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Takings: An Introduction and Overview*

David L. Callies**

I. INTRODUCTION

In *Palazzolo v. Rhode Island*,[1] the Rhode Island Supreme Court found that the case was not ripe because the plaintiff landowner had not received a "final decision" from the state.[2] Secondly, the court held that the unfilled wetlands portion of plaintiff's land had "value" of $157,000 as an open space "gift."[3] Therefore, there was no deprivation of all economically beneficial use as required to meet the categorical total taking rule in *Lucas v. South Carolina Coastal Council*.[4] Third, the Court held that the plaintiff acquired the property with notice that it might be undevelopable, and consequently could not bring a takings claim.[5] Thus, the U.S. Supreme Court had before it the issues of ripeness, denominator, whether value is relevant in determining that there is no economically beneficial use left in the property, and the relevance of purchasor notice in total takings cases and determining distinct or reasonable investment-backed expectations in partial takings cases. This symposium discusses how the U.S. Supreme Court dealt with those issues.

The law of takings is divided into two principal parts: physical and regulatory. In the first category is that which we call eminent domain or compulsory purchase. With one exception (inverse condemnation), physical

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[1] 746 A.2d 707 (R.I. 2000). For a detailed summary of the facts and holdings in this case, see David L. Callies & Calvert G. Chipchase, Palazzolo v. Rhode Island: *Ripeness and 'Notice' Rule Clarified and Statutory 'Background Principles' Narrowed*, 33 URB. LAW. 907 (2001).

[2] *Palazzolo*, 746 A.2d at 713-14.

[3] *See id.* at 715.

[4] *See id.* at 713-14 (citing Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992)).

[5] *See id.* at 714-17.

taking occurs when government intends to take land or an interest in land. A regulatory taking occurs when government, through the exercise of the police or regulatory power, so burdens land, or an interest in land, with land use regulations that courts treat the action as if government had intended physically to exercise eminent domain. United States Supreme Court cases govern most aspects of takings on the theory that either the Fifth Amendment to the U.S. Constitution (nor shall private property be taken for public use without the payment of just compensation) or the Fourteenth Amendment (nor shall private property be taken without due process of law) applies to physical and regulatory takings. What follows is a general description and analysis of the types of takings, together with recent trends in each.

II. PHYSICAL TAKINGS: THE EXERCISE OF EMINENT DOMAIN, OR THE POWER TO CONDEMN

The power to take land, or an interest in land, is generally regarded as an inherent power of the state and federal governments as sovereign entities, and a delegated power (usually through enabling legislation) to local governments and public utilities. The Fifth Amendment to the U.S. Constitution is a limitation on that general power to take land, requiring that (1) the taking be for a public use or purpose (one and the same in most jurisdictions); and (2) the landowner receive just compensation for land taken by the government. Most state constitutions have similar limitations on physical takings by government.

A. The Taking Must Be for a Public Purpose

The U.S. Supreme Court has, for the most part, eliminated the public use limitation on physical takings by declaring that virtually any legislative declaration that is "conceivable" and not an "impossibility" will support such a taking, even if the purpose turns out later to be unachievable or impossible.[6] Most states subscribe to the same theory—although some, like Michigan, judicially scrutinize declarations of public purpose with a more jaundiced eye.[7] There is increasing public concern of late that government has run amuck in taking property for barely conceivable public purposes, such as casinos, automobile plants, and even a football franchise.[8] So far, however, successful

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[6] Hawai'i Hous. Auth. v. Midkiff, 467 U.S. 229 (1984); *see also* Berman v. Parker, 348 U.S. 26 (1954).

[7] *See, e.g.*, City of Lansing v. Edward Rose Realty, 502 N.W.2d 638 (Mich. 1993).

[8] *See Eminent Thievery*, WALL ST. J., Jan. 17, 2001, at A26; *For the Greater Good*, PLAN., Oct. 20, 2000, at 10-13.

challenges to physical takings claims based on lack of public use or purpose grounds have been few and far between.[9]

B. The Landowner Must Receive Just Compensation

Absent rare exercise of emergency powers, virtually any physical interference with private land requires compensation to the landowner. The principal case on the subject is *Loretto v. Manhattan Teleprompter CATV Corp.*,[10] in which the U.S. Supreme Court required that the owner of an apartment building be compensated for a small cable box and wires compulsorily attached to her building pursuant to a local ordinance. The majority of the Court turned aside the arguments of the minority that de minimis invasions of property could be uncompensated. What constitutes just compensation is well beyond the scope of this introduction. It involves the use of various forms of valuing property and interests in property that is usually the prerogative of expert appraisers, generally Members of the Appraisers Institute ("MAI").

III. REGULATORY TAKINGS

Simply stated, if a land use regulation (zoning, subdivision, and so forth) goes "too far" in reducing the use of a parcel of land, then it is a taking requiring compensation, as if the government physically took or condemned an interest in (or all of) the land. The U.S. Supreme Court established this basic principle in the 1922 case of *Pennsylvania Coal Co. v. Mahon.*[11] The question then becomes, of course, what is "too far"? In *Pennsylvania Coal*, the Court made it abundantly clear that the decision was not an attack on all land use controls. Indeed, just a year later, the same Court upheld local zoning regulations against a Fourteenth Amendment challenge (taking of property without due process of law).[12] Many times over the past dozen years, the Court has reiterated its understanding that state and local government may regulate the use of land under the police power, for the health, safety, and welfare of the people, without violating constitutional proscriptions against the taking of property without compensation.[13] At the same time, however, the Court has laid down guidelines for when a regulation takes property. These

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[9] *See, e.g.*, 99 Cents Only Store v. Lancaster Redevelopment Agency, CV 00-07572 SVW (AJWx), 2001 WL 811056 (C.D. Cal. June 26, 2001) (holding that condemning a viable store to allow the expansion of another was not a taking of property for a public use).

[10] 458 U.S. 419 (1982).

[11] 260 U.S. 393 (1922).

[12] *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[13] *See, e.g., id.*

fall into two categories: total or per se takings, and partial takings.[14] However, either category of cases must first be "ripe."

A. Ripeness

In *Williamson County Regional Planning Commission v. Hamilton Bank*,[15] the Court erected its infamous "ripeness" barrier to applied, as compared to facial, regulatory takings lawsuits. Its two-part requirement—(1) a final decision under government regulatory laws; and (2) a seeking of just compensation under the state's eminent domain procedures—makes it very difficult for landowners to bring takings challenges.[16] The Court in *Palazzolo* emphasized the "futility" defense to the ripeness barrier: a landowner is not required to futilely seek endless "final decisions" when the factual circumstances demonstrate that no development of any kind will be permitted on the subject property. Here, because fill would be required for any economically beneficial use of Palazzolo's land and no fill permit was available from the state, the takings claim was ripe. Professor Roberts analyzes the *Williamson* requirement and the futility exception in his article.

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[14] *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

[15] 473 U.S. 172 (1985).

[16] *See id.* at 186. For critical commentaries on *Hamilton Bank*, see Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735 (1988); Michael M. Berger, *"Ripeness" Test for Land Use Cases Needs Reform: Reconciling Leading Ninth Circuit Decisions is an Exercise in Futility*, 11 ZONING & PLAN. L. REP. 57 (1988); Michael M. Berger, *The Civil Rights Act: An Alternative Remedy for Property Owners Which Avoids Some of the Procedural Traps and Pitfalls in Traditional "Takings" Litigation*, 12 ZONING & PLAN. L. REP. 121 (1989); Michael M. Berger, *The "Ripeness" Mess in Federal Land Use Cases or How the Supreme Court Converted Federal Judges into Fruit Peddlers*, 1991 INST. ON PLAN. ZONING & EMINENT DOMAIN § 7; Brian W. Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 HOFSTRA PROP. L.J. 73 (1988); Douglas W. Kmiec, *Disentangling Substantive Due Process and Taking Claims*, 13 ZONING & PLAN. L. REP. 57 (1990); R. Jeffrey Lyman, *Finality Ripeness in Federal Land Use Cases from* Hamilton Bank *to* Lucas, 9 J. LAND USE & ENVTL. L. 101 (1993); Daniel R. Mandelker & Michael M. Berger, *A Plea to Allow the Federal Courts to Clarify the Law of Regulatory Takings*, LAND USE L. & ZONING DIG., Jan. 1990, at 3; Daniel R. Mandelker & Brian W. Blaesser, *Applying the Ripeness Doctrine in Federal Land Use Litigation*, 11 ZONING & PLAN. L. REP. 49 (1988); Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVTL. L. 91 (1994); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. LAND USE & ENVTL. L. 37 (1995); Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1 (1995).

B. Total Takings

A land use regulation totally "takes" property when it leaves the owner without any "economically beneficial use" of the land. The land may still have value. It may even retain some limited uses. It makes no difference what the landowner knew or should have known about the regulatory climate when the landowner acquired the land. If it has no beneficial economic use, then government must pay for the land or rescind the regulation (and possibly pay compensation for the time during which the illegal regulation affected the relevant land), unless, however, the regulation falls within two exceptions: nuisance, or background principles of a state's law of property. All these rules come from the U.S. Supreme Court's 1992 decision in *Lucas v. South Carolina Coastal Council*,[17] confirmed and explained in *Palazzolo v. Rhode Island*,[18] together with some gloss added by recent decisions of the U.S. Federal Circuit. It is worth examining the elements of total takings in a bit more detail, to fully understand the reach of what the Court calls this categorical or per se rule.

1. *Taking of all economically beneficial use*

The *Lucas* case presented the Court with an ideal vehicle in which to set out criteria for deciding both total and partial takings cases. It did so in the first category—total takings—in the opinion itself. It did so in the latter category in footnotes, described further below. With only two exceptions (discussed below), a regulation "takes" property when the landowner is left with no economically beneficial use of the land.[19]

Ultimately, that is what happened to David Lucas.[20] After developing a waterfront residential project, Lucas purchased the remaining two lots on his own account, intending to build upscale single-family residences on them.[21] However, before he could commence construction, the South Carolina Coastal Council moved the beach line (seaward of which construction was prohibited) so that Lucas's lots were now in a construction-free zone.[22] The original line, the new line, and the coastal protection statute by which authority the Council

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[17] 505 U.S. 1003 (1992).

[18] 533 U.S. 606 (2001).

[19] *See Lucas*, 505 U.S. at 1019. For collective comment on *Dolan* and *Lucas*, see TAKINGS: LAND DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* (David L. Callies ed., 1996), and ROBERT MELTZ ET AL., THE TAKINGS ISSUE (1999).

[20] *See generally* DAVID LUCAS, LUCAS VS. THE GREEN MACHINE (1995) (providing the historical narrative of this landmark case).

[21] *See Lucas*, 505 U.S. at 1006-08.

[22] *See id.* at 1007-09.

acted were designed to further a host of health, safety, but primarily welfare purposes largely unique to coastal areas.[23] Figuring predominately in the list of public purposes was the protection of habitat (plant, animal, and marine species), dunes, natural environment, and the tourist industry.[24]

Lucas claimed that the moving of the line, together with the development restrictions imposed by the statute and its regulations, took his property without compensation by denying him a permit to construct anything but walkways, and permitting no uses but camping and walking on the two lots.[25] The South Carolina Supreme Court upheld the statute largely on the grounds of the paramount governmental purposes set out in the Beachfront Management Act, and Lucas appealed.[26]

The U.S. Supreme Court reversed.[27] The Court announced that a regulation that removes all productive or economically beneficial use from a parcel of land is a taking requiring compensation under the Fifth Amendment.[28] Note that the Court writes of *use* and not *value*. Clearly, two beachfront lots have value even if a regulation prevents all economic use. "Salvage" uses like camping and picnicking do not count as "economically beneficial," like building a house. It is a taking regardless of how or when the property was acquired, regardless of the "expectations" of, or notice to, the landowner, and regardless of the public purpose or state interest which generated the regulation. For too long, according to the Court, police power regulations have primarily conferred "public benefits."[29] For this the *public* must pay, rather than the landowner upon whom the burden of such regulation falls:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation 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.[30]

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[23] *See id.*

[24] *See id.* at 1010.

[25] *See id.* at 1007-10.

[26] *See id.* at 1009-10.

[27] *See id.* at 1004.

[28] *See id.* at 1016-19. Note that this is not the same as rendering the lots or parcels *valueless*, as some commentators would have it. *See, e.g.*, MELTZ, *supra* note 19, at 140, 218.

[29] *See Lucas*, 505 U.S. at 1024.

[30] *Id.* at 1027. For a historical argument that most private use of wetlands is not part of such title, see Fred P. Bosselman, *Limitations Inherent in the Title to Wetlands at Common Law*, 15 STAN. ENVTL. L.J. 247 (1996).

2. Exceptions to the per se or categorical rule

Herein lie the *Lucas* exceptions to the per se rule of total takings: the Court requires compensation for taking of all economically beneficial use unless there can be identified "background principles of nuisance and property law that prohibit the uses [the landowner] now intends in the circumstances in which the property is presently found."[31] Such "background principles" are the subject of Jim Burling's article on the pages that follow. But briefly:

(a) If the common law of the state would allow neighbors or the state to prohibit the two houses that Lucas wants to construct because they are either public or private nuisances, then the state can prohibit them under the coastal-zone law without providing compensation. This result occurs because such nuisance uses are always unlawful and are never part of a landowner's title, so prohibiting them by statute would not take away any property rights. The Court gives as an example a law that might prohibit a landowner from filling his land to flood his neighbor's land.[32]

(b) If the background principles of the state's property law would permit such prohibition of use as the two houses Lucas proposed to construct, then again no compensation is required. However, the Court did not fully describe these principles, nor did it discuss them except in a nuisance context. Custom and public trust are increasingly relevant to the background principles inquiry,[33] as discussed by Jim Burling and Steve Eagle in their articles.

In determining whether the proposed use is a public or private nuisance and therefore forbidden without payment of compensation, the following three factors are critical, but *only* within the nuisance context: (1) the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities; (2) the social value of the claimant's activities and their suitability to the locality in question; and (3) the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners).[34]

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[31] *Lucas*, 505 U.S. at 1031. For the argument that only nuisance is a background principle exception, see MELTZ, *supra* note 19, at 377. For extended commentary on the *Lucas* exceptions, see Louise A. Halper, *Why the Nuisance Knot Can't Undo the Takings Muddle*, 28 IND. L. REV. 329 (1995); Todd D. Brody, Comment, *Examining the Nuisance Exception to the Takings Clause: Is There Life for Environmental Regulations After* Lucas*?*, 4 FORDHAM ENVTL. L. REP. 287 (1993).

[32] *See Lucas*, 505 U.S. at 1029.

[33] David L. Callies, *Custom and Public Trust: Background Principles of State Property Law?*, 30 ENVTL. L. REP. 10,003 (2000); David L. Callies & J. David Breemer, *Background Principles*, *in* TAKING SIDES ON TAKINGS ISSUES (Thomas E. Roberts ed., 2002).

[34] *Lucas*, 505 U.S. at 1030-31 (citations omitted).

3. Notice

The *Lucas* court made it clear that when a property owner learned of a land use regulation's effect on the subject property was irrelevant to a total regulatory takings challenge, just as it would be irrelevant in an eminent domain proceeding. While the Rhode Island Supreme Court attempted to engraft such a notice requirement on total takings jurisprudence, the U.S. Supreme Court in *Palazzolo* firmly rejected that attempt, as discussed by Professor Eagle and Jim Burling in their articles. However, at least one member of the Court's majority—Justice O'Connor—finds notice important in analyzing a landowner's investment-backed expectations under a *Penn Central* partial takings analysis, while another member—Justice Scalia—finds notice irrelevant to that analysis, as well as to the total takings analysis.

C. Partial Takings

A partial taking occurs whenever a land use regulation deprives a landowner of sufficient use and value that goes beyond necessary exercise of the police power for the health, safety, and welfare of the people, but stops short of depriving the landowner of all economically beneficial use. Indeed, the *Palazzolo* Court ultimately decided that Palazzolo suffered only a *partial* taking, as discussed in Robert Freilich's article. Partial takings by regulation are far more common than total takings, and the standard is not so easy to apply.

1. The rule: distinct investment-backed expectations of the landowner

In *Penn Central Transportation Co. v. City of New York*,[35] the Court set out rules for partial takings. The Court upheld New York City's Landmarks Preservation Law, which effectively prohibited Penn Central from constructing a fifty-five story office building in the air rights above Grand Central Station, a designated landmark under the law.[36] Penn Central claimed both the designation and the prohibition constituted a facial and applied taking of its property under the Fifth and Fourteenth Amendments.[37] The Court held that "landmarking" itself was broadly constitutional, and that the individual application of the law to Grand Central Station left sufficient remaining use of the property so as to be neither a total nor a partial taking.[38]

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[35] 438 U.S. 104 (1978).
[36] *See id.* at 115-16, 138.
[37] *See id.* at 128-29.
[38] *See id.* at 128-38.

