum cases may not be controlling, "they do provide some instruction").

[21] The Court in Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995), described the limited public forum as a government creation established to serve "limited and legitimate purposes." *Id.* at 829. A common example of a limited-public forum is the public university.

[22] *See* Casarez, *supra* note 4, at 502 (commenting on the Court's inconsistency in holding the government to viewpoint neutrality in government subsidy programs); *see also* Megan Elizabeth Lewis, *Subsidized Speech and the Legal Services Corporation: The Constitutionality of Defunding Constitutional Challenges to the Welfare System*, 74 N.Y.U. L. REV. 1178, 1187-91 (1999) (discussing the Court's confusion in handling viewpoint discrimination in the context of subsidized speech).

[23] *See* Rust v. Sullivan, 500 U.S. 173 (1991) (holding that the restriction on a federal family planning program was permissible because the speech of private doctors was "government speech"); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995) (holding that when the government disburses public funds to convey a government message, it can take steps to ensure that its message is not distorted nor garbled); *see, e.g.*, Casarez, *supra* note 4.

[24] *See, e.g., Legal Servs. Corp.*, 531 U.S. at 541; *see also* Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000) (proffering that within a limited public forum the government may spend public funds raised on "speech and other expression to

For example, in *Rust v. Sullivan*, the Court upheld a funding restriction that limited speech within a Title X[25] family planning program by prohibiting the promotion and encouragement of abortion as a method of family planning.[26] The purpose of the limitation was to clarify section 1008 of the Public Health Services Act, and the intent of Congress, that "fund[ing] would be used only to support preventive family planning services, population research, infertility services, and other related medical, informational, and educational activities."[27] The new rules were challenged by petitioners, Title X grantees, and doctors suing on behalf of themselves and their patients, in part, on the ground that the restriction violated their First Amendment right to free speech.[28] The Court upheld the funding restriction and emphasized that its decision was based on the conclusion that the proscribed speech fell outside the scope of the federally funded program.[29] The Court reasoned that "[t]his is not a case of the Government 'suppressing a dangerous idea,' but of a prohibition on a project grantee or its employee from engaging in activities outside of the project's scope."[30]

Another line of the limited forum analysis provides that viewpoint discrimination is "presumed impermissible when directed against speech otherwise within the forum's limitations."[31] For example, in *Rosenberger v. Rector and Visitors of the University of Virginia*,[32] the Court struck down a University decision to withhold payment to a student publication because the publication's editorial viewpoint promoted "a particular belief in or about a deity or an ultimate reality."[33] The Court in *Rosenberger* distinguished *Rust*

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advocate and defend its own policies"); *Rosenberger*, 515 U.S. at 833 (recognizing that "when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes").

[25] Title X was enacted as part of the Public Health Services Act of 1970. It authorizes the Secretary of Health to:

> make grants to and enter into contracts with public or nonprofit private entities to assist in the establishment and operation of voluntary family planning projects which shall offer a broad range of acceptable and effective family planning methods and services (including natural family planning methods, infertility services, and services for adolescents).

42 U.S.C.A. § 300(a) (West 2001).

[26] *Rust*, 500 U.S. at 179-80.

[27] *Id.* at 178-79 (citing H.R. CONF. REP. NO. 91-1667, at 8 (1970)).

[28] *Id.* at 181.

[29] *Id.* at 194-95.

[30] *Id.* at 194.

[31] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 830 (1995).

[32] 515 U.S. 819 (1995).

[33] *Id.* at 822-23. The challenged funding restriction stems from SAF Guidelines that exclude religious activities, defined as "any activity that promotes or manifests a particular belie[f] in or about a deity or an ultimate reality." *Id.* at 825.

by examining the purpose behind the creation of the limited public forum. Specifically, it found that the purpose for the Student Activity Fund ("SAF") was "to support a broad range of extracurricular student activities that '[were] related to the educational purpose of the University,'" not to promote a particular governmental message.[34] Characterizing the University as "the center of our intellectual and philosophic tradition" and as "one of the vital centers for the Nation's intellectual life,"[35] the Court struck down the SAF Guideline as being impermissible viewpoint discrimination and a threat to "vital First Amendment speech principles."[36]

In *Board of Regents of the University of Wisconsin System v. Southworth*,[37] the Court reaffirmed this position.[38] Respondents in this case were a group of students who objected to the University of Wisconsin's mandatory student fee because a portion of that fee went to support the speech and expressions of student organizations they found to be objectionable.[39] Respondents charged that the fee was a violation of their own First Amendment right to free speech and expression because it forced them to fund speech they did not support.[40] The Court reversed the District Court's and the Court of Appeals' decisions invalidating the student fee program. Its decision was based upon the fact that the program was created to enhance a student's educational experience by, among other things, "stimulating advocacy and debate on diverse points of view."[41] Within such government-created spheres of diverse expressions and ideas, the Court held that viewpoint neutrality is a necessity to protect the constitutional rights of private speakers.[42]

Following the Court's line of public forum analysis, it is clear that there exists some limitation to the government's control over speech within forums that are of its own creation.[43] Particularly when the government is not conveying its own programmatic message or where the forum was specifically created to allow for diverse expressions and ideas, the Court will strictly review the government's actions to ensure viewpoint neutrality.[44]

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[34] *Id.* at 824.

[35] *Id.* at 835-36.

[36] *Id.* at 835.

[37] 529 U.S. 217 (2000).

[38] *Id.* at 235.

[39] *Id.* at 221.

[40] *Id.* at 227.

[41] *Id.* at 223.

[42] "Viewpoint neutrality was the obligation to which we gave substance in Rosenberger . . . ." *Id.* at 233.

[43] *See, e.g.*, Casarez, *supra* note 4.

[44] *See* Lewis, *supra* note 22, at 1186 (noting that "[t]he Court has repeatedly emphasized that the First Amendment's general prohibition on viewpoint discrimination applies to subsidized speech: Where the government has chosen selectively to provide or withdraw

III. LEGAL SERVICES CORPORATION V. VELAZQUEZ

A. Background

In 1997, respondents—lawyers employed by LSC grantees, their clients, and others[45]—facially challenged the constitutionality of section 504(a)(16) of the OCRAA in the United States District Court for the Eastern District of New York.[46] Their request for a preliminary injunction was denied on the grounds that they had failed to establish a probability of success on the merits.[47] The district court's determination rested primarily on its finding that the funding restriction did not significantly impinge upon the lawyer-client relationship, and its characterization of the restriction as content,[48] rather than viewpoint-based, discrimination.[49]

On appeal, the United States Court of Appeals for the Second Circuit affirmed the district court's ruling, in part. The court held that the restrictions contained in section 504(a)(16) prohibiting "litigation, lobbying, and rulemaking" were not based on viewpoint, and thus were permissible, because "all three prohibited grantees' involvement in these activities, regardless of the side of the issue."[50] However, with regard to the prohibition against litigating claims that sought to reform or change the underlying welfare law, the Second Circuit reversed the district court's ruling.[51] The court invalidated the restriction as an impermissible viewpoint-based discrimination, finding that it "clearly [sought] to discourage challenges to the status quo."[52]

Petitioners, LSC joined by the U.S. Government, were granted certiorari by the United States Supreme Court for a determination of whether the funding

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funding in order to advance one viewpoint and silence competing views, the government has contravened the First Amendment").

[45] "Others" included private contributors to the LSC, and various state and local public officials whose governments contribute to LSC grantees. *Legal Servs. Corp.*, 531 U.S. at 537.

[46] Velazquez v. Legal Servs. Corp., 985 F. Supp. 323 (E.D.N.Y. 1997).

[47] *Id.* at 344.

[48] Content-based discrimination proscribes discussion of an entire class of speech. In *R.A.V. v. City of St. Paul*, 505 U.S. 377, 387-88 (1992), the Court noted that "the prohibition against content discrimination that we assert the First Amendment requires is not absolute" in those instances where the danger of viewpoint discrimination does not exist.

[49] *Velazquez*, 985 F. Supp. at 343-44. In finding the facts of *Velazquez* indistinguishable from *Rust*, the district court noted, "the 'government as speaker' analysis is only implicated when the Government engages in viewpoint, rather than content, discrimination." *Id.* at 344 n.15.

[50] *Legal Servs. Corp.*, 531 U.S. at 539 (quoting Velazquez v. Legal Servs. Corp., 164 F.3d 757, 768-69 (2d Cir. 1999)).

[51] *Id.*

[52] *Id.* (quoting *Velazquez*, 164 F.3d at 769-70).

condition imposed by Congress violated the First Amendment rights of LSC grantees and their clients.[53]

B. The Majority Opinion

The majority[54] began its analysis of the LSC funding restriction by distinguishing the LSC program from *Rust* on three primary points. First, the Court held that the LSC Act was promulgated not to promote a governmental message, but to promote private speech.[55] Under its limited public forum analysis, the Court reiterated the position that "viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker" or where it uses private entities to transmit its message.[56] Because the LSC Act funded constitutionally protected expression of LSC attorneys and their clients and was not explicitly created to promote a particularized programmatic message, as in *Rust*, the Court found the LSC restriction to be "beyond any congressional funding condition approved in the past by this Court."[57]

The Court's characterization of LSC speech as private speech was further supported by the Government's use of an existing medium of expression, here the State and Federal Judiciary, and its distortion of that medium's usual functioning.[58] The funding restriction so distorted the inherent nature of speech within the judicial system, particularly the speech of an independent bar presenting valid arguments and analyses before a court of law, that it violated the First Amendment.[59]

Secondly, *Legal Services Corp.* was distinguishable from *Rust* based upon the LSC's program integrity regulation[60] that required an LSC-funded program

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[53] Legal Servs. Corp. v. Velazquez, 529 U.S. 1052 (2000).

[54] Justice Kennedy delivered the majority opinion, in which Justices Stevens, Souter, Ginsberg, and Breyer joined. *Legal Servs. Corp.*, 531 U.S. at 536.

[55] *Id.* at 548 (holding "[t]here can be little doubt that the LSC Act funds constitutionally protected expression . . . there is no programmatic message of the kind recognized in *Rust* and which sufficed there to allow the Government to specify the advice deemed necessary for its legitimate objectives").

[56] *Id.* at 541.

[57] *Id.* at 548.

[58] *Id.* at 543.

[59] *Id.* (noting "[t]he First Amendment forbade the Government from using the forum in an unconventional way to suppress speech inherent in the nature of the medium").

[60] 45 C.F.R. § 1610.8 (2000). LSC grantees must maintain objective integrity from organizations engaging in restricted activities.

> A recipient will be found to have objective integrity and independence from such an organization if [in part]:
>
> (1) The other organization is a legally separate entity;
>
> (2) The other organization receives no transfer of LSC funds, and LSC funds do not

to maintain physical separation from any non-LSC funded program. The Court determined that the regulation operated to force the withdrawal of an LSC attorney whenever a constitutional or statutory issue arose in a suit for welfare benefits.[61] Recognizing the harsh implications of this regulation, and the economic reality faced by the indigent in securing legal representation, the Court noted, "[t]here often will be no alternative source for the client to receive vital information respecting constitutional and statutory rights bearing upon claimed benefits."[62] This was in "stark contrast to *Rust*,"[63] where the Court found that patients receiving approved Title X counseling services were not required to forfeit abortion counseling through alternative channels.

Finally, the extent to which the LSC funding restriction offended a fundamental principle of the First Amendment was decisive in distinguishing it from the restrictions upheld in *Rust*.[64] The Court has consistently granted speech critical of the government or advocating for change in its policies the highest degree of protection.[65] Quoting from the seminal First Amendment case, *New York Times Co. v. Sullivan*,[66] the Court stated, "[i]t is fundamental that the First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[67] The Court concluded by stating that it will not permit Congress to define the scope of litigation to exclude vital theories and ideas, thereby "insulat[ing] the Government's interpretation of the Constitution from judicial challenge[s]."[68] Thus, based upon a straightforward First Amendment limited public forum analysis, the Court invalidated the challenged funding restriction, affirming the decision of the Court of Appeals for the Second Circuit.[69]

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subsidize restricted activities; and

(3) The recipient is physically and financially separate from the other organization. Mere bookkeeping separation of LSC funds from other funds is not sufficient.

Id.

[61] *Legal Servs. Corp.*, 531 U.S. at 544-45.

[62] *Id.* at 546. State and national bar surveys indicate that under present congressional funding only about one-fifth of low-income Americans are able to secure legal assistance through programs such as LSC. Amon, *supra* note 13.

[63] *Legal Servs. Corp.*, 531 U.S. at 547.

[64] *Id.* at 548.

[65] *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982) (quoting Carey v. Brown, 447 U.S. 455, 467 (1980)) (noting that "[t]his Court has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values'"); Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) (recognizing that "speech concerning public affairs is more than self-expression; it is the essence of self-government").

[66] 376 U.S. 254 (1964).

[67] *Legal Servs. Corp.*, 531 U.S. at 548 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964)).

[68] *Id.*

[69] *Id.* at 549.

C. The Dissenting Opinion

Justice Scalia, joined by Chief Justice Rehnquist and Justices O'Conner and Thomas, disagreed with the majority's analysis and holding, contending that this case was "indistinguishable in all relevant respects" from *Rust*.[70] From its inception, the LSC program imposed restrictions on the types of claims LSC attorneys were permitted to represent.[71] From this distinction, the dissent reasoned that the LSC program did not create the type of public forum within which limitations on speech would be reviewed more strictly.[72] The LSC's funding restriction, the dissent concluded, prohibiting constitutional challenges to welfare laws as part of a LSC client's welfare benefits claim, was an acceptable means of limiting the scope of the LSC program.[73] Quoting *Rust*, the dissent argued that "[t]he Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem another way."[74] The dissent also concluded that the funding restriction did not constitute an impermissible viewpoint-based discrimination because it prohibited an LSC attorney from litigating either in support of, or for the reform of, an existing welfare law.[75]

As to the majority's concern regarding the restriction's interference with a forum's traditional function, the dissent took exception to the "special solicitude" given by the majority to its own profession.[76]

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[70] *Id.* at 558-59. Justice Scalia opined that "[t]he only difference between *Rust* and the present cases is that the former involved 'distortion' of (that is to say, refusal to subsidize) the normal work of doctors, and the latter involves 'distortion' of (that is to say, refusal to subsidize) the normal work of lawyers." *Id.* at 562 (Scalia, J., dissenting).

[71] *Id.* at 553.

[72] *Id.* Justice Scalia reasoned that "[f]ar from encouraging a diversity of views, it [the LSC Act] has always, as the Court accurately states, 'placed restrictions on its use of funds.'" *Id.*

[73] *Id.* Justice Scalia noted, under *Rust*, that it is permissible to decline to subsidize a certain class of litigation. *Id.*

[74] *Id.* (citing *Rust*, 500 U.S. at 193).

[75] *Id.* at 551 (noting that "[t]he litigation ban is symmetrical: Litigants challenging the covered statutes or regulations do not receive LSC funding, and neither do litigants defending those laws against challenge").

[76] *Id.* at 562 (noting that in *Rust*, the Court permitted the Government to intrude into the "normal work of doctors," but refused to apply the same line of analysis to the "normal work of lawyers").

IV. *LEGAL SERVICES CORP. V. VELAZQUEZ*: A STRAIGHTFORWARD APPLICATION OF THE COURT'S FIRST AMENDMENT LIMITED PUBLIC FORUM JURISPRUDENCE

A. Distinguishing Private Speech from Government Speech Within a Limited Public Forum

The primary purpose of the LSC Act is to provide "high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel."[77] That is, the LSC program was established not to promote a particular Government message, but rather to promote the interests of indigent clients who have valid legal claims, including welfare benefit claims, against the Government.[78] To accomplish this objective, Congress recognized that LSC attorneys must have "full freedom to protect the best interests of their clients."[79] Clearly, the best interest of the client will oftentimes demand that the LSC attorney argue a position in direct conflict with the interest of the Government.[80]

At odds with this principle was the LSC restriction that prohibited grantees from representing clients whose claims are designed to "change welfare laws, much less argue against the constitutionality or statutory validity of those laws."[81] The restriction required the LSC attorney to withdraw from a case when a constitutional or statutory claim arose, at any point during representation.[82] If a judge were to ask an LSC attorney whether a constitutional issue existed, the attorney could not respond.[83]

This restriction obviously constituted viewpoint-based discrimination. Under section 504(a)(16), an LSC attorney was free to represent an indigent client if he or she accepted the validity of the welfare law under which a disputed benefits claim was being argued.[84] The attorney, however, was prohibited from representing the same disputed benefits claim if it also involved a challenge to the constitutionality or statutory validity of that same

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[77] 42 U.S.C.A. § 2996(2) (West 2001).

[78] *Legal Servs. Corp.*, 531 U.S. at 542.

[79] 42 U.S.C.A. § 2996(6) (West 2001).

[80] *Legal Servs. Corp.*, 531 U.S. at 542-43 (holding that "[i]n this vital respect this suit is distinguishable from *Rust*"). The Court analogized the facts of this case to its decision in *Polk County v. Dodson*, 454 U.S. 312, 321 (1981), wherein it held that a public defender does not "act under the color of state law," but rather "under [the] canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client." *Id.*

[81] *Id.* at 538-39.

[82] *Id.* at 544-45.

[83] *Id.* at 545.

[84] *Id.* at 538.

welfare law.[85] This meets the very definition of viewpoint-based discrimination: "[w]hen the government targets not [the] subject matter, but particular views taken by speakers on a subject."[86] Indeed, the restriction only applied to constitutional challenges of welfare laws, further illustrating how the restriction operated to silence a particular viewpoint on an isolated class of cases.[87]

Legal Services Corp. is also distinguishable from *Rust* in that the *Rust* funding condition did not affect the entire program of a Title X fund recipient, only the scope of a grantee's Title X project activities.[88] Therefore, a recipient's speech or activity pertaining to abortion was not wholly precluded.[89] "[The Title X recipient] simply [was] required to conduct [abortion related services] through programs that are separate and independent from the project that receives Title X funds."[90]

In contrast, the funding restriction in *Legal Services Corp.* applied to "all of the activities of an LSC grantee, including those paid for by non-LSC funds."[91] In this respect, the Court concluded that the LSC funding restriction was "in stark contrast to *Rust*."[92] Under this construction, the Court was rightly concerned that many indigent clients would have no alternative source from which to receive information respecting their constitutional and statutory rights.[93]

Indeed, Congress explicitly recognized that securing private legal representation for indigent clients was a barrier in need of Governmental intervention because the pure economics involved prevented many citizens from accessing the system.[94] It proved illogical and offensive to the Court for Congress to enact legislation addressing this social problem, but then to tie the hands of attorneys.[95] In appearance, and most likely in application, the LSC

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[85] *Id.* at 538-39.

[86] Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).

[87] *Legal Servs. Corp.*, 531 U.S. at 546. Section 504(a)(16) permits LSC attorneys to represent clients on welfare benefit claims, yet at the same time, it "sifts out cases presenting constitutional challenges in order to insulate the Government's laws from judicial inquiry." *Id.*

[88] Rust v. Sullivan, 500 U.S. 173, 196 (1991).

[89] *Id.*

[90] *Id.* (citing 42 C.F.R. § 59.9 (1989)).

[91] *Legal Servs. Corp.*, 531 U.S. at 538 (citing §§ 504(d)(1) and (2) of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134 § 504, 110 Stat. 1321-1353).

[92] *Id.* at 547.

[93] *Id.*

[94] *See* 42 U.S.C.A. § 2996 (West 2001).

[95] *Legal Servs. Corp.*, 531 U.S. at 544 (noting that "[h]ere the program presumes that private, nongovernmental speech is necessary, and a substantial restriction is placed upon that speech").

funding restriction created a two-tier system of justice, affording those of low-income status less protection under the law.[96]

B. Distortion of an Existing Medium of Expression

In the final analysis, perhaps most troublesome was the LSC funding restriction's effect on the nation's fundamental system of checks and balances.[97] In certain spheres of free expression created through government funding, the freedom of fund recipients to speak outside the scope of the government-funded project is not always sufficient to justify government control over the expression's content.[98] The university campus is one such sphere where free expression is "so fundamental to the functioning of our society that the Government's ability to control speech [through funding restrictions] . . . is restricted by the vagueness and overbreadth doctrines of the First Amendment."[99] Arguably, the physician-patient relationship may be another sphere deserving First Amendment protection from Government regulation.[100] In *Legal Services Corp.*, the Court affirmed that the attorney-client relationship is such a sphere and deserves heightened scrutiny from the courts.

Characterizing the funding restriction as a fundamental intrusion into and distortion of the legal system, the Court warned:

> We must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge. Where private speech is involved, even Congress' antecedent funding decision cannot be aimed at the suppression of ideas thought inimical to the Government's own interest.[101]

By proscribing what a LSC attorney could or could not represent to the court on behalf of his or her indigent client, the restriction altered the necessary and proper functioning of the legal system.[102] The Government

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[96] *Id.* at 546. "The courts and the public would come to question the adequacy and fairness of professional representations when the attorney, either consciously to comply with this statute or unconsciously to continue the representation despite the statute, avoided all reference to questions of statutory validity and constitutional authority." *Id.*

[97] *Id.* at 547.

[98] Rust v. Sullivan, 500 U.S. 173, 199 (1991).

[99] *Id.* (citing Keyishian v. Bd. of Regents, State Univ. of N.Y., 385 U.S. 589, 603, 605-06 (1967)); *see also* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 836 (1995) (stating that "[f]or the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses").

[100] *Rust*, 500 U.S. at 200. In *Rust*, the Court did not resolve this question finding that the restriction did not "significantly impinge upon the doctor-patient relationship." *Id.*

[101] *Legal Servs. Corp.*, 531 U.S. at 548-49.

[102] *Id.* at 546.

"[could] not design a subsidy to effect this serious and fundamental restriction on advocacy of attorneys and the functioning of the judiciary."[103] Congress was certainly not required to provide attorneys for those unable to afford legal representation.[104] Moreover, upon the establishment of such a program it was not required to fund the whole range of legal claims.[105] However, once Congress decided to enact a program such as the LSC to provide the nation's poor with access to the judicial system, it was wrong to implement a funding restriction designed to insulate its laws, particularly laws uniquely applicable to this class of people, from constitutional challenges.[106] "Interpretation of the law and the Constitution is the primary mission of the judiciary when it acts within the sphere of its authority to resolve a case or controversy."[107] To permit the insulation of current welfare laws from constitutional scrutiny under the defense that the funding condition was a mere definition of a subsidized program would be to reduce the Court's First Amendment analysis to "a simple semantic exercise."[108]

V. CONCLUSION

In *Legal Services Corp.*, the Court affirmed the decision of the Second Circuit invalidating the LSC funding restriction by a bare majority vote. Therefore, the law is by no means settled as to the scope of permissible restrictions on speech within a government subsidy program. Nevertheless, by concluding that the funding restriction discriminated against the private speech of LSC attorneys and their clients, the Court made a significant step in clarifying the analysis of protected speech within a government subsidy program.[109] The decision reaffirmed the Court's traditional position that viewpoint-based discrimination against private speech, regardless of the forum, is presumptively unconstitutional.

The true significance of *Legal Services Corp.*, however, perhaps lies in the Court's dicta upholding the purposes and ideals of the First Amendment and the LSC Act, and in the Court's clear warning to Congress against overstepping accepted separation-of-power principles by legislating protection

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[103] *Id.* at 544.

[104] *Id.* at 548.

[105] *Id.*

[106] *Id.*

[107] *Id.* at 545.

[108] *Id.* at 548.

[109] Brennan Center for Justice at NYU School of Law, Velazquez – *Analysis & Implications*, *at* http://www.brennancenter.org/programs/prog_ht_velazquez_analysis.html (last modified Apr. 26, 2001) (noting that "[f]or the first time, the Court has held that LSC-funded lawyers and their clients are protected under the First Amendment notwithstanding the fact that the lawyers operate within a federally subsidized program").

for its laws against judicial challenges. One of the strongest protections afforded by the First Amendment is the right of individual citizens to criticize the government.[110] In the eyes of those working to protect the interests of the poor, this decision preserves one of the few and most effective avenues available to the poor to have their voices heard. Professor Burt Neuborne, Legal Director of the Brennan Center for Justice, sees the Supreme Court's decision in *Legal Services Corp.* as redeeming the promise of equal justice under the law.[111]

> By reaffirming First Amendment principles in this context, the Supreme Court is reminding us that lawyers for the poor are real lawyers, possessing the same rights, responsibilities and opportunities for advocacy as any other lawyer. Today's ruling ensures that lawyers for the poor can do their jobs right, and their clients can expect quality legal representation.[112]

After *Legal Services Corp.*, welfare recipients are now free to participate in our nation's system of justice on a more equal footing and to challenge the laws having the most impact upon their daily lives, utilizing all applicable legal theories available to them.

Shirley N. K. Garcia[113]

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[110] *See* Texas v. Johnson, 491 U.S. 397, 411 (1989) (noting that the "expression of dissatisfaction with the policies of this country . . . [is] situated at the core of our First Amendment values"). In defense of this principle, the Court in *Legal Servs. Corp.* stated, "Congress cannot wrest the law from the Constitution which is its source." *Legal Servs. Corp.*, 531 U.S. at 545.

[111] Press Release, Brennan Center for Justice, *Supreme Court Strikes Down Restrictions on Lawyers Representing the Poor in Welfare Benefit Cases* (Feb. 28, 2001), *at* http://www.brennancenter.org/presscenter/pressrelease_2001_0228.html.

[112] *Id.*

[113] Class of 2002, William S. Richardson School of Law, University of Hawai'i at Manoa.

Patricia N. v. LeMahieu: Abrogation of State Sovereign Immunity Under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act After *Board of Trustees v. Garrett*

I. INTRODUCTION

Over two centuries ago, Alexander Hamilton wrote, "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption . . . is now enjoyed by the government of every State in the Union."[1] The issue of state sovereign immunity, important to the framers of our government,[2] survives today,[3] particularly in the context of the right of an individual to sue a state under the provisions of the Americans with Disabilities Act ("ADA")[4] and the Rehabilitation Act.[5]

In *Patricia N. v. LeMahieu*,[6] plaintiffs Guy and Patricia N., individually, and as guardians ad litem of Amber N. (collectively "Plaintiffs"), sued the State of Hawai'i Department of Education ("Hawai'i DOE"), as well as others[7] in their official capacities (collectively "Defendants"), to recover

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[1] THE FEDERALIST NO. 81, at 487 (Alexander Hamilton) (Willmoore Kendall & George W. Carey eds., 1966) (emphasis deleted), *quoted in* Hans v. Louisiana, 134 U.S. 1, 13 (1890) (holding that a state retains sovereign immunity in federal court).

[2] Seminole Tribe v. Florida, 517 U.S. 44, 54 (1996) ("For over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'" (quoting *Hans*, 134 U.S. at 15)); *see Hans*, 134 U.S. at 14; THE FEDERALIST NO. 31, at 196 (Alexander Hamilton) (Willmoore Kendall & George W. Carey eds., 1966) ("The State governments, by their original constitutions, are invested with complete sovereignty."); *supra* note 1 and accompanying text.

[3] *See, e.g.*, Michael R. Triplett, *Disabilities: Justice Official Says Department to Continue Bringing Employment Claims Despite* Garrett, 195 DAILY LAB. REP. (BNA) A-6 (Oct. 11, 2001) (reporting on the Justice Department's intention to "continue to bring cases for monetary damages in actions on behalf of individuals against state governments" (quotation marks omitted)).

[4] 42 U.S.C.A. §§ 12101-12213 (West, WESTLAW through 2001 Pub. L. 107-11); *see infra* Part II.A.1.

[5] 29 U.S.C.A. §§ 701-797 (West, WESTLAW through 2001 Pub. L. 107-11); *see infra* Part II.A.2.

[6] 141 F. Supp. 2d 1243 (D. Haw. 2001).

[7] Specifically, Plaintiffs sued Superintendent of the Hawai'i Public Schools, Paul LeMahieu; Education Specialist, Beth Schimmelfennig; and Hawai'i DOE employee, Phyllis Ida. *Id.* at 1243.

damages, including lost wages and emotional distress.[8] The U.S. District Court for the District of Hawai'i, ruling on cross motions for summary judgment, held that the State of Hawai'i did not retain sovereign immunity in suits based on Title II[9] of the ADA and Section 504[10] of the Rehabilitation Act ("Section 504").[11]

The *Patricia N.* opinion relied on the holdings of the Ninth Circuit in *Clark v. California*[12] and *Dare v. California*.[13] This note argues that the U.S. Supreme Court has overruled these holdings, *sub silentio*,[14] and therefore *Patricia N.* was wrongfully decided because Title II and Section 504 do not validly abrogate state sovereign immunity.

Part II of this note begins with a discussion of the relevant federal legislation and continues with a discussion of the states' right to sovereign immunity and the power of Congress to abrogate that right. Part II concludes by examining the relevant cases preceding *Patricia N.* to provide an understanding of the pertinent issues. Part III details the facts of the *Patricia N.* opinion and examines the reasoning of the holding. Part IV criticizes *Patricia N.* for relying on Ninth Circuit opinions that were overruled, *sub silentio*, by holdings of the Supreme Court.

II. BACKGROUND

A. Federal Legislation

Section 5 of the Fourteenth Amendment[15] allows Congress to promulgate remedial legislation[16] to enforce Section 1,[17] which prohibits discrimination

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[8] *Id.* at 1247.

[9] 42 U.S.C.A. §§ 12131-12165 (West, WESTLAW through 2001 Pub. L. 107-11); *see infra* Part II.A.1.

[10] 29 U.S.C.A. § 794 (West, WESTLAW through 2001 Pub. L. 107-11); *see infra* Part II.A.2.

[11] *Patricia N.*, 141 F. Supp. 2d at 1248-49.

[12] 123 F.3d 1267 (9th Cir. 1997).

[13] 191 F.3d 1167 (9th Cir. 1999).

[14] Bd. of Trs. v. Garrett, 531 U.S. 356 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000).

[15] "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

[16] The Supreme Court has determined that this enforcement power is limited to the enactment of *remedial* legislation in response to discrimination by the *states*. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 519 (1997). *See generally* The Civil Rights Cases, 109 U.S. 3 (1883).

[17] Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State

against individuals by a state.[18] Pursuant to its Section 5 power, Congress enacted three statutes that are relevant to this note: Titles I[19] and II of the ADA; Section 504; and the Individuals with Disabilities in Education Act ("IDEA").[20]

1. Titles I and II of the Americans with Disabilities Act

Congress enacted the ADA to eliminate discrimination against individuals with disabilities and "to provide clear, strong, consistent, enforceable standards addressing discrimination against [those] individuals."[21] Title I prohibits discrimination against individuals with disabilities in the area of employment[22] while Title II prohibits discrimination against individuals with disabilities in the area of public services.[23] Specifically, Title II prohibits discrimination by a "public entity"[24] against a "qualified individual with a disability"[25] and

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shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

[18] *See, e.g.*, Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) ("[T]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." (quotation marks omitted) (quoting Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 445 (1923))).

[19] 42 U.S.C.A. §§ 12111-12117 (West, WESTLAW through 2001 Pub. L. 107-11).

[20] 20 U.S.C.A. §§ 1400-1487 (West, WESTLAW through 2001 Pub. L. 107-11).

[21] 42 U.S.C.A. § 12101(b) (West, WESTLAW through 2001 Pub. L. 107-11). The other purposes of the ADA are to "to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities"; and "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." *Id.*

[22] 42 U.S.C.A. § 12112. Title I states that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.* § 12112(a).

[23] 42 U.S.C.A. § 12132 (West, WESTLAW through 2001 Pub. L. 107-11).

[24] The ADA includes in its definition of a "public entity": "(A) any State or local government; [and] (B) any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C.A. § 12131(1) (West, WESTLAW through 2001 Pub. L. 107-11).

[25] The ADA defines a "qualified individual with a disability" as

an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation

prohibits the "exclusion [of that individual] from participation in or [the denial of] the benefits of the services, programs, or activities of a public entity," because of such disability.[26] The Hawai'i DOE qualifies as a "public entity";[27] it is accordingly subject to the provisions of Title II.

2. Section 504 of the Rehabilitation Act

Congress adopted the Rehabilitation Act with the goal of "empower[ing] individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society."[28] Section 504 prohibits discrimination by any federally funded program or activity[29] against a "qualified individual with a disability"[30] and prohibits exclusion of that individual from participation in or denial of the benefits of that program or activity, because of such disability.[31] Because the Hawai'i DOE receives federal funding,[32] its operations qualify as programs or

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barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C.A. § 12131(2).

[26] 42 U.S.C.A. § 12132. This prohibition is subject to certain limitations, contained in 42 United States Code ("U.S.C.") §§ 12131-12165. *Id.*

[27] *See supra* note 24.