Before reaching the merits of the case, however, the Court discussed in some detail the standards that applied in partial takings cases. The Court suggested "several factors" that have "particular significance" when it engages in "these essentially ad hoc, factual inquiries."[39] The factors are:

1. 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, of course, relevant considerations (later also called the "reasonable expectations of the claimant").

2. So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.[40]

A number of cases pick up this theme of "investment-backed expectations," including the *Lucas* decision discussed infra, although the Court discussed it largely in footnotes. While the notes are often devoted to answering the blistering barrage directed at the *Lucas* Court by the dissent (the dissent's opening salvo is: "Today the Court launches a missile to kill a mouse"[41]), they evince a clear intention to allow compensation for taking of less than all economic use, if and when such a taking is before the Court. At footnote 8, the *Lucas* Court responds to a criticism by the dissent that compensation for regulatory taking of all economic use is inconsistent with lack of compensation for a regulatory taking of, for example, ninety percent of economic use:

> This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner 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.[42]

This "frustration of investment-backed expectations" standard, which the Court chose not to apply in *Lucas* because it characterized the regulatory taking as total, is clearly not rejected. Indeed, one concurring member of the Court (Justice Kennedy) would have applied it.[43] Moreover, in an earlier footnote, the Court had already alluded to the utility of the "reasonable

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[39] *See id.* at 123-28.

[40] *Id.* at 124 (citations omitted).

[41] *Lucas*, 505 U.S. at 1036 (Blackmun, J., dissenting).

[42] *Id.* at 1019 n.8 (alteration in original) (quoting Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978)).

[43] *See id.* at 1034 (Kennedy, J., concurring).

expectations standard," though in a slightly different context—that of deciding how thin to slice property interests (or, alternatively, how many sticks in the Holfeldian bundle) for purposes of deciding whether property has been taken:

> Regrettably, the 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. When, for example, 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 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 note then criticizes that portion of the New York state court's decision in *Penn Central Transportation Co. v. City of New York*, which suggested nearby property of the owner could be amalgamated with that portion he claimed was unusual in deciding whether a taking by regulation had occurred.] . . . 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.[44]

2. *Investment-backed expectations are limited to partial takings*

It is critical at this stage to observe that the investment-backed expectations rule of the *Penn Central* case has no applicability to the *Lucas* per se rule. You will search in vain for any such implication. Indeed, the Federal Circuit so held in late 2000:[45]

> In sum, we conclude that, in accord with *Lucas*, and not inconsistent with any prior holding of this court, when a regulatory taking, properly determined to be "categorical," is found to have occurred, the property owner is entitled to a recovery without regard to consideration of investment-backed expectations. In such a case, "reasonable investment-backed expectations" are not a proper part of the analysis, just as they are not in the physical takings cases.[46]

The *Palazzolo* Court discussed this issue, as noted by Professor Eagle, Bob Frielich, and Jim Burling in their articles.

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[44] *Id.* at 1016 n.7 (emphasis added). For a different perspective on the "investment-backed expectations" standards, see Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW. 215 (1995); Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91 (1995).

[45] Palm Beach Isles Assoc. v. United States, 231 F.3d 1354 (Fed. Cir. 2000).

[46] *Palm Beach Isles*, 231 F.3d at 1364; *see also* R.S. Radford & J. David Breemer, *Great Expectations: Will* Palazzolo v. Rhode Island *Clarify the Supreme Court's Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?* 9 N.Y.U. ENVTL. L.J. 449 (2001).

D. The Denominator Issue

Common to both total and partial takings analyses is the redoubtable "denominator issue." We have already seen how the Supreme Court framed the issue in the *Lucas* footnotes discussed previously. The Court also notes, but does not resolve, the critical impact of this issue (also called the "relevant parcel" issue) in *Palazzolo*. As discussed in Steve Eagle's and Jim Burling's articles, however, Palazzolo raised this issue too late in the course of litigation for the Supreme Court to resolve. The principle issue is: What is the extent of the landowner's property interest to be considered in deciding whether the interest allegedly damaged is partially taken? Both *Florida Rock Industries, Inc. v. United States*[47] and *Loveladies Harbor, Inc. v. United States*[48] discussed the denominator issue in the context of denials of section 404 (Clean Water Act) dredge and fill permits by the Army Corps of Engineers.[49] These courts were willing to follow the rationale of *Lucas*, and consider a portion of the plaintiff's entire property in assessing deprivation of all economically beneficial use.[50] For example, in *Loveladies*, out of 250 acres the court was willing to consider only the devaluation of the 12.5 acres for which the Corps denied a permit.[51] With the difference being $2.7 million before the permit denial and $12,500 thereafter, the trial court awarded the $2.7 million, which the Federal Circuit affirmed.[52] Similarly, in *East Cape May Associates v. State*,[53] the court held that the denominator of the parcel would not include adjacent property that was subdivided and sold many years prior to the enactment of the regulations at issue.[54]

Some courts, however, have reached the opposite conclusion. For example, in *Corn v. City of Lauderdale Lakes*,[55] the Eleventh Circuit cited *Penn Central* in rejecting a landowner's claim to the taking of a particular property right, rather than looking at his land as a whole, since he possessed a "full bundle."[56]

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[47] 18 F.3d 1560 (Fed. Cir. 1994).

[48] 28 F.3d 1171 (Fed. Cir. 1994).

[49] *See id.* at 1173, 1179-82; *Florida Rock*, 18 F.3d at 1562, 1567-71.

[50] *See Loveladies*, 28 F.3d at 1179-82; *Florida Rock*, 18 F.3d at 1568-69.

[51] *See Loveladies*, 28 F.3d at 1180-81.

[52] *See id.* at 1173-75, 1183.

[53] 693 A.2d 114 (N.J. Super. Ct. App. Div. 1997).

[54] *See id.* at 124-25. To the same effect is *Palm Beach Isles Assoc. v. United States*, 208 F.3d 1374 (Fed. Cir. 2000), in which the Federal Circuit held that the relevant parcel for takings analysis purposes was 50.7 acres, rather than 311 acres. *Id.* at 1380-81. The court later separated out a 1.4 acre parcel in a subsequent decision of the same name. *See* Palm Beach Isles Assoc. v. United States, 231 F.3d 1354, 1364-65 (2001).

[55] 95 F.3d 1066 (11th Cir. 1996).

[56] *See id.* at 1074.

Similarly, the Tenth Circuit in *Clajon Production Corp. v. Petera*[57] rejected the so called "single stick" argument in holding that the right to hunt on one's own property could not be analyzed as a taking, separate from other property rights and values on the same property, citing *Penn Central* and specifically rejecting *Florida Rock*.[58] In *FIC Homes of Blackstone, Inc. v. Conservation Commission of Blackstone*,[59] the court, also citing *Penn Central*, declared that takings jurisprudence requires a consideration of the parcel as a whole rather than by individual segments, and accordingly, appraised the effect of the regulation on plaintiff's property based on all thirty-eight of plaintiff's lots to hold that plaintiff was not completely deprived of all economically beneficial use.[60] Following the same approach, the court in *Karam v. State*[61] considered factors such as whether the parcels involved were always bought and sold as a single unit, whether the plaintiffs bought both parcels under a single contract and sold it as a single unit, and whether the parcels were assessed for tax purposes as a single lot.[62]

This application of the "nonsegmentation" principle was followed with a vengeance by the Supreme Court of Michigan in *K & K Construction, Inc. v. Department of Natural Resources*.[63] Here, plaintiffs were denied a permit to fill a portion of their property that was designated as wetlands.[64] Although most of the wetlands were located on one parcel in particular, the property consisted of four parcels in total.[65] Both the trial court and court of appeals only considered the one parcel that was affected by the regulation, and held that the plaintiffs were entitled to compensation since the denial of the permits resulted in a deprivation of plaintiffs' interest in developing the property.[66] The supreme court, however, reversed and remanded, holding that the relevant denominator included all four parcels located on the property.[67] Specifically, the court reasoned, "[i]n this case it is neither realistic nor fair to consider only parcel one for purposes of the taking analysis. Parcels one, two, and four are bound together through their contiguity, the unity of J.F.K's ownership interest

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[57] 70 F.3d 1566 (10th Cir. 1995).

[58] *See id.* at 1577.

[59] 673 N.E.2d 61 (Mass. App. Ct. 1996).

[60] *See id.* at 67.

[61] 705 A.2d 1221 (N.J. Super. Ct. App. Div. 1998).

[62] *See id.* at 1228; *see also* Daddario v. Cape Cod Comm'n, 681 N.E.2d 833, 837 (Mass. 1997) (holding that "restrictions on a landowner's right to extract minerals . . . is not necessarily a regulatory taking when the property as a whole retains substantial value.") (citing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 496-97 (1987)).

[63] 575 N.W.2d 531 (Mich. 1998).

[64] *See id.* at 534.

[65] *See id.*

[66] *See id.*

[67] *See id.* at 536, 540.

in all three of these parcels, and plaintiffs' proposed comprehensive development scheme."[68] That these and other cases continue to apply the denominator theory in takings cases is probably a sufficient response to the post-*Lucas* language in *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*,[69] where the Court rejected segmentation of property interests for takings purposes in a non-land use context,[70] though occasionally a judge will read *Concrete Pipe* to reject the argument that there is a denominator issue involved in a nonphysical property rights case.[71]

IV. CONCLUSION

Palazzolo represents a critical addition to the jurisprudence of regulatory takings. The case clarifies the rules on ripeness, emphasizes the notice and background principles rules for total or per se categorical takings inherent in *Lucas*, and suggests avenues of dealing with investment-backed expectations for partial takings under *Penn Central*. What's left for the Court to decide is how it will deal with the segmentation or relevant parcel issue in regulatory takings, and (now that we know what is *not* a background principle exception to the *Lucas* categorical or total taking rule) what does in fact constitute such a background principle so as to permit a total regulatory taking without compensation.

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[68] *Id.* at 537.

[69] 508 U.S. 602 (1993).

[70] *See id.* at 643-44.

[71] *See, e.g.*, Stupak-Thrall v. United States, 89 F.3d 1269, 1295 n.30 (6th Cir. 1996) (Boggs, J., dissenting). While *Concrete Pipe* has been cited several times for the proposition that real property rights must be aggregated for takings analysis purposes, *see, e.g.*, Marshall v. Bd. of County Comm'rs, 912 F. Supp. 1456, 1472 (D. Wyo. 1996); Villas of Lake Jackson, Ltd. v. Leon County, 906 F. Supp. 1509, 1516 (N.D. Fla. 1995); Broadwater Farms Joint Venture v. United States, 35 Fed. Cl. 232, 239 (1996); Stephenson v. United States, 33 Fed. Cl. 63, 69-70 (1995); Zealy v. City of Waukesha, 548 N.W.2d 528, 532-33 (Wis. 1996), other courts have dismissed the case in a real property context on the ground that "[t]he Ordinance at issue here is not federal economic legislation, and [therefore] the *Concrete Pipe* rationale does not apply," Guimont v. City of Seattle, 896 P.2d 70, 79 n.10 (Wash. Ct. App. 1995). For the view that *Concrete Pipe* is dispositive, see MELTZ, *supra* note 19, at 146-47. For various theories on resolving the "segmentation" problem, see John A. Humbach, *"Taking" the Imperial Judiciary Seriously: Segmenting Property Interests and Judicial Revision of Legislative Judgments*, 42 CATH. U. L. REV. 771 (1993); Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 RUTGERS L.J. 663 (1996); Daniel R. Mandelker, *New Property Rights Under the Taking Clause*, 81 MARQ. L. REV. 9 (1997). For sharp and fundamentally philosophical criticism of recent segmentation/partial takings opinions, see Gerald Torres, *Taking and Giving: Police Power, Public Value, and Private Right*, 26 ENVTL. L. 1 (1996).

Transcript of the University of Hawai'i Law Review Symposium: Property Rights After *Palazzolo*

Ms. NITTA: Chief Justice Richardson, Dean Foster and Judge Bright, ladies and gentlemen, good afternoon. My name is Sheree Nitta. On behalf of the University of Hawai'i Law Review, my co-editor Becky Chestnut and I would like to welcome you to Property Rights After *Palazzolo*, a symposium generously funded by the Benjamin A. Kudo Endowment Fund, and held in conjunction with the William S. Richardson School of Law Jurists-in-Residence Program.

Today's symposium will explore the dynamic area of property rights and takings law in light of *Palazzolo v. Rhode Island*,[1] a recent and significant U.S. Supreme Court decision written by this year's Jurist in Residence, Justice Anthony Kennedy. . . .

We are fortunate to have as moderator today Professor David L. Callies, a nationally renowned expert on property rights and takings jurisprudence. Professor Callies is the Benjamin A. Kudo Professor of Law at the William S. Richardson School of Law where he teaches the subjects of land use, state and local government, and real property. He is past chair of the Real Property and Financial Section of the Hawai'i State Bar Association; past chair of the American Bar Association Section of State and Local Government Law; past chair, Academics Forum; and member of Council, Asia Pacific Forum of the International Bar Association. He's a member of the American Law Institute for the Restatement of the Law of Property, a Fellow of the American Institute of Certified Planners, and co-editor of the annual *Land Use and Environmental Law Review*. Professor Callies has authored numerous books, and more than fifty articles on property, land use, and local government.

Among his books are *Property in the Public Interest; Preserving Paradise: Why Regulation Won't Work; Regulating Paradise: Land Use Controls in Hawai'i*; and with two of our panelists, Robert Freilich and Tom Roberts, *Cases and Materials on Land Use*. He's also the editor of and contributor to *Takings, Land Development Conditions and Regulations After* Dolan *and* Lucas. Recently Professor Callies participated in a multinational study team headquartered at Japan's Meijo University. The study investigated methods of compulsory purchase and compensation in the Asia-Pacific region and was published this year by the University of Hawai'i Press. He is presently participating in a multinational research group writing a book on customary law and sustainability. He's also writing about customary property rights, following a semester of sabbatical leave as a visiting Fellow at Cambridge

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[1] Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

University's Clare Hall. He was elected a life member of Clare Hall in 2000. It is now my pleasure to introduce to you Professor David Callies. (Applause)

PROFESSOR CALLIES: Thank you, Sheree. Thank you to the Law Review for all of their hard work and particularly those connected with the symposium. They have been working extremely hard, not only on this, but on the Jurists-in-Residence program. I'm just so proud to be a professor at this law school with these students.

Our symposium today is designed to deal with property rights in a theoretical way, but primarily based on the recent U.S. Supreme Court decision *Palazzolo v. Rhode Island*. The way we will proceed is that I'll do a few introductory remarks on the area of property on which this all falls, and our panelists will cover the facts of the case and certain portions of the opinion, which we think are important to the law of property today.

I would like to briefly introduce all of our panelists, and then simply call them to the podium as the time for their presentation comes up. . . . It's conceivable that one or two may say something that the others may disagree with. Under those circumstances, why, it's fair game to talk about that, and see where we come out. So let me first introduce our distinguished panel, starting with Jim Burling, who's an attorney with the Pacific Legal Foundation, a non-profit tax-exempt public interest law firm formed in 1973 to litigate nationwide in defense of individual and economic freedoms, and to represent responsible citizens supporting sound environmental and land use litigation. Mr. Burling has been an attorney for Pacific Legal Foundation for a number of years. Before that he was in law school at Arizona College of Law where he served as editor of the Law Review and got his degree in 1983. He has worked with the Foundation since 1983, litigating cases from Alaska to Florida. He's also planning co-chair for the ALI-ABA course "Inverse Condemnation and Related Government Liability." On February 26, 2001 he argued and won the case of *Palazzolo v. Rhode Island* before the United States Supreme Court.

Next in order of appearance is Dwight Merriam, of the firm Robinson and Cole, who has been to Hawai'i a number of times before. He represents developers, landowners, local governments, and the various advocacy groups on land development and conservation issues. He's published over 150 professional articles on land use and is senior co-editor of the book *Inclusionary Zoning Moves Downtown*, and co-authored the book *The Takings Issue*. He's also taught land use at several universities including Vermont Law School.

Tom Roberts is Professor of Law at Wake Forest University School of Law in Winston-Salem, North Carolina where he teaches land use law. He co-author, as before noted, *Cases and Materials on Land Use*. He's also co-

author of the West hornbook on land use called *Land Use Planning and Control Law*. He's been an active member of the Section on State and Local Government Law for many years.

Professor Steve Eagle is Professor of Law at George Mason University School of Law in Arlington, Virginia. He teaches and writes in the area of land use, real property, and constitutional law. He is the author of a second edition of a lengthy and expert treatise on regulatory takings which was published in 2001 by Lexis Publishing. He's also the author of numerous scholarly and popular works on property rights and serves as Vice-Chair of the American Bar Association's Section on Real Property Law, Committee on Land Use Regulation.