[28] 29 U.S.C.A. § 701(b)(1) (West, WESTLAW through 2001 Pub. L. 107-11). The Rehabilitation Act sought to achieve this goal through "statewide workforce investment systems implemented in accordance with title I of the Workforce Investment Act of 1998[, 29 U.S.C. §§ 2801-2945.]" *Id.* § 701(b)(1)(A).

[29] Section 504 specifically includes "any program or activity receiving Federal financial assistance." 29 U.S.C.A. § 794(a) (West, WESTLAW through 2001 Pub. L. 107-11).

[30] The Rehabilitation Act defines a "qualified individual with a disability" as an individual who:

(i) has a physical or mental impairment which for such individual constitutes or results in a substantial impediment to employment; and

(ii) can benefit in terms of an employment outcome from vocational rehabilitation services provided pursuant to subchapter I, III, or VI of this chapter [29 U.S.C. §§ 720-741, 771-776, 795-795f].

29 U.S.C.A. § 705(20)(A) (West, WESTLAW through 2001 Pub. L. 107-11).

The Act also defines a "qualified individual with a disability" as an individual who: "(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment." *Id.* § 705(20)(B). However, the Act generally excludes from this definition individuals engaging in the illegal use of drugs, alcoholics, individuals with certain contagious diseases, homosexuals and bisexuals, and individuals with certain disorders such as pedophilia or kleptomania. *Id.* § 705(20)(C).

[31] 29 U.S.C.A. § 794(a).

[32] *See, e.g.*, Hawai'i Dep't of Educ. v. Bell, 770 F.2d 1409, 1412 (9th Cir. 1985).

activities receiving federal financial assistance under Section 504,[33] and are therefore subject to the provisions of the Act.

3. The Individuals with Disabilities in Education Act

Congress enacted IDEA,[34] which provides the states with federal funds,[35] "to ensure that all children with disabilities have available to them a free appropriate public education [("FAPE")[36]] that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living."[37] IDEA requires an

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[33] *See supra* note 29. Section 504 further defines a "program or activity" to mean *all the operations* of "a local educational agency (as defined in section 8801 of Title 20), system of vocational education, or other school system, . . . *any part of which* is extended Federal financial assistance." 29 U.S.C.A. § 794(b)(2)(B) (emphasis added). 20 U.S.C. § 8801 defines a "local education agency" as

> a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools in a city, county, township, school district or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools.

20 U.S.C.A. § 8801(19)(A) (West, WESTLAW through 2001 Pub. L. 107-11). This definition also includes "any other public institution or agency having administrative control and direction of a public elementary or secondary school." *Id.* § 8801(19)(B).

[34] For further discussion on IDEA, see *Amanda J. ex rel. Annette J. v. Clark County School District*, 267 F.3d 887, 882 (9th Cir. 2001); *Hawai'i Department of Education v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1193 (D. Haw. 2001); *Browell v. LeMahieu*, 127 F. Supp. 2d 1117, 1119 (D. Haw. 2000); *Hawai'i Department of Education v. Rodarte*, 127 F. Supp. 2d 1103, 1105-1108 (D. Haw. 2000).

[35] *See* 20 U.S.C.A. § 1412 (West, WESTLAW through 2001 Pub. L. 107-11); *accord Amanda J.*, 267 F.3d at 882; *Cari Rae S.*, 158 F. Supp. 2d at 1193; *Browell*, 127 F. Supp. 2d at 1119.

[36] IDEA defines FAPE as

> special education and related services that—
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> (A) have been provided at public expense, under public supervision and direction, and without charge;
>
> (B) meet the standards of the State educational agency;
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> (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
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> (D) are provided in conformity with the individualized education program [("IEP")] *required* under section 1414(d) of this title.

20 U.S.C.A. § 1401(8) (West, WESTLAW through 2001 Pub. L. 107-11) (emphasis added).

[37] 20 U.S.C.A. § 1400(d)(1)(A) (West, WESTLAW through 2001 Pub. L. 107-11). Some of the other purposes for IDEA were:

> [(1)](B) to ensure that the rights of children with disabilities and parents of such children are protected; and
>
> (C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities; [and]

IEP[38] for each child with a disability as part of a FAPE.[39] An IEP is prepared by an IEP Team[40] and is a written statement for each child with a disability designed to evaluate the current educational performance of that child, as well as document that child's educational needs and define the special education and related services or aids required.[41]

IDEA also subjects the Hawai'i DOE to the provisions of Section 504.[42] Because it receives federal funding through IDEA,[43] the operations of the Hawai'i DOE again qualify as programs or activities receiving federal financial assistance under Section 504.[44]

B. State Sovereign Immunity

Generally, courts have interpreted the Eleventh Amendment[45] to immunize states against lawsuits brought by citizens in federal court.[46] In 1999, the Supreme Court made clear that this immunity—properly named sovereign immunity[47]—is neither derived from nor limited by the Eleventh

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(2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families . . . .

Id. § 1400(d).

[38] IDEA provides that "each local educational agency, State educational agency, or other State agency, as the case may be, *shall* have in effect, for each child with a disability in its jurisdiction, an individualized education program." 20 U.S.C.A. § 1414(d)(2) (West, WESTLAW through 2001 Pub. L. 107-11) (emphasis added); *accord supra* note 36.

[39] *See supra* note 36.

[40] *See* 20 U.S.C.A. § 1414(d)(1)(B).

[41] *Id.* § 1414(d)(1)(A).

[42] *See supra* notes 29-31 and accompanying text.

[43] *See supra* notes 35-38.

[44] *See supra* notes 32-33 and accompanying text.

[45] The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

[46] *See* Doe v. Div. of Youth & Family Servs., 148 F. Supp. 2d 462, 482 (D.N.J. 2001) ("[Although t]he Eleventh Amendment does not explicitly prohibit lawsuits by a State's own citizens, . . . the United States Supreme Court 'has consistently held that an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State.'" (quoting Edelman v. Jordan, 415 U.S. 651, 662-63 (1974))); *accord* Bd. of Trs. v. Garrett, 531 U.S. 356, 363 (2001) ("The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court." (citing Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 73 (2000))).

[47] Alden v. Maine, 527 U.S. 706, 713 (1999). Although this note will generally use the term "sovereign immunity," many courts refer to this immunity as "Eleventh Amendment immunity." *Id.*; *see, e.g.*, Clark v. California, 123 F.3d. 1267, 1271 (9th Cir. 1999).

Amendment.[48] Rather, state sovereign immunity is recognized by the structure of the Constitution itself; it is a "fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today."[49] Accordingly, state sovereign immunity is much broader than the text of the Eleventh Amendment.[50]

Nevertheless, this immunity is not absolute: It does not mean "that federal law is inapplicable to the States, or that the federal government [cannot] enforce federal law."[51] Sovereign immunity merely "prevent[s] private parties from enforcing certain federal claims."[52] Furthermore, Congress may abrogate

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[48] *Alden*, 527 U.S. at 713.

[49] *Id.* "[T]he States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere." Gregory v. Ashcroft, 501 U.S. 452, 461 (1991). States entered the Union as sovereign entities, and "retained 'a residuary and inviolable sovereignty'" even while surrendering many of their powers to the federal government. Printz v. United States, 521 U.S. 898, 918-19 (1997) (quoting THE FEDERALIST NO. 39, at 245 (James Madison) (Clinton Rossiter ed., 1961)); *accord Gregory*, 501 U.S. at 457-58 (quoting THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)).

The Constitution reflects on this state retention of sovereignty throughout its text, most notably in its "conferral upon Congress of not all governmental powers, but only discrete, enumerated ones." *Printz*, 521 U.S. at 919; *see, e.g.*, U.S. CONST. art. I, § 8; U.S. CONST. amend. X. For a discussion of the constitutional theory underlying this view of sovereign immunity, see William E. Thro, *The Education Lawyer's Guide to the Sovereign Immunity Revolution*, 146 EDUC. L. REP. 951, 955-57 (West 2000) (stating that "the immunity of the individual States from suits by private parties" comprises "[a] vital part of [the] precarious constitutional [system of checks and balances]"). *See also* THE FEDERALIST NO. 51 (James Madison) (setting forth the importance of checks and balances on governmental power); *Alden*, 527 U.S. at 750-51 (explaining the detrimental effects on the constitutional system of checks and balances that would be caused by "[a] congressional power to strip the States of their immunity from private suits").

[50] *E.g.*, Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank, 527 U.S. 627, 634-35 (1999) (quoting Seminole Tribe v. Florida, 517 U.S. 44, 54 (1996)); *accord* Garcia v. State Univ. of N.Y., No. 00-9223, 2001 WL 1159970, at *5 (2d Cir. Sept. 26, 2001) ("[T]he significance of the Eleventh Amendment is not what it provides in its text, but the larger 'background principle of state sovereign immunity' that it confirms." (quoting *Seminole Tribe*, 517 U.S. at 72)); *see also* Thro, *supra* note 49, at 953 ("[A]lthough the text of the Eleventh Amendment speaks of suits in federal court, the States are equally immune from federal claims in their own courts.").

[51] Thro, *supra* note 49, at 953 n.15.

[52] *Id.*; *accord* Stevens v. Ill. Dep't of Transp., 210 F.3d 732, 741 (7th Cir. 2000) ("We have only concluded that States are entitled to [sovereign] immunity for suits brought by individuals under the ADA. . . . [I]n all contexts other than that of an individual suing a State in federal court, the ADA retains its full force as a means of enforcing nationwide standards for nondiscriminatory treatment of the disabled." (citations omitted)), *quoted in Garcia*, 2001 WL 1159970, at *5; Bd. of Trs. v. Garrett, 531 U.S. 356, 374 n.9 (2001).

state sovereign immunity by enacting appropriate legislation.[53] However, congressional abrogation of sovereign immunity can only occur with the satisfaction of two conditions: (1) Congress must make an unequivocal expression of its intent to abrogate immunity; and (2) Congress must act pursuant to a valid exercise of power.[54]

The first condition may be satisfied by the text of the statute.[55] As to the second, "Congress has the constitutional power to authorize suits brought by individuals against the State in only two circumstances: [(1)] when acting to enforce the Fourteenth Amendment;[56] [or (2)] when the State consents to

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[53] *See Garrett*, 531 U.S. at 363-64; *accord* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 80 (2000); *Fla. Prepaid*, 527 U.S. at 637. This power, however, is strictly limited to two specific circumstances. *See infra* notes 56-60 and accompanying text.

[54] Seminole Tribe v. Florida, 517 U.S. 44, 55 (1996), *quoted in Fla. Prepaid*, 527 U.S. at 635; *accord Garrett*, 531 U.S. at 363 (quoting *Kimel*, 528 U.S. at 73); Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 670 (1999).

[55] *Cf.* Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985) (holding that Congress did not expressly waive sovereign immunity under the Rehabilitation Act because it did not expressly state an intent to abrogate sovereign immunity). However, Congress subsequently amended the Act to provide for the express waiver required by the Supreme Court in *Atascadero*. *See* 42 U.S.C.A. § 2000d-7(a)(1) (West, WESTLAW through 2001 Pub. L. 107-19); *see also* Lane v. Pena, 518 U.S. 197, 198 (1996) (recognizing that Congress's amendment to the Rehabilitation Act included an unequivocal expression of intent to waive state sovereign immunity in response to *Atascadero*), *cited in* Doe v. Div. of Youth & Family Servs., 148 F. Supp. 2d 462, 491 n.5 (2001).

[56] *Garrett*, 531 U.S. at 364 (citing Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976)); *accord Youth & Family Servs.*, 148 F. Supp. 2d at 484-85 (citing *Coll. Savs. Bank*, 527 U.S. at 670); *cf. Fla. Prepaid*, 527 U.S. at 636-37. The Fourteenth Amendment was "enacted after the Eleventh Amendment and [was] specifically designed to alter the federal-state balance." *Coll. Savs. Bank*, 527 U.S. at 670 (citing *Fitzpatrick*, 427 U.S. 445).

In 1989, the Court extended the reach of congressional abrogation to any statute passed pursuant to any power enumerated in Article I. *See* Pennsylvania v. Union Gas, 491 U.S. 1, 14-23 (1989), *overruled by* Seminole Tribe v. Florida, 517 U.S. 44 (1996). However, in 1996, the Court held that Congress could not use its Article I powers to abrogate sovereign immunity and confined the basis of Congress's power of abrogation to Section 5 of the Fourteenth Amendment. *See Seminole Tribe*, 517 U.S. at 72-73 ("The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction."), *quoted in Garcia*, 2001 WL 1159970 at *5; *Garrett*, 531 U.S. at 364 (citing *Kimel*, 528 U.S. at 79); *see also infra* note 241 and accompanying text.

The Court further limited Congress's use of Section 5 power in 1997, requiring that (1) Congress make specific findings that the substantive guarantees of the Fourteenth Amendment were being violated, and (2) the resulting legislation must be a proportionate response to the violations. *Fla. Prepaid*, 527 U.S. at 639; *accord Kimel*, 528 U.S. at 81-82; *Garrett*, 531 U.S. at 374. *See generally* City of Boerne v. Flores, 521 U.S. 507 (1997). In other words, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne*, 521 U.S. at 520, *quoted in Garrett*, 531 U.S. at 365; *Kimel*, 528 U.S. at 81; and *Fla. Prepaid*, 527 U.S. at 639.

suit."[57] However, the necessity of the consent of a state to suit—essentially a waiver of its sovereign immunity[58]—is strictly enforced.[59] Such a waiver must be explicit; Congress cannot extract an implied or constructive waiver of state sovereign immunity.[60]

C. Relevant Court Decisions—The Road to Patricia N. v. LeMahieu

During the five years preceding *Patricia N. v. LeMahieu*,[61] several Supreme Court and Ninth Circuit decisions dealt with issues directly relevant to the abrogation of state sovereign immunity under Title II and Section 504. The following discussion provides an introduction to the issues and cases that led to *Patricia N.*

1. City of Boerne v. Flores

Decided in 1997, *City of Boerne v. Flores*[62] defined and established the application of congruence and proportionality analysis when determining the validity of congressional legislation enacted pursuant to Section 5 of the

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Finally, in *Florida Prepaid*, the Court stated that the *City of Boerne* congruence and proportionality standard must be applied when determining whether congressional legislation attempting to abrogate state sovereign immunity was properly enacted pursuant to the Fourteenth Amendment. *Fla. Prepaid*, 527 U.S. at 637; *see infra* notes 84, 181.

[57] *Youth & Family Servs.*, 148 F. Supp. 2d at 484-85 (citing *Coll. Savs. Bank*, 527 U.S. at 670).

[58] "[A] State may waive its sovereign immunity by consenting to suit." *Coll. Savs. Bank*, 527 U.S. at 670 (citing Clark v. Barnard, 108 U.S. 436, 447-48 (1883)); Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468, 473 (1987) (citing Clark v. Barnard, 108 U.S. at 447); *cf. Kimel*, 528 U.S. at 73 (stating that the Supreme Court has, for over a century, "made clear that the Constitution does not provide for federal jurisdiction over suits against non-consenting States" (citing *Coll. Savs. Bank*, 527 U.S. at 669-70; *Seminole Tribe*, 517 U.S. at 54; and Hans v. Louisiana, 134 U.S. 1, 15 (1890))), *quoted in Youth & Family Servs.*, 148 F. Supp. 2d at 483.

[59] Notwithstanding Section 5 abrogation, "absent waiver, neither a State, nor agencies under its control may be subjected to lawsuits in federal court." *Youth & Family Servs.*, 148 F. Supp. 2d at 483 (citing P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993); and *Welch*, 483 U.S. at 473).

[60] *E.g.*, *Coll. Savs. Bank*, 527 U.S. 666, *overruling* Parden v. Terminal Ry., 377 U.S. 184 (1964), *explained in Kimel*, 528 U.S. at 79; *see supra* note 56; *infra* note 241 and accompanying text.

[61] 141 F. Supp. 2d 1243 (D. Haw. 2001).

[62] 521 U.S. 507 (1997). Even though it did not directly address congressional abrogation of sovereign immunity, *City of Boerne* is particularly important because of the analytical framework it set forth.

Fourteenth Amendment.[63] Under this analysis, Section 5 legislation enforcing the Fourteenth Amendment must evidence "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,"[64] because "Congress'[s] power under [Section] 5 . . . extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment."[65] Thus, for "Congress to invoke [Section] 5, it must identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct."[66] These requirements apply to federal legislation, such as the ADA and Section 504, that attempts to abrogate state sovereign immunity under Section 5 power.[67]

2. *Clark v. California*

In 1997, the Ninth Circuit examined the abrogation of state sovereign immunity under Title II and Section 504.[68] The *Clark v. California* court

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[63] *Id.* at 529-36. The Court held that the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C.A. §§ 2000bb to 2000bb-4 (West, WESTLAW through 2001 Pub. L. 107-26), exceeded Congress's authority bestowed under Section 5 of the Fourteenth Amendment. *City of Boerne*, 521 U.S. at 536.

Congress enacted RFRA pursuant to its Section 5 power in order to prohibit "'government' from 'substantially burdening' a person's exercise of religion even if the burden results from a rule of general applicability unless [it] can demonstrate [that] the burden" survives strict scrutiny analysis. *Id.* at 515-16 (quoting 42 U.S.C. § 2000bb-1).

Finding that RFRA's legislative record contained little support for the concerns that supposedly animated the law, the Court declared that, unlike the measures in the voting rights cases, RFRA's provisions were "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 530-32. Because of the "substantial costs RFRA exact[ed]," combined with its "sweeping coverage," the Court found that "the stringent test RFRA demand[ed] of state laws . . . lack[ed] proportionality or congruence between the means adopted and legitimate end to be achieved." *Id.* at 532-34 ("Simply put, RFRA [was] not designed to identify and counteract state laws likely to be unconstitutional."); *see* 42 U.S.C.A. §§ 2000bb-2(1), 2000bb-3(a).

The Court accordingly declared RFRA unconstitutional as an impermissible expansion of congressional power under Section 5 of the Fourteenth Amendment. *See City of Boerne*, 521 U.S. at 536.

[64] *Id.* at 520.

[65] *Id.* at 519 (alteration in original) (quoting South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966)); *see also id.* at 518, 519 (emphasizing the remedial nature of Congress's enforcement power under Section 5).

[66] Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank, 527 U.S. 627, 639 (1999) (explaining *City of Boerne*).

[67] *See id.* at 637; *infra* note 84.

[68] Clark v. California, 123 F.3d 1267 (9th Cir. 1997). In *Clark v. California*, the plaintiffs, individuals with developmental disabilities who were incarcerated in correctional facilities operated by the State of California, alleged discrimination based on their disabilities. *Id.* at 1269. The plaintiffs sought injunctive relief under the ADA, the Rehabilitation Act, and 42

decided that Title II and Section 504 validly abrogated state sovereign immunity.[69] The court first determined that "Congress . . . unequivocally expressed its intent to abrogate the State's [sovereign] immunity under both the ADA and the Rehabilitation Act,"[70] thus satisfying the first requirement of abrogation analysis.[71] Turning its attention to the question of whether Congress properly enacted Title II and Section 504,[72] the court found "[b]oth the ADA and the Rehabilitation Act . . . within the scope of appropriate legislation under the Equal Protection Clause as defined by the Supreme Court."[73] The court also concluded that "neither act provides remedies so sweeping that they exceed the harms that they are designed to redress."[74] Therefore, the court held that Congress had properly abrogated state sovereign immunity.[75]

U.S.C. § 1983. *Id.* The defendants, the State of California and a number of state officials in their official capacities, moved to dismiss the complaint, claiming immunity under the Eleventh Amendment. *Id.*

[69] *Id.* at 1269.

[70] *Id.*

[71] *See supra* note 54 and accompanying text.

[72] *Id.* at 1270. The court began by noting that the parties agreed

> that a statute is "appropriate legislation" to enforce the Equal Protection Clause if the statute "may be regarded as an enactment to enforce the Equal Protection Clause, [if] it is 'plainly adapted to that end' and [if] it is not prohibited by but is consistent with 'the letter and spirit of the constitution.'"

Id. (alterations in original) (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)). *But see* City of Boerne v. Flores, 521 U.S. 507 (1997); *supra* Part II.C.1. The court then declared that Congress held a "very broad" power to pass legislation under the Fourteenth Amendment. *Id.* "'Correctly viewed, [Section] 5 is a positive grant of legislative power authorizing Congress to *exercise its discretion* in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.'" *Id.* (emphasis added) (quoting Katzenbach v. Morgan, 384 U.S. at 651). The court continued, "[t]he Fourteenth Amendment gives Congress the same broad powers as does the Necessary and Proper Clause." *Id.* (citing Katzenbach v. Morgan, 384 U.S. at 650). Essentially, the Ninth Circuit deferred to Congress, allowing it to determine the limits of the power granted under Section 5 of the Fourteenth Amendment, and applied rational basis scrutiny to the ADA. *Id.* at 1271 ("In our holding with respect to the ADA, . . . we follow Congress's own determination of its powers.").

[73] Clark v. California, 123 F.3d at 1270. The court first stated that the Equal Protection Clause protected the disabled against discrimination, because "the purpose of both the ADA and [S]ection 504 . . . is to prohibit discrimination against the disabled." *Id.* (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985); 42 U.S.C. § 12101(b) (ADA); and 29 U.S.C. § 701(b)(1)(F) (Rehabilitation Act)). The court declared that "[i]n both [A]cts, Congress explicitly found that persons with disabilities have suffered discrimination." *Id.* (citing 42 U.S.C. § 12101(a) (ADA); and 29 U.S.C § 701(a)(5) (Rehabilitation Act)).

[74] *Id.*

[75] The court rejected the defendant's argument that "Congress's power must be limited to the protection of those classes found by the Court to deserve 'special protection' under the Constitution." *Id.* at 1270-71 ("The levels of scrutiny in equal protection cases are 'standards

The court continued with a further analysis of abrogation under Section 504, declaring that "the Rehabilitation Act include[d] an express waiver of Eleventh Amendment immunity which California accepted when it accepted Rehabilitation Act funds."[76] The court found that "the Rehabilitation Act manifest[ed] a clear intent to condition a state's participation on its consent to waive its Eleventh Amendment immunity,"[77] based on its construction of 42 U.S.C. § 2000d-7,[78] part of Congress's 1986 amendment to the Rehabilitation Act.[79] The court also declared that "[t]he Supreme Court has characterized [Section 504] as 'an unambiguous waiver of the State's Eleventh Amendment immunity.'"[80] The court therefore concluded that "[b]ecause California accepts federal funds under the Rehabilitation Act, California has waived any immunity under the Eleventh Amendment."[81]

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for determining the validity of state legislation or other official action that is challenged as denying equal protection.'" (quoting *City of Cleburne*, 473 U.S. at 439-40)). It found no justification for "[holding] that these levels of scrutiny define the limits of Congress's power to enforce the Fourteenth Amendment." *Id.* at 1271. *But see* Bd. of Trs. v. Garrett, 531 U.S. 356, 365 (2001) (*see infra* notes 126-28 and accompanying text); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83, 88 (2000) (*see infra* notes 102-3 and accompanying text).

[76] Clark v. California, 123 F.3d at 1271. The court declared, "[e]ven if Congress has not abrogated a state's immunity under the Eleventh Amendment, a state may waive it." *Id.* (citing Seminole Tribe v. Florida, 517 U.S. 44, 65 (1996)). The court stated that this waiver can occur "[when] a state . . . accept[s] federal funds where the funding statute 'manifests a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity.'" *Id.* (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 247 (1985)); *see also* Parden v. Terminal Ry., 377 U.S. 184 (1964), *overruled by* Welch v. Tex. Dep't of Highways & Pub. Transp., 483 U.S. 468 (1987); and Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999). *But see Coll. Savs. Bank*, 527 U.S. 666 (holding the doctrine of constructive or implied waiver inapplicable in the context of sovereign immunity); *see also infra* notes 223-27 and accompanying text.

[77] Clark v. California, 123 F.3d at 1271.

[78] *Id.* ("'A State shall not be immune under the Eleventh Amendment . . . from any suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 . . . .'" (quoting 42 U.S.C. § 2000d-7)).

[79] *See* Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, § 1003, 100 Stat. 1807, 1845 (1986).

[80] Clark v. California, 123 F.3d at 1271 (quoting Lane v. Pena, 518 U.S. 187, 200 (1996)).

[81] *Id.* The court construed Section 504 as establishing an implied or constructive waiver of state sovereign immunity. *See, e.g.*, Pugliese v. Ariz. Dep't of Health & Human Servs., 147 F. Supp. 2d 985, 989 (D. Ariz. 2001). However, in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, the Court held that the doctrine of constructive or implied waiver was inapplicable in the context of sovereign immunity, tacitly overruling the *Clark v. California* court. *See infra* notes 223-27 and accompanying text; *cf. Pugliese*, 147 F. Supp. 2d at 989-91.

3. *Dare v. California*

Two years after *Clark v. California*, the Ninth Circuit again examined the abrogation of state sovereign immunity under Title II.[82] *Dare* likewise determined that "Congress validly abrogated state sovereign immunity pursuant to its Fourteenth Amendment powers."[83] However, concerned about the Supreme Court's decision in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[84] the *Dare* court provided further

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[82] Dare v. California, 191 F.3d 1167 (9th Cir. 1999). *Dare* involved a challenge to the State of California's six dollar biennial fee for disability parking placards. *Id.* at 1169-70. The plaintiffs claimed the placard fee violated Title II of the ADA. *Id.* at 1170. The district court, finding the fee "an impermissible surcharge," granted partial summary judgment against the defendants, the State of California and the Department of Motor Vehicles, and "ordered a permanent injunction against California's imposition of the fee." *Id.*

[83] *Id.* at 1173 (citing Clark v. California, 123 F.3d at 1270-71). The court first determined that the "measure for which California levies the [placard] fee, [to wit, providing disabled parking placards, was] 'required to provide that individual or group nondiscriminatory treatment' as mandated by the ADA." *Id.* at 1171 (quoting 28 C.F.R. § 35.130(f)). The court found the placards necessary for disabled people to gain access to the handicapped parking spaces provided by California under the requirements of the ADA, because "these spaces allow[ed] disabled people public access to public buildings in which California provides services, programs and activities." *Id.* at 1172.

Furthermore, since disabled license plates alone would be insufficient to give individuals access to public places, the court found the placards specifically necessary. *Id.* at 1173. Because "many public places do not have parking meters and people who lack disabilities face no fees in parking at those places," the court determined that the placard fee "[was] a surcharge for a required measure in violation of the ADA." *Id.* at 1173.

Declaring that "[c]harging disabled people for parking that would otherwise be free constitutes discrimination in the provision of access to public buildings, a measure required under the ADA," the court upheld the decision of the district court. *Id.* at 1173. The court also relied on its determination that "[t]he majority of Circuits addressing this issue have followed this Circuit's approach." *Id.*

[84] 527 U.S. 627 (1999). The Court held that Congress did not validly abrogate state sovereign immunity when adopting the Patent and Plant Variety Protection Remedy Clarification Act ("Patent Remedy Act"), 35 U.S.C.A. §§ 271(h), 296(a) (West, WESTLAW through 2001 Pub. L. 107-26), a federal statute that authorized private lawsuits against states for patent infringements. *Fla. Prepaid*, 527 U.S. at 630.

Because Congress "may not abrogate state sovereign immunity pursuant to its Article I powers," it may only establish abrogation of state sovereign immunity through legislation enacted under the powers granted by the Fourteenth Amendment. *Id.* at 636-37 (citing Seminole Tribe v. Florida, 517 U.S. 44, 72-73 (1996)); *see infra* note 181. However, any legislation purporting to abrogate state sovereign immunity "must nonetheless be 'appropriate' under [Section] 5 as . . . construed in *City of Boerne*." *Fla. Prepaid*, 527 U.S. at 637.

The Court determined that the legislative record of the Patent Remedy Act did not "respond to a history of 'widespread and persisting deprivation of constitutional rights' of the sort Congress has faced in enacting proper prophylactic [Section] 5 legislation," and therefore offends the principles of congruence and proportionality expressed in *City of Boerne*. *Fla.*

discussion on abrogation under Title II.[85] The court focused on the validity of Congress's exercise of its powers under Section 5 by purporting to apply the *City of Boerne* congruence and proportionality analysis as clarified by *Florida Prepaid*.[86]

The court first found the "ADA in general and Title II in particular," congruent with the congressional power to enforce the Equal Protection Clause, because Congress made "specific findings of arbitrary and invidious discrimination against the disabled."[87] However, the court did not actually examine the legislative record; rather, it merely accepted Congress's own declaration of its findings as stated in the text of the ADA.[88]

Turning to proportionality,[89] the court determined that "Congress's findings were sufficiently extensive and related to the ADA's provisions that the provisions can 'be understood as responsive to or designed to prevent,

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Prepaid, 527 U.S. at 645 (quoting City of Boerne v. Flores, 521 U.S. 507, 526 (1997)). Thus, in holding Congress's attempt at abrogating state sovereign immunity improper, the Court provided a roadmap that outlined the application of congruence and proportionality analysis when determining the validity of congressional Section 5 legislation attempting to abrogate state sovereign immunity.

[85] *Dare*, 191 F.3d at 1174. The court also noted the circuit split on this issue. *Id.*

[86] *Id.* (quoting *Fla. Prepaid*, 527 U.S. at 639, 652; and *City of Boerne*, 521 U.S. at 525, 532). The court explained that "'Congress has unequivocally expressed its intent to abrogate the State's immunity under . . . the ADA,'" and thus satisfied the intent requirement. *Id.* (quoting Clark v. California, 123 F.3d at 1269).

[87] *Dare*, 191 F.3d at 1174 (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439, 446 (1985); and 42 U.S.C. § 12101(a)(7)). The court determined that "[o]n the basis of these findings, Congress concluded . . . the ADA was a necessary legislative response to a long history of arbitrary and irrational discrimination against people with disabilities," *id.* (citing 42 U.S.C. § 12101(b)), because "the Equal Protection Clause prohibits irrational and invidious discrimination against disabled people," even though "[they] do not constitute a suspect class." *Id.* (citing *City of Cleburne*, 473 U.S. at 439, 446).

[88] *See* Patrick W. v. LeMahieu, 165 F. Supp. 2d 1144, 1148 n.3 (D. Haw. 2001) (quoting *Dare*, 191 F.3d at 1175 n.6); *cf. Dare*, 191 F.3d at 1174, 1177.

[89] *Dare*, 191 F.3d at 1175. Stating that "[c]ongressional judgment should be given great deference" in the area of protection for people with disabilities, *id.* (citing *City of Cleburne*, 473 U.S. at 442-43), the court concluded that "[t]he ADA is thus an appropriate exercise of [Section] 5 powers if Congress enacted it in response to a widespread problem of unconstitutional discrimination that includes state programs and services and if the ADA's provisions are proportional to the scope of that discrimination." *Id.*

The court expressly disagreed with the Eighth Circuit's finding in *Alsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999), that "the ADA's legislative history must 'support the proposition that most state programs and services discriminate arbitrarily against the disabled' for abrogation of immunity to be appropriate. *Dare*, 191 F.3d at 1175 n.6 (quoting *Alsbrook*, 184 F.3d at 1009-10). The court emphasized that it was "reiterate[ing] the importance of deference to Congress in [proportionality] analysis [of Section 5 legislation]." *Id.* at 1175.

unconstitutional behavior.'"[90] The court therefore concluded that "the ADA was a congruent and proportional exercise of Congress's enforcement powers under [Section] 5 of the Fourteenth Amendment that abrogated Eleventh Amendment immunity."[91]

Clark v. California and *Dare* represent one side of a split in the courts of appeals. Some courts, like the Ninth Circuit, upheld abrogation under the ADA.[92] Other courts, like the Eighth Circuit, invalidated the ADA's abrogation of sovereign immunity.[93] Likewise, a split existed as to the validity of abrogation under the Rehabilitation Act.[94]

4. *Kimel v. Florida Board of Regents*

Kimel v. Florida Board of Regents[95] examined the abrogation of state sovereign immunity under the Age Discrimination in Employment Act ("ADEA").[96]

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[90] *Dare*, 191 F.3d at 1175 (quoting *Fla. Prepaid*, 527 U.S. at 646). Declaring that in light of the scope of Congress's findings, it would "[defer to] Congress's judgment that the ADA was targeted to remedy and prevent irrational discrimination against people with disabilities," the Ninth Circuit again expressed its willingness to defer to Congress, allowing it to determine the extent of its power. *Id.* (citing Muller v. Costello, 187 F.3d 298, 309 (2d Cir. 1999)).