My colleague and co-author Robert Freilich is Emeritus Professor of Law. He is now a partner in the firm that he founded, Freilich, Leitner & Carlisle in Kansas City. And he taught law as Endowed Chair Professor at the University of Missouri, Kansas City School of Law where he still teaches the occasional course. He's co-authored *Model Subdivision Regulations and Practice: Text and Commentary*; co-authored with Tom Roberts and me *Cases and Materials on Land Use*; and more recently, *From Sprawl to Smart Growth*. He's handled over 150 land use litigation cases and has developed over 200 growth management systems in the United States.

So we have a great, expert panel. I'm sure it will be very interesting to hear what they have to say on various aspects of *Palazzolo v. Rhode Island*.

To put the subject briefly in context, we're essentially talking about regulatory takings. There are two kinds of takings of property: physical takings and regulatory takings. Physical, we're all familiar with under the rubric of eminent domain or compulsory purchase.

In a physical taking situation the government usually intends to take an interest, or the entire fee simple, in the property or piece of land. There is a no de minimis rule, and the only requirements are compensation and the exercise of eminent domain for a public purpose. There is also no notice requirement; what a landowner knew or should have known concerning the property before taking is irrelevant in terms of the award and indeed irrelevant to the issue of public purpose.

What we are dealing with here is regulatory taking. Why talk about physical taking first if we're not going to deal with it? Because regulatory taking essentially falls into two categories: total or per se taking, and partial takings. The per se or total taking rules comes from *Lucas v. South Carolina Coastal Council*,[2] of which you will hear a bit more later. Basically, if government takes all economically beneficial use from a piece of property through regulation, it is a total taking. That is relevant because the Supreme

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[2] 505 U.S. 1003 (1992).

Court has rendered total takings and takings by eminent domain virtually identical by their common law. That is to say notice is marginally, if at all, relevant with respect to a total taking because it is most like a taking by eminent domain. So this becomes an important linkage between the two, and something the justices in a total taking case often talk about; they relate a regulatory taking to a physical taking.

Regulatory taking of a partial nature is different. There is still some economically beneficial use left of the property, but enough has been taken away by the regulation to raise the question of whether the land owner should not be compensated under the Fifth Amendment or Fourteenth Amendment as a result of that partial taking. In that situation, the Supreme Court has focused primarily on a multifactored test dealing in principle with the ever-popular investment-backed expectations, *distinct* as the court first articulated them, or *reasonable* investment-backed expectations as they characterized them and other courts have characterized them since.

These are the essential issues here. We're dealing with the regulatory taking, the situation where a regulation arguably takes sufficiently or all economic use—not value but use—from property, rendering it partially or totally economically useless. Under those circumstances, the issue arises whether the Fifth Amendment applies and the landowner is entitled to compensation. That is essentially the issue.

We will start with a presentation by Mr. Burling. Both Mr. Burling and Mr. Merriam will use PowerPoint. I hope you will not take from that that only practitioners know how to use PowerPoint, and the rest of us are in the dark ages. (Laughter) Jim.

MR. BURLING: Good afternoon. Aloha, I think I'm supposed to say here. It's a real pleasure to be here and talk a little about *Palazzolo*, which is, as David just told you, one of the more significant and recent cases on regulatory takings. I'm going to take you through a little bit about the factual background of the case and what legal issues were at issue in the case. I'm going to leave to some of the panelists to talk in more detail about some of those issues and one I will talk about in more detail myself.

This is the property in Westerly, Rhode Island. (Projecting photograph) You can see it is a true wetland. You look across the pond—it's a nice picture of the pond, Winnapaug Pond—and see some other houses built there, but those houses are not on wetlands, they're on more of an uplands area. This is Anthony Palazzolo and one of his sons Michael. Anthony Palazzolo, when he was a younger man, ran a tow truck and had a small wrecking yard in Westerly, Rhode Island. He had acquired these eighteen acres in the 1960s, and there are more details, but the point is that he was not a full-fledged developer. That was not his avocation or profession.

Now, this is where the property was in Rhode Island, and this comes as a surprise, perhaps, but unlike Hawai'i, Rhode Island is really not an island. I don't know if you were in the California educational system, but if you went through there you would have to realize Rhode Island's on the East Coast. It used to be Rhode Island and Providence Plantation. But the site itself is right over here on the western side of Rhode Island. Here's an aerial photograph. You can see in this area through here (pointing) there's a great pond, called Winnapaug Pond. It has an inlet to the ocean going out this way. To the south, though, as you see, is the Atlantic Ocean. That area adjacent to the Atlantic Ocean is upland. There are many million-dollar homes along the beach here. This is Mr. Palazzolo's property. There are four houses that are already built on fill in the immediate vicinity of his property. . . .

I'm going to talk a little bit about another upland site on his property, which is right there, and the state of Rhode Island has alleged that he could build another home there. I should just mention quickly that in this direction along the beach (pointing) there's a beach club for 2800 cars that the State of Rhode Island runs.

What is the nature of Mr. Palazzolo's property rights? One of the first questions that somebody should ask when they're thinking of a regulatory taking case, in favor of it or against it, is: What is the essential property right that the individual has? Does the individual have a right to build homes here? We know from the *Lucas*[3] case a few years ago where the U.S. Supreme Court said that, if you have a property interest and if you have a property right, and if that is completely taken away, there is a taking. But if you're trying to do something with your property that you do not have a right to do, such, as the Court said, build a nuclear power plant on a fault zone, which in California is about everywhere, or if you're trying to build a dam which is going to flood your neighbor's property, you don't have an underlying property right to do that. So one of the questions in *Palazzolo*, not before the Supreme Court, but which you need to keep in the back of your mind, is our belief that Mr. Palazzolo has and had the right to fill this wetland—and this is from a supreme court decision in 1879 that says, "The right to wharf out or reclaim is a valuable right," and it constitutes part of the value, and sometimes nearly the whole value of the upland. This is the value of Mr. Palazzolo's property, being taken from it.

There's a home on fill there immediately to the left. And you can see as you continue along, there is another home and fill right in the center of the screen there. You go further along and you can see vaguely here, it's a little hard to make out, but in the center area there's a little upland area that the State of Rhode Island is alleging could be developed, at the trial. Finally, moving on

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

a little further along—you can barely see the background in the center—two trees that are supposed to be the other upland site that he has. This becomes very significant to this case later on.

Now, Mr. Palazzolo first acquired the property through a series of transactions in 1959 and 1960. He was the president and sole shareholder after a couple of intermediate transactions of Shore Gardens, Inc. or SGI. He acquired the property for $13,000. At that time it was already subdivided into seventy-four discrete lots. Several lots had been sold by the prior owner immediately before Mr. Palazzolo's acquisition. But at trial the status of who owned what when became a little murky. But for purposes of the decision, all you need to know is that he had some of these lots and others he reacquired in the 1960s, making his total purchase price $21,000. At the time he acquired the property in 1959 and 1960 there were no regulations governing the fill of wetland in Rhode Island. There were regulations governing his ability to dredge that pond. And his initial plan was to dredge the pond and use the spoil from that pond dredging to fill his wetland. That was the way things traditionally were done in the 1950s and early 1960s before our later-day ecological consciousness tells us that might not be such a good idea. In fact, he was told by some biologists at that time that dredging the pond would be ecologically beneficial because it was so shallow that some of the shellfish life would freeze in a hard winter, and therefore dredging the pond, making it a little deeper, was a good idea. But, nevertheless, he had some difficulties getting those permits approved.

He first applied in 1962 to dredge the pond and fill the wetland. That was denied as being incomplete. In 1963 he applied to dredge the pond, fill eighteen acres, making the property suitable for residential development. There was no action on that permit application for a long time. In 1966 he reapplied to dredge the pond and fill a lesser amount, about eleven and a half acres, for a recreational beach facility, and there was no action on that permit as well. He appealed that, in the 1960s, those two permits that had been sat on for a while, and in 1971 the state ruled that neither application would have any significant effect on wildlife. Both permits were granted.

Now, for those in private practice and for those students thinking of going into private practice, when you have a client—I'm going to give you a practice tip—and your client has a permit, you must tell that client to exercise that permit and do what he is allowed to do, or she is allowed to do, quickly before something happens. And Mr. Palazzolo made the great mistake of many individuals when they receive a permit: he sat on his rights for too long, and he did not immediately rush in with the bulldozers, because there was a new regulatory agency on the block in Rhode Island. And when they found out that he had been given these permits, they threw what you will learn in your upper

classes is technically known as a conniption fit. (Laughter) They became very unhappy about that, and the permits were withdrawn seventeen days later.

As I said, Mr. Palazzolo had sat on his rights and had not developed the property in that time. At this point he threw up his hands, his kids were in school—he had five kids—he just said, "The heck with this. I'm going to go out make a living for a while, and I'll deal with this some other time." And during the period of time that he waited, and a little bit before that, new regulations were put in place. First, statutory authority in 1965 was put in place to restrict the filling of wetlands. In 1971 that new kid on the block I mentioned, the Coastal Resource Management Council, was created and given authority to regulate the fill of coastal wetlands. And a permitting scheme was adopted with specific regulations in 1976.

Mr. Palazzolo was tired of paying $100 a year corporation registration fee, so he stopped paying the money. So he got a nice letter from the State of Rhode Island in 1978 saying, "Your corporation is automatically dissolved." Therefore, the ownership of the property passed from his corporation, of which he was the owner and sole shareholder, to him in particular. And that is a very crucial fact, probably one of the most crucial facts in this case is that he, according to Rhode Island law, acquired the property in his individual capacity in 1978. Why that becomes critical—think about when those regulations were passed, 1976, two years before. He, though, after a while decided, "I haven't had enough pleasure in a while, I'm going to reapply for permits." So in 1983 he applied for permits again, this time not to dredge the pond but to bring in material from off the area, in the mainland area and use that to fill eighteen acres. He wasn't specific about what he was going to do when he filled the eighteen acres. He said, "Whatever the zoning would allow me to do." That could theoretically be homes, it could be recreation, but he just wanted to get the first step done first. So he applied for a permit. That was denied in 1984 because there weren't enough details in it, and there was some impact on the environment.

This, you can see here, is the seventy-four-lot subdivision from 1959. There had been some erosion of some of the pond in these areas here. I will point out sometime later a comparable sale that becomes a little bit significant later. But this is how he was going to lay out the property.

However, in 1985 he decided to go through another permitting process, which was to fill 11.4 acres, again with no dredging, for a low-impact recreational beach facility. It was going to be an unpaved parking lot with room for fifty cars and boat trailers. And people could take their boats down to the pond and sail their boats in the pond or use that for a nice, convenient access to the inlet out to the ocean. He was going to have barbecue pits, picnic tables, and portable sanitation. That way he would not have to have septic systems which had certain ramifications for nitrate leaching into the

environment. But this is not the typical sort of beach club that Justice Kennedy would go to, I would imagine. And he said, "This is not an idyllic image." And if you've met Justice Kennedy in the last few days, maybe he's not one to take a couple six packs of beer over to the beach club for an afternoon. I don't know. (Laughter) Justice Ginsburg definitely, though, she thought it was a most disagreeable beach club, in her dissenting opinion. (Laughter)

And, indeed, this wasn't the most elaborate of plans. It really wasn't medium to elaborate. It was rather low on the elaborate scale. (Laughter) But he applied for it. And it wasn't turned down because the plan was not elaborate; it was turned down because wetlands in Rhode Island are important. There's no doubt about that. These wetlands are going to be a refuge and feeding area for larvae and juvenile fin fish, shellfish, and for migratory waterfowl, wading birds; it's going to be fauna, sediment trapping, flood storage—all the things that you learn about in your ecology courses that are so important for wetlands. And most importantly, it failed to meet the Coastal Resources Management Council's key requirement for all coastal wetland projects. That is, it did not serve a compelling public purpose providing benefits to the public as a whole as opposed to individual or private interests. Now, by the time this has happened you have to remember Mr. Palazzolo had owned this property for about twenty-five years. And he had become, like many tow truck drivers and wrecking yard operators, a student of constitutional law by this time. (Laughter) And so when he read that he had been turned down because it doesn't fulfill a compelling public purpose for the benefit of the public as a whole, he thought, "Oh!"; a little light bulb went off above his head, because he had read in *Armstrong v. United States*[4] the Fifth Amendment's guarantee is designed to bar government from forcing some people alone to bear burdens which in all fairness and justice, should be borne by the public as a whole.

"Public as a whole, public as a whole," Mr. Palazzolo said, "They've taken my property." And he sued them in 1986 on the basis that the denial of the beach club—not the prior, but the beach club application—denied him economically viable use of his property which he alleged was worth $3.1 million, based on comparable sales in the area.

(Projecting photograph) This is the comparable sale, sold for $125,000 in 1986. You multiply that by seventy-four, then subtract several million dollars that it would take to fill this property and develop it, put in the utilities, and that sort of thing, his appraiser netted out $3.1 million. That was never proven at trial. The trial court never decided exactly what it was worth, but $3.1 million is the figure that he had alleged.

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[4] 364 U.S. 40 (1960).

Now, at trial the state insisted that he could have developed a small part of the property—you remember some upland I showed you before? And there was a 1500-foot by twelve- to fourteen-foot wide road that goes out onto the property, that little tenth of an acre turn around. Here's a picture of it. It's between these two trees here. (Pointing) Here's a cooler picture of it with Mr. Palazzolo saying, "Where am I going to put a house? Where am I going to turn around my car if I have a house here?" And, indeed, that is an interesting question. But the State said that he could build a home on this property. And, indeed, a home would be worth $200,000, would be worth an awful lot of money as a home site because you're in a pretty area of the wetland, all the other eighteen acres that Mr. Palazzolo could not use.

There's also some talk about there being "another upland" at trial which is in that area. You can see right here. (Pointing) But Mr. Palazzolo's own attorney, being no dummy, said at trial, "Well, how are you going to get to that wetland? You're going to have to build a road. How do you build a road across wetland without doing fill?" Interesting question. As it turned out, that did not become a significant issue in the case because nobody really believed that he could build on that property.

His case wound its way all the way to the Rhode Island Supreme Court where they ruled against him on several grounds. First, the claim was not ripe because he had never applied to develop the upland. To have a regulatory taking case that is appropriate to be in court you have to know what you can and cannot do with the property. The court said, "Since he didn't apply for the upland permit we don't know what he could do with it and therefore it's not ripe."

They also said because he was on notice of the regulation in 1978, the title to his property did not include the right to develop in a manner governed by the regulations. They ruled that this notice also impacted his investment-backed expectations. When he acquired the property in 1978 from himself, he had no investment-backed expectations to develop it because the regulations were already in place. And, finally, because there was some value left in the property, the $200,000 for the upland, [it retained economically viable use].

We had three questions to the U.S. Supreme Court. One, whether a regulatory taking claim is categorically barred whenever the enactment of a regulation predates the claimant's acquisition of the property. Two, where a land use agency has authoritatively denied a particular use of the property, and the owner alleges that such denial per se constitutes a regulatory taking, whether the owner must file additional applications seeking permission for less ambitious uses in order to ripen the taking claim. And, third, whether the remaining permissible uses of the regulated property are economically viable merely because the property retains a value greater than zero.

The other speakers will be talking in more detail about how the Court answered these questions. . . . But I'll tell you that the Court said, "Look, there is some value and use left in the property. Being able to build a single home is not insignificant. Therefore Mr. Palazzolo has not been totally wiped out of all the use of this property, therefore there is not a categorical taking." However, they sent it back for a balancing test to see whether or not he actually could develop this property at some time in the future. And that is now before the Rhode Island Supreme Court, which has asked for a briefing on the questions of whether there's a public trust doctrine issue involved, whether or not he actually had the right to fill the property, and what were his investment-backed expectations.

And one postscript before I close is that Mr. Palazzolo, after the decision came out, actually went to the State of Rhode Island and said, "You say I can fill the upland? Okay. I'm applying for a permit to fill this one tenth of an acre turn-around. Let me have the permit." The inspector went out to his property late last summer, early fall and said, "We're not going to give you a permit here." And that's where the case stands right now. Thank you. (Applause)

PROFESSOR CALLIES: Dwight.

MR. MERRIAM: Well, this is not my first time here, but it is my great privilege and pleasure to be here. I actually came here thirty-three years ago this year to live. Actually my family lived here and I went off to Vietnam for three years, on and off. My oldest daughter, who is now thirty, was born here. So it is a great joy to come back. I have been back many times. I had the pleasure of representing the City and County of Honolulu in the mid-1980s in the Queen's Beach case which was the lead case of a dozen cases in which the city and county had been attacked for the first time under the federal civil rights law for its zoning actions. Dave Callies was my co-counsel. We were entirely successful in the end in those cases. . . .

The only reason why I was really invited here is because I have the Blair Witch Project tape of Anthony Palazzolo. (Laughter) I have—unlike Jim Burling—I have no dog in this fight but I write about such things. So I learned about this case and I wrote about it. And I got to meet Anthony Palazzolo. And one day he decided to take me for a ride in his car out on the upland. This is an excerpt. Now, this is worth the price of admission here today. (Laughter) It's three minutes and a few seconds. . . .
(Video playing)

MR. MERRIAM: That's the Blair Witch Project tape. Now you have to listen to a lecture. I want to talk to you about the "relevant parcel rule" in the

context of *Palazzolo*. It is not that big an issue in the case. I think you'll find this useful. How many of you just incidentally, ever heard the term "relevant parcel"? One, two. How many of you are in here to get out of the rain? (Laughter) Let me go through this because now my fifteen minutes of fame starts.