[91] *Id.*

[92] *See* Garrett v. Univ. of Ala., 193 F.3d 1214 (11th Cir. 1999), *overruled by* Bd. of Trs. v. Garrett, 531 U.S. 356 (2001); Martin v. Kansas, 190 F.3d 1120 (10th Cir. 1999); Amos v. Md. Dep't of Pub. Safety & Corr. Servs., 178 F.3d 212 (4th Cir. 1999) (holding that abrogation of sovereign immunity under the ADA and Rehabilitation Act was valid), *vacated on grant of reh'g en banc*, (Dec. 28, 1999); Kimel v. Fla. Bd. of Regents, 139 F.3d 1426 (11th Cir. 1998), *aff'd on other grounds*, 528 U.S. 62 (2000); Coolbaugh v. Louisiana, 136 F.3d 430 (5th Cir. 1998); Thrope v. Ohio, 19 F. Supp. 2d 816 (S.D. Ohio 1998); *see also* Burns-Vidlak *ex rel.* Burns v. Chandler, 165 F.3d 1257 (9th Cir. 1999) (stating that Congress validly abrogated state sovereign immunity under the ADA and Rehabilitation Act).

[93] *See* DeBose v. Nebraska, 207 F.3d 1020 (8th Cir. 1999) (holding that abrogation under Title I was invalid); *Alsbrook*, 184 F.3d 999 (holding that abrogation under Title II was invalid); Brown v. N.C. Div. of Motor Vehicles, 166 F.3d 698 (4th Cir. 1999) (holding that abrogation under the ADA was invalid).

[94] *See* Kilcullen v. N.Y. Dep't of Labor, 205 F.3d 77 (2d Cir. 2000) (holding abrogation under Rehabilitation Act valid); Bradley v. Ark. Dep't of Educ., 189 F.3d 745 (8th Cir. 1999) (holding that waiver of sovereign immunity under the Rehabilitation Act was invalid), *vacated in part on grant of reh'g en banc in part, sub nom*, Jim C. v. Ark. Dep't of Educ., 197 F.3d 958 (8th Cir. 1999); *Amos*, 178 F.3d 212 (holding that abrogation of sovereign immunity under the ADA and Rehabilitation Act was valid), *vacated on grant of reh'g en banc*, (Dec. 28, 1999); *see also Burns-Vidlak*, 165 F.3d 1257 (stating that Congress validly abrogated state sovereign immunity under the ADA and Rehabilitation Act).

[95] 528 U.S. 62 (2000).

[96] *Id.* at 66. Although the *Kimel* Court did not directly address either the ADA or the Rehabilitation Act, it is particularly relevant to the discussion on congressional abrogation of state sovereign immunity.

The Court held that, although the ADEA,[97] which prohibits age discrimination by an employer,[98] "contain[ed] a clear statement of Congress'[s] intent to abrogate the States' immunity,[[99]] . . . the abrogation exceeded Congress'[s] authority under [Section] 5 of the Fourteenth Amendment."[100]

Applying the *City of Boerne* congruence and proportionality analysis, as affirmed by *Florida Prepaid*,[101] to the ADEA, the Court first determined that discrimination by the states based on age classification was only subject to rational basis review.[102] Therefore, like RFRA in *City of Boerne*[103] and the Patent Remedy Act in *Florida Prepaid*,[104] the ADEA represented an expansion of congressional Section 5 power because "[its] protection extend[ed] beyond the requirements of the Equal Protection Clause."[105]

Examining the legislative record of the ADEA,[106] the Court determined that "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitu-

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[97] 29 U.S.C.A. §§ 621-634 (West, WESTLAW through 2001 Pub. L. 107-26).

[98] *See* 29 U.S.C.A. § 623(a)(1) (stating that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age"). Although these prohibitions "originally applied only to individuals [between the ages of 40 and 65,] Congress subsequently removed the upper age limit, and the Act now covers individuals age 40 and over." *Kimel*, 528 U.S. at 67 (citations omitted). Congress similarly expanded the ADEA's scope of coverage, which originally only included private employers, to include state governments and their agencies as well as the federal government. *See id.* at 68-69.

[99] *See Kimel*, 528 U.S. at 73-74.

[100] *Id.* at 67. In 1983, the Court held the ADEA valid under the congressional power granted by the Commerce Clause, and so "concluded that it was unnecessary to determine [the Act's validity] under [Section] 5 of the Fourteenth Amendment." *Kimel*, 528 U.S. at 78 (citing EEOC v. Wyoming, 460 U.S. 226, 243 (1983)). However, in 1996 the *Seminole Tribe* Court decided that Article I could not support congressional abrogation of sovereign immunity, thus necessitating the determination of whether the ADEA could be supported by Section 5 power. *Kimel*, 528 U.S. at 78; *see supra* note 56 and accompanying text; *infra* note 241 and accompanying text.

[101] *See supra* note 84.

[102] *Kimel*, 528 U.S. at 83. Finding guidance in its earlier cases that "considered claims of unconstitutional age discrimination under the Equal Protection Clause," the Court explained, "[a]ge classifications, unlike governmental conduct based on race or gender, cannot be characterized as 'so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy.'" *Id.* (quoting City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985)).

[103] 521 U.S. at 536; *see supra* note 63.

[104] 527 U.S. at 647; *see supra* note 84.

[105] *Kimel*, 528 U.S. at 88 (concluding that "Congress, through the ADEA, has effectively elevated the standard for analyzing age discrimination to heightened scrutiny").

[106] *Id.* at 89-91. The Court thus followed the process set forth by *City of Boerne*, 521 U.S. at 530-31, and affirmed in *Florida Prepaid*, 527 U.S. at 639-47. *See Kimel*, 528 U.S. at 88.

tional violation,"[107] and therefore "Congress had no reason to believe that broad prophylactic legislation was necessary in this field."[108] Furthermore, because "[t]he ADEA ma[de] unlawful, in the employment context, all 'discriminat[ion] against any individual . . . because of such individual's age,'"[109] it "prohibit[ed] substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard."[110] The Court therefore concluded that "the ADEA [was] not 'appropriate legislation' under [Section] 5 of the Fourteenth Amendment."[111] Rather, the Act was "merely an attempt to substantively redefine the States' legal obligations with respect to age discrimination."[112] Because its provisions were neither congruent nor proportional to the purported need to protect citizens against age discrimination by the states, the Court accordingly declared the ADEA's abrogation of state sovereign immunity invalid.[113]

Despite the analogous applicability of *Kimel* to abrogation under the ADA,[114] the split in the courts of appeals remained. Although a number of courts proceeded to invalidate abrogation under the ADA by applying the congruence and proportionality analysis,[115] other courts continued to uphold the Act's abrogation of state sovereign immunity.[116]

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[107] *Kimel*, 528 U.S. at 89. The Court dismissed the "United States' argument that Congress found substantial age discrimination in the private sector," questioning whether those findings "could be extrapolated to support a finding of *unconstitutional* age discrimination in the public sector," and finding it "sufficient . . . that Congress failed to identify a widespread pattern of age discrimination by the States." *Id.* at 90-91 (citing *Fla. Prepaid*, 527 U.S. at 639-40).

[108] *Id.* at 91.

[109] *Id.* at 86 (quoting 29 U.S.C. § 623(a)(1)).

[110] *Id.*

[111] *Id.* at 82-83; *see also id.* at 86 ("Judged against the backdrop of our equal protection jurisprudence, it is clear that the ADEA is 'so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.'" (quoting *City of Boerne*, 521 U.S. at 532)).

[112] *Id.* at 88.

[113] *See id.* at 91.

[114] *See, e.g.*, Bd. of Trs. v. Garrett, 531 U.S. 356 (2001); *infra* Part II.C.5.

[115] *See* Popovich v. Cuyahoga County Ct., 227 F.3d 627 (6th Cir. 2000) (holding that abrogation under the ADA exceeded congressional authority granted by Section 5 of the Fourteenth Amendment), *vacated on grant of reh'g en banc*, (Dec 12, 2000); *accord* Lavia v. Pa. Dep't of Corr., 224 F.3d 190 (3d Cir. 2000); Walker v. Mo. Dep't of Corr., 213 F.3d 1035 (8th Cir. 2000); Stevens v. Ill. Dep't of Transp., 210 F.3d 732 (7th Cir. 2000); *see also* cases cited *supra* note 92.

[116] *See* Cisneros v. Wilson, 226 F.3d 1113 (10th Cir. 2000); *see also* cases cited *supra* note 93.

5. Board of Trustees v. Garrett

In 2001, the Supreme Court, reacting to the split in the courts of appeals, examined the validity of abrogation of state sovereign immunity under the ADA. In *Board of Trustees v. Garrett*,[117] the Court found that Congress did not validly abrogate state sovereign immunity when enacting Title I.[118]

The Court focused on Title I, even though the "Respondents' complaints . . . alleged violations of both Title I and Title II," because "*no party . . . briefed the question* whether Title II of the ADA, dealing with the 'services, programs, or activities of a public entity,' . . . is available for claims of employment discrimination *when Title I of the ADA expressly deals with that subject.*"[119] The Court further limited its analysis to the question "whether Congress acted within its constitutional authority by subjecting the States to suits in federal court for money damages under the ADA,"[120] because it acknowledged that the ADA satisfied the first requirement of abrogation analysis.[121]

Determining that "the ADA can apply to the State only to the extent that the statute is appropriate [Section] 5 legislation,"[122] the Court examined Title I

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[117] 531 U.S. 356. The Court decided the issue of "whether employees of the State of Alabama may recover money damages by reason of the State's failure to comply with the provisions of Title I of the [ADA]," in order "to resolve a split among the Courts of Appeals on the question whether an individual may sue a State for money damages in federal court under the ADA." *Id.* at 363; *see also infra* note 119 and accompanying text (detailing the *Garrett* Court's explanation for its decision to focus on Title I).

[118] *Garrett*, 531 U.S. at 360.

[119] *Id.* at 360 n.1 (emphasis added) (quoting 42 U.S.C. § 12132). The Court, noting the proposition stated in *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quotation marks omitted) (alteration in original) (citation omitted)), declared: "We are not disposed to decide the constitutional issue whether Title II, which has somewhat different remedial provisions from Title I, is appropriate legislation under [Section] 5 of the Fourteenth Amendment when the parties have not favored us with briefing on the statutory question." *Garrett*, 531 U.S. at 360 n.1.

[120] *Garrett*, 531 U.S. at 364.

[121] *Id.* at 363-64 ("A State shall not be immune under the [E]leventh [A]mendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction of a violation of this chapter." (quotation marks omitted) (third alteration in original) (quoting 42 U.S.C. § 12202)); *see also supra* Part II.B (discussing sovereign immunity).

[122] *Garrett*, 531 U.S. at 364. Congressional abrogation of the states' Eleventh Amendment immunity may not rest upon the powers enumerated in Article I of the Constitution, because "'[t]he Eleventh Amendment restricts the judicial power under Article III, and *Article I cannot be used to circumvent the constitutional limitations placed on federal jurisdiction.*'" *Id.* (emphasis added) (quoting Seminole Tribe v. Florida, 517 U.S. 44, 72-73 (1996)); *accord* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 79 (2000). However, because "'the Eleventh

under the congruence and proportionality analysis.[123] The Court thus reaffirmed the *Florida Prepaid* and *Kimel* Courts' application of *City of Boerne* to congressional legislation that attempted to abrogate state sovereign immunity.[124]

As in *Kimel*,[125] the *Garrett* Court first defined the limitations placed on the states' treatment of the disabled by Section 1 of the Fourteenth Amendment.[126] Guided by its prior decisions under the Equal Protection Clause,[127] the Court concluded that state legislation or conduct relating to the disabled "incurs only the *minimum 'rational-basis' review* applicable to general social and economic legislation."[128]

Having defined the scope of the constitutional right at issue, the Court examined the legislative record of the ADA to determine whether "Congress identified a history and pattern of unconstitutional employment discrimination

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Amendment, and the principle of state sovereignty which it embodies, are necessarily limited by the enforcement provisions of . . . the Fourteenth Amendment,' . . . Congress may subject nonconsenting States to suit in federal court when it does so pursuant to a valid exercise of its [Section] 5 power." *Garrett*, 531 U.S. at 364 (citation omitted) (quoting Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976)).

[123] *Garrett*, 531 U.S. at 364-74.

[124] "[Section] 5 legislation reaching beyond the scope of [Section] 1's actual guarantees must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Garrett*, 531 U.S. at 365 (quoting *City of Boerne*, 521 U.S. at 520). Furthermore, although "Congress is not limited to mere legislative repetition of [the Supreme] Court's constitutional jurisprudence," it is a "long-settled principle that it is the responsibility of [the Supreme] Court, *not* Congress, to define the substance of constitutional guarantees." *Id.* (emphasis added) (citing *City of Boerne*, 521 U.S. at 519-24). Thus, the Court declared that the Judiciary should *not* defer to Congress when determining the limits of congressional power. *See infra* notes 191-93 and accompanying text.

[125] *See supra* note 102 and accompanying text.

[126] *Garrett*, 531 U.S. at 365-68. The Court explained that the "first step in applying these now familiar principles [of congruence and proportionality] is to identify with some precision the scope of the constitutional right at issue." *Id.* at 365.

[127] The Court sought guidance from its earlier decision in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985), which involved an equal protection challenge to a city ordinance that required a special use permit of the operation of a group home for the mentally retarded. *Garrett*, 531 U.S. at 366. The *City of Cleburne* Court held that mental retardation did not qualify as a "quasi-suspect classification." 473 U.S. at 435, *cited in Garrett*, 531 U.S. at 366. The *City of Cleburne* Court rationalized this decision by stating:

> If the large and amorphous class of the mentally retarded were deemed quasi-suspect, . . . it would be difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large.

Id. at 445-46, *quoted in Garrett*, 531 U.S. at 366.

[128] *Garrett*, 531 U.S. at 366 (emphasis added) (citing *City of Cleburne*, 473 U.S. at 446).

by the States against the disabled."[129] Contrasting the ADA with the Voting Rights Act of 1965,[130] which survived a Constitutional challenge in *South Carolina v. Katzenbach*,[131] the *Garrett* Court found the evidence considered by Congress in enacting the ADA stark in comparison to that considered when Congress enacted the Voting Rights Act.[132] The Court concluded that the record of the ADA failed to show that Congress actually made legislative findings of a pattern of irrational discrimination against the disabled by the states.[133]

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[129] *Id.* at 368. The Court explained, "[j]ust as [Section] 1 of the Fourteenth Amendment applies only to actions committed 'under color of state law,' Congress'[s] [Section] 5 authority is appropriately exercised only in response to state transgressions." *Id.* (citing Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank, 527 U.S. 627, 640 (1999); and Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 89 (2000)).

[130] 42 U.S.C.A. §§ 1973 to 1973bb-1 (West, WESTLAW through 2001 Pub. L. 107-26).

[131] 383 U.S. 301 (1966). In *South Carolina v. Katzenbach*, the Court considered whether the Voting Rights Act was "appropriate" legislation to enforce the Fifteenth Amendment's protection against racial discrimination in voting. *See id.* at 308. Noting that "Congress explored . . . the problem of racial discrimination in voting" with great care, *id.* at 308, the Court concluded that the Act was a valid exercise of Congress's enforcement power under Section 2 of the Fifteenth Amendment. *Id.* at 337.

Although Congress enacted the Voting Rights Act under its Fifteenth Amendment enforcement powers, the *Garrett* Court found *South Carolina v. Katzenbach* instructive because "Section 2 of the Fifteenth Amendment is virtually identical to [Section] 5 of the Fourteenth Amendment." *Garrett*, 531 U.S. at 373 n.8. *Compare* U.S. CONST. amend. XIV, § 5 *with* U.S. CONST. amend. XV, § 2.

[132] *See Garrett*, 531 U.S. at 373-74.

[133] *See id.* at 368. The Court stated:

> Congress made a general finding in the ADA that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." [While t]he record assembled by Congress includes many instances to support such a finding, . . . the *great majority of these incidents do not deal with the activities of States*.

Id. at 369 (emphasis added) (quoting 42 U.S.C. § 12101(a)(2)). Although "the record [did] show that some States, adopting the tenets of the eugenics movement of the early part of this century, required extreme measures such as sterilization of persons suffering from hereditary mental disease," the Court dismissed these findings by noting that "there is no indication that any State had persisted in requiring such harsh measures as of 1990 when the ADA was adopted." *Id.* at 369 n.6.

Furthermore, even though Respondents cited a handful of examples involving states in their brief, which "undoubtedly evidence[d] an unwillingness on the part of state officials to make the sort of accommodations for the disabled required by the ADA," the Court questioned whether these incidents were irrational under *City of Cleburne*, "particularly when the incident is described out of context." *Id.* at 370. The Court reasoned that even allowing, arguendo, that these incidents "showed unconstitutional action on the part of the State, these incidents taken together fall far short of even suggesting the pattern of unconstitutional discrimination upon which [Section] 5 legislation must be based." *Id.* (citing Kimel v. Fla. Bd. of Regents, 528 U.S.

Title I failed the congruence and proportionality analysis, however, not only because of the absence of specific legislative findings, but also because the legislation was grossly excessive.[134] The Court criticized the ADA's prohibition on "'utilizing standards, criteria, or methods of administration' that disparately impact the disabled, without regard to whether such conduct has a rational basis."[135] Furthermore, the Court also pointed out that "the ADA require[d] employers to 'mak[e] existing facilities used by employees readily accessible to and usable by individuals with disabilities,'"[136] even though "it would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities."[137]

Although the ADA provided an exception "from the 'reasonable accommodatio[n]' requirement where the employer 'can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity,'" the Court declared that "even with this

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62, 89-91 (2000); and City of Boerne v. Flores, 521 U.S. 507, 530-31 (1997)).

As the Court explained,

> Congress, in enacting the ADA, found that "some 43,000,000 Americans have one or more physical or mental disabilities." In 1990, the States alone employed more than 4.5 million people. It is telling, we think, that given these large numbers, Congress assembled only such minimal evidence of unconstitutional state discrimination in employment against the disabled.

Id. (citations omitted) (quoting 42 U.S.C. § 12101(a)(1)) (citing BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: THE NATIONAL DATA BOOK, 1999 at 338 (119th ed. 1999) (Table 534)).

Thus, in enacting the ADA, Congress failed to make specific findings of a pattern of discrimination by the states, as required by *City of Boerne*. *See Garrett*, 531 U.S. at 374; *accord Kimel*, 528 U.S. at 91; Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank, 527 U.S. 627, 645-46 (1999). *See generally City of Boerne*, 521 U.S. at 530-32.

[134] *See Garrett*, 531 U.S. at 370 ("Even were it possible to squeeze out of these examples a pattern of unconstitutional discrimination by the States, the rights and remedies created by the ADA against the States would raise the same sort of concerns as to congruence and proportionality as were found in *City of Boerne*."). The Court further stated that the "[c]ongressional enactment of the ADA represents *its judgment* that there should be a 'comprehensive national mandate for the elimination of discrimination against individuals with disabilities.'" *Id.* (emphasis added) (quoting 42 U.S.C. 12101(b)(1)). Thus the Court further affirmed the principle set out by *City of Boerne*. *See infra* note 192 and accompanying text.

[135] *Garrett*, 531 U.S. at 372 (quoting 42 U.S.C. § 12112(b)(3)(A)). While "disparate impact may be relevant evidence of racial discrimination, such evidence alone is insufficient even where the Fourteenth Amendment subjects state action to strict scrutiny." *Id.* at 372-73 (citing Washington v. Davis, 426 U.S. 229, 239 (1976)). The Court further explained, "'our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.'" *Id.* at 373 (quoting *Washington*, 426 U.S. at 239).

[136] *Id.* at 372 (quoting 42 U.S.C. §§ 12112(b)(5)(B), 12111(9)).

[137] *Id.*

exception, the accommodation duty far exceed[ed] what is constitutionally required [because] it makes unlawful a range of alternate responses that would be reasonable but would fall short of imposing an 'undue burden" upon the employer.'"[138] Moreover, "[t]he Act also ma[de] it the employer's duty to prove that it would suffer such a burden, instead of requiring (as the Constitution does) that the complaining party negate reasonable bases for the employer's decision."[139]

The Court concluded that although "Congress is the final authority as to desirable public policy," Congress did not meet the requirements of congruence and proportionality that would allow it to "authorize private individuals to recover money damages against the States[, because] Section 5 does not so broadly enlarge the congressional authority."[140] Thereby applying the congruence and proportionality analysis set forth in *City of Boerne*,[141] affirmed and refined in *Florida Prepaid*[142] and reaffirmed by *Kimel*,[143] the Court held that Congress did not validly abrogate state sovereign immunity when enacting Title I.[144]

Garrett and *Kimel* thus set the stage for the federal courts to analyze Title II and Section 504 properly under the congruence and proportionality standards by examining the legislative record of the Acts.[145] However, unlike the court in *Pugliese v. Arizona Department of Health & Human Services*,[146] the *Patricia N. v. LeMahieu*[147] court deferred entirely to the Ninth Circuit and accepted the holdings of *Clark v. California* and *Dare* when holding that Congress validly abrogated state sovereign immunity under Title II and Section 504.

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[138] *Id.* (alteration in original) (quoting 42 U.S.C. § 12112(b)(5)(A)).

[139] *Id.* (quoting 42 U.S.C. § 12112(b)(5)(A)).

[140] *Id.* at 374 (footnote omitted). "There must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation." *Id.*

[141] 521 U.S. 507 (1997); *see supra* Part II.C.1.

[142] 527 U.S. 627 (1999); *see supra* note 84.

[143] 528 U.S. 62 (2000); *see supra* Part II.C.4.

[144] *See Garrett*, 531 U.S. at 374.

[145] *See, e.g.*, Pugliese v. Ariz. Dep't of Health & Human Servs., 147 F. Supp. 2d 985 (D. Ariz. 2001) (holding that the abrogation of sovereign immunity under Section 504 was invalid).

[146] *Id.*

[147] 141 F. Supp. 2d 1243 (D. Haw. 2001).

III. PATRICIA N. v. LEMAHIEU

A. Background

Plaintiff Amber N., diagnosed with autism,[148] is entitled to a FAPE under IDEA.[149] Amber's parents contacted Autism Partnership[150] to help create a home treatment program, part of her IEP,[151] because they were concerned that Amber was not receiving all the care and services to which she was entitled.[152] Her parents, alleging "severe financial and emotional hardship . . . suffered as a result of Defendants' . . . failure to comply with" the requirements of the IEP,[153] requested an administrative hearing.[154] The administrative decision, rendered in favor of Plaintiffs, ordered reimbursement to Amber's parents for the direct out-of-pocket expenses provided in furtherance of her home program.[155] Defendants did not appeal the administrative ruling.[156]

Plaintiffs then filed a complaint in federal court, seeking "compensation for the full range of damages [suffered] . . . resulting from the wrongs committed by the [Hawai'i] DOE."[157] Defendants filed a "Motion to Dismiss or in the Alternative for Summary Judgment"[158] on the ground that "the Eleventh Amendment bar[red] . . . claims against the state which are based on section

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[148] For a general discussion on autism, see, for example, *Amanda J. ex rel. Annette J. v. Clark County School District*, 267 F.3d 877, 882-83 (9th Cir. 2001).

[149] *Patricia N.*, 141 F. Supp. 2d at 1246.

[150] Autism Partnership was formed in 1994 to "meet the tremendous need for comprehensive services to families with autistic children." *Autism Partnership Early Intervention Clinic Intensive Behavioral Treatment, at* http://www.autismpartnership.com/index.htm (last visited Oct. 23, 2001). The company offers a "comprehensive program that offers a variety of treatment options." *Id.*

[151] *Patricia N.*, 141 F. Supp. 2d at 1246. Amber's IEP, required by IDEA as part of a FAPE, *see supra* Part II.A.3, consisted of a part day at school, followed by intensive home treatment. *Patricia N.*, 141 F. Supp. 2d at 1246.

[152] *Patricia N.*, 141 F. Supp. 2d at 1246.

[153] *Id.* at 1246. Amber's father

> took family leave for two months from his job, withdrew his deferred compensation to help pay for Amber's Program and eventually was forced to take several months sick leave because of concerns about his heart and the stress this situation was causing. Amber's mother quit her job and spent her days and nights coordinating and training trainers and keeping in communication with . . . Autism Partnership.

Id. at 1246 n.1 (citations omitted).

[154] *Id.* at 1246. For a general discussion on IDEA proceedings, see, for example, *Hawai'i Department of Education v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1194-95 (D. Haw. 2001).

[155] *See Patricia N.*, 141 F. Supp. 2d at 1247.

[156] *Id.*

[157] *Id.* (quotation marks omitted) (citation omitted). These included lost wages and damages for emotional distress. *Id.*

[158] *Id.*

504 of the Rehabilitation Act."[159] Plaintiffs subsequently filed a "Motion for Partial Summary Judgment."[160] After a hearing, the court granted in part and denied in part Defendants' Motion, and also granted in part and denied in part Plaintiffs' Motion.[161]

B. The Court's Analysis

The court rejected Defendant's argument that the State of Hawai'i retained sovereign immunity.[162] Noting that "Congress may abrogate state sovereign immunity only if: (1) it states unequivocally that it intends to do so, and (2) the waiver constitutes a valid exercise of its authority under [Section] 5 of the Fourteenth Amendment,"[163] the court reasoned that Congress "has such authority under [Section] 5 where it is necessary to protect the rights guaranteed under [Section] 1 of the Fourteenth Amendment."[164]

Relying heavily on *Clark v. California*[165] and *Dare v. California*,[166] the court held that the abrogation of sovereign immunity under Title II and Section 504 was a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment.[167] The court also made note of the *Clark v.*

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[159] *Id.* at 1248. Defendants also sought dismissal on several other grounds:

> (2) collateral estoppel applie[d] given that Plaintiffs and Defendants [were] also parties to the Felix consent decree, (3) the statute of limitations bar[red] all claims before April 4, 1998, (4) Plaintiffs . . . failed to state a claim under 42 U.S.C. § 1983, (5) punitive damages [were not appropriate] in this case, and (6) Plaintiffs . . . failed to allege sufficient facts to establish a violation of the ADA or Section 504 of the Rehabilitative Act.

Id.

[160] *Id.* at 1247. Plaintiffs sought summary judgment on two issues: "(1) that the hearing decision [was] res judicata between the parties, and (2) that they [were] entitled to partial summary judgment as to liability because Amber has been excluded from FAPE because of her disability and Defendants acted with 'deliberate indifference.'" *Id.* at 1255.

[161] Specifically, the court granted dismissal of the 42 U.S.C. § 1983 claims, but denied Defendants' Motion on all other grounds. *Id.* at 1246. Although the court found that Defendants were precluded from relitigating certain narrow issues, it held that "Plaintiffs [were] not entitled to judgment as a matter of law on the issue of liability." *Id.*

This note focuses on the sovereign immunity aspects of *Patricia N.* Although the other issues are fascinating and controversial in their own right, they lie beyond the scope of this note.

[162] *Id.* at 1248.

[163] *Id.* (citing Seminole Tribe v. Florida, 517 U.S. 44 (1996)); *see supra* Part II.B (discussing state sovereign immunity).

[164] *Patricia N.*, 141 F. Supp. 2d at 1248 (citing Bd. of Trs. v. Garrett, 531 U.S. 356, 365 (2001)).

[165] 123 F.3d 1267 (9th Cir. 1997); *see supra* Part II.C.2.

[166] 191 F.3d 1167 (9th Cir. 1999); *see supra* Part II C.3.

[167] *Patricia N.*, 141 F. Supp. 2d at 1249, 1250 (citing Clark v. California, 123 F.3d at 1270); and *Dare*, 191 F.3d at 1175 (9th Cir. 1999)). The court stated that Congress clearly intended

California court's additional holding, that "even in the absence of abrogation of state sovereign immunity under [Section] 5 by Congress, states that have accepted federal funds under the statute have waived sovereign immunity and therefore may be subject to suit on that basis."[168]

In holding that Title II and Section 504 abrogated state sovereign immunity, the court dismissed two Supreme Court cases decided more recently than *Clark v. California* and *Dare*.[169] Because neither *Garrett* nor *Kimel* directly addressed either Title II or Section 504, the court declared both opinions inapposite to the determination of the validity of abrogation under either statute.[170] The court accordingly denied Defendant's Motion to Dismiss based on Eleventh Amendment immunity, stating that it "remains bound by the *Clark v. California* and *Dare* precedent until the Ninth Circuit or Supreme Court rules otherwise."[171]

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to abrogate sovereign immunity, under Title II of the ADA and Section 504, and thus satisfied the intent requirement. *Id.* at 1248 (citing 42 U.S.C. § 2000d-7(a)(1)).

[168] *Id.* (citing Clark v. California, 123 F.3d at 1271; and Jim C. v. United States, 235 F.3d 1079, 1080 (8th Cir. 1999) (holding that "[S]ection 504 is a valid exercise of Congress'[s] spending power, and that [the state] waived its immunity with respect to Section 504 suits by accepting federal funds")). However, Spending Clause analysis of Section 504 does not change this waiver from constructive to express; the holding of *College Savings Bank* still applies. *See, e.g.*, Pugliese v. Ariz. Dep't of Health & Human Servs., 147 F. Supp. 2d 985, 990-91 (D. Ariz. 2001); *infra* notes 223-27 and accompanying text. Furthermore, Congress may not base abrogation of sovereign immunity upon its Article I powers. *See, e.g.*, *Garrett*, 531 U.S. at 364 (citing Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 79 (2000)); *see also infra* notes 241-47 and accompanying text. Therefore Section 504 cannot constitute a waiver of state sovereign immunity. *See infra* notes 241-47 and accompanying text; *see also infra* notes 224-27 and accompanying text.

[169] *Patricia N.*, 141 F. Supp. 2d at 1249 (citing *Garrett*, 531 U.S. 356; and *Kimel*, 528 U.S. 62).

[170] *See Patricia N.*, 141 F. Supp. 2d at 1249; *accord* Patrick W. v. LeMahieu, 165 F. Supp. 2d 1144, 1148 (D. Haw. 2001); *see also* Triplett, *supra* note 3 (quoting the Justice Department's statement that "[it] will continue to litigate cases under Title II . . . because *Garrett* was limited to employment questions" (quotation marks omitted)). *But see Pugliese*, 147 F. Supp. 2d at 989 n.6 ("[A]s the decision in *Garrett* expressly holds that Congress'[s] evidence of discrimination was insufficient, the [*Clark v. California*] [c]ourt's finding that Congress properly abrogated the State's [sovereign] immunity is no longer binding.").

[171] *Patricia N.*, 141 F. Supp. 2d at 1250. Although the court noted that "while *Garrett* and its predecessors may cast doubts upon the long-term viability of the holdings in [*Clark v. California*] and *Dare*," it nevertheless concluded that "[*Garrett*] has not specifically overruled these cases." *Id.* at. 1249; *accord Patrick W.*, 165 F. Supp. 2d at 1148 n.3. *But see Pugliese* 147 F. Supp. 2d at 989 n.6; *supra* note 170. The court also noted a split between the Courts of Appeals as to the effectiveness of abrogation under Title II and Section 504. *Patricia N.*, 141 F. Supp. 2d at 1249.

IV. ANALYSIS

The keystone of the *Patricia N. v. LeMahieu*[172] decision was the court's conclusion that neither *Board of Trustees v. Garrett*[173] nor *Kimel v. Florida Board of Regents*[174] was determinative of the validity of the abrogation of sovereign immunity under Title II and Section 504.[175] However, the Supreme Court's holding in *Garrett*, the result of congruence and proportionality analysis applied and reaffirmed in *Kimel*, overrules, *sub silentio*, *Clark v. California*[176] and *Dare v. California*.[177] Therefore, the *Patricia N.* court improperly relied on *Clark v. California* and *Dare* when denying Defendant's Motion to Dismiss on sovereign immunity grounds.

A. *Title II and Section 504 Are Not Appropriate Remedial Legislation*

In order to properly abrogate state sovereign immunity, both Title II and Section 504 must not only be either remedial or preventative in nature, but also enacted pursuant to Section 5 of the Fourteenth Amendment,[178] because Article I cannot support abrogation.[179] Such legislation must evidence a "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end,"[180] because "Congress'[s] power under [Section] 5 . . . extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment."[181]

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[172] 141 F. Supp. 2d 1243 (D. Haw. 2001).

[173] 531 U.S. 356 (2001); *see supra* Part II.C.5.

[174] 528 U.S. 62 (2000); *see supra* Part II.C.4.

[175] *See supra* notes 169-170 and accompanying text.

[176] 123 F.3d 1267 (9th Cir. 1997); *see supra* Part II.C.2.

[177] 191 F.3d 1167 (9th Cir. 1999); *see supra* Part II.C.3.

[178] *See Garrett*, 531 U.S. at 364-65; *Kimel*, 528 U.S. at 80-81; Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 672 (1999).

[179] *Garrett*, 531 U.S. at 364 (citing *Kimel*, 528 U.S. at 79); Seminole Tribe v. Florida, 517 U.S. 44, 72-73 (1996); *Coll. Savs. Bank*, 527 U.S. at 672; *see supra* note 56; *infra* note 241 and accompanying text.

[180] City of Boerne v. Flores, 521 U.S. 507, 520 (1997). The Court explained, "[t]he appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Id.* at 530 (citations omitted) (citing South Carolina v. Katzenbach, 383 U.S. 301, 308, 334 (1966)). Furthermore, "[r]emedial legislation under [Section] 5 'should be adapted to the mischief and wrong which the [Fourteenth] [A]mendment was intended to provide against.'" *Id.* at 532 (alterations in original) (quoting The Civil Rights Cases, 109 U.S. 3, 13 (1883)).

[181] *City of Boerne*, 521 U.S. at 519 (alteration in original). Moreover, congruence and proportionality analysis must be applied when determining whether a remedial or preventative federal statute validly abrogates state sovereign immunity. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank, 527 U.S. 627, 637 (1999) (holding that "legislation

As stated in *Garrett*, the disabled receive only rational basis protection under the Equal Protection Clause.[182] Title II and Section 504 both provide greater protection to the disabled.[183] Accordingly, each Act constitutes an expansion of congressional power under Section 5.[184] Therefore, in order for either Title II or Section 504 to be considered proper Section 5 legislation, the protection provided by each Act must exhibit congruence and proportionality to the actual findings of state discrimination considered by Congress.[185]

A proper application of the congruence and proportionality standard to Title II and Section 504 reveals the flawed analysis conducted by the Ninth Circuit in *Clark v. California* and *Dare*. Although Title II and Section 504 both satisfy the first requirement of abrogation—in each Act, Congress clearly expressed its intent to abrogate state sovereign immunity[186]—Title II and Section 504 both fail the second, because neither Act is both remedial in nature and congruent and proportional to the congressional findings of a pattern of state discrimination against the disabled.[187]

In *Clark v. California*, the Ninth Circuit deferred to Congress and allowed it to decide the limits of power granted under Section 5 of the Fourteenth Amendment.[188] Likewise, the *Dare* court "relied on Congress'[s] [own] findings of a 'widespread problem of unconstitutional discrimination that includes state programs,'"[189] rather than closely scrutinizing the legislative

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[purporting to abrogate sovereign immunity] must nonetheless be 'appropriate' under [Section] 5 as that term was construed in *City of Boerne*"). The Court explained that

> Congress justified the Patent Remedy Act under three sources of constitutional authority: the Patent Clause; the Interstate Commerce Clause; and [Section] 5 of the Fourteenth Amendment.... [However,] *Seminole Tribe* makes clear that Congress may not abrogate state sovereign immunity pursuant to its Article I powers; hence the Patent Remedy Act cannot be sustained under either the Commerce Clause or the Patent Clause.

Id. at 635-36 (citations omitted) (footnote omitted) (citing U.S. CONST. art. I, § 8, cls. 3, 8; S. REP. NO. 102-280 (1992); H.R. REP. NO. 101-960, pt. 1 at 39-40 n.4 (1990); and *Seminole Tribe*, 517 U.S. at 72-73).

[182] *Garrett*, 531 U.S. at 366.

[183] *See* Thompson v. Colorado, 258 F.3d 1241, 1255 (10th Cir. 2001); Pugliese v. Ariz. Dep't of Health & Human Servs., 147 F. Supp. 2d 985, 989 (D. Ariz. 2001); *cf. Garrett*, 531 U.S. at 372.

[184] *See Garrett*, 531 U.S. at 374; *City of Boerne*, 521 U.S. at 536; Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82-83 (2000); *Fla. Prepaid*, 527 U.S. at 647-48.

[185] *See Garrett*, 531 U.S. at 368-70; *Kimel*, 528 U.S. at 88-91; *Fla. Prepaid*, 527 U.S. at 639-41; *City of Boerne*, 521 U.S. at 530-32.

[186] *See* 29 U.S.C.A. 2000d-7(a)(1) (West, WESTLAW through 2001 Pub. L. 107-11); 42 U.S.C.A. 12002 (West, WESTLAW through 2001 Pub. L. 107-11).

[187] *See Garrett*, 531 U.S. at 363-64.

[188] *See* Clark v. California, 123 F.3d 1267, 1271 (9th Cir. 1997); *supra* note 72.

[189] Patrick W. v. LeMahieu, 165 F. Supp. 2d 1144, 1148 n.3 (D. Haw. 2001) (quoting Dare v. California, 191 F.3d 1167, 1175 n.6 (9th Cir. 1999)); *see Dare*, 191 F.3d at 1175; *see also supra* notes 89, 90.

record of either the ADA or the Rehabilitation Act "to determine if Congress made specific findings of irrational discrimination by the States."[190] It is true that "[Section] 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[191] However, as the *City of Boerne* Court declared,

> Congress does not enforce a constitutional right by changing what the right is. It has [only] been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."[192]

Both *Garrett* and *Kimel* affirmed *City of Boerne*, stating that it should be *left to the judiciary* to determine the relationship between federal and state power, *not Congress*.[193] The Ninth Circuit's deferral to Congress in *Clark v. California* and *Dare* directly contradicts this principle.

The *Garrett* Court, in determining whether Title I properly abrogated sovereign immunity, found that the extensive legislative record of the ADA failed to evidence a sufficient pattern of discrimination by the states that

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[190] *Patrick W.*, 165 F. Supp. 2d at 1148 n.3 (quoting *Dare*, 191 F.3d at 1175 n.6); *cf. Garrett*, 531 U.S. at 368-72 (stating that congressional findings of societal discrimination should *not* be used to infer that there is ongoing discrimination by the states).

[191] Katzenbach v. Morgan, 384 U.S. 641, 651 (1966), *quoted in City of Boerne*, 521 U.S. at 517.

[192] *City of Boerne*, 521 U.S. at 519; *accord* Clark v. California, 123 F.3d at 1270 ("[T]he Supreme Court retains the power to decree the substance of the Fourteenth Amendment's restriction on the states, and Congress may not enlarge those rights." (citing *City of Boerne*, 521 U.S. at 524-25)). Furthermore,

> [i]f Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and like other acts, . . . alterable when the legislature shall please to alter it." Under this approach, it is difficult to conceive of a principle that would limit congressional power. Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.

City of Boerne, 521 U.S. at 529 (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)). *See* William W. Van Alstyne, *The Failure of the Religious Freedom Restoration Act Under Section 5 of the Fourteenth Amendment*, 46 DUKE L.J. 291, 292-303 (1996).

[193] *See Garrett*, 531 U.S. 356, 365, 374 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (2000) ("The ultimate interpretation and determination of the Fourteenth Amendment's substantive meaning remains the province of the Judicial Branch."); *supra* note 124; *see also City of Boerne*, 521 U.S. at 516 ("The judicial authority to determine the constitutionality of laws, in cases and controversies, is based on the premise that the 'powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.'" (quoting *Marbury*, 5 U.S. (1 Cranch) at 176)).

would satisfy the congruence and proportionality standard.[194] The legislative record of Title II is the same as that of Title I; each comprises a part of the same Act, the ADA.[195] Therefore, Title II, like Title I, fails to establish the necessary pattern of discrimination against the disabled by the states, as determined by the *Garrett* Court.[196] Lacking such a pattern, the extensive rights and remedies set forth by Title II,[197] in excess of that required by the Equal Protection Clause,[198] can be neither congruent nor proportional to the discrimination Title II is purported to address.[199]

The legislative record of the Rehabilitation Act, while similar to that of the ADA, is "significantly smaller and contains substantially less evidence and fewer findings."[200] Furthermore, "Congress has directed that the ADA and [Rehabilitation Act] be construed consistently."[201] Courts have held that "the validity of abrogation under the twin statutes presents a single question for judicial review."[202] Therefore, like the ADA, the Rehabilitation Act cannot

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[194] *Garrett*, 531 U.S. at 374.

[195] *Cf.* Patterson v. Illinois, 35 F. Supp. 2d 1103, 1108 (D. Ill. 1999) ("Titles I and II were enacted by the same Congress on the same [day]." (citing Americans with Disabilities Act of 1990, Pub. L. 101-336, 104 Stat 327 (1990))), *quoted in* Currie v. Group Ins. Comm'n, 147 F. Supp. 2d 30, 36 (D. Mass. 2001).

[196] *E.g.*, Thompson v. Colorado, 258 F.3d 1241, 1255 (10th Cir. 2001) (citing *Garrett*, 531 U.S. at 368, and 375 (Kennedy, J., concurring)).

[197] "Under Title II, a state's program, service or activity, even if rationally related to a legitimate state interest and valid under *Cleburne*, would be struck down unless it provided 'reasonable modifications.'" Alsbrook v. City of Maumelle, 184 F.3d 999, 1009 (8th Cir. 1999) (citing 42 U.S.C. § 12131(2)). A court could uphold the state's policy "[o]nly if the state . . . demonstrate[d] that modifications would 'fundamentally alter' the nature of the service, program, or activity." *Id.* (citing 28 C.F.R. § 35.130(b)(7); *City of Boerne*, 521 U.S. at 534; and Coolbaugh v. Louisiana, 136 F.3d 430, 440-41 (5th Cir. 1998) (Smith, J., dissenting)). Furthermore, "[t]he specter of open-ended obligations for a state under Title II is further compounded by the fact that, unlike the term "reasonable accommodation" used in Title I, the term "reasonable modification" is not defined anywhere in the statute." *Id.* (contrasting 42 U.S.C. § 12111(9) with 42 U.S.C. § 12131). Moreover, "it cannot be said that Title II identifies or counteracts particular state laws or specific state actions which violate the Constitution. Title II targets *every* state law, policy or program." *Id.* (emphasis in original).

[198] *See, e.g.*, Garcia v. State Univ. of N.Y., No. 00-9223, 2001 WL 1159980, at *8 (2d Cir. Sept. 26, 2001).

[199] *E.g.*, *Thompson*, 258 F.3d at 1255; *accord Garcia*, 2001 WL 1159970, at *7; *see Garrett*, 531 U.S. at 374; Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank, 527 U.S. 627, 646-47 (1999); City of Boerne v. Flores, 521 U.S. 507, 533-34 (1996).

[200] Pugliese v. Ariz. Dep't of Health & Human Servs., 147 F. Supp. 2d 985, 989 (D. Ariz. 2001) (emphasis deleted).

[201] Armstrong v. Wilson, 124 F.3d 1019, 1023 (9th Cir. 1997) (citing 42 U.S.C. § 12134(b)).

[202] Kilcullen v. N.Y. Dep't of Labor, 205 F.3d 77, 82 (2d Cir. 2000); *see also* Bay Area Addiction Research & Treatment, Inc. v. City of Antioch, 179 F.3d 725, 730 n.8 (9th Cir. 1999) ("Our interpretation of Title II of the ADA applies equally to [Section] 504 of the Rehabilitation

evidence the required pattern of discrimination:[203] Section 504 fails the congruence and proportionality analysis.[204] Thus, neither Title II nor Section 504 can be viewed as legislation enacted pursuant to a proper exercise of Congress's Section 5 enforcement power.[205] Accordingly, Title II and Section 504 cannot support abrogation of state sovereign immunity.[206]

B. Conditional Waiver of Sovereign Immunity by Section 504 Exceeds Congress's Power Under the Spending Clause

The *Clark v. California* court improperly concluded that by accepting funds under Section 504 a state waives its sovereign immunity.[207] Such an extraction exceeds the congressional authority conferred by the Spending Clause.[208] The Constitution did not place direct limits on "'the power of Congress to authorize expenditures of public moneys for public purposes'" under its grants of legislative power.[209] However, the spending power is *not* unfettered.[210]

In *South Dakota v. Dole*,[211] the Supreme Court articulated four general restrictions on the spending power.[212] First, "the exercise of the spending power must be in pursuit of 'the general welfare.'"[213] Second, Congress must unambiguously "condition the States' receipt of federal funds," in order for "'the States to exercise their choice knowingly, cognizant of the consequences

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Act." (citing *Armstrong*, 124 F.3d at 1023)).

[203] *See, e.g., Pugliese*, 147 F. Supp. 2d at 989.

[204] *Id.*; *accord Garcia*, 2001 WL 1159970, at *10; *see Garrett*, 531 U.S. at 374; *Kimel*, 528 U.S. at 91; *Fla. Prepaid*, 527 U.S. at 647; *City of Boerne*, 521 U.S. at 533.

[205] *See Thompson*, 258 F.3d at 1255 (Title II); Alsbrook v. City of Maumelle, 184 F.3d 999, 1010 (8th Cir. 1999) (Title II); *Pugliese*, 147 F. Supp. 2d at 989 (Section 504); *cf. Garrett*, 531 U.S. at 374; *Kimel*, 528 U.S. at 91; *Fla. Prepaid*, 527 U.S. at 647; *City of Boerne*, 521 U.S. at 533.

[206] *See Alsbrook*, 184 F.3d at 1010 (Title II); *Pugliese*, 147 F. Supp. 2d at 989 (Section 504).

[207] *See supra* notes 76-81 and accompanying text.

[208] "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. CONST. art. I, § 8, cl. 1.

[209] South Dakota v. Dole, 483 U.S. 203, 207 (1987) (quoting United States v. Butler, 297 U.S. 1, 66 (1936)).

[210] *Id.* (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17, and 17 n.13 (1981)).

[211] 483 U.S. 203. *Dole* involved a challenge to a federal statute that conditioned the award of a percentage of federal highway funds on a state's adoption of a twenty-one year-old minimum drinking age. *Id.* at 205 (citing 23 U.S.C. § 158 (1982 & Supp. III)).

[212] *Id.* at 207.

[213] *Id.* (citing Helvering v. Davis, 301 U.S. 619, 640-41 (1937); and *Butler*, 297 U.S. at 65).

of their participation.'"[214] Third, the Court recognized that "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'"[215] Finally, the Court recognized "that other constitutional provisions may provide an independent bar to the conditional grant of federal funds."[216]

Section 504 cannot withstand these limitations on the spending power.[217] In regard to the first factor, the sparse legislative record of the Rehabilitation Act[218] makes it difficult to argue that Section 504's prohibition on discrimination against the disabled is in pursuit of the general welfare. As the *Garrett* Court found with the ADA, the enactment of Section 504 represents Congress's judgment that "the Federal Government [should play] a leadership role in promoting the employment of individuals with disabilities."[219] The spending power cannot provide such a constitutional loophole for Congress.[220]

Second, although Congress may have included an unequivocal expression of its intent to elicit a waiver of sovereign immunity on the receipt of federal funds under Section 504,[221] such a condition, by itself, does not invoke the waiver of state sovereign immunity. In *College Savings Bank v. Florida*

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[214] *Id.* (quoting *Pennhurst*, 451 U.S. at 17).

[215] *Id.* at 207-08 (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)) (citing Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958)).

[216] *Id.* at 208 (citing Lawrence County v. Lead-Deadwood Sch. Dist., 469 U.S. 256, 269-70 (1985); Buckley v. Valeo, 424 U.S. 1, 91 (1976) (*per curiam*); and King v. Smith, 392 U.S. 309, 333 n.34 (1968)).

[217] While the *Dole* Court readily determined that 23 U.S.C. § 158 met the first three requirements, it focused on the fourth criterion. *Id.* at 209-12. However, the Court found that 23 U.S.C. § 158 was merely a "relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose." *Id.* at 211. The Court accordingly held that Congress's enactment of 23 U.S.C. § 158 "was a valid use of the spending power." *Id.* at 212.

[218] *See supra* note 200 and accompanying text.

[219] 29 U.S.C.A. § 701(b)(2) (West, WESTLAW through 2001 Pub. L. 107-11); *see supra* note 33; *cf. supra* notes 201-2 and accompanying text.

[220] *See infra* notes 240-41 and accompanying text. As Justice O'Connor stated:

> If the spending power is to be limited only by Congress' [s] notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives "power to the Congress to tear down the barriers, to invade the states' jurisdiction and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed."

Dole, 483 U.S. at 217 (O'Connor, J., dissenting) (quoting United States v. Butler, 297 U.S. 1, 78 (1936)).

[221] *See* 42 U.S.C.A. § 2000d-7(a)(1) (West, WESTLAW through 2001 Pub. L. 107-19), *recognized in* Lane v. Pena, 518 U.S. 197, 198 (1996).

Prepaid Postsecondary Education Expense Board,[222] the Court held that waivers of sovereign immunity must be expressed unequivocally.[223]

Although "Congress may attach conditions on the receipt of federal funds," incident to its Constitutional power granted under Article I,[224] any waiver of sovereign immunity thus extracted would be "implied or constructive, and [would] not evidence the 'clear declaration'" required by the Supreme Court.[225] As Justice Scalia explained in *College Savings Bank*:

> The whole point of requiring a "clear declaration" by the State of its waiver is to be certain that the State in fact consents to suit. But . . . [t]here is a *fundamental difference* between a *State's expressing unequivocally* that it waives its immunity, and *Congress's expressing unequivocally* its intention that if the State takes certain action it shall be deemed to have waived that immunity. In the latter situation, the most that can be said with certainty is that the State has been put on notice that Congress intends to subject it to suits brought by individuals. *That is very far from concluding that the State made an "altogether voluntary" decision to waive its immunity.*[226]

Thus, "reliance on the Spending Clause can not change the nature of [a conditional] waiver from constructive to express."[227] Accordingly, Congress cannot impose a constructive waiver of a state's sovereign immunity by virtue of its acceptance of federal funding.

Third, the condition imposed, the states' waiver of sovereign immunity, is only marginally related to the federal interest in particular national projects or programs. The states' educational programs and activities, like many others,[228] only became "federal" by virtue of the sweeping definition supplied

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[222] 527 U.S. 666 (1999).

[223] 427 U.S. 666, 680 (1999). The Court expressly overruled *Parden v. Terminal Railway*, 377 U.S. 184 (1964) (holding that a state impliedly or constructively waives its sovereign immunity when it participates in an activity to which Congress has attached waiver of immunity as a condition). *Coll. Savs. Bank*, 527 U.S. at 680 ("We think that the constructive-waiver experiment of *Parden* was ill conceived, and see no merit in attempting to salvage any remnant of it. . . . Whatever may remain of our decision in *Parden* is expressly overruled.").

[224] *Dole*, 483 U.S. at 206.

[225] Pugliese v. Ariz. Dep't of Health & Human Servs., 147 F. Supp. 2d 985, 990 (D. Ariz. 2001).

[226] *Coll. Savs. Bank*, 527 U.S. at 680-81 (citations omitted) (emphasis deleted) (emphasis added), *quoted in Pugliese*, 147 F. Supp. 2d at 990.

[227] *Pugliese*, 147 F. Supp. 2d at 991.

[228] *See, e.g.*, Bay Area Addiction Research & Treatment, Inc. v. City of Antioch, 179 F.3d 725 (1999) (applying both the ADA and the Rehabilitation Act to city zoning ordinances).

by the Rehabilitation Act.[229] This does not create a substantial federal interest congruent with the imposition of such a condition.[230]

Finally, state sovereign immunity implicates the fourth factor articulated by the *Dole* Court. "State sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected."[231] Therefore, "[t]he test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one."[232] Waiver of sovereign immunity will be recognized only "if the State voluntarily invokes [the federal court's] jurisdiction, or else if the State makes a 'clear declaration' that it intends to submit itself to" the federal court's jurisdiction.[233] Mere acceptance of federal funding does not satisfy this requirement.[234]

Furthermore, the *Dole* Court recognized "that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'"[235] Section 504 states that it abrogates sovereign immunity[236] with respect to "all the operations of" any state educational program or activity of which "any part [receives] Federal financial assistance."[237] In order for a state to escape waiver, it must forgo *all* federal assistance given to *any part* of its educational system. This would constitute a substantial penalty to the states.[238] Such extreme financial pressure transforms the "conditional" waiver of sovereign immunity into an impermissible compulsory waiver.[239]

Such a use of the spending power contradicts the Court's recent interpretations on the balance of federal and state power, which emphasize the

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[229] *See* 29 U.S.C.A. § 794(b) (West, WESTLAW through 2001 Pub. L. 107-11); *supra* note 33.

[230] *See supra* note 219 and accompanying text; *cf. Dole*, 483 U.S. at 208 (finding that "the condition imposed by Congress [was] directly related to one of the main purposes for which highway funds [were] expended—safe interstate travel" (citing 23 U.S.C. 101(b)).

[231] *Coll. Savs. Bank*, 527 U.S. at 682, *quoted in Pugliese*, 147 F. Supp. 2d at 990.

[232] Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985), *quoted in Pugliese*, 147 F. Supp. 2d at 989.

[233] *Coll. Savs. Bank*, 527 U.S. at 676 (1999) (citations omitted), *quoted in Pugliese*, 147 F. Supp. 2d at 990.

[234] *See supra* notes 223-27 and accompanying text.

[235] *Dole*, 483 U.S. at 211 (quoting Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937)).

[236] 42 U.S.C.A. § 2000d-7(a)(1) (West, WESTLAW through 2001 Pub. L. 107-19).

[237] 29 U.S.C.A. § 794(b) (West, WESTLAW through 2001 Pub. L. 107-11); *see supra* note 33.

[238] Compare *Dole*, 483 U.S. at 211, where the interest at stake was five percent of a state's federal highway funds, with Jim C. v. United States, 235 F.3d 1079, 1083 (8th Cir. 2000) (Bowman, J., dissenting), which argued that the Rehabilitation Act's implication of all a state's federal funding for education—in the case of Arkansas, some $250,000,000—clearly created a compulsion rather than a condition and was therefore impermissible.

[239] *Jim C.*, 235 F.3d at 1083 (Bowman, J., dissenting).

exclusive power of the states to regulate for the general welfare.[240] Moreover, the *Seminole Tribe v. Florida* Court held that Congress cannot base abrogation of sovereign immunity on Article I powers.[241] Thus, the Spending Clause cannot support a conditional waiver of sovereign immunity under Section 504.

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[240] For example, in *New York v. United States*, 505 U.S. 144, 187-88 (1992), Justice O'Connor stated:

> [T]he Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day. . . . States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," reserved explicitly to the States by the Tenth Amendment.

(citation omitted) (quoting THE FEDERALIST NO. 39 at 245 (James Madison) (Clinton Rossiter ed., 1961)) (holding that "[t]he Federal Government "may not compel the States to enact or enforce a federal regulatory program"); *see also* United States v. Lopez, 514 U.S. 549, 567-68 (1995) (holding that the criminalization of the act carrying a gun in the proximity of a school exceeded Congress's commerce power); Printz v. United States, 521 U.S. 898, 935 (1997) (holding that "Congress cannot circumvent [*New York*'s] prohibition [against compulsion] by conscripting the State's officers directly"); United States v. Morrison, 529 U.S. 598, 611 (2000) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur." (quotation marks omitted) (quoting *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring))); *supra* note 49 (discussing the constitutional theory of sovereign immunity); *infra* note 241 and accompanying text (discussing the Supreme Court's treatment of the waiver of sovereign immunity under Congress's Article I powers).

[241] 517 U.S. 44 (1996); *see supra* note 56. Although the *Seminole Tribe* Court did not directly address the Spending Clause, the *College Savings Bank* Court's explanation of *Seminole Tribe* suggests that waiver based on the Spending Clause would be dealt with similarly. *See* Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 683 (1999) ("Recognizing a congressional power to exact constructive waivers of sovereign immunity through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*."); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank, 527 U.S. 627, 635 (1999) (affirming that neither the Interstate Commerce Clause nor the Patent Clause could support abrogation), *aff'd*, Coll. Savs. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999); *see also* Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1988 (1985) ("[T]he Court should now reinterpret the Spending Clause to work in concert, rather than in conflict, with its reading of the Commerce Clause."); Note, *Federalism, Political Accountability, and the Spending Clause*, 107 HARV. L. REV. 1419, 1436 (1994) ("[The p]rinciples of federalism . . . call for a reevaluation of the Spending Clause analysis . . . .").

V. CONCLUSION

The *Patricia N. v. LeMahieu*[242] court improperly adhered to the Ninth Circuit's holdings in *Clark v. California*[243] and *Dare v. California*[244] when determining the validity of sovereign immunity abrogation under Title II and Section 504. Congruence and proportionality analysis of Title II and Section 504, as guided by *Board of Trustees v. Garrett*[245] and *Kimel v. Florida Board of Regents*,[246] reveals that these Acts were not proper Section 5 legislation. Lacking specific findings of a pattern of irrational discrimination by the states, the remedies imposed were neither congruent nor proportional to the purported harms Congress attempted to redress. Accordingly, Title II and Section 504 represent an impermissible expansion of congressional power. Section 5 does not grant Congress the authority to "determine what constitutes a constitutional violation."[247] In other words, "Congress does not enforce a constitutional right by changing [that right]."[248] *Garrett* and *Kimel* thus overrule *Clark v. California* and *Dare*, *sub silentio*.

The simple solution is for the district court to apply *Garrett* and *Kimel* to Title II and Section 504. While this would have the effect of contradicting *Clark v. California* and *Dare*, other courts, including some in the Ninth Circuit, have already declared the abrogation of state sovereign immunity under Title II and Section 504 invalid.[249] In light of *Garrett* and *Kimel*, *Clark v. California* and *Dare* are simply not good law. The legislative histories of both the ADA and the Rehabilitation Act reveal no pattern of systematic

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[242] 141 F. Supp. 2d 1243 (D. Haw. 2001).

[243] 123 F.3d 1267 (9th Cir. 1997); *see supra* Part II.C.2.

[244] 191 F.3d 1167 (9th Cir. 1999); *see supra* Part II.C.3.

[245] 531 U.S. 356 (2001); *see supra* Part II.C.5.

[246] 528 U.S. 62, 89 (2000); *see supra* Part II.C.4.

[247] City of Boerne v. Flores, 521 U.S. 507, 519 (1996).

[248] *Id.*

[249] *See* Garcia v. State Univ. of N.Y., No. 00-9223, 2001 WL 1159970 (2d Cir. Sept. 26, 2001) (citing *Garrett*, 531 U.S. at 374); Thompson v. Colorado, 258 F.3d 1241 (10th Cir. 2001) (holding that abrogation under Title II was invalid); Sanderlin v. Seminole Tribe, 243 F.3d 1282 (11th Cir. 2001) (holding that waiver of sovereign immunity under the Rehabilitation Act, as applied to the Seminole Tribe, was invalid); Pugliese v. Ariz. Dep't of Health & Human Servs., 147 F. Supp. 2d 985 (D. Ariz. 2001) (holding that abrogation under both Title II and the Rehabilitation Act was invalid); Neiberger v. Hawkins, 150 F. Supp. 2d 1118 (D. Colo. 2001) (holding that abrogation under Title II was invalid); Williamson v. Ga. Dep't of Human Res., 150 F. Supp. 2d 1375 (S.D. Ga. 2001) (holding that abrogation under Title II was invalid); Jones v. Pa. Dep't of Welfare, 164 F. Supp. 2d 490 (E.D. Pa. 2001); Doe v. Div. of Youth & Family Servs., 148 F. Supp. 2d 462 (D.N.J. 2001) (holding that abrogation under Title II was invalid); Badillo-Santiago v. Andreu-Garcia, 167 F. Supp. 2d 194 (D.P.R. 2001) (holding that abrogation under Title II was invalid); *see also* Demshki v. Monteith, 255 F.3d 986 (9th Cir. 2001) (extending *Garrett* to hold that abrogation under Title V of the ADA was invalid).

discrimination against the disabled by the states.[250] Lacking this pattern of violation, neither Title II nor Section 504 can support abrogation of state sovereign immunity.

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[250] *See Garrett*, 531 U.S. at 369-73; *Pugliese*, 147 F. Supp. 2d at 989.

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Kyllo v. United States: The Warrantless Use of Thermal Imagery Devices, and Why the Public Use Standard Proves Unworkable

I. INTRODUCTION

Since the advent of thermal imagery technology,[1] courts have wrestled with the issue of whether the warrantless use of a thermal imaging device violates the Fourth Amendment.[2] The majority of circuits that have approved the use of a thermal imager have focused their inquiries upon the "waste heat,"[3] emitted from a home.[4] Courts in disagreement have countered that the focus should not be upon the "waste heat," but the activities within the home that produced it.[5] An answer was needed to help guide these courts.

The United States Supreme Court in *Kyllo v. United States*[6] (*"Kyllo II"*) held that the warrantless use of a thermal imager violates the Fourth Amendment.[7] Initially decided by the Ninth Circuit,[8] *Kyllo I* itself was riddled

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[1] *See How Night Vision Works*, *at* http://www.howstuffworks.com/nightvision3.htm (last visited Nov. 21, 2001) (stating that infrared devices were first developed by the U.S. military for use in World War II and the Korean War).

[2] Gregory L. Kelley, *The Warrantless Use of Thermal Imagery*, 12 T.M. COOLEY L. REV. 597, 600 (1995) (addressing the recent split of federal appellate courts on the issue of thermal imagery devices and the Supreme Court's probable willingness to address the issue); Kathleen A. Lomas, *Bad Physics and Bad Law: A Review of the Constitutionality of Thermal Imagery Surveillance After* United States v. Elkins, 34 U.S.F. L. REV. 799, 802 (2000) (regarding the continuing debate over the constitutionality of the use of thermal imagery devices within and among the circuits).

[3] The term "waste heat" is used to describe purposefully vented heat that is an incidental byproduct of indoor marijuana growing operations. *See* United States v. Penny-Feeney, 773 F. Supp. 220, 225 (D. Haw. 1991).

[4] *See* United States v. Myers, 46 F.3d 668 (7th Cir. 1995); United States v. Pinson, 24 F.3d 1056 (8th Cir. 1994); United States v. Kyllo, 190 F.3d 1041, 1045 (9th Cir. 1999) (the Ninth Circuit Court of Appeals had previously held the use of the thermal imaging device was in fact a search under the Fourth Amendment, but later withdrew that opinion); United States v. Ford, 34 F.3d 992 (11th Cir. 1994) (holding that the defendant's purposeful venting of "waste heat" failed to establish a subjective expectation of privacy); United States v. Ishmael, 48 F.3d 850 (5th Cir. 1995) (holding that the use of a thermal imager on a building outside the curtilage of the home did not violate the Fourth Amendment, based on the "open fields" doctrine).

[5] *See* Montana v. Siegal, 934 P.2d 176 (Mont. 1997) (holding use of thermal imager constituted a search under Montana Constitution Article II, Section II); People v. Deutsch, 44 Cal. App. 4th 1224 (Cal. Ct. App. 1996); United States v. Elkins, 95 F. Supp. 2d 796 (W.D. Tenn. 2000).

[6] 121 S. Ct. 2038 (2001) [hereinafter *Kyllo II*].

[7] *Id.* at 2046.

[8] Kyllo v. United States, 190 F.3d 1041 (9th Cir. 1999) [hereinafter *Kyllo I*].

with controversy. The Ninth Circuit first held that the warrantless use of a thermal imager violated the Fourth Amendment.[9] Due, in part, to a change in the composition of the panel in *Kyllo I*,[10] the court withdrew its first decision and held that the use of a thermal imager by police does not require a warrant.[11] Ultimately, in a five to four decision,[12] the Supreme Court held that the warrantless use of a thermal imaging device violates the Fourth Amendment.[13] In reaching this decision, the Court addressed several issues upon which the lower courts were in disagreement,[14] seemingly putting this debate to rest.

Interestingly, however, in an attempt to comport with established precedent,[15] the Court interjected a qualification that the device in question must not be one "in general public use."[16] In doing so, the Court left open the definition of "general public use," assuming instead that the device used in the case failed to meet such a standard.[17]

This note argues that the Court's failure to define the term "general public use" will ultimately destroy the validity of its decision and create further confusion within the circuits. Part II will briefly review prior decisions of the lower courts and their precedential value as relating to *Kyllo II*. Part III will cover the *Kyllo II* decision. Part IV will analyze the reasoning of the Court's decision in *Kyllo II* and the effect of the qualifying term "in general public use." Ultimately, this note will conclude that the public use standard is untenable.

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[9] *Kyllo II*, 121 S. Ct. at 2041 (citing Kyllo v. United States, 140 F.3d 1249 (9th Cir. 1998)).

[10] "While the government's petition for rehearing was pending, the author of the Kyllo II [the second decision of the Ninth Circuit] opinion resigned from the bench for health reasons, and a replacement was selected, over Mr. Kyllo's objection." Brief for Petitioner at 8, Kyllo v. United States, 190 F.3d 1041 (9th Cir. 1999) (No. 99-8508).

[11] *Kyllo I*, 190 F.3d at 1047.

[12] The majority opinion authored by Justice Scalia was joined by Justices Souter, Thomas, Ginsburg, and Breyer. Chief Justice Rehnquist, Justice O'Connor, and Justice Kennedy joined the dissenting opinion filed by Justice Stevens. *Kyllo II*, 121 S. Ct. at 2039.

[13] *Kyllo II*, 121 S. Ct. at 2046.