Here is the first question. Is it property? We don't usually ask first and foremost whether it *is* property. In the *Kaiser*[5] case, the Queen's Beach case, that, indeed, was an important issue. But once you get past that you have to ask what is taken. Sometimes we call this the numerator. Remember this from fourth grade arithmetic? Most law students are trying to escape math and science, so this may be really technical for you—numerator and denominator—but I gotta do it. (Laughter) In any event, the numerator is what's taken and the denominator is the total property interest. . . . What's the analysis that's applied? You heard David tell a little bit about this. It's the *Penn Central*[6] three-part analysis:

Is there a reduction of value?

What were the investment-backed expectations?

And what's the character of the government's action?

You're balancing the benefit to the public from restrictions against the burden to the private property owner. I submit to you that the *Palazzolo* decision reinforces the importance of the *Penn Central* three-part analysis.

Now let's take a quick look at how all this works, just in a little interplay. (Pointing to diagram) This is a diagram of, say, a 100-acre site on the left, and a 10,000 square foot site on the right here. The 100-acre parcel over here is on a street that's now being proposed to be designated an arterial or collector street. So instead of a twenty-five foot setback they're now going to go to fifty feet; very typical change in regulation. And look at this. When you look at the large parcel, the 100-acre parcel on the left, that little change in the setback—are you with me on this? It's like a little, it's a planning thing. I got a planning degree so I get to do this. The parcel on the left has lost twenty times as much land as that little quarter acre lot on the right. Okay? Which one has a taking based on the numerator? I don't know.

But let's look at the denominator. If you put that loss of acreage as a percentage over the size of the underlying lot, all of a sudden that big parcel, the 100-acre one, only has a 1.25% loss in total acreage, whereas the 10,000 square foot lot has lost 25% of the parcel and may now be undevelopable because there's hardly a place to put a house there after you have fifty feet of a 100-foot deep lot taken up with a setback. Where's the taking?

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[5] Kaiser Aetna v. United States, 444 U.S. 164 (1979).

[6] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

Well, I don't have an answer for you. But I will tell you what's important here is the interplay of the numerator and the denominator. When we talk about relevant parcel, sometimes we call it numerator/denominator. Sometimes we call it the denominator, the takings fraction. I call it the relevant parcel. Sometimes it's called the parcel as a whole, the non-segmentation rule, non-severance rule. Now, I'm talking about the denominator.

What is the property against which we are comparing the loss? Now, is it an issue for the courts? Absolutely. This is the quote from *Penn Central* saying, on the so-called non-segmentation rule, "You can't divide everything up. You have to look at the total holdings." Anybody in this room read *Penn Central*? Okay. That's a good start. A 1978 decision. Look at the total holdings of *Penn Central* when you make a decision about whether it's a taking for the New York Landmarks Commission to prohibit a tall tower on top of the Grand Central Terminal Building.

It came up in *Lucas*[7] in the notorious footnote seven about how important determining what the denominator is. It came up again in a case called *Concrete Pipe*,[8] and then in *Palazzolo* in which Jim Burling, who did magic in winning the case, even though some of us predicted he couldn't possibly win it, and on top of that in a classic lifting-him-up-by-his-bootstraps attempted to invoke this whole business of the numerator/denominator problem, the Court said, "Gee, it really isn't in your case." But in passing Justice Kennedy said, "Some of our cases indicate the extent of deprivation effected by regulatory action is measured against the value of the parcel as a whole, all the holdings around the area and underground and in the air. But we have at times expressed discomfort with the logic of this rule."

What is he saying? What's going on here? What's he hinting at in *Palazzolo*? Well, I submit to you that he's hinting at the fact that with this three-part *Penn Central* test—loss of value, investment-backed expectations, character of the government's action—that the Court's looking for a flexible rule of determining what the property interest is against which the taking must be compared.

Now, to understand a little bit more about how this works let's look at—oh, also I mentioned in passing, as I started to read these cases in connection with writing this article, many of the relevant parcel cases interestingly talk about proportionality and fairness. I think there's a very powerful undercurrent in all of these takings cases sometimes expressed, sometimes not, of fairness and proportionality. Certainly this business of determining the total property holdings against which the loss must be compared is part of that.

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

[8] Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602 (1993).

So we're trying to find a set of rules by which the relevant parcel may be determined. And like Ron Propeil of RONCO fame, and the Vegematic, we got to know how to slice and dice property to determine what's in the denominator. Here's some pictures we had fun making up in my office. (Projecting diagrams) This is a dozen different ways of looking at property. A great property professor here is going to be rolling on the floor here momentarily when he sees these.

This is the two-dimensional one, just length and width laying there, right? The subsurface rights—which case is this? Pick a case what this could be. Anybody.

AUDIENCE: *Pennsylvania Coal.*[9]

MR. MERRIAM: *Pennsylvania Coal.* What's one of the '87 trilogy cases? Another coal case. The difference is it's soft coal instead of hard coal.

AUDIENCE: *Keystone.*[10]

MR. MERRIAM: *Keystone Bituminous Coal.* So we want to look at the total surface and subsurface rights. We may want to look at the air rights as part of that denominator for the total property holdings. (Pointing to graphic) This is a consolidated operation; the landowners are treating the two parcels as one. Non-contiguous lands that are treated as one don't have to be connected to be part of the denominator, but if they're treated as part of a consolidated operation they could be part of the denominator.

You're going to hear some from Bob Freilich later about the time element. You may slice and dice property with *time.* This happens to be a graphic for a particular case where part of it was acquired in '56, part of it '68, part of it in '99. How much of that do you include in determining whether a property is taken?

This is an illustration of somebody who bought a small piece of property initially a long time ago, '57, a much bigger piece quite recently separated by a road, used as a consolidated farming operation. But the public regulation occurred somewhere between the initial acquisition and the later acquisition, and now affects that first parcel. How are you ever going to decide what land to count and what land not to count?

Now this one, anybody here ever heard of transfer of development rights? You have, probably, if you have read *Penn Central.*[11] Another element of

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[9] Pa. Coal v. Mahon, 260 U.S. 393 (1922).

[10] Keystone Bituminous Coal Ass'n v. DeBenedicts, 480 U.S. 470 (1987).

[11] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

property is that some of these air rights, like where you can't build over Grand Central, can be sold and moved to another parcel and used by another owner. Do you include these air rights which are transferable as part of your denominator property interest in trying to determine whether someone has been treated so unfairly that the restrictions on their property rise to the level of a compensable taking?

Now this one, how many of you are planners, educated or trained as planners? Or economists? I'll take an economist. Thank you. This is about externalities; happens to be positive externalities. It's also called in the law "the average reciprocity of advantage," which is a little bit of nothing up the sleeve but an elbow. What it says is if your property is restricted by a height limitation, it hurts your value, right? Because you can't build a tall tower. But your neighbor's property is restricted, too, by a height limitation. What does that do to your property? It confers a benefit on it, a positive externality, a positive benefit on value that's external to the other property. That creates an average reciprocity of advantage by the restriction. Should that average reciprocity of advantage, those values that pour back from mutual restrictions, also be counted in the denominator? I haven't time for any of these answers. You're getting no answers today, just questions. And the encumbered property—nobody's really talked much about this. But if, for example, it has hazardous waste on it, and must be cleaned up, should you net out the value by that cost? As I said, Bob Freilich will talk a little bit more about property over time. But do you consider in today's scene the value later?

So here in summary are some of the factors to be considered. Are the properties connected horizontally or vertically? If they are, they're probably to be treated as all or part of the denominator. How did the owner treat the property in terms of planning for the land? How did the government treat it? When were the parcels acquired? Did somebody try to convey away the parcels in order to keep them from being in the denominator? The final factors to consider: the size and character of the parcels commonly traded in the community, the extent to which the restrictions benefit other property—we covered that—and whether parcels have been combined.

Oh, incidentally, here's Anthony Palazzolo (projecting photograph). Not only did he order all the West books in the mid-1980's and study them, he's a genius when it comes to taking issues and he knows stuff about cases I never heard of. I've sat at his knee and listened to him lecture on them. But now he's got e-mail. Here's his latest e-mail I got on wireless from St. Louis on the way out here: "Good morning, Dwight. Take a read and envision the battle in the making, a titanic battle between an unknown lightweight and the behemoth Attorney General of Rhode Island. Buy your ticket early and get a front row seat. By the way, that unknown lightweight has been in training for forty-one years. Ha, ha." That's from Anthony Palazzolo.

Thank you very much. I'm done. (Applause)

PROFESSOR CALLIES: We will now have Professor Tom Roberts who will discuss other issues with respect to the *Palazzolo* case. Tom.

PROFESSOR ROBERTS: Thank you, David. I'm happy to be here. This is the first time I've made my way to Hawai'i. I was telling a friend of mine that I was going to speak on February eighth on *Palazzolo* in Hawai'i. He e-mailed me back, said he was also going to speak on this case today, in Minnesota. (Laughter) And he thought he needed a new agent. (Laughter) I am happy to be here. I appreciate the law school's invitation.

I'm going to talk primarily about the ripeness and another aspect of the procedural hurdles that confront a landowner in bringing a regulatory takings case.

There were two cases decided by the Supreme Court in the mid-1980s, the *Williamson County*[12] case and the *McDonald*[13] case, that set up two requirements for a regulatory takings claim, two procedural requirements. One was that the property owner obtain a final decision on a meaningful development application in order to have a ripe claim. The second requirement is that once a ripe claim is established the property owner then must bring an action for compensation in state court.

These two requirements have plagued landowners—I think "plagued" is not too strong a term—and have been highly controversial. Efforts have been made by landowners and their attorneys to eliminate or gut these requirements through judicial action and efforts in Congress. Congress has twice passed a bill to significantly alter these requirements but the Senate hasn't taken up the bills, and they died. So I want to talk about, first, the final decision rule, which was applied in the *Palazzolo* case, and then, time permitting, I'll talk about the second requirement, the state compensation requirement.

Probably the primary difficulty with the final decision requirement is that a landowner really doesn't know how many applications he has to make in order to make the claim ripe. The Court speaks about a "meaningful development application," but it's not all that clear what constitutes a meaningful application. There are, the Court has told us, certain grandiose projects that have failed to meet the test. The fifty-five and fifty-story office towers proposed to be put on top of Grand Central Station were presumably grandiose projects that in part rendered that claim unripe. The application for a subdivision in the *McDonald* case with no lesser application being submitted rendered that claim unripe.

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[12] Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

[13] McDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986).

But over the years as the lower courts have applied this meaningful development application rule, it's become more and more frustrating to property owners in part because the Court is playing a paternalistic role in compelling property owners to downsize their requests. "If you can't get fifty stories, then try forty. If you can't get forty, try thirty. And in doing so, downsizing the request, you'll eventually compromise and negotiate with the city and then we won't have to hear your case. We're also saving you a lot of time and money, because if you bring your action based upon your initial grandiose scheme of maximum development potential of your parcel, it's a sure loser. So you should thank us in the first instance and not bother us with these cases."

Well, this paternalism—though the Court didn't quite put it that way—is not welcome. I think property owners likely feel that way and would just as soon, in many instances, bring this action without having to go through the process of downsizing the requests, and debating with the municipal authorities over what will be allowed and what won't be allowed.

As I said, the efforts have been made, significant efforts, to both legislatively and judicially challenge this rule. *Palazzolo* does two things with this meaningful development application rule. One, it makes it clear that it's here to stay as the Court reaffirms in the *Williamson County* and the *McDonald* meaningful development application rule. It's not, it seems to me, likely to go away.

Secondly, though, the Court tweaks the rule a bit. And in so doing it does so in a way favorable to the landowner-challenger. It tweaks it in just a sufficient way that, I think, it renders the necessity and the likelihood of congressional action less likely. Though bills may well be brought to do that, it just seems to me they're not quite as necessary as they were before.

As Jim was mentioning in his presentation of the facts of the case, the state Supreme Court in Rhode Island found Palazzolo's claim to be unripe for three reasons. The first, the court said, was that: we really don't know whether Palazzolo might not be allowed to develop some of the wetlands. He was denied the right to fill all of the wetlands. He was denied in his second application the right to fill eleven acres or twelve acres of the eighteen acres of wetlands. But maybe the state would let him fill five, perhaps.

To this the United States Supreme Court said, "We don't think that's the case. We think it's clear from the record that in Rhode Island the law is that one can't fill wetlands. It would be a waste of time; it would be futile for him to make another application to the Coastal Commission there to seek to fill, so he doesn't really have to do that."

The more contentious issue was whether Palazzolo had done enough to try; he really hadn't made any applications on the uplands. As Dwight was saying, you look at the uplands parcels in conjunction with the wetlands to see

whether there has been a taking. The Rhode Island Supreme Court said the fact that he had not applied for a permit to develop the uplands was another reason it was unripe. This in likelihood was the most contentious part of the decision, insofar as ripeness was concerned, between the majority and the dissenting justices. The majority essentially said to the State of Rhode Island, "We can tell from the record that Palazzolo will be allowed to build one house on the upland parcel worth $200,000." The State had conceded that one house could be built for $200,000. The Court basically said, "We're not going to let you change your mind, and now argue that you might permit more intensive development of the uplands parcel. So we know there was a final decision. It's clear to us by your concession in the case below that one house can be built there. It's clear to us what can be done with the upland tract. So it's ripe."

Finally, the state Supreme Court had said it was unripe for the third reason that Palazzolo had never requested, in his application to develop the property, approval for the seventy-four-lot subdivision upon which his compensation claim was based. He was claiming a $3.1 million loss from not being able to have a seventy-four-lot subdivision, but he never specifically applied for that. The Rhode Island Supreme Court said, therefore, the case was unripe.

The Supreme Court said, "the fact that he hasn't applied for that seventy-four-lot subdivision is not relevant to his ripeness challenge to the wetlands law. It's clear from the Coastal Commission's conduct that it won't permit any fill of the wetlands. Whether he succeeds on the merits on his takings claim with respect to compensation is another matter." "It's not really relevant," the Court said, "to determining ripeness. We know he can't fill wetlands."

The bottom line from this discussion: if you look at the opinions, both the majority and the dissenting justices spend about four pages each, by far the longest part of each decision, the majority and dissent, is spent on examining the record with respect to ripeness. It's a fact-intensive issue. And the majority, where the record is unclear, the Court resolves the doubt in favor of the property owner. I think it's that aspect of the case that makes it a significant decision in terms of ripeness.

For the majority, Palazzolo had done all that he *should* do. And for the dissent, Palazzolo hadn't done all that he *could have* done in order to obtain more clarity from Rhode Island as to what he might do.

Mixing the concern for the clarity of law, the clarity of the way the law applies to the tract of land, which is the essence of the ripeness determination, mixing that need for clarity with a sense of fairness, is what *Palazzolo* does that's a bit different. And it resolves this doubt in the record in favor of the property owner and this, in a very subtle but important way, may be read

as switching the burden of proof to the government to respond to development applications.

Up until now in many ways it's been one of these kind of "just say no" rules. "Just say no" doesn't work in terms of a drug abuse program, but it has worked to some degree for local governments who could take an application and just say no, not really responding, and telling the property owner what he or she could do that *might* satisfy their objections. It could just sit back, say no, shrug its shoulders and then it would be incumbent upon the property owner to bring another application of lesser magnitude and then see what would happen.

I think with *Palazzolo*, and though there's no express statement to this effect in the majority opinion, it seems to me this is the essence of the decision, and if you review what Justice Kennedy writes, he points out on several occasions that the state didn't explain the reach of its law. He says that in two or three different ways, saying that the state—I mean in reading the case after the fact from a landowner's perspective at least—I would say that the case talks about measuring the ripeness determination by whether the state responded to the development applications. If the state didn't respond to the development applications, then a presumption may work in favor of the property owner saying, "Well, it's clear they're not going to allow anything if they just simply say no to these applications."

So I think, in sum, in terms of ripeness, that is the final decision ripeness rule; the Court's discussion of the facts of the case, the references to the failure of Rhode Island to come forward and tell Palazzolo what he could do, are important factors. And whether the lower courts pick up on this is another matter, but it importantly shifts some of the difficult uncertainty off the property owner's back to know what is a meaningful application, and puts it on the government's side. If the government doesn't respond, then I think at least according to *Palazzolo* there will be some good reason to think that the case will be ripe.

In sum, though, I think that what *Palazzolo* does in terms of final decision on ripeness is the doctrine—as I like to think about this—kind of matures in the case. Final decision is going to be highly fact-based. When we are assessing issues of meaningfulness and fairness and utility, it's not likely to be anything that will produce highly predictable results. It will be highly fact-intensive. I don't think there's any way around that. I don't think legislation can cure that. I don't think the bills in Congress are materially better in doing that since they still use terms like "meaningful."

So I don't think we'll see in the many judicial applications of the final decision rule much more clarity. Rather, we will see a mixing of concern for the clarity of the law, and the fairness of the governmental process. There may be more focus on whether the governmental responses to the applications have

been fair. If not, it will be easier to make the case ripe. Thank you. (Applause)

PROFESSOR CALLIES: I think the most important part that he covered, and often the most difficult to assess, is how to figure out what the courts mean by ripe. Professor Eagle.

PROFESSOR EAGLE: Thank you. I'd like to begin by thanking the Law Review and the Kudo Endowment and the Kudo Professor, Professor Callies, for inviting me. And the subject that I'm going to speak about this afternoon is a real time bomb that the Court in *Palazzolo* has only partially defuzed. This is the so-called regulatory takings "notice rule."

The notice rule is a doctrine that asserts that a landowner may not claim a taking simply by the fact that the landowner acquired his or her interest with notice of a preexisting regulation, quite without regard to whether the regulation otherwise would be valid or invalid.

The notice rule is built on two Supreme Court cases that previous panelists have discussed: *Lucas v. South Carolina Coastal Council*[14] and *Penn Central Transportation Co. v. City of New York*.[15] Together they give us this sweeping rule.

Jim Burling noted that in *Lucas* the Court equated a total deprivation of economic value with a physical invasion. So if there is a total taking of economic use, there is a taking, but Justice Scalia, who wrote the opinion, having been a good law professor at the University of Chicago, qualified it by saying that, nevertheless, there might be a situation where the owner's conduct would violate long established property rights laws. So he said, "Any limitation so severe as to eliminate all economic use cannot be newly legislated or decreed without compensation but must inhere in the title itself, in the restrictions that background principles of the state's law of property and nuisance already placed on land ownership." Well, that sounds fair enough. But how far does this term "background principles" go?

The answer is some courts have interpreted that, shall I say, very aggressively. In one well-known set of cases lead by *Kim v. City of New York*[16] in 1997, the New York Court of Appeals said in identifying the background rules of state property law that inhere in an owner's title, "a court should look to the law in force, whatever its source, when the owner acquired the property." In other words, a municipal regulation that was promulgated the week before counts as much as a principle that's been in Anglo-American

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[14] 505 U.S. 1003 (1992).

[15] 438 U.S. 104 (1978).

[16] 681 N.E.2d 312 (N.Y. 1997).

property law for a millennium. So essentially this is what I call the "positive notice rule." Whatever the sovereign says goes, because the sovereign has said it.

The other branch of the notice rule comes from reasonable investment-backed expectations, which had its genesis in the *Penn Central* case, as Dwight Merriam talked about. Here too, courts have interpreted this expectations branch somewhat, shall I say, aggressively. In one leading case decided by the Federal Circuit, *Good v. United States*,[17] a landowner had acquired a parcel in the Florida Keys, and went through many years of litigation back and forth over being able to obtain development rights under state law. Well, the good news for the landowner is that finally he prevailed. The bad news for the landowner is that *after* the landowner acquired the parcel, the Endangered Species Act had been passed. And ultimately, now that the landowner prevailed in the state courts, he went back to get a renewed federal permit and that was denied on the grounds the state had told the Army Corps of Engineers that the rice rat and the marsh rabbit were endangered on his land.

Well, the landowner, of course, said, "Wait a minute. How could I have had reasonable investment-backed expectations affected by a statute that didn't even come into existence until after my purchase?" The panel at the Federal Circuit said, "Appellant's position is not entirely unreasonable. But we must ultimately reject it in view of the regulatory climate that existed when appellant acquired the subject property. Appellant could not have had a reasonable expectation that he would obtain approval." The expectation, therefore, not only is affected by law but by the *climate* as well.

The Supreme Court had a clear and definite answer to the notice rule, and this was supplied by Justice Scalia in *Nollan v. California Coastal Commission*[18] in 1987 in footnote 2 where he said, "So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in transferring the lot." Message: A very basic principle of Anglo-American property law is that an owner transfers to a successor everything that the owner owned.

Well, one option open to the Court in *Palazzolo*, of course, was simply to quote this language and say, "Issue closed." Justice Kennedy's opinion did not do that. To be sure, he quoted this footnote. He said, rather in passing, that it was "controlling," but then went on to a somewhat fulsome discussion of the issue precisely as if *Nollan* was not controlling.

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[17] 189 F.3d 1355 (Fed. Cir. 1999).

[18] 483 U.S. 825 (1987).

And he did firmly quash the positive notice rule by saying, "Were we to accept the state's rule, the post-enactment transfer of title would absolve the state of its obligation to defend any action restricting land use no matter how extreme or unreasonable." And the Court would not allow that. But here's where the real action begins. Having said that you can't take away the right of a landowner to take his challenge simply because there wasn't an existing rule, the Court went on with a battle within the five-member majority.

In fact, in fairness to Justice Kennedy, he was writing for five justices, two of whom rather clearly had fundamental disagreements about what they were signing on to. This gave rise to the dueling concurrences between Justice Scalia, who said, "A *Penn Central* taking no less than a total taking is not absolved by the transfer of title, period," and Justice O'Connor, who wrote a concurrence which, to borrow a phrase from a noted litigator in the field, Michael Berger, sounds like a Goldilocks and the Three Bears kind of analysis. Justice O'Connor said, "If existing regulations dictate reasonableness, then the state wields far too much power. On the other hand, if existing regulations do nothing to inform the analysis, then an important indicium of fairness is lost. Our decision today does not remove the regulatory backdrop against which an owner takes title to property from the purview of the *Penn Central* inquiry. It simply restores balance to that inquiry."

The four dissenting justices all indicated that they were signing on to that view. So the upshot is five justices in *Palazzolo* said that expectations do have something to do with whether one could validly own property, and those expectations are to some extent shaped by a preexisting ordinance. But the Court would not define how that worked.

Now, after the *Palazzolo* case we're finding some early returns. The Federal Circuit in a case called *Rith Energy*[19] has said neither *Palazzolo* nor *Nollan* holds that investment-backed expectations are irrelevant in analyzing the regulatory taking. Fair enough. They're recognizing the obvious; reasonable investment-backed expectations are in play. The Colorado Supreme Court has said that after *Palazzolo* we have to do a two-step test. First we look at *Lucas*. If there's no taking under *Lucas*, then we go to *Penn Central*. Fair enough too.

As might be expected, some states are taking a close look at the public trust doctrine as a way of getting around the abrogation of the positive notice rule in *Palazzolo*.[20] For instance, the Rhode Island Supreme Court on its remand instruction indicated that the public trust doctrine has to be reviewed carefully again to see if there's something *there* which precludes Palazzolo from building.

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[19] Rith Energy, Inc. v. United States, 270 F.3d 1347 (Fed. Cir. 2001).

[20] Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

A Wisconsin appellate court has said that the conversion of rental boat slips into a "dockominium," a condominium/boat slip arrangement with no physical change *whatsoever*, violates the public trust doctrine. And we have in the wings *McQueen v. South Carolina Department of Health and Environmental Control*,[21] a case very similar to *Lucas*, extraordinarily so, in fact, which the Court granted certiorari on, vacated, and remanded in light of *Palazzolo* the day after *Palazzolo* was decided. This may be the vehicle for the Supreme Court to have another look at the notice rule.

Now just very recently the South Carolina Supreme Court indicated the issues it wants briefed on remand in *McQueen*. The first two are not surprising. Again, they want to know about background principles, and whether there was a complete deprivation of all economic enjoyment. The third one's a little intriguing: may a court use investment-backed expectations to determine McQueen's damages? So now investment-backed expectations seem to be getting to the damages question. All very intriguing.

Now, again, the state has the alternative of either paying just compensation or redefining its own law so that compensation isn't required. If the state leaves the law that way it is, it may have to pay. If it changes the law, it may save itself the burden of paying and leave the landowner with the burden. In reviewing these kinds of questions, I suggest that, as the Supreme Court has discussed in other contexts, the judiciary has to be particularly vigilant about state laws redefining individual rights when the state's own interests are at stake. (Applause)

PROFESSOR CALLIES: This is all complicated material, as you see. But we leave it to Bob Freilich, Professor Emeritus and practitioner to put some of this in a more practical context. Bob.

DR. FREILICH: Well, it's always a good feeling to be the wrap-up speaker, right? Because you know you're getting to the bathroom pretty soon. There's always the famous speaker, right, who went on and on and on, and he saw the whole audience empty. And finally he sees this one fellow sitting there. He ends his speech and he goes down and shakes his hand, says, "Thank you very much for listening to my entire speech. I appreciate that." "Appreciate, hell," he says, "I'm the next speaker." (Laughter) So I hope to be brief.

I have been here to the islands about twelve times. In fact, back in 1973 I worked with the City and County of Honolulu to establish the first moratorium in Hawai'i's history to create open space in Waikiki. Subsequently, I developed a growth management system for Maui and have also been involved

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[21] 530 S.E.2d 628 (S.C. 2000), *cert. granted*, 121 S. Ct. 2581 (2001) (mem.).

in the NAVFAC [Naval Facilities] studies on the Naval Facilities air bases in the islands.

I've always enjoyed coming back here. It's a special challenge, Hawai'i law in land use. It's certainly complicated enough. It has two features that many other states don't have.

Number one, it has customary law. That's very different, except [for that] now emerging with the Native Americans in the West, actually all over the country.

The second thing is that it has really two tiers of regulation. Not only municipal, but it has very extensive statewide regulation coming from the state's splitting up the islands into four major tiers: conservation areas, rural areas, agricultural areas, and then urbanized areas. Only in the urbanized areas can, in fact, the county exercise their control. It's a little bit like the Florida Keys where they not only have to deal with the environmental restrictions of the normal act but also with the state declaring it to be a critical area of state concern.

I am really interested here in planning. I come with this perspective. The Supreme Court has recently taken a case called the *Lake Tahoe* case, *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*[22] involving the purity and ecological sanctity of Lake Tahoe.

I actually worked with Lake Tahoe early on in that process. I can tell you one of the most interesting facets of that project was the fact that we came up with a goal or vision statement, which I still think is the best that's ever been come up with in the nation. It was very simple: "Keep the lake blue." It was really a very, very effective statement about the problems of environmental significance.

Well, the reason why the *Tahoe* case is so interesting is because the Supreme Court took it only about six weeks after it decided the *Palazzolo* case, and it has a very significant aspect of the *Palazzolo* case in it. So it's going to be extremely instructive in that regard.

In the *Tahoe* case, the Commission was instructed by the states of California and Nevada and the federal government in the interstate compact creating the Tahoe Regional Planning Agency, that it had to do a study of all land in the basin to determine whether it was effectively washing down sediment and other soil and contaminants into the lake. They were given the power to impose a moratorium on all land development applications for a period not to exceed thirty months. In effect, the agency, when it did its planning study, exceeded that by some two months.

Ironically enough, all of the rest of the requirements of the Tahoe Regional Planning Agency over the years permitted restrictions on development,

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[22] 216 F.3d 764 (2000), *cert. granted*, 121 S. Ct. 2589 (2001) (mem.).

development rights transfers, and a whole series of cases, had really been resolved most effectively in favor of the agencies.

The only case that has significantly come up for takings is this case involving this moratorium. It's very strange because the Council for this Tahoe-Sierra Preservation Council, which is a very strange nomenclature, because these are 600 landowners who were suing. They take on the rubric of the Tahoe-Sierra Preservation Council, but what they're really talking about is the preservation of their land rights.

And, interestingly enough, it really involves this question of planning. Because if we take what Dwight said earlier about this partial numerator versus denominator, do not we have to take also the concept of how long a period of time can we restrict development from any use or value of land over a period of time? In other words, if I restrict somebody for thirty-two months, am I not taking 100% of the property's use for thirty-two months? Is that a *Lucas* take?

The other way of looking at it is, if I take it only for thirty-two months, is not the numerator thirty-two months and the denominator perpetuity and, therefore, I'm only taking a small fraction of the use and value of the land? How do we look at this numerator/denominator question? Well, this is presumably going to be decided by the Supreme Court in the *Tahoe* case. And in doing so, presumably it should shed light on this whole question of the numerator/denominator issue.

Now, one thing I think that's very, very important: there was an earlier case called *First English Evangelical Lutheran Church v. County of Los Angeles.*[23] It's a very significant case in dealing with this issue of numerator/denominator. In reality the *First English* case involved a flood, a massive flood in Los Angeles County that wiped out hundreds of dwellings, bungalows, encampments. In fact, only two weeks after the flood the First English Lutheran Church campground was actually supposed to have some 800 campers on the site. If the flood had occurred two weeks later we would have had a massive death toll from this raging flood down the canyon. Los Angeles County adopted a moratorium. It actually lasted some five years. The property owners sued for a taking, alleging that, in effect, the moratorium took 100% of their use and value of the property.

This is a very, very interesting Supreme Court case because rarely does the Supreme Court ever take a case based upon only the pleadings. In other words, this was on a motion to dismiss, and as all of you know from procedure we must read the pleadings to be true on a motion to dismiss—take every allegation and averment to be true. So the statement that was made by the

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[23] 482 U.S. 304 (1987).

property owners, that they had lost all use and value, was taken as true by the Supreme Court.

It then decided in the case—and this was the importance of this case—that compensation is the remedy for a regulatory taking. That had never been understood in the United States completely. Some states had allowed it, but California in this case had always said that compensation was not the remedy, invalidation of the regulation was the remedy.

The Supreme Court said no, in fact the only remedy is compensation. And when it dealt with this question of the taking, they then remanded the case back down to the California courts to determine whether or not a taking had occurred. The California Court of Appeals on the remand decided that there was no taking because the property was only taken for five years out of infinity. In other words, using this numerator/denominator, it was not, in fact, a taking. It also highlighted the character of the governmental action by saying that we're going to view this not as taking of the entirety but more as a *Penn Central* case, and a moratorium for health and safety is also of major significance. However, in the Supreme Court opinion in *First English*, the Court was very, very mysterious about this whole question. On the one side, the Court says several times that a temporary taking must be a permanent taking. By the way, in the *Lucas* case—that South Carolina case where they took all of the lots that Lucas had—the Court says over nineteen times that it has to be both permanent and a complete extinguishment of all value.

One of the issues, therefore, for the Supreme Court, was a permanent taking, which is then cut off because the government sees fit to rescind the regulation rather than to face permanent damages or compensation. That is a taking because it's a permanent taking cut short; therefore, it's a temporary taking. On the other side there's language in *First English* that says, "Well perhaps it is a taking because the only thing we're going to tolerate in terms of time restrictions is what we call normal delays in development approval processes." Now, is a planning moratorium a normal delay in an approval of a development application? Not really, because a planning delay is a regulation that is looking to develop itself prior to any application.

Well, really, what are the major factors that are going to be affected by this decision? First of all, we have in this case very significant planning issues. If government cannot plan for what may occur in the future, then it cannot prevent non-conforming uses from being created while it is studying problems or vesting of the rights, then in fact government will tend to adopt—very, very rapidly—regulations without much thought, without much planning, just simply to protect its own process against an argument of taking.

The second thing is: what kind of discussion are we going to have of planning issues? Because, in reality, the purpose of the moratorium or an interim regulation is to give both sides the opportunity to debate what the

standards should be in regulations that will in the future be regulated. In the oral argument in the Supreme Court, Michael Berger, who represented the plaintiffs, when asked about this question stated that, well, there's a difference with a normal delay for an application for approval because there's an expectation it will be approved, whereas one of the judges then basically put back to Mr. Berger: Well, isn't there also an expectation that a development application may be denied? Isn't a short-term moratorium one where there are going to be rules that will allow development to occur on the property? So these are extremely interesting issues.

Then the second factor is going to be longer-term growth management or smart growth environmental systems. I myself argued the *Golden*[24] case, the *Ramapo* case, which established essentially the constitutionality of growth management. It was an eighteen-year delay of development subdivision where there were no adequate public facilities available to service the development. Systems like Portland, Oregon, which have an urban service area boundary separating urban from rural uses, could be attacked if the decision in *Tahoe* comes down the way the plaintiffs want it, because they can basically say that the delay in giving urban uses to those outside the urban service boundary is going to be a take—certainly a long-term affair as opposed to a short-term moratorium. These are going to be very, very interesting cases.

There's a series of cases that have come out; in fact, Steve Eagle has analyzed this. He's one of the first ones to do this in his treatise. He calls it "the war against crime; takings and the war against crime."

There are what we call nuisance abatement boards that have the power to shut down landlord-owned rental property if, in fact, drug transactions occur on the property. Some seven cases have been decided, saying that's not a taking for the one year, that's an interim measure. Of course, one of the exceptions is the nuisance exception.