[14] Several issues included whether any intimate details had been revealed and whether the defendant had a reasonable expectation of privacy. *Id.* at 2042-44.

[15] *Id.* at 2046 n.6 (citing California v. Ciraolo, 476 U.S. 207 (1986)).

[16] *Id.* at 2043.

[17] *Id.* at 2050 (Stevens, J., dissenting).

II. BACKGROUND

A. Thermal Imaging Technology

Thermal imagers detect and display infrared radiation emitted by the heat source being scanned.[18] These radiation emissions are identified as temperature differentials, displayed on the device's viewfinder.[19] Warmer items appear as white images and cooler objects appear darker.[20] Such devices can detect differences in heat as little as half a degree Celsius.[21] In many cases, a thermal imager will reveal nothing more than amorphous hot spots along walls of a structure.[22] In certain cases, however, thermal imagers have been able to detect people through closed windows.[23]

Thermal imaging technology was first developed by the military for such uses as infrared targeting or nighttime operations.[24] Since its advent, thermal imaging devices have been used in other areas as well.[25] Most recently, thermal imagers have been utilized by police in the war on drugs.[26] Officers across the country have been using thermal imaging devices to detect the abnormal levels of heat produced from indoor marijuana growing operations.[27] Since such operations utilize high-intensity lamps to provide the necessary light to plants, they in turn produce inordinate amounts of heat as a by-product.[28] In many cases, the high heat needs to be vented from the structure in order to provide the marijuana plants with optimal growing conditions.[29] Police, using a thermal imaging device, focus on this unwanted heat, appropriately coined "waste heat."[30]

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[18] United States v. Cusumano, 67 F.3d 1497, 1499 n.1 (10th Cir. 1995).

[19] United States v. Ishmael, 48 F.3d 850, 851 (5th Cir. 1995).

[20] *Cusumano*, 67 F.3d at 1499 n.1.

[21] *Id.*

[22] *See Kyllo II*, 121 S. Ct. at 2041; *Cusumano*, 67 F.3d at 1499.

[23] Matt L. Greenberg, *Warrantless Thermal Imaging May Impermissibly Invade Home Privacy*, 68 U. CIN. L. REV. 151, 158 (1999).

[24] *See* Kim L. Hooper, *A Much Better Look; Thermal Imaging is Expensive, But It Helps Firefighters Search for Victims in Smoky Areas*, INDIANAPOLIS STAR, Mar. 13, 1999, at W1; Greenberg, *supra* note 23.

[25] *See infra* note 220.

[26] *See* United States v. Penny-Feeney, 773 F. Supp. 220, 223 (D. Haw. 1991).

[27] *See* United States v. Myers, 46 F.3d 668 (7th Cir. 1995); United States v. Pinson, 24 F.3d 1056 (8th Cir. 1994); United States v. Kyllo, 190 F.3d 1041 (9th Cir. 1999); United States v. Ford, 34 F.3d 992 (11th Cir. 1994); United States v. Ishmael, 48 F.3d 850 (5th Cir. 1995).

[28] Greenberg, *supra* note 23, at 155.

[29] *Id.*

[30] *Penny-Feeney*, 773 F. Supp. at 225.

B. Search and Seizure Under the Fourth Amendment

The Fourth Amendment protects against unreasonable searches and seizures by providing:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[31]

Thus, the Fourth Amendment provides a person with an expectation of privacy against unreasonable governmental intrusion.[32] Such an expectation of privacy could face erosion if the actions of police armed with thermal imagers were not considered a search.[33]

Katz v. United States[34] provides the basis of the determination of whether a search has occurred through the use of an electronic surveillance device. *Katz* involved police officers attaching an eavesdropping device to the outside of a phone booth.[35] Although no physical penetration of the phone booth occurred, officers were able to listen to the occupant's conversation within. The fact that there had been no physical entry on the part of police did not convince the Court that a search had not taken place,[36] "[f]or the Fourth Amendment protects people, not places."[37] But the Court was also quick to point out that, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection .... But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[38] Thus, courts focused on the "waste heat" theory have argued that the heat vented in most cases has been knowingly exposed to the public and is not subject to Fourth Amendment protection.[39]

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[31] U.S. CONST. amend. IV.

[32] *Kyllo II*, 121 S. Ct. at 2041.

[33] *See* Greenberg, *supra* note 23, at 174. "[B]ypassing a neutral predetermination of the scope of a search leaves individuals secure from Fourth Amendment violations 'only in the discretion of the police.'" Katz v. United States, 389 U.S. 347, 358-59 (1967) (quoting Beck v. Ohio, 379 U.S. 89, 97 (1964)).

[34] 389 U.S. 347 (1967).

[35] *Id.* at 348.

[36] *Id.* at 353.

[37] *Id.* at 351.

[38] *Id.*

[39] *See, e.g.*, United States v. Myers, 46 F.3d 668 (7th Cir. 1995); United States v. Pinson, 24 F.3d 1056 (8th Cir. 1994).

More importantly, however, is the concurrence in *Katz* in which Justice Harlan developed a two-part test to decide whether a search had occurred.[40] Under the *Katz* test, "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[41] In the context of thermal imaging devices, this test has been applied with mixed results.

C. Allowing the Use of Thermal Imaging Devices

For those courts that have endorsed the use of thermal imagers by police, a distinct line of reasoning has developed, centered on the *Katz* test.[42] In *United States v. Pinson*,[43] the Eighth Circuit was the first federal court of appeals to address the issue. In *Pinson*, police utilized a thermal imaging device to scan the defendant's home for signs of a marijuana growing operation.[44] Based on the positive information gathered, police were able to obtain a warrant and search the defendant's home, resulting in the discovery of marijuana, growing equipment, and related paraphernalia.[45] On appeal, the Eighth Circuit applied the *Katz* test to determine if a search had occurred.[46] In addressing the first prong, the court found that the defendant did not possess the required subjective expectation of privacy in the "waste heat."[47] Even if the defendant had a subjective expectation of privacy relating to the heat, "'such an expectation of privacy would not be one that society would be willing to accept as objectively reasonable.'"[48] This conclusion was based on

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[40] *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

[41] *Id.* at 361. Justice Harlan's concurrence in *Katz* is often cited because of the succinctly explained requirements necessary to determine if a search has occurred.

[42] Initially presented by the United States District Court for the District of Hawai'i in *United States v. Penny-Feeney*, 773 F. Supp. 220 (D. Haw. 1991), the *Penny-Feeney* court first determined that the object of any arguable search was the "waste heat" purposefully vented by the defendant. Based on that determination, the court analogized waste heat to garbage left at the curbside, *California v. Greenwood*, 486 U.S. 35 (1988), and the thermal imager to a dog-sniff, *United States v. Solis*, 536 F.2d 880 (9th Cir. 1976). Furthermore, no intimate details had been revealed by the thermal imager as in *California v. Ciraolo*, 476 U.S. 207 (1986).

[43] 24 F.3d 1056 (8th Cir. 1994).

[44] *Id.* at 1057.

[45] *Id.*

[46] *Id.* at 1058.

[47] *Id.* at 1058-59. The court compared the decision to that in *Penny-Feeney*, 773 F. Supp. 220 (D. Haw. 1991), in which that court did not find a reasonable expectation of privacy. *Pinson*, 24 F.3d at 1059.

[48] *Pinson*, 24 F.3d at 1056 (quoting *Penny-Feeney*, 773 F. Supp. at 226).

a comparison of the "waste heat" to the garbage at issue in *California v. Greenwood*.[49]

In *Greenwood*, the Supreme Court determined that society would find it unreasonable for a person to have an expectation of privacy in garbage left at the curbside.[50] The *Pinson* court reasoned that, like the purposefully disposed of garbage, there can be "no reasonable expectation of privacy in heat which Pinson voluntarily vented outside."[51] Additionally, the court compared the thermal imaging device to the use of a drug-sniffing dog,[52] which has been held not to constitute a search under the Fourth Amendment.[53] The court stated, "[j]ust as odor escapes a compartment or building and is detected by the sense-enhancing instrument of a canine sniff, so also does heat escape a home and is detected by the sense-enhancing infrared camera."[54] Finding that the defendant did not have a reasonable expectation of privacy in the "waste heat," the court pointed out that no intimate details of the home were revealed by the use of the thermal imager.[55] Thus, the court determined that the defendant had failed the *Katz* test and the use of the thermal imager did not violate his Fourth Amendment rights.[56]

Following the decision in *Pinson*, the Eleventh Circuit faced the same issue in *United States v. Ford*.[57] In *Ford*, officers used a thermal imager to scan for the presence of inordinate amounts of heat, normally generated from indoor growing operations.[58] As a result, officers detected a high level of heat resonating from the mobile home and obtained a warrant.[59] The subsequent search revealed "a sophisticated hydroponic laboratory and over four hundred marijuana plants."[60] Also worthy of mention were the defendants' purposeful attempts at venting the "waste heat," by punching holes in the floor and installing a blower.[61] In addressing the defendants' claimed Fourth Amendment violation, it was this purposeful venting that led the Eleventh

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[49] 486 U.S. 35 (1998).

[50] *Id.* at 40-41.

[51] *Pinson*, 24 F.3d at 1058.

[52] *Id.*

[53] *See* United States v. Place, 462 U.S. 696, 707 (1983) (holding that the use of nonintrusive equipment like a trained police dog does not violate the Fourth Amendment).

[54] *Pinson*, 24 F.3d at 1058.

[55] *Id.* at 1059. The court stated, "[t]he detection of the waste heat was not an intrusion into the home; no intimate details of the home were observed, and there was no intrusion upon the privacy of the individuals within." *Id.*

[56] *Id.*

[57] 34 F.3d 992 (11th Cir. 1994).

[58] *Id.* at 993.

[59] *Id.*

[60] *Id.*

[61] *Id.*

Circuit to conclude the defendants lacked a subjective expectation of privacy necessary under the *Katz* test.[62] But even if the defendants had a subjective expectation of privacy, the court was unwilling to recognize such an expectation as reasonable, pointing to the fact that the thermal imager did not reveal any "intimate details."[63] As in *Pinson*, the *Ford* court likened the "waste heat" to garbage and other "waste products intentionally or inevitably exposed to the public."[64] The fact that the "waste heat" could only be detected through the use of the thermal imager did not trouble the court, as it stated that "[t]he Supreme Court has repeatedly held that the fact that a surveillance device allowed for super- or extra-sensory perception is not fatal to a *Katz* analysis."[65] The Eleventh Circuit's strikingly similar analysis to that in *Pinson* logically stated that the thermal imager passed Fourth Amendment muster.

Less than a year later the Court of Appeals for the Seventh Circuit, applying the *Katz* test, reached the same conclusion in *United States v. Myers*.[66] As with prior cases, *Myers* involved the surveillance of a defendant's home by police officers through the use of a thermal imager.[67] Based on the results of the thermal imager and other evidence gathered by police, a search was conducted of the defendant's home, revealing marijuana and related growing equipment.[68] Upon examining Myers' claimed Fourth Amendment violation, the court determined that the defendant lacked a subjective expectation of privacy because he had deliberately discharged the heat from his home.[69] Even if the defendant had a subjective expectation of privacy, the Seventh Circuit was "convinced that such an expectation is not one society is prepared to recognize as 'reasonable.'"[70] The court stated that no intimate details had been threatened by the thermal imager,[71] and that "society has been unwilling to protect as reasonable 'waste products intentionally or inevitably exposed

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[62] *Id.* at 995.

[63] *Id.* at 996. Several courts have held that a thermal imager violates the Fourth Amendment if the device discloses intimate details. *See, e.g.*, Dow Chemical Co. v. United States, 476 U.S. 227 (1986) (holding use of a precision aerial mapping camera to photograph an industrial plant does not violate the Fourth Amendment where no "intimate details" other than outlines of buildings were revealed); Florida v. Riley, 488 U.S. 445 (1989) (stating use of a helicopter to view a greenhouse from navigable airspace does not violate the Fourth Amendment, where no "intimate details" associated with the house or curtilage were observed).

[64] *Ford*, 34 F.3d at 997.

[65] *Id.* (citing Dow Chemical Co. v. United States, 476 U.S. 227, 239 (1986)); *see also* United States v. Place, 462 U.S. 696, 707 (1983); United States v. Knotts, 460 U.S. 276, 285 (1983).

[66] 46 F.3d 668 (7th Cir. 1995).

[67] *Id.* at 669.

[68] *Id.*

[69] *Id.*

[70] *Id.* at 670.

[71] *Id.* (citing United States v. Pinson, 24 F.3d 1056, 1059 (8th Cir. 1994)).

to the public.'"[72] As a result, there had been no infringement upon a reasonable expectation of privacy.

As a whole, the reasoning employed by the Seventh, Eighth, and Eleventh Circuits has been the prevalent argument of those courts that deem the warrantless use of a thermal imager non-violative of the Fourth Amendment.[73]

D. Disallowing the Use of Thermal Imaging Devices

For those courts that have determined that the warrantless use of a thermal imager violates the Fourth Amendment, a distinct line of reasoning has likewise developed. Applying the *Katz* test to similar fact patterns, these courts have come to the exact opposite conclusion of the Seventh, Eighth, and Eleventh Circuits.

One of the first courts to argue that thermal imaging violates the Fourth Amendment was the United States District Court for the Western District of Wisconsin in *United States v. Field*.[74] In *Field*, government officials were suspicious that the defendant was growing marijuana, and used a thermal imaging device to observe heat levels emanating from his home.[75] The thermal imaging led to a physical search and as a result, the defendant was charged with the manufacture of marijuana[76] and subsequently filed a motion to suppress the evidence.[77] In applying the *Katz* test, the *Field* court invalidated the use of a thermal imager with a single phrase, stating, "private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant and that expectation is plainly one that society is prepared to recognize as justifiable."[78]

The court supported this statement by discrediting many of the arguments favoring thermal imagers. First, the court focused on the argument that the device is merely "passive." The court noted, however, that similar devices such as high-powered telescopes or wiretaps are likewise passive, yet require a warrant for use.[79] The court stated that "[p]assive devices are quite capable of invading a person's reasonable expectation of privacy in his or her home

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[72] *Myers*, 46 F.3d at 670 (quoting in part California v. Greenwood, 486 U.S. 35, 37 (1988)).

[73] Michael D. O'Mara, *Thermal Surveillance and the Fourth Amendment: Heating Up the War on Drugs*, 100 DICK. L. REV. 415, 428-29 (1996).

[74] 855 F. Supp. 1518 (W.D. Wis. 1994).

[75] *Id.* at 1523.

[76] *Id.* at 1520.

[77] *Id.* at 1524-25.

[78] *Id.* at 1530.

[79] *Id.* (citing United States v. Kim, 415 F. Supp. 1252, 1256 (D. Haw. 1976) (where the use of an 800 millimeter telescope to observe activities within an apartment from a quarter-mile away violated the Fourth Amendment)); *see also* 18 U.S.C. § 2510-2511 (stating that the use of wiretaps requires a court order).

by revealing what is occurring therein."[80] Moreover, the court questioned why the government wanted to use such a device after arguing that it did not reveal anything.[81] Turning to the waste heat analogy, the court discarded it as inapplicable because leaving garbage on the curb is an affirmative act, while the loss of heat from a home is, for the most part, an unconscious one.[82] The court did, however, acknowledge that if the facts tended to show that the venting of heat was an actual choice of the homeowner, then the garbage analogy might apply.[83]

In *United States v. Elkins*,[84] the United States District Court for the Western District of Tennessee held that the use of a thermal imager to search the defendant's buildings for the presence of marijuana constituted a search.[85] The court found that the defendant had a subjective expectation of privacy in the heat signatures emanating from the building even though the building was not a private residence.[86] Thus, the defendant had met the first prong of the *Katz* test. Focusing upon the second prong of the *Katz* test, the *Elkins* court utilized the Supreme Court's ruling in *Dow Chemical Co. v. United States*[87] for the proposition that society recognizes as reasonable an expectation of privacy within the interior of commercial buildings.[88] Since the structure in *Elkins* was a commercial building, the court found it appropriate to apply *Dow Chemical*. Thus, the defendants had met the second prong of the *Katz* test and consequently the use of the thermal imager was considered a search.[89]

Field and *Elkins* exemplify the rationale of courts that have applied the *Katz* test in holding the warrantless use of a thermal imager violates the Fourth Amendment. In one of the only decisions by a federal court of appeals to hold the same, the Tenth Circuit initially held in *United States v. Cusumano*[90] ("*Cusumano I*") that the officer's use of a thermal imager, absent a warrant, violated the Fourth Amendment. The *Cusumano I* court employed much of the same reasoning in *Field* and *Elkins*, arguing that the focus of the inquiry should not be the "waste heat" but the activities that produced them.[91] As

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[80] *Field*, 855 F. Supp. at 1531.

[81] *Id.* at 1531.

[82] *Id.* at 1532.

[83] *Id.* The *Field* court also dismissed the likening of a dog-sniff to a thermal imager, because while a dog is trained only to alert to the presence of contraband, a thermal imager will not discriminate between sources of heat, legal or otherwise. *Id.* at 1533.

[84] 95 F. Supp. 2d 796 (W.D. Tenn. 2000).

[85] *Id.* at 813.

[86] *Id.* at 811.

[87] 476 U.S. 227 (1986).

[88] *Elkins*, 95 F. Supp. 2d at 811.

[89] *Id.* at 812.

[90] 67 F.3d 1497 (10th Cir. 1995) [hereinafter *Cusumano I*].

[91] *Id.* at 1502.

such, society is willing to accept as reasonable an expectation of privacy for activities conducted within the home.[92] However, due to a rehearing by an en banc panel of the Tenth Circuit, the *Cusumano I* decision had been vacated and the issue of the thermal imager's use was not addressed for reasons of judicial restraint.[93] Despite the overruling of the *Cusumano I* decision, courts favoring the inadmissibility of evidence derived from thermal imagers have followed the rather extensive reasoning in that case to argue their position.[94]

III. UNITED STATES V. KYLLO

A. Factual Background

In 1991, William Elliott ("Elliott"), an agent for the United States Bureau of Land Management,[95] began to suspect Danny Lee Kyllo ("Kyllo") in a possible conspiracy to grow and distribute marijuana.[96] Elliott's suspicions were supported by information provided by Oregon state police officers,[97] who informed Elliott that Kyllo and his wife Luanne lived in a triplex, which had been occupied by the daughter of the task force's original target.[98] The officers also informed Elliott that Luanne had been arrested the prior month for delivery and possession of a controlled substance and that Kyllo had once before told an undercover officer that he could supply marijuana.[99] Following receipt of that information, agent Elliott subpoenaed Kyllo's utility records

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[92] *Id.* at 1506. The court in *Cusumano I* further dismissed the analogies of waste heat to garbage and the use of a thermal imager to a dog-sniff. The court was also willing to extend its ruling beyond the facts of the case and hold that, in general, the use of a thermal imager to monitor activities of the home was repugnant to the Fourth Amendment. *Id.* at 1504.

[93] United States v. Cusumano, 83 F.3d 1247, 1248 (10th Cir. 1996) [hereinafter *Cusumano II*].

[94] *See* United States v. Elkins, 95 F. Supp. 2d 796, 809 (W.D. Tenn. 2000) (stating that the ruling had support from *Cusumano I*); People v. Deutsch, 44 Cal. App.4th 1224, 1230 (Ca. Ct. App. 1996) (relying on the proposition put forth in *Cusumano I* that the imager reveals the activities that created the waste heat); Montana v. Siegal, 934 P.2d 176, 190 (Mont. 1997) (agreeing with the *Cusumano I* court that the proper focus of the inquiry is whether the defendant possessed an expectation of privacy in the activities that created the heat).

[95] United States v. Kyllo, 190 F.3d 1041, 1043 (9th Cir. 1999). The United States Bureau of Land Management worked as part of a joint task force investigating possible conspiracy to grow and distribute marijuana. *Id.*

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

and compared them with a spreadsheet of typical average power use, concluding that Kyllo's electrical use was abnormally high.[100]

At 3:20 a.m. on January 16, 1992, Daniel Haas ("Haas"), a sergeant in the Oregon National Guard, accompanied Elliott to the triplex where Kyllo lived.[101] There the agents aimed an Agema Thermovision 210 thermal imager ("Agema 210")[102] at the home in order to detect the presence of higher than normal levels of heat radiation. From the agents' position in Elliott's car, located across the street from Kyllo's residence, they were able to detect a high level of heat radiation emanating from the garage roof as well as from one side of the home.[103] Elliott inferred from the scan that Kyllo had been using high intensity halide lights to grow marijuana within his home.[104] Based upon the results of the thermal imaging scan, along with the utility bills and informant information, Elliott sought a search warrant from a magistrate judge.[105] After receiving the warrant, agent Elliott conducted a search of Kyllo's home, resulting in the seizure of more than one hundred marijuana plants, weapons, and drug paraphernalia.[106]

Kyllo was indicted on one count of manufacturing marijuana in violation of 21 U.S.C. section 841(a)(1).[107] Following a hearing, the United States District Court for the District of Oregon denied Kyllo's motion to suppress the

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[100] *Id.* According to the government's brief, the petitioner's residence had a consistently high power consumption level, compared to a nearby residence that had higher levels of power consumption only for several months of the year. This fact was consistent with Agent Elliott's experience that marijuana growing operations often work in a staggered fashion to facilitate a constant supply of adult marijuana plants. Brief for the United States at 3-4, Kyllo v. United States of America, 121 S. Ct. 2038 (2001)(No. 99-8508).

[101] *Kyllo I*, 190 F.3d at 1044.

[102] *Id.* A thermal imaging device such as the Agema 210 detects heat radiation on the exterior surfaces of objects. The thermal imager is a passive device that pulls in the radiation much like a camera. Items under surveillance appear in the viewfinder as either white (for items with high heat signatures), black (for items with low or no heat signatures), or a shade of gray, depending upon the amount of heat the object possesses. United States v. Kyllo, 121 S. Ct. 2038, 2041 (2001). For examples of a thermal imaging photo, see http://www.hortonlevi.co.uk/samples/default.htm (last visited Oct. 30, 2001).

[103] *Kyllo II*, 121 S. Ct. at 2041. Petitioner Kyllo's home was part of a triplex on Rhododendron Drive in Florence, Oregon. *Id.* At the time of the surveillance, Kyllo's unit had been emitting much more heat along one side of the building and the roof, in comparison to the other units. *Id.*

[104] *Id.*

[105] *Id.*

[106] *Kyllo I*, 190 F.3d at 1044.

[107] *Kyllo II*, 121 S. Ct. at 2041. 21 U.S.C. § 841(a)(1) provides:

> Unlawful Acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

21 U.S.C. § 841(a)(1) (2001).

evidence.[108] Kyllo then entered a conditional guilty plea and was sentenced to sixty-three months incarceration.[109] Kyllo appealed the denial of his motion to the Ninth Circuit, which remanded for an evidentiary hearing on the intrusiveness and capabilities of the Agema 210.[110] On remand the district court concluded that: (1) the Agema 210 was "a non-intrusive device which emits no rays or beams and shows a crude visual image of the heat being radiated from the outside of the house"; (2) the device "did not show any people or activity within the walls of the structure"; (3) "the device used cannot penetrate walls or windows to reveal conversations or human activities"; and (4) "no intimate details of the home were observed."[111] Based on their findings, the district court upheld the use of the Agema 210 and validated the warrant used to seize evidence from Kyllo's home.[112] Again on appeal, a divided panel of the Ninth Circuit reversed, finding that the defendant had a reasonable expectation of privacy in his home from thermal imaging.[113]

While the government's petition for rehearing was pending, a majority opinion judge resigned, changing the panel's composition.[114] The new panel granted the government's request for rehearing, with the replacement judge siding with the dissent in the prior opinion.[115] This change resulted in a new majority and a re-affirmance of the district court's order.[116] The reconstituted Ninth Circuit panel chose to follow the *Pinson* analysis, reasoning that Kyllo took no affirmative steps to conceal the waste heat.[117] The court further compared the use of the Agema 210 to a dog-sniff and raised a point that none of the intimate details of the home had been revealed.[118] The court later denied the defendant's petition for rehearing en banc.[119]

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[108] *Kyllo I*, 190 F.3d at 1044.

[109] *Id.*

[110] *Id.*

[111] *Kyllo II*, 121 S. Ct. at 2041.

[112] *Id.*

[113] Brief for Petitioner at 8-9, Kyllo v. United States, 190 F.3d 1041 (9th Cir. 1999) (No. 99-8508). The court argued that the defendant had a subjective expectation of privacy in activities conducted within his home and that society was willing to accept such an expectation as reasonable. *Id.*

[114] Due to health reasons, District Judge Robert R. Merhige, Jr., who authored the opinion while sitting in designation, resigned from the bench and was replaced with Judge Brunetti. Brief for the United States at 8, Kyllo v. United States, 190 F.3d 1041 (9th Cir. 1999) (No. 99-8508).

[115] *Id.* at 9.

[116] *Id.*

[117] *Kyllo I*, 190 F.3d at 1046.

[118] *Id.*

[119] Brief for Petitioner at 10, Kyllo v. United States, 190 F.3d 1041 (9th Cir. 1999) (No. 99-8508).

B. Majority Opinion

Justice Scalia began the Court's opinion in *Kyllo II* by reciting the Fourth Amendment, which states "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[120] The opinion went on to state that the original design of the Fourth Amendment was to protect an individual within the home from government intrusion, and that any such search of the home, absent a warrant, is unconstitutional.[121] According to the Court, "with few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no."[122] Justice Scalia realized, however, that determining whether a search had occurred would not be simple under the Court's precedent.[123]

The Court acknowledged that it had previously held a search does not occur, even within the confines of a home, unless the individual has met the two-part test in *Katz*.[124] But in the context of technological equipment, the Court was quick to point out that it had not previously approved such use for the surveillance of the home.[125] Therefore, the Court was willing to finally address the issue of just how much technological enhancement would be considered a search.[126]

First, the Court discussed the *Katz* test, just as the Ninth Circuit had below.[127] Interestingly, the Court chose not to analyze the facts of the case under the two-part test, choosing instead to concede that while it may be difficult to define the *Katz* test in areas such as automobiles and telephone booths, when it comes to the area of the home "there is a ready criterion, with roots deep in the common law, of the minimum expectation of privacy that exists, and that is acknowledged to be reasonable."[128] Thus, the Court made

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[120] United States v. Kyllo, 121 S. Ct. 2038, 2041 (2001).

[121] *Id.* at 2041-42 (quoting Silverman v. United States, 365 U.S. 505, 511 (1961)) ("At the core of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'").

[122] *Kyllo II*, 121 S. Ct. at 2042 (citing Illinois v. Rodriguez, 497 U.S. 177, 181 (1990)).

[123] *Id.*

[124] *Id.* at 2043 (citing California v. Ciraolo, 476 U.S. 207 (1986); Florida v. Riley, 488 U.S. 445 (1989)).

[125] *Id.* (citing Dow Chemical Co. v. United States, 476 U.S. 227, 237 (1986)) (stating that although the use of an enhanced aerial camera was not considered a search, it was important that the area in question was not an area immediately adjacent to the home where privacy expectations are heightened).

[126] *See Kyllo II*, 121 S. Ct. at 2043.

[127] *Kyllo I*, 190 F.3d at 1045-47.

[128] *Kyllo II*, 121 S. Ct. at 2043.

the determination that the defendant had a subjective expectation of privacy that society was willing to deem as reasonable. The Court reasoned that to find otherwise would be to allow technology to erode the Fourth Amendment.[129] Thus, the Court held that

> obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical 'intrusion into a constitutionally protected area,'... constitute[d] a search–at least where . . . the technology in question is not in general public use.[130]

Therefore, the Court determined that the information gathered through the use of the Agema 210 was the product of a search.[131]

The Court further addressed the government's contention, reflected in the dissent by Justice Stevens, that the Agema 210 is a passive device that merely measures heat emanating from outside the home.[132] Comparing the thermal imager to other devices that could be said only to detect sound waves or light waves emanating from a house, the majority rejected a mechanical interpretation of the Fourth Amendment,[133] as it had previously done in *Katz*.[134] Justice Scalia realized that the thermal imager was relatively crude, but established the holding in anticipation of future use or development of more advanced equipment.[135]

In dicta, the Court discredited a contention posed by the dissent that an inference cannot be considered a search.[136] The majority argued that if this were true, any resulting "inference" gained through the thermal imager's use, especially "through-the-wall" observations, which the dissent found impermissible, would be valid.[137]

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[129] *Id.*

[130] *Id.* (quoting Silverman v. United States, 365 U.S. 505, 512 (1961)).

[131] *Kyllo II*, 121 S. Ct. at 2043.

[132] *Id.* at 2044. According to the dissent, there is a fundamental difference between "off-the-wall" and "through-the-wall" observations. *Id.* The Court argued that the dissent's idea of a distinction between off or through the wall observations was incompatible with the belief that information regarding the intimate details of a home, collected through the use of a thermal imager, are impermissible. *Id.* The Court stated that even the most sophisticated imagers garnish their information "off-the-wall," and the dissent's disapproval of the more sophisticated imagers discredits any such distinction. *Id.*

[133] *Id.*

[134] *Compare* Katz v. United States, 389 U.S. 347 (1967). In *Katz*, the Court rejected the argument that a device attached to the exterior of the phone booth picked up only sound waves extending beyond the booth itself. *Id.* at 352-53. The Court held that the user of the phone booth had a reasonable expectation that his conversations would not be monitored. *Id.*

[135] *Kyllo II*, 121 S. Ct. at 2044.

[136] *Id.*

[137] *Id.* The Court attempted to point out that the issue of the case was not illegal inferencing, but rather the allegedly illegal use of a thermal imaging device. *Id.*

The majority similarly discredited the government's contention that use of the Agema 210 was constitutional because the activities monitored were not private in nature.[138] The government pointed to *Dow Chemical*,[139] in which the Court found the use of aerial photography equipment constitutional because such equipment did not reveal any "intimate details."[140] Justice Scalia discredited the government's use of *Dow Chemical*, because that case involved aerial photography of an industrial complex, an area that did not "share the Fourth Amendment sanctity of the home."[141] The majority's main thrust was that within the home, all details are "intimate details" because of the high level of regard the Fourth Amendment holds for the home.[142] Thus, the level of warmth Kyllo kept within his home was a detail worthy of protection.[143] Although the Court held that the heat emanating from Kyllo's home was an intimate detail, it nevertheless argued that the prohibition of thermal imagers should not be limited to "intimate details."[144]

As the Court put it, "[the intimate details standard] would be impractical in application, failing to provide 'a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment.'"[145] The Court argued that regardless of whether the device is sophisticated or crude, it cannot distinguish an intimate detail from a non-intimate detail.[146] Therefore, the majority reasoned that such devices, crude or otherwise, could not discern a lawful activity from an illegal one.[147] As a result, the Court failed to see how a rule could be developed that would apply only to "through-the-wall" surveillance.[148] The Court implied instead that it would have to establish guidelines to determine what is considered an intimate detail of the home.[149]

Moreover, the officer contemplating the use of a thermal imager would have to know in advance whether her surveillance "through-the-wall" would detect any intimate details.[150] In passing, the Court noted the dissent's argument that

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[138] *Id.* at 2045.

[139] Dow Chemical Co. v. United States, 476 U.S. 227, 236-37 (1986).

[140] *Id.* at 238.

[141] *Kyllo II*, 121 S. Ct. at 2045.

[142] *Id.*

[143] *Id.*

[144] *Id.*

[145] *Id.* (quoting Oliver v. United States, 466 U.S. 170, 181 (1984)).

[146] *Kyllo II*, 121 S. Ct. at 2045.

[147] *Id.* The Court used the example of a woman taking her daily sauna and bath, which such devices as the Agema 210 could detect and which is perfectly legal, not to mention intimate. *Id.*

[148] *Id.* at 2046.

[149] *Id.*

[150] *Id.*

uncertainty may result from the qualification of whether the technology is in general public use.[151] The majority declined to examine the factor further, however, stating that such a qualification was based on the Court's precedent in *Ciraolo*.[152]

Simply stated, "[w]here, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."[153]

Also worthy of note is the majority's composition, headed by Justice Scalia. Based on prior decisions, one might expect that Justices Breyer, Ginsburg, and Souter would have taken a more liberal view in supporting an individual in a criminal case.[154] The presence of Justices Scalia and Thomas on the decision's majority, however, was surprising due to their history of relatively conservative views on criminal matters.[155] While it is not unheard of for Justices Scalia and Thomas to hold such an expansive view of the Fourth Amendment,[156] its occurrence in this case is worth noting.

C. Dissenting Opinion

The main argument of the dissenting opinion, authored by Justice Stevens,[157] focuses on the distinction between "off-the-wall" and "through-the-

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[151] *Id.* at 2046 n.6.

[152] *Id.*

[153] *Id.* at 2046.

[154] Christopher E. Smith, *Criminal Justice and the 1999-2000 U.S. Supreme Court Term*, 77 N.D. L. REV. 1, 8 (2001). According to Smith, during the 1997-1998 term, support for individuals in criminal cases was at a level of forty-five percent or less for the more conservatively aligned judges (Rehnquist, Thomas, Scalia, O'Connor, Kennedy, and Breyer), while the judges who supported individuals (Souter, Ginsburg, and Stevens) did so in sixty-four to seventy-three percent of such cases. During the 1999-2000 term, the differentiation became more prominent, with the five most conservative justices (Rehnquist, Scalia, Thomas, O'Connor, and Kennedy) siding with individuals between twenty-three and thirty-six percent of the time. Justice Breyer separated himself from the conservative justices by siding for individuals fifty-five percent of the time. Justices Ginsburg, Souter, and Stevens were again heavy supporters of individuals in criminal cases by voting for them between sixty-eight and seventy-one percent of the time. *Id.*

[155] *Id.* at 4-11. As previously noted by Smith, during the 1999-2000 term, Justices Scalia and Thomas have supported individuals in criminal cases only thirty-two percent of the time. Of further interest is the lower percentage of support for individuals by Justices Scalia and Thomas in non-unanimous decisions, which is only twenty-seven percent. Also worthy of note is the almost unwavering consistency with which Justice Thomas has sided with Justice Scalia (ninety-three percent). *Id.* at 10.

[156] *Id.* at 5.

[157] *Kyllo II*, 121 S. Ct. at 2047 (Stevens, J., dissenting). Judge Stevens was joined by Chief Justice Rehnquist and Justices O'Connor and Kennedy.

wall" surveillance. The dissent classified the Agema 210 as a device that merely performs surveillance "off-the-wall," gathering information available to the general public.[158] Unlike a device such as an x-ray, that can accomplish a physical penetration,[159] the dissent posited that the Agema 210 was merely passive and only measured heat on the exterior surfaces of the home, failing to reveal any details of the home's interior.[160] Moreover, the dissent pointed out that "what a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[161] The dissent further suggested that anyone in the general public, using his or her ordinary senses, could have detected the vented heat in this case.[162] Analogizing the heat to aromas generated in the kitchen, the dissent stated that when such intangibles leave a building they enter the public domain and any subjective expectation that they would remain private is not only implausible but not something that society is likely to find reasonable.[163]

The dissent then pointed to the fact that while the Agema 210 may have picked up details of the home accessible to the general public, it did not detect details of the interior.[164] Given the belief that a search of the home cannot occur unless details of the interior are revealed, Justice Stevens questioned how the officer's inferences of such activity could be considered a search.[165] The dissent argued that,

> regardless of whether they inferred (rightly) that petitioner was growing marijuana in his house, or (wrongly) that the lady of the house [was taking] her daily sauna and bath,. . .the only conclusions the officers reached concerning the interior of the home were at least as indirect as those that might have been inferred from the contents of discarded garbage.[166]

The dissent believed that for the first time in history, the Court was willing to assume that an inference amounted to a Fourth Amendment violation.[167]

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[158] *Id.* at 2048.

[159] *Id.*

[160] *Id.*

[161] *Id.* at 2047 (citing California v. Ciraolo, 476 U.S. 207 (1986)); Florida v. Riley, 488 U.S. 445 (1989); California v. Greenwood, 486 U.S. 35 (1988); Dow Chemical Co. v. United States, 476 U.S. 227 (1986); Air Pollution Variance Bd. of Colo. v. W. Alfalfa Corp., 416 U.S. 861 (1974)).

[162] If, for example, rainwater had evaporated at different rates or there existed a noticeable difference in the melting of snow on the roof, then any neighbor or passerby could discern that excess heat may be venting from the structure. *Kyllo II*, 121 S. Ct. at 2048.

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.* at 2049.

In addition to the previously stated arguments, the dissent argued there existed a strong public interest in avoiding litigation over the monitoring of emissions from homes.[168] Allowing public officials to monitor various emissions, the dissent argued, would help to identify hazards to the community.[169] In comparison, Justice Stevens believed the countervailing privacy interests were at best trivial.[170]

Yet another point raised by the dissent was the majority's failure to determine whether the use of the Agema 210 in this case was unreasonable, and its focus instead on the creation of a rule designed to cover "more sophisticated systems" in the future.[171] The dissent provided three examples of why such a rule would be too broad. First, the dissent raised the question of what constitutes "in general public use."[172] Justice Stevens argued that the apparent lack of a definition illustrated the Court's assumption that the device at issue failed to meet any such criterion.[173] Second, the dissent argued that such a rule would also encompass devices that could replace dogs trained to sniff narcotics.[174] In *United States v. Place*,[175] however, the Court held that a dog-sniff, which only detected the presence of narcotics, was not considered a search within the Fourth Amendment.[176] The dissent reasoned, therefore, that any sense-enhancing device that detected only illegal activity should not be considered a search as well.[177] But the Court's broad ruling would find unconstitutional just such a device.[178] Third, the dissent viewed the application of the new rule to any information regarding the interior of the home as too broad.[179] It argued that if a device was required to detect the sole presence of illegal activity, the fact that the activity was within the home should make no difference.[180] Furthermore, information regarding the interior

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[168] *Id.*

[169] *Id.* Excessive heat, traces of smoke, suspicious odors, odorless gases, airborne particulates, or radioactive emissions are examples of emissions that public officials should be allowed to monitor as potential hazards to the community. *Id.*

[170] *Id.* Justice Stevens argued that most homeowners insulate their homes to keep the heat in, rather than prevent heat from escaping, and that society would probably not suffer from requiring those individuals who desire to keep heat in from insulating their homes to do so. *Id.*

[171] *Id.* at 2050.

[172] *Id.*

[173] *Kyllo II*, 121 S. Ct. at 2050. The dissent pointed to the record to show that nearly a thousand units had been manufactured and similar units number over ten thousand. According to the record, such units are also readily available to the public for various uses. *Id.* at 2050 n.5.

[174] *Id.* at 2050.

[175] 462 U.S. 696 (1983).

[176] *Id.* at 707.

[177] *Kyllo II*, 121 S. Ct. at 2050.

[178] *Id.*

[179] *Id.*

[180] *Id.* at 2050-51.

of the home could also encompass information gathered outside the home that leads to inferences about activity within.[181]

The dissent also viewed the majority's rule as too narrow because it focused on information regarding the interior of the home.[182] Justice Stevens argued that a rule designed to protect persons from intrusive sense-enhancing equipment should not be limited to the home.[183] If the device gained access to a private place, for example, the telephone booth in *Katz*, then the rule should apply there as well.[184]

Regarding the majority's explanation for its new rule disallowing the use of a thermal imager, the dissent discredited the two reasons as unpersuasive.[185] First the dissent disagreed with the Court's use of *Katz* as instructive.[186] The dissent reasoned that unlike *Katz*, where the device allowed the officers an equivalent of actual presence in the protected area, the Agema 210 did nothing more that detect heat outside the home and did not reveal anything about the interior.[187] Second, the dissent dismissed the Court's argument that "through-the-wall" surveillance cannot rely on a distinction between "intimate details."[188] Justice Stevens explained that such an argument makes the assumption that the Agema 210 did perform "through-the-wall" surveillance, when in fact it did not.[189]

In closing, the dissent commended the Court's concern for the threat to privacy from advancing technology, but criticized its lack of judicial restraint.[190] Two options presented by the dissent called for perhaps an evidentiary hearing on whether the device is in general public use,[191] or allowing the legislature to confront the issue rather than constraining them with the Court's constitutional interpretation.[192] Since the dissent viewed this as nothing more than creating inferences from "off-the-wall" surveillance

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[181] *Id.*

[182] *Id.*

[183] *Id.* at 2051.

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *Id.*

[188] *Id.* at 2052.

[189] *Id.* The dissent pointed to the district court's exhibits of the thermal images as vague examples submitted by the petitioner himself, raising the question whether the device could take "accurate, consistent infrared images" of the outside of the home. *Id.*

[190] *Id.*

[191] *Id.* at 2050 n.5.

[192] *Id.* at 2052.

rather than "through-the-wall" surveillance, they would not consider the use of the Agema 210 a search.[193]

Justice Stevens' presence as the dissent's author is highly unusual because of his well-known belief in expanding citizens' rights, especially in criminal justice cases.[194] According to certain statistics, Justice Stevens, along with Justice Souter, has led the way in liberal voting.[195] In light of Justice Stevens' reputation as one of the Court's strongest supporters of individuals' rights,[196] his support for law enforcement's use of thermal imaging devices is puzzling. Perhaps the majority's broad reaching test was too liberal even for Justice Stevens?

IV. ANALYSIS

Although the *Kyllo* opinion seemingly fails to address many of the arguments raised by the lower courts,[197] such as whether waste heat can be analogized to garbage, a closer look reveals otherwise. The common thread among past cases has been the use of the *Katz* two-prong test to determine whether the use of a thermal imager constituted a search repugnant to the Fourth Amendment. In applying the *Katz* test, the Court took the view of lower courts such as the court in *Field*, holding that a person has a subjective expectation of privacy within the home if society recognizes it as reasonable.[198] Therefore, it was unnecessary for the Court to address many of the other issues raised by courts in cases such as *Pinson*,[199] because those courts based their arguments on the assumption that the object of the search was the "waste heat" emanating from within the home.[200] The *Kyllo* Court, on the other hand, viewed the activities within the home as the object of the search. Therefore, no further inquiry was required.

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[193] *Id.* at 2049. The dissent cited to several lower court opinions as juxtaposed to its holding; *Kyllo I*, 190 F.3d 1041 (9th Cir. 1999); United States v. Robinson, 62 F.3d 1325 (11th Cir. 1995); United States v. Myers, 46 F.3d 668 (7th Cir. 1995); United States v. Ishmael, 48 F.3d 850 (5th Cir. 1995); United States v. Pinson, 24 F.3d 1056 (8th Cir. 1994); United States v. Cusumano, 67 F.3d 1497 (10th Cir. 1995), *vacated by* 83 F.3d 1247 (10th Cir. 1996) (en banc).

[194] Smith, *supra* note 154, at 7.

[195] *Id.* at 9. Table 3 of Smith's note lists Justices Stevens and Souter as voting seventy-one percent of the time, during the 1999-2000 term, in favor of individual rights for criminal cases.

[196] *Id.* at 7. Smith states, "Justices Stevens and Souter stood out as the strongest supporters of individual rights in criminal justice cases, although Justice Ginsburg was nearly as liberal in the Term's criminal justice cases." *Id.*

[197] *See* United States v. Penny-Feeney, 773 F. Supp. 220 (D. Haw. 1991). The heat measured by the thermal imager was analogized to garbage and the use of the thermal imager was also compared to the use of a dog-sniff. *Id.* at 226-27.

[198] United States v. Field, 855 F. Supp. 1518, 1530 (W.D. Tenn. 1994).

[199] United States v. Pinson, 24 F.3d 1056 (8th Cir. 1994).

[200] *Id.* at 1058.

Based upon the Court's unspoken view that the object of the search was the interior of the home, it also decided the "intimate details" argument in favor of those courts following the reasoning in *Field*. The Court stated that within the home, all details are intimate.[201]

As examples, the Court pointed to *United States v. Karo*[202] and *Arizona v. Hicks*.[203] In *Karo*, officers placed a beeper within a can of ether to track its movements after shipment.[204] The officers later tracked the can of ether to the defendant's abode and ultimately were able to track its movements within the home.[205] The Court in *Karo* held that the monitoring of a beeper within a residence closed to visual surveillance is a violation of the Fourth Amendment.[206] In *Hicks*, officers responding to a shooting noticed pieces of stereo equipment that seemed out of place in the accused's home.[207] Based upon a suspicion, one of the officers recorded the serial numbers from some of the equipment and later learned the equipment had been stolen.[208] The Court in *Hicks* held that since the serial numbers were not in "plain view," they were the product of a search.[209]

Like the beeper's transmissions in *Karo*, and the serial numbers in *Hicks*, the Court reasoned that the heat emanating from within Kyllo's home was indicative of "intimate details" and therefore subject to Fourth Amendment protection.[210] The end result of the Court's somewhat sparse analysis was an answer to the lower court's question: "Does the warrantless use of a thermal imaging device constitute a search, violative of the Fourth Amendment?"[211] The Court answered "yes."[212] While the Court's analysis alone would have been sufficient to carry the ruling, the Court's interjected qualification that the device "is not in general public use," not only creates confusion but also casts doubt on the Court's holding. Without some sort of guidance in determining if a device is in general public use, lower courts will be left to examine the decision relied upon by the majority in creating such a rule.[213]

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[201] United States v. Kyllo, 121 S. Ct. 2038, 2045 (2001).

[202] 468 U.S. 705 (1984).

[203] 480 U.S. 321 (1987).

[204] *Karo*, 468 U.S. at 708.

[205] *Id.*

[206] *Id.* at 713.

[207] Arizona v. Hicks, 480 U.S. 321, 323-24 (1987).

[208] *Id.*

[209] *Id.* at 324-25.

[210] United States v. Kyllo, 121 S. Ct. 2038, 2045 (2001).

[211] *Id.* at 2040.

[212] *Id.* at 2046.

[213] *See Kyllo II*, 121 S. Ct. at 2046 n.6. In crafting the qualification that the device must not be in general public use, the Court was attempting to fit within precedent established in *California v. Ciraolo*, 476 U.S. 207 (1986). *Kyllo II*, 121 S. Ct. at 2046 n.6.

The sole case pointed to by the majority as reason for the establishment of the "in general public use" factor,[214] was *California v. Ciraolo*.[215] In *Ciraolo*, officers suspicious of possible marijuana cultivation by the defendant attempted to observe his property from the ground.[216] Unable to do so, the officers secured a private airplane to fly overhead.[217] From a height of 1,000 feet the officers were able to identify ten-foot tall marijuana plants growing in the defendant's backyard.[218] In finding that the defendant did not possess an objective expectation of privacy, the Court in *Ciraolo* stated:

> In an age where private and commercial flight in the public airways is routine, it is unreasonable for respondent to expect that his marijuana plants were constitutionally protected from being observed with the naked eye from an altitude of 1,000 feet.[219]

Based upon this statement, courts facing the issue after *Kyllo* will still lack a definition of "in general public use."

Courts that choose to utilize the reasoning in *Kyllo* may believe that the rule was intended to illustrate the ease of public accessibility to commercial and private aircraft alike. Therefore the thermal imager would not qualify as being within "general public use." On the other hand, courts using the reasoning in *Pinson* may argue that thermal imagers have been in general public use[220] since at least 1976.[221] In light of the tendency for courts of appeals like the Seventh, Eighth, and Eleventh Circuits to allow the use of thermal imagers by officers, it is quite probable that they will eventually hold such devices have been in general public use.

Alternatively, these courts may look to a numerical comparison of the aircraft in *Ciraolo*. Future courts following the *Kyllo* decision may argue that

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[214] *Id.*

[215] 476 U.S. 207 (1986).

[216] *Id.* at 209.

[217] *Id.*

[218] *Id.*

[219] *Id.* at 215.

[220] *See* O'Mara, *supra* note 73, at 417 (stating that other uses for the thermal imager include the use by steel mills and paper plants to detect production line temperatures, in surgical procedures, in accidents and natural disasters to locate bodies, and to investigate causes of fires); Aaron Larks-Stanford, *The Warrantless Use of Thermal Imaging and "Intimate Details": Why Growing Pot Indoors and Washing Dishes are Similar Activities Under the Fourth Amendment*, 49 CATH. U. L. REV. 575 (2000) (stating that other uses have included checking moisture-laden roofs, overloaded power lines, and substandard building insulation); *Some Uses for Thermal Imaging*, *at* http://www.harveysburg.com/thermal_imager.htm (last visited Oct. 30, 2001).

[221] *See* United States v. Kilgus, 571 F.2d 508 (9th Cir. 1978). At the time, the court in *Kilgus* recognized the viable use of the relatively new thermal imagery technology in the generic identification of objects.

there are presently tens of thousands of private and commercial aircraft pressed into service, and that is the defining factor the Court in *Kyllo* was trying to make. On the other hand, courts intent on finding the use of a thermal imager as non-violative of the Fourth Amendment may argue that there are close to ten thousand of these devices as well.[222] With the *Ciraolo* decision providing little support, courts may look elsewhere.

Lower courts will likely turn to other examples in which the Court has approved the use of surveillance equipment, such as *Dow Chemical*.[223] In *Dow Chemical*, the petitioner had denied the EPA access to their plant in order to conduct an inspection.[224] As a result, the EPA employed a commercial aerial photographer to fly above the plant, and, using a precision mapping camera, take photos of the plant below,[225] revealing nothing more than "an outline of the facility's buildings and equipment."[226] The Court in *Dow Chemical* held that the specialized aerial mapping camera was not some unique sensory device unavailable to the public.[227] Based upon that holding, a future court facing the problem could easily come to the conclusion that a thermal imager falls within the general public use. Such courts may argue that gaining access to an aerial mapping camera is much more difficult than gaining access to a thermal imager, and therefore, if the aerial mapping camera is allowed, then a thermal imager should likewise be so allowed. Other courts could argue that in general a camera is much more accessible to the public. For instance, a person can walk into one of many camera stores and buy a camera, but few if any stores specialize in the sale of thermal imagers.

It is the confusion over whether a device is in general public use that may ultimately erode the holding of the *Kyllo* decision.[228] If a court were to make the determination that a device is within general public use, the reasoning of the majority would carry little weight. The Court's reasoning was that all details of the home are intimate and require a warrant for a search. But, the fact that an intimate detail of the home was previously unknowable without physical intrusion wouldn't matter just because the device used to acquire such facts was deemed within general public use. In the end, courts will be

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[222] *See* United States v. Kyllo, 121 S. Ct. 2038, 2050 (2001). Within the dissent Justice Stevens pointed to the record in which an estimate of thermal imaging devices currently available is at least 10,000 units, and such units are easily accessible to any member of the public. *Id.* at 2050 n.5 (Stevens, J., dissenting).

[223] 476 U.S. 227 (1986).

[224] *Id.* at 229-30.

[225] *Id.* at 229. Photos of the complex were taken "from altitudes of 12,000, 3,000, and 1,200 feet. At all times the aircraft was lawfully within navigable airspace." *Id.*

[226] *Id.* at 238.

[227] *Id.* at 238-39.

[228] *Kyllo II*, 121 S. Ct. at 2050 (Stevens, J., dissenting).

more concerned with whether a certain device fits the term "in general public use."

Additionally, "the category of 'sense-enhancing technology' covered by the new rule, is far too broad."[229] As the dissent points out, the new rule could include future devices that would detect only the presence of illegal contraband, like the drug-sniffing dogs in *Place*,[230] which were held not to violate the Fourth Amendment absent a warrant. As previously mentioned, *Place* involved police use of a drug-sniffing dog to detect the presence of concealed contraband.[231] The defendant in *Place* had been detained at La Guardia Airport by police officers suspicious of him.[232] After the officers were denied the right to search the defendant's luggage, they subjected the bags to a "sniff test" by a trained narcotics detection dog, revealing the possible presence of hidden drugs.[233] Based upon the reaction of the dog, a warrant was issued to search the bags, resulting in the discovery of 1,125 grams of cocaine.[234] In finding that the use of a dog-sniff did not violate the Fourth Amendment, the Court stated:

> the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.[235]

So it stands to reason that a device that could only detect the presence of narcotics, such as the dog in *Place*, should not be held to constitute a search.[236] In fact, the idea that a thermal imager cannot discern between illegal and legal activity played a determinative role in the Court's reasoning.[237] But under the Court's new rule, such a device would be unconstitutional, "as would the use of other new devices that might detect the odor of deadly bacteria or chemicals for making a new type of high explosive."[238]

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[229] *Id.* at 2050.

[230] United States v. Place, 462 U.S. 696 (1983).

[231] *See supra* note 53 and accompanying text.

[232] *Place*, 462 U.S. at 699.

[233] *Id.*

[234] *Id.*

[235] *Id.* at 707.

[236] *Kyllo II*, 121 S. Ct. at 2050. If a device were to detect only the odor of marijuana, it should fall within the classification of a dog-sniff approved of in *Place*.

[237] *Id.* at 2045. The Court stated the device "might disclose, for example, at what hour each night the lady of the house takes her daily sauna and bath." *Id.*

[238] *Id.* at 2050.

Similarly, the new rule could invalidate previous decisions of the Supreme Court that have allowed the use of technological surveillance devices, such as *Smith v. Maryland*.[239] In *Smith* the defendant was a suspected robber who had been placing threatening phone calls to his prior victim.[240] After learning the defendant's identity, the telephone company, at the request of the police, installed a pen register[241] to record the numbers dialed from the defendant's phone.[242] The pen register revealed that the defendant had been placing calls to the victim that combined with other evidence resulted in the defendant's indictment for robbery and subsequent conviction.[243] Although the defendant argued that he placed the phone call from within his own home, the Court still found that such a subjective expectation in the phone numbers dialed were not an expectation that society is prepared to recognize as reasonable.[244] This would seem to contradict *Kyllo* because the Court specifically held that, "in the home . . . all details are intimate details, because the entire area is held safe from government eyes."[245] The contradictions do not end there. For instance, how many people actually have access to a pen register? Isn't a thermal imager more accessible to the "general public" than a pen register? Admittedly then, the pen register approved of in *Smith* would now fail because it revealed intimate details of the home worthy of protection and the device arguably is not in general public use.

In light of the possible inconsistencies with prior case law resulting from the majority's qualification of "in general public use," the Court may have done better to follow the judicial restraint urged by the dissent.[246] Indeed, the Supreme Court has followed such a tradition many times before.[247] It has been

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[239] 442 U.S. 735 (1979).

[240] *Id.* at 737.

[241] A pen register is a device, installed at the phone company, which can record the outgoing phone numbers dialed by the line to which the register is attached. *Id.* at 736 n.1. It will not, nor could it record the conversation on the phone line. *Id.*

[242] *Id.* at 737.

[243] *Id.*

[244] *Id.* at 743.

[245] *Kyllo II*, 121 S. Ct. at 2045.

[246] *Id.* at 2052. The dissent argued that if the Court had focused "on the rather mundane issue that [was] actually presented by the case before it," the legislators would have been given an opportunity to "grapple with these emerging issues." *Id.* The doctrine of judicial restraint suggests "that federal courts should address constitutional questions only when necessary to a resolution of the case or controversy before it." United States v. Cusumano, 83 F.3d 1247, 1250 (10th Cir. 1996).

[247] *See Cusumano II*, 83 F.3d at 1250 (citing Three Affiliated Tribes v. Wold Eng'g, 467 U.S. 138 (1984) ("It is a fundamental rule of judicial restraint, however, that this Court will not reach constitutional questions in advance of the necessity of deciding them."); Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.").

argued that within the *Kyllo* case it was necessary to disregard judicial restraint and address the constitutionality of the Agema 210 because the resulting warrant was based primarily upon the imager's use.[248] While that argument may be true, the majority could still have practiced judicial restraint by determining strictly whether the Agema 210 was violative of the Fourth Amendment, instead of creating, "an all-encompassing rule for the future."[249] Focusing solely upon the Agema 210's use in this case would give deference to the legislative branch of government in addressing these emerging issues.[250]

Notwithstanding the complications of the decision, the *Kyllo* opinion attempts to provide "a workable accommodation between the needs of law enforcement and the interests protected by the Fourth Amendment."[251] But as previously explained, the holding will only create more confusion for law enforcement as well as the courts. As alluded to by the dissent, a more realistic approach would have been to hold an evidentiary hearing as to the current availability of thermal imagers like the Agema 210.[252]

V. CONCLUSION

Kyllo is a commendable attempt by the Supreme Court to answer the question of whether the warrantless use of a thermal imaging device violates the Fourth Amendment. In drafting its rule the Court lays down an analysis, which for better or worse, provides self-sufficient reasoning for future courts to follow. In light of the Court's use of the "general public use" qualification, however, such an analysis will be lost to a more avid concern about a device's general availability. At some point, courts will attempt to make the determination as to whether a device is in general public use, requiring an examination of relevant case law. Such an examination will likely result in very little precedent, at which time the Court may again find itself confronting the issue of a thermal imager's use. If, and when, the Court is faced once more with the question of a thermal imager's constitutionality, an evidentiary hearing will likely be in order to determine whether current figures on the availability of the Agema 210 suffice to establish "general public use."[253] Based on the Court's overriding concern for the sanctity of the home, and the ever increasing encroachment of technology on an individual's privacy rights,

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[248] *See* Greenberg, *supra* note 23, at 170-71 (suggesting the Ninth Circuit was correct in disregarding the use of judicial restraint in this case).

[249] *Kyllo II*, 121 S. Ct. at 2052.

[250] *Id.*

[251] *Kyllo II*, 121 S. Ct. at 2045 (quoting Oliver v. United States, 466 U.S. 170, 181 (1984)).

[252] *Kyllo II*, 121 S. Ct. at 2050 n.5.

[253] *Id.* at 2052.

it seems doubtful that the Agema 210 or thermal imagers like it will be held to be within "general public use" any time soon.

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Hawai'i's Response to Strategic Litigation Against Public Participation and the Protection of Citizens' Right to Petition the Government

I. INTRODUCTION

In recent years, strategic litigation against public participation ("SLAPPs")[1] has silenced, intimidated, and deterred many American citizens from exercising their constitutional rights of free speech and petition. SLAPPs are suits based on a citizen's petitioning activity, and are often used by corporations, among others, to suppress opposition to private development or business.[2] In his groundbreaking article on SLAPPs, George Pring defined the four elements of a SLAPP suit: (1) a civil complaint or counterclaim (for monetary damages and/or injunction), (2) filed against non-governmental individuals and/or groups, (3) because of their communications to a government body, official, or the electorate, (4) on an issue of some public interest or concern.[3] SLAPPs thus achieve their purpose by utilizing the judicial system to retaliate and prevent citizens from participating in the governmental process.[4]

Hawai'i and a number of other states have taken notice of the growing number of SLAPPs filed against citizen activists and the potential impact such suits may have on a citizen's ability and willingness to participate in governmental decisions.[5] In response, Hawai'i's legislature considered and nearly passed an anti-SLAPP bill in the 2001 legislative session, but

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[1] George W. Pring, a Professor of Law at the University of Denver, and Penelope Canan, an Associate Professor of Sociology at the University of Denver, were the first to identify and discuss the nature and character of SLAPP suits. *See* GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT (1996).

[2] *See* City of Cotati v. Cashman, 109 Cal. Rptr. 2d 407, 412 (Cal. Ct. App. 2001) (explaining that the "paradigm SLAPP" is filed by a developer against environmental activists or community associations, but noting that SLAPP suits arise in a variety of other contexts as well).

[3] George W. Pring, *SLAPPs: Strategic Lawsuits Against Public Participation*, 7 PACE ENVTL. L. REV. 3, 8 (1989).

[4] *Cashman*, 109 Cal. Rptr. 2d at 412.

[5] *See* H.B. 741, 2001 Leg., 21st Sess. (Haw. 2001); S.B. 126, 2001 Leg., 21st Sess. (Haw. 2001) (finding that "[t]he threat of financial liability, litigation costs, destruction of one's business, loss of one's home, and other personal losses from groundless [SLAPP] lawsuits seriously affects government, commerce, and individual rights by significantly diminishing public participation in government, in public issues, and in voluntary service").

ultimately decided to carry the bill over for rehearing in the 2002 session.[6] If enacted, Hawai'i's anti-SLAPP bill will be one of the strongest anti-SLAPP laws in the nation, imposing severe penalties on SLAPP filers.[7]

Section II of this article will briefly examine the historical background behind a citizen's right to petition the government, and the constitutional protections underlying petitioning activity. Section II will also discuss in detail how SLAPPs have come to be identified as an unconstitutional infringement on petitioning activity, and will consider various courts' approach to dealing with SLAPPs.

Section III will discuss the emergence of anti-SLAPP legislation in the United States and examine key elements of Hawai'i's anti-SLAPP bill. It will compare specific provisions of Hawai'i's bill with anti-SLAPP legislation from various states, providing suggestions for revisions and alterations to Hawai'i's bill based on practical and legal experiences of states that have applied their anti-SLAPP laws in litigation.

Section IV concludes that before passing Hawai'i's anti-SLAPP bill in its current form, Hawai'i's legislators should compare its provisions with those of other states, and carefully balance the need to protect petitioning activity with the equally important need to prevent "sham" petitioning and allow filers with legitimate claims access to the judicial system. Despite a few weaknesses in Hawai'i's bill, however, it is still one of the strongest examples of anti-SLAPP legislation in the nation and would effectively protect and promote public participation.

II. BACKGROUND

A. The Right to Petition Under the First Amendment

The right to petition the government to redress grievances, as provided for in the First Amendment to the United States Constitution[8] and Article I, Section 4 of the Hawai'i Constitution,[9] has long been recognized as a basic freedom essential to our democratic form of government. In *Thomas v.*

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[6] *See* H.B. 741; S.B. 126.

[7] *See generally* H.B. 741; S.B. 126.

[8] U.S. CONST. amend. I (stating "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances").

[9] HAW. CONST. art. I, § 4. The language is identical to that of the First Amendment to the U.S. Constitution.

Collins,[10] the United States Supreme Court held that the First Amendment rights of free speech, free press, freedom to peaceably assemble, and freedom to petition for redress of grievances are "inseparable . . . cognate rights," and that "it is . . . in our tradition to allow the widest room for discussion, [and] the narrowest range for . . . restriction," in relation to these rights.[11] The right to petition, like other fundamental rights, has been recognized as essential "to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people . . . [as] [t]herein lies the security of the Republic, the very foundation of constitutional government."[12]

Constitutionally protected petitioning thus covers a wide range of activity and may take a variety of forms, including all legal, nonviolent attempts to influence government action, such as: "filing complaints, reporting violations of law, testifying before government bodies, writing letters, lobbying legislatures, advocating before administrative agencies, circulating petitions, conducting initiative and referendum campaigns, filing lawsuits . . . [as well as] peaceful demonstrations, protests, picketing, and boycotts aimed at producing government action."[13] Such activities, which promote democratic government and the free flow of public discussion and debate, have increasingly become the subject of SLAPP suits.[14]

B. Contexts in Which SLAPPs Emerge

As studies have shown, SLAPPs often involve businesses suing private citizens to retaliate against the citizen exercising his or her political and legal rights in opposition to the business's activities.[15] SLAPPs emerge in other

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[10] 323 U.S. 516, 539-40 (1945) (reversing union official's conviction for failing to comply with a temporary restraining order requiring him to obtain an "organizer's card" before speaking publicly and soliciting members for his union and holding the state requirement that one obtain an "organizer's card" as a prerequisite for public speech incompatible with the rights of free speech and assembly). *Id.*

[11] *Thomas*, 323 U.S. at 530.

[12] De Jonge v. Oregon, 299 U.S. 353, 365 (1937).

[13] PRING & CANAN, *supra* note 1, at 16; *see also* NAACP v. Clairborne Hardware, 458 U.S. 886, 911-12, 933 (1982) (holding that a boycott of white merchants' businesses to demand racial equality and integration was Constitutionally protected petitioning activity which did not expose petitioners to liability, and that only those who engaged in violent behavior could be held liable).

[14] Aaron R. Gary, *First Amendment Petition Clause Immunity From Tort Suits: In Search of a Consistent Doctrinal Framework*, 33 IDAHO L. REV. 67, 71-72 (1996).

[15] PRING & CANAN, *supra* note 1, at 216. Multiparty business concerns comprise approximately 44% of filers. *Id.*

contexts as well, often arising when a citizen or group of citizens oppose or criticize public officials, employees, or projects.[16]

In 1972, the Sierra Club and four individuals sought to enjoin a company from conducting logging activities in a forest pending the Secretary of Agriculture's review of a proposal to designate the forest a Wilderness Area.[17] In response, the company sued both the Sierra Club and the individuals for interference with advantageous relationship.[18] The company sought injunctive relief, compensatory damages, and $1,000,000 in punitive damages.[19]

In another case, the Town of Brookhaven Planning Board denied a property owner, SRW Associate's, application to cluster develop its property amidst resistance from community civic associations.[20] The associations sent statements urging community members to join their efforts, and expressed their opposition to the project at a Board hearing.[21] Claiming that application denial was the direct result of false and misleading statements by the civic associations and their officers, SRW Associates sued the associations and officers for injurious falsehood, prima facie tort, conspiracy, and malicious abuse of process.[22]

In a third case, Dr. Keith Dixon, an archaeology professor at California State University, opposed the university's plans to build a strip mall and parking lot on an ancient Native American village site.[23] Dixon criticized the university's plans both internally and through letters to the university.[24] A survey company hired by the university, which had previously opined in a study that the project would cause no detrimental impact, sued Dixon for $570,000.[25] It claimed libel, slander, trade libel, and interference with contractual relations and prospective economic advantage.[26]

As these cases demonstrate, SLAPPS come disguised as a variety of claims, the most common of which are defamation, business torts,[27] conspiracy,

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[16] Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California*, 32 U.C. DAVIS L. REV. 965, 969 (1999).