Other courts say if it doesn't rise to a nuisance, then it is a *Lucas* take for this one-year period. Well, is it really a *Lucas* take? This is one of the most interesting questions. Michael Berger was asked by Justice O'Connor the following question: "What's the line between normal delays in development applications and normal delays for the planning process?" He was asked by Justice Breyer, "Well, do you mean to tell me that in the case of September Eleventh, the World Trade Center, that if the current owner of that property wishes to go ahead with development and the City and State of New York said, 'we have to wait a year to determine what should be done with that property,' that's a taking?"

He said to Justice Breyer, "Absolutely, that is a taking for a one year period." He said, "It's like a car. If you take my car for thirty-two months and

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[24] Golden v. Planning Bd. of the Town of Ramapo, 334 N.Y.S.2d 138 (1972).

then return it to me, sure there's value in the car after the thirty-two months. But I've been deprived of the use of the car for thirty-two months." The trouble with that formulation is that when I take somebody's car I'm doing a *physical* taking, as was pointed out in the beginning by Dwight, also by Jim Burling. I've taken your car. It's the same thing as the General Motors case where the government condemns a short-term lease. Aren't they liable? Yes, because they took the property for that one year.

So these are very interesting questions that are coming up. And to sum it up in a way, I'd like to just pose two points. One: we always think of environmentalists as NIMBYs, "not in my backyard," and BANANAs, "build absolutely nothing anywhere at any time." (Laughter) But we also talk about public officials as being NIMTOOS, "not in my term of office." Okay? That basically means that we don't do any long-term planning. Families do, individuals do planning. Let's think: we get married, we plan for the education of children, we plan for retirement, we plan for death. We call it planning. Corporations do planning; they have to know what they're going to build and when, and have these huge corporate plans. But only government, you see, cannot do planning because, to the eyes of some of the extreme property rights people, to do planning is to have a five-year Stalinist plan. But if you look up "planning" in the dictionary, it doesn't say that. It says, "Planning is the use of man or woman's intelligence with a little bit of forethought." I didn't see any Stalinistic version in that definition.

Think about Einstein in 1905: special and general relativity; time and space as the third and fourth dimensions of our physical universe. But if we say time is not part of the property owner's equation, what may happen is the United States Supreme Court may very well announce a nineteenth century solution to a twenty-first century problem and skip over the twentieth century entirely. As Justice Kennedy said yesterday, to bring the reality of the law into tune with science and custom, will certainly, in my opinion, not be the end result of the *Tahoe* case.

So I'm very pleased to be with you, and I thank you very much for the courtesy of your attention. (Applause)

PROFESSOR CALLIES: That's the most timely panel I have ever had the privilege of dealing with; thank you all for being so timely.

Professor Freilich raised some interesting points at the end, as did Professor Eagle. I wonder if any of our first two or three panelists would like to make a response. I see Mr. Burling putting down his pen and seizing the microphone. That seems to indicate clearly by body language that he has something he wants to reply to.

MR. BURLING: Well, naturally I'd like to say that I agree with everything that Professor Freilich says, but, hey, I'd be lying. (Laughter)

When we're looking at trying to divide property into bits and pieces, by looking at whether it's temporal severance—whether it's a thirty-two month moratorium—or we're looking at a small parcel of property, I think it's helpful to get a little reality check. This is what I hope that the Supreme Court is going to do, although there's no indication from oral argument or anything else what they're going to do.

You look at the sort of thing that the marketplace values and what units of property the market traditionally looks at. So when we're talking about a thirty-two-month period of time when you cannot use property for any purpose, I'm happy to go back to the nineteenth century, the twentieth century, the twenty-first century and say there are a lot of people out there that will pay good money for an option on property or some kind of lease to use it or not use it or whatever for a thirty-two-month period. And if you can accept that, then you can accept what was taken away from the landowners in *Lake Tahoe* for that period of time was certainly a taking.

I think there's also one further thing you need to take away when you're thinking of *Tahoe* and that is not thirty-two months for the temporary moratorium, but closer to twenty years—that's the period of time that the landowners, most of them, haven't been able to use their property because there's one moratorium, and another moratorium, and then a plan, and then a lawsuit. Eventually these poor people still can't use their property.

MR. MERRIAM: This case is only thirty-two months.

MR. BURLING: The case is thirty-two months, but there was questioning at the Court as to, well, where are the landowners now; can they use their property? Although this was initially part of the questions presented to the Court, the Court sliced the questions down to look only at the thirty-two-month period. But I would submit that the questioning of the Court makes it apparent that they realize, especially now, that there's a lot more going on here. So if we're going to allow a thirty-two-month slice of time to be taken away without compensation—because, heck it's only thirty-two months—well, what about the next thirty-two months and the next thirty-two months and the next thirty-two months? At some time we have to have practicality here. I would suggest you look at what the market unit of the property is.

PROFESSOR ROBERTS: I'd like to respond to that comment. I think that the procedural posture of the *Tahoe* case makes it irrelevant that it was thirty-two months. It could have been one month and the argument of the

landowners would be the same because they brought a facial takings claim, claiming that any moratorium was a facial taking, so it doesn't matter. The district court in that case found that the planning authority had acted reasonably and promptly in enacting the plan over the thirty-two months.

So if we were to remand the case and look at it on an as-applied basis we would find the court's declaration that it was reasonable. I don't think the thirty-two months multiplied by thirty-two months, and it going on year after year after year, is a realistic concern under the way the case was presented. The case was a facial takings claim, and it would be rather extreme, I think, to mandate any disruption, any cessation of use by moratorium, constitutes a taking. I think it's sufficient to have a doctrine of reasonableness that if, in fact, it goes on under the circumstances for an unreasonable period of time it would be a taking. That's where the courts to date have come down. I don't know what the Supreme Court will do, but that's what the lower courts' decisions say.

MR. MERRIAM: That's part of the struggle, the business of reasonableness. That's why I highlighted in my remarks that when you read these cases you'll find that very often the courts will talk about fairness and reasonableness. They're trying to balance so many factors at once, it's almost like B.F. Skinner's operant conditioning where there are so many factors you can't even count them, but in the end you must balance to resolve them.

Take the notice defense issue in *Palazzolo*, an important part of the decision, which essentially says even if you bought with knowledge you get to bring your takings claim to litigate it and have a court decide it, if that's a fair summary of it.

What are we going to do? Stepping aside from *Palazzolo*'s facts, there's an eighty-one-year-old junkman who's owned this property most of his adult life and is frustrated along the way with developing it. But what happens if you go out and you buy a wetland yesterday for practically nothing, ten dollars an acre. Should you be allowed to go in and claim that land as fully developable upland and bring the taking claim and be compensated as fully developable upland, when your investment expectations as represented in your purchase price were extremely low, and you clearly took it with knowledge?

You have this issue here now before you in Hawai'i in the critical area designation. When those critical areas are designated by Fish and Wildlife, the properties are devalued as a result because they've lost development potential because of difficulty of getting approval. Then someone buys this property with the knowledge of the critical habitat designation. Are they going to be able to bring a takings claim?

Well, yes, they probably are in most cases, unless the statute of limitations has run, which it can in a federal case. But how are you going to balance

subjectively? I submit to you that it is this investment-backed expectations analysis. So *Palazzolo* has by no means answered the critical questions of the takings issue, not by a long shot.

DR. FREILICH: Let me just respond briefly to this. I think Jim Burling is raising a very interesting issue. What happens if it's thirty-two months, and thirty-two months, and thirty-two months? There's one test in the takings test that we haven't explored yet. That is the question of whether or not the governmental action substantially advances a legitimate state interest. In other words, a valid state interest in preserving wetland or planning for the future is clearly a legitimate state interest; there's no public purpose contest in most of these cases. But are you substantially advancing that interest?

Now, in the *Del Monte Dunes*[25] case one year before *Palazzolo*, Justice Scalia emerged from under the table screaming, "Five times! Five times!" This developer had basically been turned down five times over a number of years and finally said, "That's enough." And the case said it could go to a jury and a taking award was granted.

That, I think, is the key issue. Are we going to allow the courts to look at bad faith? If something is unreasonable in duration, why should we measure it under the Takings Clause? Why shouldn't we measure it under substantive due process? Why shouldn't we measure it under issues of arbitrariness under state law? But the Supreme Court has ducked that, over and over and over again, constantly saying that we're not going to equate this substantial advancement with this issue of substantive due process. And yet they have never defined this.

I suggest that the question is if it's less than permanent, it's a *Penn Central* take. We have to weigh it under those factors. If somebody says that it's too long, the duration is too great, et cetera, I think we've got a question of constitutional reasonableness, but not taking. You've got another issue involved and that I don't think the Court is squarely facing up to.

PROFESSOR EAGLE: For the benefit of those of you who were not at the oral argument that Bob Freilich was referring to when he said Justice Scalia "came up from under the table," I should point out that he is not a person of great height, and he was leaning way back in his chair so that many people in the courtroom could not see him. He simply then came up to a straight position and made his comment. (Laughter)

When Bob mentioned before that those who would support compensation in cases like *Tahoe-Sierra* are against planning, and people who are property owners are against planning, often you hear people who are property owners

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[25] City of Monterey v. Del Monte Dunes at Monterey, Inc., 526 U.S. 687 (1999).

are against the environment, none of those are true. No one is saying government cannot do whatever it deems important to protect the environment. No one is saying government can't engage in planning. The only question—and this is from *Armstrong v. United States*[26]—is whether, in fact, the burden of that should be borne by the few individuals most directly affected, or whether the burden should be borne by the people as a whole, who are the people who are going to be benefited from planning.

On this question of expectations, I received one question which says: "In *Penn Central* takings must the owner's investment-backed expectations be, quote, reasonable, closed quote?" Now Frank Michelman had earlier written an article talking about crystalline definite expectations. Justice Brennan in *Penn Central* talked about investment-backed expectations for no discernible reason that anyone could figure out. Then Justice Rehnquist in the *Kaiser-Aetna* case used the word "reasonable" investment-backed expectations. To me, this underlies the whole problem with expectations.

I have to say at the outset, I do not understand it; I do not know what it means. When we talk about reasonable investment-backed expectations, clearly we're talking about expectations that are objectively reasonable in the sense that the community's prepared to honor it. If we're talking about uses of land by an owner that the community is prepared to honor, to me this has a long-standing name in American law called "property." Why take property, which is a unitary concept, which is an in rem concept—one person's right as against literally the world—and then come up with a subsidiary, secondary set of definitions talking about expectations?

MR. MERRIAM: Steve, take my hypothetical, the wetlands designation. Property owner says, "The heck with it. I'm going to sell it." They sell it for ten dollars an acre. Does that person who buys it for ten dollars an acre have an expectation that he or she ought to be compensated at a hundred thousand dollars an acre because they now can't get it filled? If it's a federal jurisdictional wetland and you buy it—we have a joke in our office—you're going to have to take this out of the transcript later on—we're a 190-lawyer law firm, we represent developers about two-thirds of the time—somebody will come in, they'll show us the federal wetland, and they'll say, "I can't get a permit to fill it." And we say, "You bought a wetland, you own a wetland." (Laughter) Should that person who paid ten bucks for this undevelopable federal jurisdictional wetland get a hundred or two hundred thousand dollars an acre?

[26] 364 U.S. 40 (1960).

MR. BURLING: Of course. Of course that person should get it because the former owner had property that was worth, say, a thousand dollars an acre or a hundred dollars an acre. The wetland regulations are passed. Then the owner becomes too old, too sick or —

MR. MERRIAM: Ohhhhhh, man . . . . (Laughter)

MR. BURLING: — too poor to go through the development process. It happens all the time.

MR. MERRIAM: Ohhhhhh, man . . . . (Laughter)

MR. BURLING: And if the prior original owner cannot develop that property, and it must pass either because the person dies or simply runs out of the ability—yeah, "ohhh" you say, but that's what property is all about in this country. Property is what people strive for. If you can't develop your property in your lifetime with your ability, you pass it on to the next person and try to get as much as you can for it.

Now, if the new owner cannot develop the property, and the new owner has no hope of compensation, then the original owner *is* only going to get ten dollars an acre. But, if the new owner can either develop the property or bring a regulatory taking claim, if the new owner has the same rights as the old owner, then first of all, the former owner is going to get paid more, and second of all, the government is not going to get a windfall because otherwise the rights to develop this property, and the value of the wetland, no longer belongs to the old owner who sold it or died, no longer belongs to the new owner who, according to Dwight, shouldn't have any right to challenge the regulations.

MR. MERRIAM: I'm just asking the question. I'm a neutral here. (Laughter)

MR. BURLING: And fortunately I'm here to answer it. (Laughter) If that were the case then the government would be acquiring vast interests in property for nothing. That's why we got involved with the *Palazzolo* case, to put an end to that idea.

MR. MERRIAM: Oh, my goodness. (Laughter)

PROFESSOR ROBERTS: I think there's a distinction between someone who acquires property by operation of law upon death by intestacy or through will or by the termination of a corporation, and one who acquires it by voluntary transfer. When you're taking into account reasonable expectations, the voluntary transfer person, I think, is legitimately subjected to that assessment

whereas the person who acquires the property by will or devise or intestacy isn't.

PROFESSOR EAGLE: None of this makes any sense to me. A person who acquires something by will or intestacy—if I get a telegram that my great uncle, whom I've never heard of, died and left me property, it should seem that I have less expectation than anybody else and the government can simply confiscate without paying me anything. Yet it's never worked that way.

DR. FREILICH: Let me just go back. If we're going to have to protect our environment in this nation by buying up all of the land in the nation because property owners say that they have inherent rights to fill and destroy the environment and they should be paid for that economic value, we don't have enough money, we don't have the quadrillions that would be necessary to deal with that issue. Justice Scalia in the *Lucas* case said a hundred percent taking is a relatively *rare* situation. The *Lucas* case is *relatively rare.*

The real issue here is, I think we have to weigh these situations under *Penn Central.* We have to say, "How significant is the governmental character of the action?" The environmental protection of habitat and wetlands are significant governmental actions, more significant than aesthetics or design. Secondly, what is the inherent expectation of property owners, in terms of the background principles of protecting the environment, public trust, custom? Third, what's the economic deprivation that they have sustained in terms of what they paid for it, and what, therefore, is the value in its restricted state?

I think we've got to get away from trying to qualify every single property-owned interest as a hundred percent taking of that interest or we're definitely going to find this doctrine is running out of whack in the United States.

PROFESSOR EAGLE: Let me get to an audience question. This one is, "regarding background principles, especially public trust and law of custom, e.g., *Cannon Beach*,[27] what tests would you apply to make sure that the state isn't just trying to insulate the actions from paying just compensation or by increasing public rights at the expense of private landowners?"

The public trust doctrine started out as a relatively narrow doctrine saying that the king has a right to preserve access to the seashore for the purpose of fishing and navigation. In the last few decades advocates of environmentalism without paying for rights have tried to use the public trust doctrine as a way of very greatly expanding the scope of this, and sometimes without much demonstrable basis in law.

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[27] Stevens v. City of Cannon Beach, 854 P.2d 449 (Or. 1993), *cert. denied*, 114 S. Ct. 1332 (1994) (mem.).

Professor Callies is really an expert on cases like *Cannon Beach* and the law of custom. But as I recall those were fairly narrow doctrines which were very exuberantly used by courts that sought to do the right thing without, as Justice Holmes said in the *Penn Coal* case, having to pay for it along the way.

MR. MERRIAM: In these issues there's a surprising lack of symmetry. You heard my friend Jim say about this windfall for the government. Let me ask my panel members and have the audience think about it at the same time. Imagine you own a piece of land way out in the countryside with a crummy one-lane dirt road to it. And the government decides to build H-4 [freeway] or whatever it is past your property, and, as a consequence, puts an interchange there and rezones it from agriculture to business. And all of a sudden your property, which was worth virtually nothing, is now worth millions and millions of dollars because of the government's investment in the infrastructure. Where's the windfall there? Isn't the private property owner getting an enormous windfall, and why don't we account for that in this process of allocating the benefits and burdens of governmental action?

PROFESSOR EAGLE: I have it in a word: taxes. Tax money pays for those things; government doesn't do it. It takes the money from the people, uses it to make civic improvements, and the people are then benefited by their own money.

MR. BURLING: Let's go to the vision of Lockian bundles and Hobbesian sticks for a second, and —

MR. MERRIAM: Are you explaining that quote for us? (Laughter)

MR. BURLING: Yeah. Listen carefully. (Laughter)

MR. MERRIAM: I'll consider the source.

MR. BURLING: I may be the best source, but the next best source could be John Locke and Thomas Hobbes, and the two competing philosophies represented by these people —

MR. MERRIAM: Who never brought a takings claim. (Laughter)

MR. BURLING: — who unfortunately lived in the day before the U.S. Constitution was adopted. Now be quiet. (Laughter) John Locke had the philosophy that government existed for the purpose of protecting property rights. The people joined together as part of their government for self-

protection, mutual benefit, and protecting the property of individuals. And Locke said that if the government acts instead as an engine of destruction of people's property, then the government is essentially at war with the people.