[17] Sierra Club v. Butz, 349 F. Supp. 934, 935 (N.D. Cal. 1972).

[18] *Id.* at 935.

[19] *Id.* at 936.

[20] SRW Assoc. v. Bellport Beach Prop. Owners, 517 N.Y.S.2d 741, 742 (1987).

[21] *Id.* at 742.

[22] Id.

[23] Dixon v. Superior Court, 36 Cal. Rptr. 2d 687, 691 (Cal. Ct. App. 1994).

[24] Dixon's letters were a means of public comment endorsed by California's Environmental Quality Act, which requires a public agency preparing an environmental impact report or negative declaration "to consider any information or comments it receives." *Id.* at 691.

[25] *Id.* at 692.

[26] *Id.*

[27] "Business torts" include claims such as "interference with business, with contract, with prospective economic advantage; antitrust, restraint of trade or unfair competition." PRING & CANAN, *supra* note 1, at 150.

judicial or administrative process violations, violation of civil or constitutional rights, and other violations such as nuisance, trespass, and invasion of privacy.[28] All SLAPPs are similar, however, in that none attempt to vindicate legitimate legal claims, but rather attempt to intimidate and discourage opposition from the target[29] of the SLAPP.[30] SLAPP filers often achieve their goal of intimidation by seeking damages that, if awarded, would prove financially devastating to SLAPP targets.[31] One commentator estimates that SLAPP damage claims average more than $9,000,000.[32] In addition, the average duration of SLAPPs, from filing to final decision, is nearly three years.[33] Even though approximately seventy-seven percent of SLAPP targets ultimately prevail in court,[34] victory often comes only after great time and expense to the target.[35] The filer thus loses on its claim but achieves its goal of punishing the target for exercising his or her legal rights of speech and petition, and demonstrating the consequences of such acts to others who might contemplate future opposition.[36]

Furthermore, SLAPP filers are often undeterred by judicial safeguards that a SLAPP target may seek to utilize, such as a request for sanctions, or a counter-suit for abuse of process or malicious prosecution.[37] This is in part

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[28] *Id.* at 150-51.

[29] For the purpose of consistency, this article will identify defendants as "targets" and plaintiffs as "filers" of SLAPP suits.

[30] John Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 LOY. L.A. L. REV. 395, 403 (1993).

[31] *See, eg.*, Protect Our Mountain Env't v. Dist. Court, 677 P.2d 1361, 1364 (Colo. 1984). Developer sued environmentalist group for abuse of process and civil conspiracy, seeking $10,000,000 compensatory and $30,000,000 punitive damages. *Id.*

[32] Barker, *supra* note 30, at 403.

[33] Pring, *supra* note 3, at 12 n.33.

[34] Pring, *supra* note 3, at 12.

[35] With claims averaging more than $9,000,000, and the duration of SLAPPs averaging over three years, even SLAPP targets that prevail in litigation have still been put at risk for huge damage claims and have been forced to spend significant amounts of time defending against these claims. *See* Barker, *supra* note 30, at 403; Pring, *supra* note 3, at 12 n.33.

[36] *See, e.g.*, PRING & CANAN, *supra* note 1, at 2.

> The ominous new risk for those who express their views to the government is that opponents -- not content with rebuttal in the same public forums -- will drag citizens out of the political arena and into the courthouse with staggering personal lawsuits. The "chilling" effect this new breed of cases on public debate and citizen involvement is already significant; the possible effect on the future of our society and its public-participatory form of government is even more threatening.

Id.

[37] *See* Laura J. Ericson-Siegel, *Review of Florida Legislation; Comment: Silencing SLAPPs: An Examination of Proposed Legislative Remedies and a "Solution" for Florida*, 20 FLA. ST. U.L. REV. 487, 498 (1992)(asserting that a target may fight back with "a counterclaim or a subsequent lawsuit [for] [m]alicious prosecution, abuse of process, [etc.]"). *But see* Barker,

because many SLAPP filers view payment of damages to a SLAPP target as a cost of doing business,[38] and the SLAPP target may be reluctant to continue litigation in order to recover damages.

C. "Chilling" Citizen Activism

SLAPPs, by putting citizens at risk of personal liability for their petitioning activity, threaten a citizen's constitutional rights and "chill" citizen activism. Cases like *Bill Johnson's Restaurants, Inc. v. NLRB*[39] have addressed this problem. Particularly in cases where a petitioner lacks financial resources, the threat of being sued for damages can impose a tremendous deterrent on the petitioner's willingness to exercise First Amendment rights.[40] Filers have thus found SLAPPs an effective means to stifle public participation and debate, making it "far less likely that a citizen activist will continue to speak out, and even if she persists . . . [being] more cautious with both words and actions."[41]

In particular, real estate developers, who comprise over one-third of all SLAPP filers,[42] often view "'SLAPP suits [as] viable weapons in [their] arsenal . . . in certain circumstances' . . . [including where] the filer has a good reputation; the dollars at stake are high; the targets stoop to personal attacks; and the targets are relatively unsophisticated individuals, not backed by larger entities."[43] Thus, even though most targets eventually prevail or settle SLAPPs filed against them, the time and expense involved in defending against the SLAPP often drains the target's resources, energy, and supporters, and diminishes the target's willingness to engage in future petitioning activity.[44]

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supra note 30, at 406 (finding that "because winning is not a SLAPP plaintiff's prime motivation, existing safeguards are inadequate").

[38] Barker, *supra* note 30, at 406.

[39] 461 U.S. 731 (1983). A restaurant owner brought an action to enjoin a fired employee (waitress) from picketing outside its restaurant, and for damages for libel. *Id.* at 733-34. The Court noted that lawsuits where an employer sues an employee for engaging in protected activities may be a "powerful instrument of coercion or retaliation." *Id.* at 740.

[40] *Bill Johnson's Rests., Inc.*, 461 U.S. at 741 (agreeing with appellate court's finding that "the chilling effect of a state lawsuit upon an employee's willingness to engage in protected activity is multiplied where the complaint seeks damages in addition to injunctive relief").

[41] Ericson-Siegel, *supra* note 37, at 494.

[42] PRING & CANAN, *supra* note 1, at 30.

[43] PRING & CANAN, *supra* note 1, at 42 (quoting and citing Mark Chertok, *The Real Estate Development SLAPP*, SLAPPS: STRATEGIC LAWSUITS AGAINST PUBLIC PARTICIPATION IN GOVERNMENT 37 (ALI-ABA Course of Study Materials 1994). Chertok is an attorney who has represented both SLAPP targets and filers. PRING & CANAN, *supra* note 1, at 42.

[44] Aaron R. Gary, *First Amendment Petition Clause Immunity From Tort Suits: In Search of a Consistent Doctrinal Framework*, 33 IDAHO L. REV. 67, 130 (1996).

SLAPP experts George Pring and Penelope Canan have estimated that "thousands of SLAPPs have been filed [from the mid-1970s to the mid-1990s], . . . tens of thousands of Americans have been SLAPPed, and still more have been muted or silenced by the threat."[45] In light of growing awareness of such estimates, state courts and legislatures have addressed the problem by establishing judicial and statutory remedies for SLAPP targets.

The judicial response to SLAPPs was developed by the U.S. Supreme Court's *Noerr-Pennington*[46] doctrine, a modern approach to protection of a citizen's right to petition the government.

D. The Noerr-Pennington *Doctrine*

The *Noerr-Pennington* doctrine, which emerged from two important anti-trust cases, established the principle that petitioning activity aimed at procuring government action cannot be subject to liability.[47] In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,[48] members of the trucking industry sued a group of railroads for waging an anti-competitive publicity campaign against the truckers, alleging a violation of the Sherman Act.[49] In their complaint, the truckers claimed the railroads' publicity campaign was designed to promote laws that would destroy the trucking industry, tarnish the industry's reputation, and deter customers from

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[45] PRING & CANAN, *supra* note 1, at xi.

[46] *See* E. R.R. Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mine Workers of America v. Pennington, 381 U.S. 657 (1965).

[47] *See Pennington*, 381 U.S. at 670 (following E. R.R. Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), which established that no liability attaches under the Sherman Act for "a concerted effort to influence public officials regardless of intent or purpose").

[48] 365 U.S. 127 (1961).

[49] The truckers alleged violations of 15 U.S.C. §§ 1-2, which provide that:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in discretion of the court.

15 U.S.C. § 1 (West 2001).

Section 2 states:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of court.

15 U.S.C. § 2 (West 2001).

continuing to employ truckers.[50] Furthermore, the truckers argued that the publicity campaign caused the Pennsylvania governor to veto a pro-trucking law, resulting in direct injury to the industry.[51]

Although the truckers' cause of action was for violation of the Sherman Act, the U.S. Supreme Court held that the railroads' campaign, despite being initiated for anti-competitive purposes, was protected by the Petition Clause.[52] The Court found the railroads' campaign constituted "political activity" aimed at influencing the passage of laws, and that no violation of the Sherman Act can be predicated on "solicitation of government action with respect to the passage and enforcement of laws."[53]

In the later case of *United Mine Workers of America v. Pennington*,[54] a miner's union sued a coal producer to recover royalty payments it alleged were due under a collective bargaining agreement.[55] The coal producer filed a counterclaim against the union, alleging the union violated the Sherman Act by conspiring to restrain and monopolize interstate commerce.[56] Citing the decision in *Noerr*, the Court held that the trial judge improperly allowed the jury to consider facts showing that the union and its alleged co-conspirators made joint efforts to influence the Secretary of Labor and the Tennessee Valley Authority.[57] In remanding the case for a new trial, the Court directed the lower court to instruct the jury that the union's petitioning activities were protected under the *Noerr* precedent, thus shielding the union from Sherman Act liability.[58] As in *Noerr*, the Court held that "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition."[59]

E. The "Sham" Exception

The *Noerr-Pennington* doctrine established protection for petitioning activity regardless of its underlying "intent" or "purpose."[60] The doctrine, however, set forth the principle that like the right to free speech, the right to

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[50] *Noerr Motor Freight, Inc.*, 365 U.S. at 129.

[51] *Id.* at 130.

[52] Congress is prohibited from making any law abridging the freedom to "petition the Government for a redress of grievances." U.S. CONST. amend. I.

[53] *Noerr Motor Freight, Inc.*, 365 U.S. at 138.

[54] 381 U.S. 657 (1965).

[55] *Id.* at 659.

[56] *Id.*

[57] *Id.* at 670.

[58] *Id.* at 671.

[59] *Id.* at 670.

[60] *Id.*

petition the government is not absolute.[61] In *Noerr*, despite the Court's ruling that the anti-competitive intent underlying the railroads' publicity campaign was irrelevant, the Court asserted that "[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor . . . ."[62] It is from this declaration that the "sham" exception, which excludes from protection petitioning activity initiated solely for the purpose of injuring another party, emerged.[63] Later cases such as *California Motor Transport Co. v. Trucking Unlimited*,[64] *City of Columbia v. Omni Outdoor Advertising, Inc.*,[65] and *Protect Our Mountain Environment, Inc. v. District Court*[66] followed this principle, developing a "sham" exception to the general rule protecting petitioning activity. These courts applied the exception to situations in which a target-petitioner's activities are "not genuinely aimed at procuring favorable government action."[67] In determining if petitioning activity is a "sham," courts typically use an objective rather than subjective

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[61] *See, e.g.*, Protect Our Mountain Env't, Inc. v. Dist. Court, 677 P.2d 1361, 1366 (Colo. 1984) (holding that "[t]he right to petition the government . . . is not without limits. [Where litigation is used as a means of petitioning activity], [t]he First Amendment does not grant a license to use the courts for improper purposes."); *see also Noerr Motor Freight, Inc.*, 365 U.S. at 144 (holding that when petitioning activity is a mere "sham" to interfere with a competitor's business relationships "application of the Sherman Act [to impose liability] would be justified").

[62] *Noerr Motor Freight, Inc.*, 365 U.S. at 144.

[63] *See, e.g.*, *Protect Our Mountain Env't, Inc.*, 677 P.2d at 1366 (noting that in *Noerr Motor Freight, Inc.*, "the Supreme Court developed what has become known as the 'sham exception,'" which applies in cases where petitioning activity is initiated not to influence legislation or law enforcement practices, but merely as an attempt to interfere with a competitor's business relationships).

[64] 404 U.S. 508, 515-16 (1972) (holding that parties who conspired to monopolize trade by preventing a competitor from participation in the regulatory process should not enjoy *Noerr* protection because their petitioning activity was a "sham," used as a means to "harass and deter their competitors from having 'free and unlimited access' to the agencies and courts").

[65] 499 U.S. 365, 381 (1991) (holding that petitioner, who lobbied city officials to enact zoning ordinances that would prevent other advertising companies from competing in the market, did not violate the Sherman Act and could not be held liable for "sham" petitioning since its activities related to the passage of ordinances).

[66] 677 P.2d 1361 (Colo. 1984).

[67] *See, e.g.*, *Protect Our Mountain Env't, Inc.*, 677 P.2d at 1366 (holding that like "sham" speech or other forms of petitioning activity, when it becomes apparent that a petitioner is using the courts for the purposes of "sham" litigation, courts will not grant the petitioner constitutional protection). This is because "[j]ust as false statements are not immunized by the First Amendment right to freedom of speech, baseless litigation is not immunized by the First Amendment right to petition." *Id.* (internal citations omitted).

standard,[68] granting constitutional protection only when a petitioner's activities are legitimately aimed at procuring favorable government action.[69]

Although the *Noerr-Pennington* doctrine and "sham" exception emerged from anti-trust cases, courts apply both in other contexts as well. Courts have used the *Noerr-Pennington* doctrine to shield citizens from liability for, inter alia, petitioning a zoning board,[70] petitioning city officials to enforce noise ordinances,[71] and boycotting to demand racial equality and integration.[72] However, the *Noerr-Pennington* doctrine and the "sham" exception, although providing guidelines for protection of First Amendment petitioning rights, did not constitute a formal "test" for determining the scope of protection to be afforded. Later, *Protect Our Mountain Environment, Inc. v. District Court*[73] set forth specific criteria for such protection.[74]

F. The POME *Test For Determining The Scope of Protected Petitioning Activity*

In *Protect Our Mountain Environment*,[75] Gayno, a developer, filed an application with Jefferson County officials to rezone land on which it intended to construct residential units.[76] The board approved Gayno's request, at which time Protect Our Mountain Environment ("POME"), a group concerned about the project's environmental impact, filed suit to overturn the board's

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[68] PRING & CANAN, *supra* note 1, at 27-28. The objective standard focuses on outcome, while the subjective standard focuses on intent. *Id.* In applying the objective standard, courts will protect petitioning activity when the petitioner is seeking an "*outcome* of a governmental process (that is, actual legislation, rulings, or other government action or inaction). . . [and will deny protection when the petitioner] uses the governmental *process* solely as an end in itself (that is, invokes the costs, delays, and inconveniences of the government procedure only, without regard to outcome)." *Id.* (emphasis added).

[69] PRING & CANAN, *supra* note 1, at 27-28.

[70] Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 615 (8th Cir. 1980) (holding that under *Noerr*, citizens who demanded zoning amendments and spread "false derogatory rumors about [a developer's] proposed housing project" were shielded from liability).

[71] Aknin v. Phillips, 404 F. Supp. 1150, 1153 (S.D.N.Y. 1975) (holding that citizens who complained about the noise generated by a local discotheque at a public hearing were exercising their First Amendment rights and could not be held liable for doing so).

[72] NAACP v. Clairborne Hardware Co., 458 U.S. 886 (1982) (holding that a boycott of white merchants' businesses to demand racial equality and integration was Constitutionally protected petitioning activity which, if performed nonviolently, would not expose petitioners to liability).

[73] 677 P.2d 1361 (Colo. 1984).

[74] *See id.* at 1367.

[75] *Id.* at 1361.

[76] *Id.* at 1362-63.

approval.[77] The district court ruled, and the Colorado Court of Appeals affirmed against POME, awarding Gayno damages and double costs.[78] Gayno, encouraged by its victory, filed suit against POME for abuse of process and civil conspiracy, seeking $10,000,000 in compensatory damages and $30,000,000 in exemplary damages.[79] POME filed a motion to dismiss Gayno's complaint, asserting that the earlier suit was a valid exercise of its right to petition the government under the First Amendment.[80] The court rejected POME's request, however, holding that POME's earlier suit constituted a "sham" that was not constitutionally protected.[81] POME then sought and was granted prohibitory relief from Colorado's Supreme Court, which overruled the lower court's decision, directing the court to reconsider POME's motion.[82]

In its decision, the *POME* court noted the potential "chilling effect" SLAPPs can have on citizens' exercise of their constitutional right to petition the government, but also recognized that "[d]amage to other persons and society . . . can . . . result from baseless litigation instigated under the pretext of legitimate petitioning activity."[83] The *POME* court then formulated a test that attempted to balance a citizen's right to petition against the need to eliminate "sham" petitioning.[84] The *POME* court ruled that when a target moves to dismiss a filer's claim based on First Amendment protection for the target's petitioning activity, the filer must demonstrate the "constitutional viability" of its claim to prevent dismissal.[85]

The *POME* court therein adopted a heightened standard of protection for cases based on petitioning activity.[86] It found that when a filer sues a target for misuse or abuse of process, and the target responds with a motion to dismiss based on its constitutional right to petition the government, the filer must make a "sufficient showing" to allow the court to determine that the

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[77] *Id.* at 1363.

[78] *Id.* at 1364.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.* at 1370.

[83] *Id.* at 1368.

[84] *Id.* (noting the "competing concerns" of the need to prevent SLAPPs from chilling citizens' right to petition the government with the possibility of harm caused by baseless litigation initiated under the guise of legitimate petitioning activity).

[85] In determining whether the filer's claim can survive the motion to dismiss, the *POME* court held that both parties must be given the opportunity to present material relevant to the motion, at which point the court may decide the motion as one for summary judgment. *Id.* at 1368-69.

[86] *Id.* at 1369.

target's petitioning activities were not protected by the First Amendment because:

> (1) the [target's] administrative or judicial claims were devoid of reasonable factual support, or if so supportable, lacked any cognizable basis in law for their assertion; and (2) the primary purpose of the [target's] petitioning activity was to harass the [filer] or to effectuate some other improper objective; and (3) the [target's] petitioning activity had the capacity to adversely affect a legal interest of the [filer].[87]

The *POME* test provided a framework for dealing with SLAPPs that was adopted in subsequent cases.[88] The test affords targets heightened protection by requiring a filer not only to prove the target's petitioning activity was meritless, but also that it was initiated for an improper purpose.[89] The *POME* test paved the way for state anti-SLAPP legislation in the late 1980s and early 1990s.

III. THE DEVELOPMENT OF ANTI-SLAPP LEGISLATION

Recognizing the need to protect citizens' right to petition the government as an essential aspect of our democratic society, legislatures in eighteen states have enacted anti-SLAPP legislation.[90] In 1989, Washington was the first state to pass an anti-SLAPP law.[91] Since then, other states have enacted anti-SLAPP laws offering differing levels of protection for citizens' speech and

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[87] *Id.* at 1369.

[88] *See, e.g.*, Scott v. Hern, 216 F.3d 897, 915 (10th Cir. 2000) (affirming summary judgment on abuse of process claim after applying the *POME* test and finding that the defendant physician's submission of a petition for involuntary commitment of defendant was constitutionally protected petitioning activity and was not "devoid of factual support or cognizable basis in law"); Concerned Members of Intermountain Rural Elec. Ass'n v. Dist. Court, 713 P.2d 923 (Colo. 1986) (directing the lower court to apply the *POME* test in deciding a motion for summary judgment on a counterclaim which petitioners argued was based on their petitioning activity).

[89] *Protect Our Mountain Env't, Inc.*, 677 P.2d at 1369.

[90] *See* California Anti-SLAPP Project, http://www.sirius.com/~casp/menstate.html (last modified Apr. 18, 2001); *see also* CAL. CIV. PROC. CODE § 425.16 (West 2001); DEL. CODE ANN. tit. 10, § 8136-8138 (West 2001); FLA. STAT. ch. 768.295 (West 2001); GA. CODE ANN. § 9-11-11.1 (2001); IND. CODE ANN. § 34-7-7 (West 2001); LA. CODE CIV. PROC. ANN. art. 971 (West 2001); ME. REV. STAT. ANN. tit. 14 § 556 (West 1999); MASS. GEN. LAWS ch. 231, § 59H (West 2001); MINN. STAT. ANN. § 554.02 (West 2001); NEB. REV. STAT. §§ 25-21-241 to -246 (2001); NEV. REV. STAT. ANN. § 41.640-.670 (West 2001); N.M. STAT. ANN. §§ 38-2-9.1 and 9.2 (2001); N.Y. CIV. RIGHTS LAW § 76 (West 2001); OKLA. STAT. ANN. tit. 12, § 1443.1 (West 2001); 42 PA. CONS. STAT. §§ 27-77-7707 and 27-83-8301 to -8305 (2001); R.I. GEN. LAWS § 9-33-3-1 to -4 (2001); TENN. CODE ANN. § 4-21-1003 to -1004 (West 2001); and WASH. REV. CODE ANN. § 4.24.500-4.24.520 (West 2001).

[91] *See* WASH. REV. CODE § 4.24.500-4.24.520 (West 2001).

petition rights.[92] In addition, eleven states, including Hawai'i, have recently or are currently considering anti-SLAPP bills.[93]

A. Elements of Hawai'i's Anti-SLAPP Bill

Representative Hermina Morita[94] and Senator Bob Nakata introduced Hawai'i's anti-SLAPP bill in the 2001 Hawai'i State Legislature as House Bill 741 and Senate Bill 126.[95] In the House, the anti-SLAPP bill passed three readings, and was transmitted to the Senate, where it passed two readings, but was carried over for rehearing in the 2002 Regular Session.[96]

In the bill's text, the Hawai'i legislature notes that "[c]ivil lawsuits and counterclaims, often claiming millions of dollars, have been and are being filed against thousands of citizens, businesses, and organizations based on their valid exercise of their right to petition [the government] . . . ."[97] The bill also observes that because the judicial response to SLAPPs has not been "uniform" or "comprehensive,"[98] anti-SLAPP legislation in Hawai'i is needed to protect and encourage continued citizen participation in government, promote prompt resolution of SLAPPs, and provide costs and damages to targets who have been forced to defend against SLAPPs.[99]

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[92] *See* California Anti-SLAPP Project, *supra* note 90, http://www.sirius.com/~casp/menstate.html (last modified Apr. 18, 2001).

[93] *Id.* States that have previously considered or are currently considering anti-SLAPP legislation include Arkansas, Colorado, Hawai'i, Kansas, Maryland, Michigan, New Hampshire, New Jersey, Oregon, Texas, and Virginia. *Id.*

[94] Representative Morita is the first listed Introducer of House Bill 741, which was also introduced by Representatives Cynthia Thielen, Roy Takumi, Marilyn Lee, Helene Hale, Marcus Oshiro, Mark Takai, Blake Oshiro, Brian Schatz, and Dennis Arakaki. *See* H.B. 741, 2001 Leg., 21st Sess. (Haw. 2001).

[95] *See* H.B. 741; S.B. 126, 2001 Leg., 21st Sess. (Haw. 2001).

[96] H.B. 741; S.B. 126.

[97] *See* H.B. 741; S.B. 126.

[98] H.B. 741; S.B. 126.

[99] H.B. 741; S.B. 126. The Legislature's stated purpose for the anti-SLAPP bill is to:

> (1) Protect and encourage citizen participation in government to the maximum extent permitted by law; (2) Create a more equitable balance between the rights of persons to file lawsuits and to trial by jury, and the rights of persons to petition, speak out, associate, and otherwise participate in their governments; (3) Support the operations of and assure the continuation of representative government in America, including the protection and regulation of public health, safety and welfare by protecting public participation in government programs, public policy decisions, and other actions; (4) Establish a balanced, uniform, and comprehensive process for speedy adjudication of SLAPPs as a major contribution to lawsuit reform; and (5) Provide for attorney fees, costs, and damages for persons whose citizen participation rights have been violated by the filing of a SLAPP against them.

H.B. 741; S.B. 126.

Under the provisions of Hawai'i's anti-SLAPP bill, the court treats a SLAPP target's motion to dismiss a filer's claim as a motion on the pleadings, at which time discovery is suspended.[100] The alleged SLAPP filer will have the burden of proving by a preponderance of the evidence[101] that acts of the SLAPP target were *not immunized* as "constitutionally protected petitioning activity."[102] Failure to make such a showing will result in dismissal of the filer's claim.[103] A SLAPP target that loses its motion to dismiss will have the right of expedited appeal, although no similar right is provided for the SLAPP filer.[104] In addition, the bill allows any government body, the attorney general, county attorney or corporate counsel to which the SLAPP target directed its petitioning activity to intervene on behalf of the target.[105]

Under the Hawai'i bill, a court will award attorney's fees, expert witness fees, and costs to a SLAPP target that successfully moves to dismiss a SLAPP filer's claim.[106] If the court finds the filer's claim was frivolous, the SLAPP target will also be entitled to actual damages or $5,000, whichever is greater.[107] The bill further provides that the court shall order such additional sanctions against the SLAPP filer, its attorneys or law firms "sufficient to deter repetition of such conduct and comparable conduct by others similarly situated."[108] Finally, the bill allows a SLAPP target that has been damaged or injured by the suit to seek actual or compensatory damages, punitive damages, attorney's fees, and costs.[109]

Compared to anti-SLAPP laws in most other states, the provisions of Hawai'i's anti-SLAPP bill reflect the legislators' concern about the effects of SLAPPs, and their willingness to adopt tough measures to combat these meritless suits.[110]

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[100] *See* H.B. 741. However, under Hawai'i's Senate Bill, which has only passed two readings, the court will treat the motion to dismiss as a motion for summary judgment. *See* S.B. 126.

[101] Hawai'i's Senate Bill 126, which has only passed two readings, uses a "clear and convincing" standard rather than a "preponderance of the evidence" standard for the filer's burden of proof provision. *See* S.B. 126.

[102] Upon the target's motion to dismiss, the filer has seven days to amend its pleadings (to be pled with specificity). H.B. 741. Hawai'i's Senate Bill does not contain this provision. *See* S.B. 126.

[103] *See* H.B. 741; S.B. 126.

[104] *See* H.B. 741; S.B. 126.

[105] *See* H.B. 741; S.B. 126.

[106] *See* H.B. 741; S.B. 126.

[107] *See* H.B. 741; S.B. 126.

[108] *See* H.B. 741; S.B. 126.

[109] *See* H.B. 741; S.B. 126.

[110] *See* H.B. 741; S.B. 126. One stated purpose of Hawai'i's proposed anti-SLAPP legislation is to "[p]rotect and encourage citizen participation in government to the maximum extent permitted by law," reflecting Hawai'i legislators' concern and commitment to protecting

B. A Comparison of Hawai'i's Anti-SLAPP Bill to Statutes of Other States

1. Scope of protection

Hawai'i's anti-SLAPP bill protects all acts in furtherance of a petitioner's right to petition the government, regardless of intent or purpose, but excludes acts not legitimately aimed at procuring a favorable government response.[111] Most other states' statutes similarly protect communications made to government officials or bodies to influence action on issues of public concern.[112]

Georgia's anti-SLAPP statute establishes that a suit based on activities that could reasonably be construed to further the rights of free speech or petition[113] requires both the party and attorney filing the claim to produce written verification under oath that their claim is warranted by existing law or a good

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citizens against SLAPP suits by adopting highly protective measures for public petitioning. H.B. 741; S.B. 126.

[111] *See* H.B. 741; S.B. 126. "Immunized acts" include:

> Any act by a person in furtherance of the constitutional right to petition under the United States or State constitution, including seeking relief, influencing action, informing, communicating, and otherwise participating in the process of government, shall be immune from civil liability, regardless of intent or purpose, except where not aimed at procuring any governmental or electoral action, result or outcome.

H.B. 741; S.B. 126.

[112] *See, e.g.*, NEV. REV. STAT. ANN. § 41.650 (West 2001) which states that "A person who engages in a good faith communication in furtherance of the right to petition is immune from civil liability for claims based upon the communication." *Id.* The Tennessee statute states:

> Any person who in furtherance of such person's right of free speech or petition under the Tennessee or United States Constitution in connection with a public or governmental issue communicates information regarding another person or entity to any agency of the federal, state or local government regarding a matter of concern to that agency shall be immune from civil liability on claims based upon the communication to the agency.

TENN. CODE ANN. § 4-21-1003 (West 2001). The Massachusetts statute states:

> 'A party's exercise of its right to petition' shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.

MASS. GEN. LAWS ch. 231, § 59H (West 2001).

[113] Georgia's statute states that protected speech and petitioning rights include those made before a legislative, executive or judicial proceeding, or made in connection with an issue under consideration or review by one of these government bodies. GA. CODE ANN. § 9-11-11.1 (2001).

faith argument for a change in the law, and is not being made for an improper purpose.[114] If the claim is later found to violate this verification of legitimacy, thus constituting a SLAPP, the court may impose sanctions on the filer, or dismiss the claim, ordering the filer to pay damages.[115]

Other states' anti-SLAPP laws provide a narrower scope of protection. Delaware, New York, and Nebraska's statutes limit the scope of protected petitioning activity to reporting, ruling on, challenging, or opposing an application for a permit, zoning change, lease, license, or other government-based entitlement or permission to act.[116] Similarly narrow in scope, Washington's statute protects individuals from liability only for reports of "wrongdoing" to appropriate governmental bodies.[117] Florida's statute is

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[114] GA. CODE ANN. § 9-11-11.1 (2001). The statute states:

> For any claim asserted against a person or entity arising from an act by that person or entity which could reasonably be construed as an act in furtherance of the right of free speech or the right to petition government for a redress of grievances under the Constitution of the United States or the Constitution of the State of Georgia in connection with an issue of public interest or concern, both the party asserting the claim, and the party's attorney of record, if any, shall be required to file, contemporaneously with the pleading containing the claim, a written verification under oath . . . [certifying] that the party and his or her attorney of record, if any, have read the claim; that to the best of their knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law . . . [and also that] the claim is not interposed for any improper purpose such as to suppress a person's or entity's right of free speech or right to petition government, or to harass, or to cause unnecessary delay or needless increase in the cost of litigation.

Id.

[115] GA. CODE ANN. § 9-11-11.1 (2001). If a party and the party's attorney verify their claim and it is later found in violation of the statute's provisions, the court:

> [U]pon motion or upon its own initiative, shall impose upon the persons who signed the verification, a represented party, or both an appropriate sanction which may include dismissal of the claim and an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee.

Id.

[116] DEL. CODE ANN. tit. 10, § 8136 (West 2001). Delaware's statute states:

> An 'action involving public petition and participation' is an action, claim, cross-claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, rule on, challenge or oppose such application or permission . . . 'public applicant or permittee' shall mean any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission.

Id. See also N.Y. CIV. RIGHTS LAW § 76 (West 2001); NEB. REV. STAT. § 25-21,242 (2001).

[117] WASH. REV. CODE ANN. § 4.24.500 (West 2001). Washington's statute states:

> [T]he threat of a civil action for damages can act as a deterrent to citizens who wish to

restrictive in a different way: rather than limit protection to certain kinds of petitioning activity, the statute bars only government entities, rather than any potential SLAPP filer, from bringing a SLAPP suit.[118]

Compared to other states, Hawai'i's bill is broad in its scope of protected petitioning activity, not containing language that would unduly restrict the kinds of activity immunized from liability.[119] It is important that Hawai'i's anti-SLAPP bill covers only petitioning activity "aimed at procuring a governmental or electoral action, result or outcome."[120] This reinforces a citizen's constitutional right to influence governmental action. It does not, however, provide protection when a citizen conducts activities under the guise of "petitioning" without intent to influence government action, but with intent to shield herself from liability under anti-SLAPP law.[121]

Although Hawai'i's bill offers protection for a wide range of petitioning activity, Hawai'i legislators should also consider alternate approaches, like Georgia's anti-SLAPP statute, which is more proactive in preventing SLAPP suits.[122] Under Georgia's anti-SLAPP law, the requirement that a filer submit written verification of the legitimacy of its claim forces the filer and attorney to consider both the reasons for filing the suit and the potential ramifications for initiating baseless litigation.[123] Georgia's approach thus models the standard set forth by Rule 11 of the Federal Rules of Civil Procedure.[124]

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report information to federal, state, or local agencies. The costs of defending against such suits can be severely burdensome. The purpose of [this law] is to protect individuals who make good-faith reports to appropriate governmental bodies.

Id.