But the fundamental character of the Lockian vision, and the one that we have adopted in our constitutional system, is that we own property. We have the right to use it and government is there to protect it, as opposed to the Hobbesian vision, which is that government is there to certainly protect us all and to keep us from having a state of war with one another where life is nasty, poor, brutish, and short, but determining what you can do with your property, determining what rights you have, is entirely up to the sovereign. If the sovereign says you have rights, that's fine. But the sovereign can certainly say you have no rights, and that's fine too. Under the Hobbesian vision of government we really have no inherent rights. We only have those rights that are given to us by the sovereign.

So, we're talking about this property you own in a rural area. The government has no right to destroy it and take it away from you. If the people who make up the government decide to take some action that's going to be mutually beneficial and increase the value of your property, that's fine too. As Steven said, the government will get its desserts through taxes and taxes and more taxes. But it does not mean that, simply because government has destroyed the value of your property, you should not be compensated, because somebody else somewhere receives a benefit from what government does.

We do know from basic property law, when government takes your property and pays you compensation, if you have other land that is increased in value next to the property because of that project in a special way, then there's an offset, and you get paid less for your property. But the rule is that when you have your property destroyed, you have to be paid for it even if somebody is going to get a benefit somewhere else.

DR. FREILICH: I think the legal framework for that was the debate between Holmes and Brandeis in the *Penn Coal* case. Holmes won out, I think, primarily because that case was between two private property owners contesting a marketability of title contract. I don't think Holmes ever, in my judgment, foresaw the fact that that principle would end up resulting in governmental damages.

But the issue is simply this: Do property owners own the property which was acquired, subject to the benefits, burdens of the police power, the power to regulate the health, safety, and general welfare? Who can say in our society that property owners are exempt from such important restrictions and regulations? As I said, Scalia, even Scalia, says it's the relatively rare situation where we don't have to be subjected to that rule. I don't see why the people—and the government's nothing more than the people—I don't see why

the people have to buy all of the right to quality of life in the society from the adjoining property. We had for a thousand years principles that you have to use your property in such a way to protect the benefits of adjoining or other properties.

One of the things that I think is interesting is if this taking, in my opinion, breaks loose, if in fact we really get a day where a significant amount of property in the United States is going to have to be bought in order to have quality of life, I think the entire structure of the takings system will collapse. So, fundamentally, I think this is really a major issue. Sometimes I wonder whether the court in these cases truly had the deeper understanding of its impacts, whether it's pro-property or pro-government side, truly understood the nature of the depth of the issue they were struggling with.

PROFESSOR EAGLE: It would be nice if we were governed by angels in this situation. But James Madison warned us that men aren't angels and that we have a structure of constitutional government because the people who are in power are not always doing the right thing.

In the *Lucas* case itself, for instance, David Lucas invested $975,000 to buy his two lots. South Carolina told him that if he built houses there, that might cause storm surges with great loss of life inland. So the only thing David Lucas was allowed to build for his $975,000 were some modest sunbathing decks. Anyway, after the Supreme Court decided the *Lucas* case and on remand it was determined that there were no background principles which would vindicate wiping out Lucas's rights, the case wound up such that Lucas was basically paid off. He was compensated. And the South Carolina Coastal Council wound up owning the two lots.

It then asked the Legislature for a supplemental appropriation to reimburse it for the money it had to pay Lucas. The Legislature said, "Nothing doing. You bought those lots. They're yours." And so what did the Council turn around and do? They sold the lots to developers to put up the same kind of house that Lucas was going to put up. And the lawyer explained, "Well, there are already a lot of houses along that coast. It didn't make any sense not to build the two more considering how much money that the Council was going to be losing otherwise. So why not do it?"

Even that isn't the end of the story. It turns out that the owner immediately behind one of those two lots was willing to pay the state a lot of money for a conservation easement to leave that lot empty forever so the owner could look out over it. The state turned him down. Now that the land belonged to them, they were going to get fair market value out of it.

So when the state says, "We have to drastically cut out *your* rights because nothing is too good for the people than to have the loss of that value to

preserve the environment," well, the test is: is it necessary if the people themselves have to pay it for it? Often the answer is no.

PROFESSOR ROBERTS: Just a couple points to add to that. I think it's interesting, getting back to ripeness, one of the defects in that South Carolina law is that it didn't have a variance procedure, which is a major, glaring error on the part of regulators. Sure, the lawyers said after the fact it never made any sense not to allow houses there because there were houses in between Lucas's two vacant lots and on either side of the lots. A system ought to have a safety valve to determine where the law makes sense to be applied or it doesn't.

After the houses were built on those two lots that Lucas once owned and were sold to other individuals, the lots eroded so rapidly that the owners of these new houses then sued the state of South Carolina, claiming the state was obligated to renourish their beach.

MR. MERRIAM: One of the other twists is—there are a lot of stories behind this story, but I can't let what Steve said go without some supplemental information, because I'm very familiar with the case. I represented the people that sold David Lucas the larger development, Isle of Palms. He was one of the developers. And his purchase of these two lots was partly cashing out his position as a partner in the development.

And if you want to look at the denominator, I guess you'd have to look at David Lucas as the developer and not just the so-called purchaser. The economics were questionable. What was really paid for is what was never really resolved but it went up the way it did. All you get to read are the decisions as announced. And there were only twelve lots in the state that eventually came under variance provisions, which were put into effect after Hugo, and it was voluntary. And only two lots did not apply for a variance, and they were David Lucas's lots, who intentionally did not apply for the variance in order to have a good clean takings case.

The point is that there's a lot that can be done in trading around interest in land and so forth to avoid a *Lucas*-type taking, which is an extraordinary event. Most of these takings cases are ones that arise out of very difficult, and really exceptional fact patterns, and not ones we routinely see on a day-to-day basis.

MR. BURLING: Well, yes and no.

MR. MERRIAM: Mostly yes.

MR. BURLING: Robert's point is correct, that if the government had to pay for every diminution of value, he said it would be trillions and trillions of dollars. The fact is, if government can regulate property completely cost free and have to pay nothing for it at any time, you're going to see situations like *Lucas* where they just simply tell somebody, "You can't develop your property. Too bad."

But if a cost is attached to the regulation, the cost of requiring fairness and justice to the landowners, there will be times when the government is simply going to have to make, for a change, a reasoned choice of where the priorities are. It's not a question of has property been taken, it's a question of who's going to pay for it. Who's going to bear the burden, the landowner? Is he going to bear the burden or is she going to bear the burden? Or is it going to be the government who has instituted the action? When cost is put on the regulation, regulations will probably be a bit more reasonable and prioritized better.

MR. MERRIAM: Suppose we just try a hypothetical. I don't think you can get out of this one. (Laughter)

MR. BURLING: Wanna bet? (Laughter)

MR. MERRIAM: I've never tried this on anybody but I'll do it very quickly. You've got twenty acres. You get a clustered subdivision approval and you put all your lots in ten acres. You have ten acres of open space left, right? Everybody with me? The government, for whatever reason, does not exact a restrictive easement. You just have a subdivision in which all the lots are on ten acres and there is ten acres of open space.

Now, I go and buy the ten acres of open space from the subdivider. I come to you and I say, "Don't you think they ought to approve a subdivision on this ten acres of open space left over from the cluster?" Do I have a takings claim or not?

MR. BURLING: Tell me, Dwight, is there some nuisance problem with building on this lot?

MR. MERRIAM: No.

MR. BURLING: No nuisance.

MR. MERRIAM: No.

MR. BURLING: No great public harm?

MR. MERRIAM: No.

MR. BURLING: Then, why not?

PROFESSOR EAGLE: I should add that this is the same issue that always comes up in transfer of development rights, where an owner, who owns land in one area, is told he can't build there and has to instead get rights to build somewhere else. But what makes those rights valuable is that the people who previously owned the land somewhere else were not allowed to build on them. Their value was specifically driven down simply so that the state could sell it to somebody else.

If it's not a nuisance with the TDR owners building on it, it wasn't a nuisance before. Once you get away from principles of nuisance law or other *reasonable* bases for exercising the police power, then you're at sea without a compass.

DR. FREILICH: Well, actually there are techniques today and most governments doing more advanced smart growth planning are building valuation into regulation. For example, if I want to preserve environmentally sensitive land like the *Lucas* property or others, or if I want to preserve, for example, open space for agriculture land, the TDR system is totally a disaster, because TDRs say we should transfer development rights from the land that's going to be regulated and make the people who are building in transportation corridors or centers where we *want* development to occur to pay for those rights. It will never work because under most systems of government zoning that we have, whatever you want to build, you always get without the payment of development rights.

But suppose we charge on, for example, those people who are building large lots and sprawl. Suppose, for example, government has five units per acre as its average it wants to achieve. For example, in Honolulu it would actually be higher than five units per acre under their plan. Somebody wants to go out and build acre lots, or two-acre lots—why not hit them with a mitigation fee because they're consuming ten times as much or sixteen times as much space per capita as the person who's building to the average.

Take those funds and put them into the fund to buy the conservation easement, buy Lucas's lots, protect agricultural land, and make farmers as much or more money as they could if they had sold out to the developers. In other words, the problem is we haven't yet adjusted what Dwight talked about—the benefits and burdens of reciprocal advantage—because we haven't understood the need to do that. If, in fact, what Jim is saying occurs, that we have to pay for these types of restrictions, then we're going to see a whole new

system of relatively adjusting those benefits and burdens because it's going to be property in the long run that's going to pay for it one way or the other.

PROFESSOR EAGLE: So that people should pay to live the way we don't think they ought to live on their own land?

DR. FREILICH: If they're consuming, if they're consuming ten times as much land and it costs government sixteen times as much to send police out there to service it for emergency services –

DR. BURLING: That's a different question.

DR. FREILICH: Well, why? Why is that a different question?

MR. BURLING: You're talking about it costing more for services, and you can recapture that through assessments or taxes or other ways of doing that. But if you're talking about simply making somebody pay more because we want more open space or ag land or something like that, that isn't right.

DR. FREILICH: Under constitutional taking principles you can't charge for operation and maintenance. You can only charge for one-time capital costs under *Dolan*.

MR. MERRIAM: Bob, I think what Jim is saying is that he supports a sprawl impact fee, which is what you're advocating.

MR. BURLING: I would only support a sprawl impact fee if under *Nollan* and *Dolan* some of the basic tests are met: is the development causing such a great public impact and public harm that development could be denied because of the impact of sprawl? I would doubt it. Assuming that is the case, then the fee can be imposed to mitigate that particular effect as long as it is roughly proportional.

But, again, because somebody wants to build a home on a ten-acre lot as opposed to a quarter-acre lot, I find it difficult to understand how the impact to the public is so severe that the individual must pay some sort of fee or extortion to the governmental entity.

DR. FREILICH: It's not an extortion. It's an extraction, like a tooth. It hurts for a while but it ultimately — (Laughter)

MR. BURLING: It's really like when the extortionist has pliers, extracting my teeth without any Novocain. It's extortion. (Laughter)

PROFESSOR CALLIES: The similes and metaphors are getting pretty extreme here. (Laughter) I'd like to note a couple of things.

Note in closing that the panelists who favor largely the government side of things want as much as possible swept into the partial taking analysis, as little as possible in the total taking analysis, and the partial taking analysis interpreted very broadly.

The panelists who lean toward protecting private property interests want as much possible swept into the total takings basket, and the *Penn Central* partial takings analysis interpreted as narrowly as possible.

To some extent this represents what our Supreme Court eventually is going to have to grapple with. It probably won't grapple with these in the *Tahoe* case. It left many of these issues open in the *Palazzolo* case. But the *Palazzolo* case did, as we discussed, basically articulate some truths.

The Latest Take on Background Principles and the States' Law of Property After *Lucas* and *Palazzolo*

James Burling*

I. INTRODUCTION

It makes little sense to ask whether a regulation has taken property without first determining what the property is. In defining the nature of property in the context of the doctrine of regulatory takings, the United States Supreme Court has been persistently cryptic, infusing each answer to basic definitional questions with yet more questions. To give the Court its due, however, there is little consensus in political science and philosophy over what property actually is. It would be unwise for the Court to wade further in the definitional thicket than it needs to.

The United States Supreme Court has given us some direction, most recently alluding to something it calls "background principles." Simply put, a use of property that does not fall within the property's background principles may not be protected by the Takings Clause. However, exactly what these background principles are, even in the context of the several Supreme Court decisions that have referred to them, especially *Lucas v. South Carolina Coastal Council*[1] and *Palazzolo v. Rhode Island*,[2] remains enigmatic. With background principles comes consideration of the doctrines of nuisance (common law and statutory), the public trust doctrine, and the law of custom. To what extent these doctrines can be "modernized" or "enhanced" in order to bring them within the rubric of takings claim-defeating background principles is a central concern of takings theory today.

A related issue, and one that was substantially clarified in *Palazzolo*, is the question of when statutory and regulatory enactments become background principles that can shield a government from takings liability. A trend in some jurisdictions is to hold that a person acquiring property with notice of a preexisting regulation has no right to bring a claim for a regulatory taking

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[1] 505 U.S. 1003 (1992).

[2] 533 U.S. 606 (2001).

because the title itself is limited by the preexisting regulatory regime.[3] One jurisdiction went so far as to hold that title and background principles are affected not only by the regulatory regime in place at the time of acquisition, but also by growing regulatory constraints that the purchaser could reasonably have anticipated.[4]

This article will discuss the guidance that the Supreme Court has provided on the meaning of background principles from *Lucas* to *Palazzolo*, how various state courts and lower federal courts have treated the subject, and finally, what the future may hold for background principles and regulatory takings.

II. "BACKGROUND PRINCIPLES" AS AN ANTIDOTE FOR THE DEMISE OF A "POLICE POWER" EXCEPTION TO THE DUTY TO COMPENSATE

Prior to *Lucas,* more than a few jurisdictions had suggested that the weight of the Just Compensation Clause could be avoided by the simple expedient of declaring that governmental actions designed to prevent harm through the judicious exercise of the police power were not "regulatory takings."[5] This theory may have followed from the statement in the granddaddy of all regulatory takings cases, *Pennsylvania Coal v. Mahon*,[6] that the "[Coal] act cannot be sustained as an exercise of the police power."[7] In other words, the theory explained that a valid exercise of the police power could not be a taking. Nonetheless, the *Mahon* Court never itself suggested that the invocation of the police power could insulate a government from the Takings

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[3] *See, e.g.*, Palazzolo v. State, 746 A.2d 707 (R.I. 2000); Bell v. City of Virginia Beach, 498 S.E.2d 414 (Va. 1998), *cert. denied*, 525 U.S. 826 (1998); Kim v. City of New York, 681 N.E.2d 312 (N.Y. 1997), *cert. denied*, 522 U.S. 1008 (1997).

[4] Good v. United States, 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000).

[5] *See, e.g.*, State Dep't of Health v. The Mill, 809 P.2d 434, 436 (Colo. 1991) (alleging that "even if The Mill had been deprived of all use of its property, the deprivation was a valid exercise of police power and therefore was not compensable"); Price v. Junction, 711 F.2d 582, 592 (5th Cir. 1983) ("Texas cases tell us that a reasonable exercise of the police power does not effect a taking."); *see also* Joseph Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 61-76 (1964) (finding the takings clause invoked when government exercises police power in its "enterprise" capacity, but not in the capacity of a "mediator") [hereinafter Sax, *Takings and the Police Power*]. For a middle view, see John J. Constonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. REV. 465, 500 (1983) (suggesting a "sliding scale" be employed). "Government's burden will be less stringent in conflicts between public safety and a landowner's economic interest in property, for example, than in conflicts in which a less well-established police power goal is opposed to the proprietor's dominion interest." *Id.*

[6] 260 U.S. 393 (1922).

[7] *Id.* at 414.

Clause. Indeed, in nearly its next breath the Court warned: "When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears."[8]

What's more, the regulation at issue in *Pennsylvania Coal*, a regulation designed to prevent harm to private structures, plainly involved a police power regulation designed to prevent harm, albeit not a great harm.[9] To be fair, however, because the Court never again seriously entertained the possibility of the existence of a regulatory taking from 1922 to 1987, perhaps the confidence of the regulating community in a police power harm-prevention exception to the Fifth Amendment can be excused.

We now know, however, that the notion that a government can avoid the reach of the Takings and Just Compensation clauses by merely invoking a harm-preventing police power rationale were put to rest in *Lucas*. Faced with the specter of a state supreme court shielding a state from liability based upon a dramatic, if not brazen, attempt to prohibit all development activities on highly valuable oceanfront lots throughout the state, and on David Lucas's lots in particular, the Court had had enough of "artful" harm-prevention rationales.[10]

In the context of a regulatory taking, the problem can be framed by asking whether the owner actually had a right to put the property to a particular economically beneficial and productive use to begin with. In *Lucas* the Court held:

> Any limitation so severe cannot be newly legislated or decreed (without compensation), 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 land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts — by adjacent landowners (or other uniquely affected persons) 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.[11]

The Court proceeded to suggest that truly noxious activities, such as building a nuclear reactor in a fault zone or a dam that would flood a neighbor's

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[8] *Id.* at 415.