[118] FLA. STAT. ch. 768.295 (West 2001). Florida's statute states:

No governmental entity in this state shall file or cause to be filed, through its employees or agents, any lawsuit, cause of action, claim, cross-claim, or counterclaim against a person or entity without merit and solely because such person or entity has exercised the right to peacefully assemble, the right to instruct representatives, and the right to petition for redress of grievances before the various governmental entities of this state, as protected by the First Amendment to the United States Constitution and s. 5, Art. I of the State Constitution.

Id.

[119] *See* H.B. 741, 2001 Leg., 21st Sess. (Haw. 2001); S.B. 126, 2001 Leg., 21st Sess. (Haw. 2001). The scope of protected activity includes all communications or petitions to the government, regardless of intent or purpose, unless such activity is not aimed at influencing the government. H.B. 741; S.B. 126.

[120] H.B. 741; S.B. 126.

[121] H.B. 741; S.B. 126. Communications or petitions *not* aimed at procuring a governmental or electoral action, result, or outcome are specifically excluded from protection. H.B. 741; S.B. 126.

[122] *See* GA. CODE ANN. § 9-11-11.1 (2001) (requiring a filer and its attorney to submit written verification of the validity of their claim).

[123] *Id.*

[124] *See* FED. R. CIV. P. 11(b).

Hawai'i should not follow the lead of New York, Delaware, and Nebraska, because these states' statutes protect only petitioning activity by permitees or public applicants, thereby failing to cover approximately half of all SLAPP suits.[125] SLAPPs filed by "government [bodies], by landlords against tenants, companies against consumers, employers against employees, and police against citizens"[126] would not be covered.[127] Citizens would thus be exposed to liability even when they engage in certain forms of legitimate petitioning activity. Similarly, Florida's statute, which bars only government entities from bringing SLAPP claims, would fail to provide protection for SLAPP targets in approximately seventy percent of SLAPPs filed.[128]

In defining the scope of immunized petitioning activity, Hawai'i's anti-SLAPP bill does not contain the express "public issue" requirement contained in some states' anti-SLAPP statutes.[129] Courts in California[130] have encountered confusion trying to define "public issue" in determining what constitutes immunized petitioning activity.[131] In *Zhao v. Wong*,[132] the court held that to be protected under California's anti-SLAPP statute, a statement or writing made before a legislative, executive, or judicial proceeding must also be made in connection with a "public issue."[133] Subsequent cases like *Briggs v. Eden Council for Hope and Opportunity*[134] rejected *Zhao's* rigid threshold, holding that under section 425.16 of California's Civil Procedure Code, a target who petitions before, or in connection with, a legally authorized proceeding *does*

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[125] PRING & CANAN, *supra* note 1, at 194; *see also* N.Y. CIV. RIGHTS LAW § 76-a (West 2001); DEL. CODE ANN. tit. 10, § 8136 (West 2001); NEB. REV. STAT. § 25-21,242 (2001).

[126] *Id.* at 195.

[127] *See* N.Y. CIV. RIGHTS LAW § 76 (West 2001); DEL. CODE ANN. tit.10, § 8136 (West 2001); NEB. REV. STAT. § 25-21,242 (2001). Each of these anti-SLAPP statutes limit the scope of protection afforded to cases where public applicants or permittees attempt to report on, comment on, rule on, or challenge an application or permit.

[128] *See* PRING & CANAN, *supra* note 1, at 216; *see also* FLA. STAT. ch. 768.295 (West 2001).

[129] *See, e.g.*, CAL. CIV. PROC. CODE § 425.16 (West 2001) (establishing that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California's Constitution in connection with a public issue shall be subject to a special motion to strike . . . ."). Georgia's statute similarly requires that the petitioning activity be "in connection with an issue of public interest or concern" in order to be granted immunity. GA. CODE ANN. § 9-11-11.1 (2001).

[130] California has the "public issue" requirement. *See* CAL. CIV. PROC. CODE § 425.16 (West 2001).

[131] *See, e.g.*, Briggs v. Eden Council for Hope & Opportunity, 969 P.2d 564, 568-69 (Cal. 1999). The court criticized and rejected the requirement in *Zhao v. Wong*, 55 Cal. Rptr. 2d 909 (Cal. Ct. App. 1996), that an issue under consideration by a legislative, executive, or judicial body or in any other proceeding involve a "public issue," asserting that "[n]either *Zhao v. Wong* nor its progeny provides authority, legal or grammatical, for such a strained construction." *Id.*

[132] 55 Cal. Rptr. 2d 909 (Cal. Ct. App. 1996).

[133] *Id.* at 917.

[134] 969 P.2d 564 (Cal. 1999).

not have to show that the petitioning activity involved a "public issue."[135] In light of the confusion generated by the "public issue" requirement in some states' anti-SLAPP laws, Hawai'i should be careful not to adopt similarly vague language in its bill.

The scope of Hawai'i's anti-SLAPP bill is therefore sufficiently broad to encompass all constitutionally protected petitioning activity while avoiding problems interpreting the scope of a "public issue" or other limiting requirements. The bill also limits its protection to petitioning activity aimed at procuring government action, a filtering device used to exclude "sham" petitioning.

The extensive protection offered to petitioners in Hawai'i's bill is reinforced at the motion to dismiss stage, where the filer, not the target, has the burden of showing why its claim should not be dismissed as a SLAPP.[136]

2. *Motion to dismiss and burden of proof*

Under Hawai'i's House bill, the target of a SLAPP may file a motion to dismiss at the early stages of litigation.[137] This contrasts with the anti-SLAPP statutes of Delaware, Indiana, and Nebraska, which treat the target's motion to dismiss as one for summary judgment.[138] Hawai'i's approach is preferable because it allows early dismissal and minimizes the time and expense the target must invest in defending itself.[139]

Hawai'i's burden of proof provision also favors the target, establishing that in order to prevent dismissal, a filer must prove by a "preponderance of the evidence" that the target's activities are not constitutionally protected.[140] This sets a lower standard than Minnesota's statute, which allows dismissal unless the filer produces "clear and convincing" evidence the target's activities are

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[135] *Id.* at 575 (emphasis added).

[136] H.B. 741, 2001 Leg., 21st Sess. (Haw. 2001); S.B. 126, 2001 Leg., 21st Sess. (Haw. 2001).

[137] *See* H.B. 741 (allowing an expedited hearing of the target's motion as a motion for judgment on the pleadings); *see also* S.B. 126 (allowing an expedited hearing of the target's motion as a motion for summary judgment).

[138] DEL. CODE ANN. tit. 10, § 8137 (West 2001), IND. CODE § 34-7-7-9 (West 2001), NEB. REV. STAT. § 25-21,246 (2001).

[139] *See* H.B. 741, 2001 Leg., 21st Sess. (Haw. 2001). Hawai'i's House bill provides that a target's motion "shall be treated as a motion for judgment on the pleadings, and the court shall expedite the hearing of the motion." *Id.*; *see also* S.B. 126, 2001 Leg., 21st Sess. (Haw. 2001) (allowing target's motion to be treated as a motion for summary judgment).

[140] H.B. 741. "The court shall grant the motion and dismiss the [filer's] judicial claim, unless the [filer] has proven by a preponderance of the evidence that the acts of the [target] are not immunized . . . ." *Id.*

not immune.[141] Maine's statute goes even further, allowing dismissal unless the filer can show the target's petitioning activity "was devoid of any reasonable factual support or any arguable basis in law and the [target's] acts caused actual injury" to the filer.[142] Like Hawai'i's anti-SLAPP bill, Minnesota's, Maine's, and Massachusetts's anti-SLAPP statutes focus not on the merit of the filer's claim, but on the target's petitioning activity.[143] This puts the burden of proof on the SLAPP filer to prove the activity is not constitutionally protected.[144]

Other states focus on the viability of the filer's claim. For example, Delaware and Nebraska's statutes provide for dismissal of a SLAPP suit unless the filer establishes that its claim has "substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law."[145]

California's anti-SLAPP statute differs from many other states' statutes and Hawai'i's anti-SLAPP bill[146] by providing that a *target*, upon filing a motion to dismiss, must first demonstrate its petitioning activity was made in connection with a public issue, and thus falls within the scope of the statute.[147] Upon such a showing, the court will dismiss a petitioning activity-based suit unless the SLAPP filer has established a probability of success on its claim.[148]

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[141] MINN. STAT. ANN. § 554.02 (West 2001). "[T]he court shall grant the motion and dismiss the judicial claim unless the court finds that the [filer] has produced clear and convincing evidence that the acts of the [target] are not immunized from liability . . . ." *Id.*

[142] ME. REV. STAT. ANN. tit. 14 § 556 (West 1999).

[143] *See* MINN. STAT. ANN. § 554.02. The court will grant the target's motion to dismiss a claim based on the target's petitioning activity unless the filer "has produced clear and convincing evidence that the acts of the [target] are not immunized from liability." *Id.*; ME. REV. STAT. ANN. tit. 14 § 556. The court will grant a target's motion to dismiss a claim based on petitioning activity unless the filer "shows that the [target's] exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law and that the [target's] acts caused actual injury to the [filer]." *Id.* Maine's provision is identical to Massachusetts's. *See* MASS. GEN. LAWS ch. 231, § 59H (West 2001).

[144] MASS. GEN. LAWS ch. 231, § 59H.

[145] DEL. CODE ANN. tit. 10, § 8137 (West 2001); NEB. REV. STAT. § 25-21, 245 (2001).

[146] *See, e.g.*, H.B. 741, 2001 Leg., 21st Sess. (Haw. 2001). The court will dismiss the filer's claim unless it "has proven, by a preponderance of the evidence that the acts of the [target] are not immunized." *Id.*; *see also* S.B. 126, 2001 Leg., 21st Sess. (Haw. 2001) (requiring dismissal unless the filer has shown "clear and convincing" evidence that the target's acts are not immunized).

[147] California courts define "public issue" broadly. *See* Ludwig v. Superior Court, 43 Cal. Rptr. 2d 350, 355 (Cal. Ct. App. 1995). Development of a discount mall and the impact on traffic and environment was deemed a "public issue." *Id.*

[148] *See* CAL. CIV. PROC. CODE § 425.16 (West 2001); LA. CODE CIV. PROC. ANN. art. 971 (West 2001); *see also* Wilcox v. Superior Court, 27 Cal. App. 4th 809, 824 (Cal. Ct. App. 1994), *modified, reh'g denied*, 27 Cal. App. 4th 940 (1994) (holding that the California legislature did not intend a standard lower than "reasonable probability" in determining a party's "probability of prevailing").

California courts have justified this approach, asserting that it is logical to put the initial burden on the party seeking the benefit of anti-SLAPP law, and that "it is fundamentally fair that before putting the [filer] to the burden of establishing probability of success on the merits the [target] be required to show imposing that burden is justified by the nature of the [target's] complaint."[149]

Hawai'i's bill seeks to insulate targets from the litigation process by requiring the filer, in order to prevent dismissal, to prove the target's activities are not immune from liability.[150] While this is a legitimate aim of the anti-SLAPP law, Hawai'i's legislature should also consider more fully the possibility that in some cases, the filer has a valid claim because the target's petitioning activities are not constitutionally protected. In its current form, Hawai'i's bill encourages targets whose actions could be construed as "petitioning activity" to call forth anti-SLAPP law as a defense, forcing filers who wish to pursue their claims to expend time and money proving the target wrong. Although such cases may be rare, the legislature should consider the alternative of first requiring the target to show its actions involved "petitioning activity" before shifting the burden to the filer to demonstrate the validity of its claim.[151] Even with this threshold requirement, a target's interests are protected, since the target can recover costs and fees if its petitioning activity is later determined by the court to be constitutionally protected.[152]

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[149] *Wilcox*, 27 Cal. App. 4th at 819.

[150] *See, e.g.*, H.B. 741, 2001 Leg., 21st Sess. (Haw. 2001); S.B. 126, 2001 Leg., 21st Sess. (Haw. 2001). Upon a target moving to dismiss a filer's claim "[t]he [filer] shall . . . [h]ave the burden of proof and persuasion on the motion." *Id.*

[151] A filer's claim against a target will be subject to a motion to strike if the target can demonstrate its acts were "in furtherance of the [target's] right of petition or free speech under the United States or California Constitution in connection with a public issue." CAL. CIV. PROC. CODE § 425.16 (West 2001). Acts in furtherance of free speech and petition rights in connection with a public issue are deemed to include:

> (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or any issue of public interest.

Id.

[152] *See, e.g.*, CAL. CIV. PROC. CODE § 425.16. California's anti-SLAPP law places the initial burden on the target to show that its activities were in furtherance of its rights to free speech and petition in connection with a public issue, at which time the filer's claim will be subject to a motion to strike unless the filer can establish that it has a probability of prevailing on its claim. *Id.* If, however, a filer cannot make such a showing and the filer's claim is dismissed, the target "shall be entitled to recover his or her attorney's fees and costs." *Id.*

3. Discovery

Under a majority of states' anti-SLAPP statutes and Hawai'i's anti-SLAPP bill, discovery will be stayed upon a SLAPP target's filing a motion to dismiss.[153] This provision, missing from anti-SLAPP laws in states like New York, is important, because many SLAPP filers use the discovery process to prolong litigation and burden targets with the expense of conducting discovery.[154]

4. Right of appeal

While Hawai'i's bill guarantees a target that loses its motion to dismiss the right to an expedited appeal, other statutes, like California's, afford this right to either party losing on the motion.[155] Hawai'i's bill does not clearly establish the purpose for allowing a target, but not a filer, to appeal a decision on a motion to dismiss. Before enacting this provision in its current form, Hawai'i's legislature should consider issues of procedural fairness and access to the judicial system for both targets and filers. The legislature should either set forth defensible reasons for granting the right of appeal to targets, but not to filers, or should extend the right of appeal to both sides.

5. Intervention by third parties

Maine and Massachusetts's anti-SLAPP statutes allow the attorney general to defend or support a SLAPP target that files a motion to dismiss.[156] Other states allow either the attorney general or the government body to which the

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[153] *See, e.g.*, GA. CODE ANN. § 9-11-11.1 (2001), ME. REV. STAT. ANN. tit. 14 § 556 (West 1999); MINN. STAT. ANN. § 554.02 (West 1999); IND. CODE ANN. § 34-7-6 (West 2001); LA. CODE CIV. PROC. ANN. art. 971 (West 2001). In addition, each of these states' statutes provide for specified discovery to be conducted upon "good cause shown."

[154] *See* Catherine Maxson, *The State of State Anti-Slapp Laws*, *available at* http://library.lp.findlaw.com/scripts/getfile.pl?FILE=firms/dwt/dwt000060 (last visited Nov. 1, 2001).

[155] CAL. CIV. PROC. CODE § 425.16.

[156] ME. REV. STAT. ANN. tit. 14 § 556 (West 1999). "The Attorney General on the Attorney General's behalf or on behalf of any government agency or subdivision to which the [target's] acts were directed may intervene to defend or otherwise support the [target] on the special motion." *Id.* MASS. GEN. LAWS ch. 231, § 59H (West 2001). "The attorney general, on his behalf or on behalf of any government agency or subdivision to which the moving party's acts were directed, may intervene to defend or otherwise support the moving party . . . ." *Id.*

target's petitioning activities were directed to intervene on behalf of the target.[157]

Allowing intervention by a third party is important to deter filers using litigation to intimidate individuals or small citizen groups that may be unable or unwilling to hire an attorney.[158] Hawai'i's bill, which permits a government body or the attorney general to intervene on a target's behalf, provides not only an effective way to protect targets who lack resources, but also allows the government to further its own interests.[159] By intervening, the government has an opportunity to protect against infringement of fundamental citizen rights.[160]

6. Damages

Under most anti-SLAPP laws, a SLAPP target prevailing on its motion to dismiss will recover attorney's fees and costs.[161] Nevada and Florida's anti-

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[157] *See, e.g.*, MINN. STAT. ANN. § 554.02 (West 2001) ("[A]ny governmental body to which the moving party's acts were directed or the attorney general's office may intervene in, defend, or otherwise support the moving party."); NEV. REV. STAT. ANN. § 41.660 (West 2001) ("The attorney general or the chief legal officer or attorney of a political subdivision of this state may defend or otherwise support the person against whom the [petitioning-based] action is brought."); WASH. REV. CODE ANN. § 4.24.520 (West 2001) ("[A]n agency receiving a complaint or information under [this law] may intervene in and defend against any suit precipitated by the communication to the agency."); R.I. GEN. LAWS § 9-33-3 (2001) ("Any governmental agency or subdivision to which the [target's] petition or free speech were directed or the attorney general may intervene to defend or otherwise support the party claiming lawful exercise of its right of petition or free speech . . . ."); TENN. CODE ANN. § 4-21-1004 (West 2001). The Tennessee statute provides:

> [A]n agency receiving a complaint or information . . . may intervene and defend against any suit precipitated by the communication to the agency. In the event that a local government agency does not intervene in and defend against a suit arising from any communication protected under this act, the office of the attorney general and reporter may intervene in and defend against the suit.

Id.

[158] *See, e.g.*, Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 741 (1983) (noting that "[w]here, as here, such a suit is filed against an hourly-wage waitress or other individuals who lack the backing of a union, the need to allow [an entity with money and resources such as] the [National Labor Relations] Board . . . to intervene and provide a remedy is at its greatest").

[159] *See, e.g.*, De Jonge v. Oregon, 299 U.S. 353, 365 (1937) (discussing the need to preserve the constitutional rights of free speech, press, and assembly as a means to ensure that the government is responsive to the people, and to secure our constitutional government).

[160] Committee on Judiciary and Hawaiian Affairs, Standing Committee Report No. 703, 2001 Leg. 21st Sess. (Haw. 2001) (finding "that public participation is essential to the fulfillment of our democratic principles . . . [and that] passage of this bill [H.B. 741] is necessary to mitigate the inequity of SLAPPs and preserve the public's role in the democratic process").

[161] Some courts have held that attorney's fees may be awarded even if the SLAPP filer voluntarily dismisses its claim before the motion to dismiss is made. *See, e.g.*, Liu v. Moore, 81 Cal. Rptr. 2d 807 (Cal. Ct. App. 1999).

SLAPP statutes, in contrast, provide costs and attorney's fees to the party who ultimately prevails in the suit, rather than at the motion to dismiss stage.[162]

Under Delaware and Nebraska's anti-SLAPP statutes, a SLAPP target may recover costs and attorney's fees provided it can show the SLAPP suit lacked a substantial basis in law or lacked a substantial argument for the extension, modification, or reversal of existing law.[163] A SLAPP target in Delaware can also recover punitive damages by showing the filer intended to harass, intimidate, punish, or maliciously inhibit the exercise of the target's rights of free speech, petition, and association.[164] In Minnesota, such a showing would entitle the target to recover actual damages,[165] while in Nebraska, it would allow a target to recover compensatory damages.[166]

Hawai'i's bill allows the court to award damages to the target as part of a successful motion to dismiss.[167] This provision encourages efficient use of the judicial system, because it provides monetary relief without requiring the target to initiate a malicious prosecution or abuse of process suit to recover litigation costs.[168]

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[162] NEV. REV. STAT. ANN. § 41.670 (West 2001). Nevada's statute provides that: "[I]f the court grants a special motion to dismiss . . . [t]he court shall award reasonable costs and attorney's fees to the person against whom the action was brought." *Id.*; *see also* FLA. STAT. ch. 768.295 (West 2001) ("The court shall award the prevailing party reasonable attorney's fees and costs incurred in connection with a claim that an action was filed in violation of this [law]").

[163] DEL. CODE ANN. tit. 10, § 8138 (West 2001). Delaware's statute states:

> A defendant in an action involving public petition and participation . . . may maintain an action, claim, cross-claim or counter-claim to recover damages, including costs an attorney's fees . . . [provided that the action] was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law.

Id.; *see also* NEB. REV. STAT. § 25-21,243 (2001).

[164] DEL. CODE ANN. tit. 10, § 8138.

[165] MINN. STAT. ANN. § 554.04 (West 2001). Minnesota's statute states:

> If a motion under this chapter is granted and the [target] demonstrates that the respondent brought the cause of action in the underlying lawsuit for the purpose of harassment, to inhibit the [target's] public participation, to interfere with the [target's] exercise of protected constitutional rights, or otherwise wrongfully injure the [target], the court shall award the [target] actual damages.

Id.

[166] NEB. REV. STAT. § 25-21,243 (2001) ("[C]ompensatory damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the purpose of harassing, intimidating, punishing, or otherwise maliciously inhibiting the free exercise of petition, speech, or association rights.").

[167] H.B. 741, 2001 Leg., 21st Sess. (Haw. 2001); S.B. 126, 2001 Leg., 21st Sess. (Haw. 2001).

[168] Other states statutes similarly provide that a court "shall" automatically award costs and attorney's fees to a target prevailing on its motion to dismiss. *See, e.g.*, CAL. CIV. PROC. CODE § 425.16 (West 2001); LA. CODE CIV. PROC. ANN. art. 971 (West 2001); MASS. GEN. LAWS ch. 231, § 59H (West 2001); MINN. STAT. ANN. § 554.04 (West 2001).

In addition, the section in Hawai'i's bill providing for actual damages or $5,000, punitive damages and other sanctions may deter deep pocket filers who regard paying lesser damages as a "cost of doing business."[169]

On the other hand, the extensive damages provision in Hawai'i's bill may deter filers who have legitimate claims from seeking judicial relief. For example, even if a filer does not sue for malicious or retaliatory purposes, it may still fear huge damage payments for filing a claim based on what could possibly be construed as petitioning activity. Thus, Hawai'i's bill should only grant punitive damages upon clear demonstration that the filer disregarded the target's First Amendment right to petition the government and sued the target for the purposes of intimidation or retaliation.[170]

Although Hawai'i's bill does not provide damages for a filer forced to defend its claim when a target files a frivolous or improper motion to dismiss, other anti-SLAPP laws provide such a remedy. According to the California, Louisiana, and Indiana statutes, if the court finds the SLAPP target's motion to strike is frivolous or solely intended to cause delay, the filer can recover attorney's fees and costs.[171] In Delaware and Nebraska, the court can award a filer costs and attorney's fees if the filer can establish, by clear and convincing evidence, that information communicated by the target's petitioning was done with knowledge of its falsity, or with reckless disregard for whether it was false.[172]

Under Hawai'i's bill, a potential problem may arise when a filer has a legitimate claim against a target and the target improperly invokes anti-SLAPP protection to evade liability. In such cases, by only providing for attorney's

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[169] John Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPs*, 26 LOYOLA L.A. L. REV. 395, 406 (1993). "SLAPP plaintiffs do not intend to *win* the litigation. 'Rather, they seek to silence their critics by forcing them to spend thousands of dollars to defend themselves.'" *Id.* (quoting Dan Walters, *First Amendment Under Assault*, SACRAMENTO BEE, Apr. 8, 1991, at A3).

[170] In its current form, Hawai'i's bill provides that "[a]ny person damaged or injured by reason of a claim filed in violation of their rights under section -2 may seek relief in the form of a claim for actual or compensatory damages, as well as punitive damages, attorneys' fees, and costs, from the person responsible." H.B. 741, 2001 Leg., 21st Sess. (Haw. 2001); S.B. 126, 2001 Leg., 21st Sess. (Haw. 2001). This provision, however, does not clearly establish the target's burden of proof in order to recover such damages. *Id.*

[171] LA. CODE CIV. PROC. ANN. art. 971 (West 2001). "If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award reasonable attorney's fees and costs to the plaintiff prevailing on the motion." *Id.*; *see also* IND. CODE ANN. § 34-7-7-8 (West 2001); CAL. CIV. PROC. CODE § 425.16 (West 2001).

[172] This provision only applies if the truth or falsity of the communication was material to the filer's claim. DEL. CODE ANN. tit. 10, § 8136 (West 2001); *see also* NEB. REV. STAT. § 25-21,244 (2001).

fees and costs for a *target* who is successful on its motion to dismiss,[173] Hawai'i's bill imposes a costly and unfair burden on a filer who must defend its (legitimate) claim against a target's improper motion to dismiss. Hawai'i should consider amending its bill in this regard to mirror California's statute, which awards costs and attorney's fees to a filer if the court finds that the target's motion to dismiss is "frivolous or is solely intended to cause unnecessary delay."[174] This would provide fair compensation to a filer with a valid claim, who has to expend time and money defending against a target's frivolous or improper motion to dismiss. If, however, the target engages in legitimate petitioning activity and has a valid basis for bringing its motion to dismiss, the filer should (and under Hawai'i's bill does) pay costs, attorney's fees, and other damages to the target, who will therefore not suffer economic loss defending itself.

C. Judicial Management of SLAPPs

Hawai'i courts have yet to produce a body of case law outlining how SLAPPs should be dealt with, although at least one local court has refused to dismiss a filer's counterclaim as a SLAPP when it determined that the counterclaim contained "disputes of material fact."

In *Protect Puako v. County of Hawaii*,[175] a group of homeowners ("the Group") brought suit against a developer, alleging a failure to comply with a statute requiring an environmental assessment prior to commencing development.[176] The developer asserted a counterclaim against the Group for tortious interference with contract and prospective economic advantage, alleging the Group had intentionally interfered with its agreement with a local community association, inducing the association to breach that agreement.[177] The Group filed a motion for summary judgment on the developer's counterclaims, arguing that its lawsuit against the developer and other actions were constitutionally protected "petitioning activity," and could not expose the Group to liability.[178] The Group asserted the developer's counterclaim

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[173] H.B. 741, 2001 Leg., 21st Sess. (Haw. 2001); S.B. 126, 2001 Leg., 21st Sess. (Haw. 2001).

[174] CAL. CIV. PROC. CODE § 425.16; *see also* LA. CODE CIV. PROC. ANN. art. 971.

[175] (3rd Cir. Haw. July 17, 2000) No. 00-1-0279 (order denying Plaintiff Protect Puako's motion for summary judgment Sept. 11, 2001). The reader should be advised that the author worked on this case as a summer associate at a law firm that represented the developer.

[176] Plaintiff's Motion for Summary Judgment at 2, Protect Puako v. County of Hawaii (3rd Cir. Haw. 2000) (No. 00-1-0279).

[177] Defendant's Memorandum at 7, Protect Puako v. County of Hawaii (3rd Cir. Haw. 2000) (No. 00-1-0279).

[178] Plaintiff's Motion for Summary Judgment at 4, Protect Puako v. County of Hawaii (3rd Cir. Haw. 2000) (No. 00-1-0279).

was a SLAPP "brought for improper purposes, including harassment, needless increase in the costs of litigation, and attempted interference with [the Group's] constitutionally protected rights."[179] The developer maintained that its counterclaim was not a SLAPP because it was not based upon the Group's petitioning activity, but rather on its interference with the previously mentioned agreement, as well as "a campaign of misinformation about [the developer's] Project and [the Group] filing its lawsuit almost ten years after the statute of limitations had expired."[180] The developer further alleged that the Group's suit was a "sham," because it was: (1) objectively baseless in that the Group could not realistically expect success on the merits since the statute of limitations was expired, and (2) an attempt to interfere directly with the developer's business relationships through use of the judicial process.[181]

Presented with these competing arguments, the court denied the Group's motion for summary judgment on the developer's counterclaim.[182] The court's written order did not set forth its reasons for declining to characterize the developer's counterclaim as a SLAPP.[183] In upholding the developer's counterclaim, the court did, however, rule that "present[] disputes of material fact . . . preclude entry of summary judgment in favor of the [Group]."[184]

Although the circuit court's decision in this case may not represent Hawai'i courts' judicial leaning in all such cases, it does reiterate the need for Hawai'i to develop a framework for distinguishing legitimate claims from SLAPPs. Statutory authority establishing how courts should identify and dispose of SLAPPs would thus provide filers, targets, and courts with a clear definition of what constitutes a SLAPP, and how courts will deal with SLAPPs.[185]

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[179] *Id.* at 1.

[180] Defendant's Memorandum at 8, Protect Puako v. County of Hawaii (3rd Cir. Haw. 2000) (No. 00-1-0279).

[181] *Id.* at 12.

[182] Protect Puako v. County of Hawaii (3rd Cir. Haw. 2001) (No. 00-1-0279).

[183] *Id.*

[184] *Id.*

[185] Enactment of Hawai'i's anti-SLAPP bill would provide community activists with a shield of protection for their petitioning activity, although Hawai'i courts would still have to establish the scope of protection afforded. Under Hawai'i's bill, immunized acts include those "in furtherance of the constitutional right to petition . . . including seeking relief, influencing action, informing, communicating, and otherwise participating in the process of government . . . regardless of intent or purpose, except where not aimed at procuring any governmental or electoral action, result or outcome." H.B. 741, 2001 Leg. 21st Sess. (Haw. 2001); S.B. 126, 2001 Leg. 21st Sess. (Haw. 2001).

IV. CONCLUSION

As set forth above, Hawai'i's bill is highly protective of a target's right to petition. This protection, however, should be tempered by the need to prevent "sham" petitioning, as well as the need to allow a filer with a legitimate legal claim access to the judicial system.[186]

Hawai'i's bill also contains areas of concern that legislators should address before the bill is passed. First, legislators should examine the burden of proof provision, where any suit in which the target claims its actions constitute "petitioning activity" will place the burden of proof on the filer to disprove such activity is immune. Legislators should also further consider the damages provision, which allows a target, but not a filer, to recover damages, even in cases where the target makes a frivolous or improper motion to dismiss the filer's claim. Hawai'i's legislature should look at both provisions more carefully before enacting its anti-SLAPP bill, and weigh the competing interests of citizen activists with those whom they oppose.

In weighing these interests, the legislature should consider the proactive approach of Georgia, which requires the filer to verify the legitimacy of its claim before filing, or risk paying damages.[187] Hawai'i's legislature might also consider California's approach, where the target must make an initial showing that its acts were in furtherance of speech or petition in connection with a public issue.[188] Even though the target must invest time and money making this initial showing, it will recover costs and attorney's fees if it prevails on the motion.[189] By distributing the burden of proof equally between target and filer, and allowing the court to impose costs and attorney's fees on the party found to be at fault, California's approach is more procedurally fair than those placing the whole burden on the filer.

Hawai'i should also consider amending its bill to allow not only a target, but also a filer, to recover damages under certain circumstances. By allowing

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[186] Some SLAPP filers may have legitimate claims against a target, based on common-law tort or contract principles. If the target's constitutional right to petition the government supersedes the filer's claim, an anti-SLAPP law will not only provide protection for the target, but will also make clear for the filer what kinds of claims it *cannot* successfully pursue. The current lack of clarity, at least from a filer's perspective, is demonstrated by the following interview: When questioned regarding a suit filed against nearby landowners, a developer answered "[t]his suit . . . is about breach of contract, pure and simple. [The landowners] contracted with us that there would be no intervention or opposition toward [our development], in return for design concessions from us. We have lived up to the agreement. They have not." Amfac Maui, *New Visitor Project is Needed*, LAHAINA NEWS, Aug. 14, 1997, *reprinted in* Point-CounterPoint, *at* http://miavx1.muohio.edu/~shermarc/p412/lhn/point814.htx.

[187] GA. CODE ANN. § 9-11-11.1 (2001).

[188] CAL. CIV. PROC. CODE § 425.16 (West 2001).

[189] *Id.*

only a target to recover damages, the bill denies a filer the opportunity to recover costs of litigation even when forced to defend the validity of its claim against a frivolous or improper motion to dismiss.[190] Hawai'i should look to the statutes of other states like California, Florida, and Louisiana, which allow the court to award damages to either party.[191] Allowing Hawai'i courts the discretion to award damages to either party will thus provide a remedy for both targets that have been SLAPPed, as well as filers forced to defend legitimate claims against a target's frivolous or improper motion to dismiss.

Despite these limited areas of concern, Hawai'i's anti-SLAPP bill will be effective in protecting citizens who wish to participate in the governmental process, but who fear full participation because of potential liability. Hawai'i's legislature should therefore, after considering its alternatives and making necessary changes, continue to push the passage of strong anti-SLAPP legislation.

Erin Malia Lum[192]

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[190] The filer could attempt to recover costs and attorney's fees from a target who filed a frivolous or improper motion to dismiss by initiating a subsequent action (that is, for abuse of process), but would be denied efficient resolution of the dispute and recovery of costs and attorney's fees, both of which are benefits afforded a target. *See* H.B. 741, 2001 Leg., 21st Sess. (Haw. 2001); S.B. 126, 2001 Leg., 21st Sess. (Haw. 2001). This is because Hawai'i's bill only allows a "moving party" (the target) to recover costs and attorney's fees. *Id.*

[191] *See* CAL. CIV. PROC. CODE § 425.16 (West Supp. 2001); FLA. STAT. ch. 768.295 (West 2001); LA. CODE CIV. PROC. ANN. art. 971 (West 2001).

[192] Class of 2003, William S. Richardson School of Law.