[9] *Id.* at 414 ("[T]he statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant's constitutionally protected rights.").

[10] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1025 n.12 (1992) ("Since such a justification can be formulated in practically every case, this amounts to a test of whether the legislature has a stupid staff. We think the Takings Clause requires courts to do more than insist upon artful harm-preventing characterizations.").

[11] *Id.* at 1029 (emphasis added).

property, would likely not be part of a property's background principles.[12] Thus, "[t]he use of these properties for what are now expressly prohibited purposes was *always* unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit."[13] The Court also expressed great skepticism that the construction of single-family homes in a neighborhood of other single-family homes—the precise situation in *Lucas*—could be prohibited under a state's background principles of nuisance law.[14]

With its emphasis on background principles the Court put an end to the notion that the Constitution's requirement for just compensation could be avoided merely by the invocation of a police power justification for the regulatory action. In other words, even though a regulatory action may be justified under the police power, if it proscribes a use that has not already been proscribed under the state's background principles, then just compensation must be paid when the economic impacts are severe enough.

The blow that *Lucas* dealt to the regulating community, however, was not fatal. Despite the unambiguous language of the Court in its description of background principles, and its limitation on their expansion, there has been a concerted effort among governmental advocates to define as broadly as possible the sorts of actions that are already prohibited under background principles. This is a logical development because it is about the only certain way to avoid the expense of paying just compensation for a regulatory taking. Some of these attempts have been successful and others have not. Since *Lucas* was decided, the members of the Court have discussed background principles four times, most recently and most significantly in *Palazzolo*.

III. FROM *STEVENS V. CANNON BEACH* TO *BUSH V. GORE*, THE COURT SPEAKS, QUIETLY, ON BACKGROUND PRINCIPLES

In *Stevens v. City of Cannon Beach*,[15] two members of the Court confronted the perception that the Oregon Supreme Court may have altered that state's background principles when it found that the ancient law of custom guaranteed a public right of access to dry sand beaches along the coast. In an expansion of the law of custom that is seemingly contrary to centuries of common law tradition, the Oregon court extended the application of the law of custom in a manner that was inconsistent with a holding from the same court some four

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[12] *Id.*

[13] *Id.*

[14] *Id.* at 1031 (noting, "[i]t seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land").

[15] 114 S. Ct. 1332 (1994) (Scalia, J., dissenting).

years earlier.[16] The landowners petitioned the United States Supreme Court, seeking review under the Due Process and Takings clauses.[17] The Court denied certiorari, but Justices Scalia and O'Connor would have granted certiorari on the Due Process Clause question.[18] The dissenters agreed that the Takings Clause issue had not been adequately developed below for there to be a grant of certiorari. However, their dissatisfaction with the Oregon court's expansion of the law of custom was obvious:

> [A] State may not deny rights protected under the Federal Constitution . . . by invoking nonexistent rules of state substantive law. Our opinion in *Lucas*, for example, would be a nullity if anything that a state court chooses to denominate "background law"—regardless of whether it is really such—could eliminate property rights. [A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. No more by judicial decree than by legislative fiat may a State transform private property into public property without compensation. . . . [I]f it cannot fairly be said that an Oregon doctrine of custom deprived Cannon Beach property owners of their rights to exclude others from the dry sand, then the decision now before us has effected an uncompensated taking.
>
> To say that this case raises a serious Fifth Amendment takings issue is an understatement.[19]

While neither the Court nor the dissenters thought the takings challenge had been developed adequately enough below for certiorari, this statement by the author of the *Lucas* opinion is a warning against judicial attempts to manipulate a state's background principles in order to avoid a taking.

Later, in *Phillips v. Washington Legal Foundation*,[20] the Court was confronted with the question of whether interest on lawyers' trust accounts was property protected by the Fifth Amendment. The Court rejected petitioners' argument that such interest was not property, in part because they could "point to no 'background principles' of property law . . . that would lead one to the conclusion that the owner of a fund temporarily deposited in an

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[16] Compare *City of Cannon Beach v. Stevens*, 854 P.2d 449 (Or. 1993), with *McDonald v. Halvorson*, 780 P.2d 714, 724 (Or. 1989). For criticisms of the Oregon Court's generous interpretation of the law of custom see David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375 (1996) and David L. Callies, *Custom and Public Trust: Background Principles of State Property Law*, 30 ENVTL. L. REP. 10,003 (2000).

[17] *Stevens*, 114 S. Ct. at 1332.

[18] *Id.* at 1336.

[19] *Id.* at 1334-35 (internal citations and quotations omitted).

[20] 524 U.S. 156 (1998).

attorney trust account may be deprived of the interest the fund generates."[21] However, the Court also injected a significant amount of equivocation into what had been a strong statement in *Lucas* against reworking background principles when it stated: "In other words, *at least as to confiscatory regulations (as opposed to those regulating the use of property)*, a State may not sidestep the Takings Clause by disavowing traditional property interests long recognized under state law."[22] Why the Court injected this offhand qualification that was unnecessary to the holding is not explained; perhaps the Court thought it would strengthen the force of the holding in *Phillips* that did involve a confiscatory regulation.

The next time the Court focused on background principles, although only peripherally, was in the maelstrom of *Bush v. Gore*.[23] In order to bring home the point that a state supreme court may not rewrite the law to reach a desired end, the Court reminded us that:

> Similarly, our jurisprudence requires us to analyze the "background principles" of state property law to determine whether there has been a taking of property in violation of the Takings Clause. That constitutional guarantee would, of course, afford no protection against state power if our inquiry could be concluded by a state supreme court holding that state property law accorded the plaintiff no rights.[24]

IV. THE STATES AND LOWER FEDERAL COURTS EMBRACE NUISANCE LAW, THE PUBLIC TRUST DOCTRINE, THE LAW OF CUSTOM, AND OTHER "BACKGROUND PRINCIPLES"

With the rise of background principles as a keystone to regulatory takings jurisprudence, governmental regulators and sympathetic courts have been quick to "rediscover" (as opposed to define anew) limitations on the use of property. Some of these principles have a venerable pedigree (the law of nuisance), some have been the subject of considerable expansion in recent years (the public trust doctrine), some would have been unrecognizable under the common law (the modern twist on the law of custom), and some have been, to put it charitably, rather creative (as in the "custom" of Native Hawaiian gathering rights). Not every attempt to dramatically expand the scope of background principles as a limitation on the use of property, however, has succeeded.

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[21] *Id.* at 168.

[22] *Id.* at 167 (emphasis added).

[23] 531 U.S. 98 (2001).

[24] *Id.* at 115 n.1.

A. *The Evolving Status of the Law of Nuisance as a Static Background Principle*

In *Lucas* the Court described the evolution of the law from the all-or-nothing proposition of *Mugler v. Kansas*,[25] which held that a prohibition of a noxious use was not compensable, to the more nuanced understandings of contemporary takings law:

> The transition from our early focus on control of "noxious" uses to our contemporary understanding of the broad realm within which government may regulate without compensation was an easy one, since the distinction between "harm-preventing" and "benefit-conferring" regulation is often in the eye of the beholder.[26]

In other words, early cases such as *Mugler* were the early Court's way of describing the legitimacy of the state action that prohibited certain noxious uses. But that logic would be stretched too thin if each and every "harm-preventing" action of government were absolved from takings liability, as opposed to "benefit-conferring" regulations which some had posited to be the sine qua non of regulatory takings.[27] The *Lucas* Court then made it quite clear that the *Mugler*-derived noxious use test would no longer be the basis of a nuisance exception to takings liability.

> When it is understood that "prevention of harmful use" was merely our early formulation of the police power justification necessary to sustain (without compensation) any regulatory diminution in value; and that the distinction between regulation that "prevents harmful use" and that which "confers benefits" is difficult, if not impossible, to discern on an objective, value-free basis; it becomes self-evident that noxious-use logic cannot serve as a touchstone to distinguish regulatory "takings"—which require compensation—from regulatory deprivations that do not require compensation.[28]

The Court went on to emphasize that background principles rather than a contemporary harm-prevention rationale could provide the only legitimate exception to the requirement that deprivation of use and value must be compensated.

The Federal Circuit elaborated on this *Mugler*-limiting theme and rejected a suggestion that the federal government could be absolved from liability when the Corps of Engineers denied a permit to Loveladies Harbor, Inc. to fill 11.5 acres of wetlands for residential development on Long Beach Island, New

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[25] 123 U.S. 623 (1887). *Mugler* involved the closure of a brewery under Kansas's temperance laws.

[26] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1024 (1992).

[27] *See* Sax, *Takings and the Police Power*, *supra* note 5.

[28] *Lucas*, 505 U.S. at 1026.

Jersey.[29] Relying on the doctrine that state law defines nuisance law, the court was persuaded that because New Jersey had agreed to the development in question, it did fall within that state's definition of nuisance.[30] The court also distinguished the application of a state's ordinary law of nuisance from the sort of extraordinary prohibition found in cases like *Mugler* and its progeny:

> The *Mugler* exception is generally understood to apply, assuming it retains modern validity, to the extraordinary case in which a particular activity is seen as so offensive to the public sensibility as to warrant no Constitutional protection. The *Lucas* test, on the other hand, is a matter of ascertaining the continuing boundary between private ownership and government reach, and inheres in the title of every piece of property without necessarily being defined with regard to a particular use or activity of the owner.[31]

The trend for some courts to downplay the impact of *Mugler* was well developed before *Lucas* made it the Court's policy. For example, in *Whitney Benefits v. United States*,[32] a coal company's plans to mine in Wyoming were thwarted when Congress passed the Surface Mining Coal Reclamation Act,[33] which prohibited mining in alluvial valley floors. Among other contentions, the government claimed that it owed no compensation because mining in such an environmentally sensitive area would be a nuisance.[34] The court rejected this argument noting first that the record was devoid of facts showing that the mining would cause serious health and safety problems, and second, the fact that other mines were allowed to continue operations in similar environmental conditions obviated a finding of a nuisance.[35] Tellingly, the court rejected the government's conflation of a legitimate exercise of its police power with the law of nuisance; just because the government could prohibit an activity under the police power did not mean that the prohibited activity was a nuisance.[36]

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[29] Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994).

[30] *Id.* at 1182 ("Since the federal power to regulate without risk of a taking is based on the state's nuisance law . . . the federal authority, if exercised, is exercised at the risk of an absence of state authority.").

[31] *Loveladies*, 28 F.3d at 1182-83 (citation omitted). At this point in its discussion the court also found it relevant that the landowner purchased its property before the regulations were in place. *See* discussion *infra* Part III.B.

[32] 926 F.2d 1169, 1177 n.10 (Fed. Cir. 1991).

[33] 30 U.S.C. § 1201 (1977).

[34] *Whitney Benefits*, 926 F.2d at 1176.

[35] *Id.* at 1176-77. This remark concerning the allowance of similar uses presages the statement in *Lucas* that it was unlikely that building homes in an existing residential neighborhood could rise to the level of a nuisance. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1031 (1992) ("So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant [militate against a finding of nuisance].").

[36] *Whitney Benefits*, 926 F.2d at 1177.

Other mining cases have resulted in similar findings, most notably in a series of decisions from the Court of Federal Claims and Federal Circuit dealing with the Corps of Engineers' rejection of a permit to mine limestone found in a wetlands in *Florida Rock v. United States*.[37] In response to arguments that mining in the wetlands could constitute a nuisance, the Court of Federal Claims noted first that as a factual matter this was unlikely because rock mining in the area was "the precursor of stylish, if not elegant, residential development" and mining was also ongoing only a few thousand feet away.[38] Despite the unequivocal rejection of its nuisance theory, the government pressed on, arguing in a later iteration of the case, that *Lucas* changed everything. The government argued that:

> [S]ince this court must "take as given that the revisions in the regulations of the Army Corps of Engineers, and the entire body of federal navigational and environmental laws to which they give effect, advance legitimate and important federal interests" . . . a legitimate permit denial would therefore preclude a taking.[39]

The court was not convinced, finding that:

> This argument would make sense if legitimate use of the government's regulatory power precluded any takings liability, [and that] . . . [n]uisance law for purposes of the Takings Clause is not simply defined by Congress, whenever it declares that a use should not occur. The government's argument would enable Congress to pass laws which eliminate property rights retroactively as if those rights never existed in the first place.[40]

Numerous other courts have likewise rejected governmental arguments that a nuisance justification for an exercise of the police power absolves the government from liability in contexts ranging from wetlands filling,[41] wetlands mining,[42] development activities,[43] and railroad right of way

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[37] *See, e.g.*, Fla. Rock v. United States, 21 Cl. Ct. 161, 168 (1990) [hereinafter, *Florida Rock III*] (holding that the use of wetlands is not a nuisance, even if Congress regulated or prohibited the use); Fla. Rock v. United States, 8 Cl. Ct. 160, 170 (1985) [hereinafter, *Florida Rock I*] (stating that by making a nuisance exception coterminous with the police power, the Compensation Clause would be read "out of existence").

[38] *Florida Rock III*, 21 Cl. Ct. at 167.

[39] Fla. Rock v. United States, 45 Fed. Cl. 21, 28 (1999) (quoting Deltona v. United States, 657 F.2d 1184, 1192 (Ct. Cl. 1981)) [hereinafter, *Florida Rock V*].

[40] *Id.* at 28-29.

[41] Formanek v. United States, 26 Cl. Ct. 332, 340 (1992) (rejecting the assertion that filling a wetland would constitute an "extreme threat to public health").

[42] State *ex rel.* R.T.G., Inc. v. State, 753 N.E.2d 869 (Ohio App. 2001). This case is currently awaiting review by the state supreme court.

[43] K & K Constr. Co. v. State, 551 N.W.2d 413, 417 (Mich. App. 1996) ("[T]he generalized invocation of public interests in the state constitution, and the Legislature's [statutory]

conversions,[44] to even a destruction of diseased turkeys.[45]

Reflecting the fact-intensive nature of these cases, there have also been several cases that have found a desired use of property to be so fraught with nuisance potential that the use could be banned without a takings implication. Perhaps the most broadly sweeping affirmation of the ability of a state to define background principles came many years before *Lucas* in *Just v. Marinette County*, where the Wisconsin Supreme Court held that: "An owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others."[46] This statement would seem inconsistent with *Lucas* and there is considerable debate over whether *Just* retains its vitality after *Lucas*.[47] Nevertheless, it has been cited repeatedly with approval in Wisconsin.[48]

Similarly, in *Bernardsville Quarry Inc. v. Borough of Bernardsville*,[49] the New Jersey Supreme Court repeated the passage quoted above from *Just*, and found no taking when a regulation prohibited the operation of an existing quarry that would cause an "extreme violence to topography." The court expressly rejected the holding of *Whitney Benefits* and found that the quarry owners had no right to mine, stating "even though the quarrying . . . may not be unlawful . . . or . . . an actual nuisance, it can have harmful impacts on the public welfare."[50]

As noted above, before *Lucas* the state of Colorado asserted that a legitimate exercise of the police power was immune from takings liability in *State Department of Health v. The Mill*,[51] a case that dealt with an attempt to

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declarations . . . do not constitute background principles of nuisance and property law sufficient to prohibit the use of plaintiffs' land without just compensation."), *rev'd on other grounds*, 575 N.W.2d 531 (Mich. 1998), *cert. denied*, 525 U.S. 819 (1998); McDougal v. County of Imperial, 942 F.2d 668, 678 (9th Cir. 1991) ("Even in those cases where the activity restrained was akin to a public nuisance and the state's interest was admittedly substantial, the Court has gone on to weigh the claimant's showing of diminution of value to his property.").

[44] Preseault v. United States, 100 F.3d 1525, 1539 (Fed. Cir. 1996) (rejecting the notion "that the background principles of a state's property law include the sweep of a century of federal regulatory legislation").

[45] Yancey v. United States, 915 F.2d 1534, 1542 (Fed. Cir. 1990) (holding that takings damages were appropriate for a turkey farmer who had his turkeys quarantined during an outbreak of avian flu).

[46] Just v. Marinette County, 201 N.W.2d 761, 768 (Wis. 1972).

[47] *See, e.g.*, McQueen v. South Carolina Coastal Council, 530 S.E.2d 628, 632 (S.C. 2000), *vacated on other grounds and remanded sub nom.* McQueen v. South Carolina Dep't of Health & Envtl. Control, 121 S. Ct. 2581 (2001).

[48] *See, e.g.*, Zealy v. City of Waukesha, 548 N.W.2d 528, 534-35 (Wis. 1996).

[49] 608 A.2d 1377 (N.J. 1992).

[50] *Id.* at 1384–85.

[51] 809 P.2d 434 (Colo. 1991).

reprocess and dispose of uranium mine tailings. Several years after *Lucas*, the Colorado Supreme Court held in a later incarnation of the case that a federal statute restricting the use of the mill tailings was a background principle, as "[t]he relevant Colorado common law principles would not permit a landowner to engage in activities that spread radioactive contamination."[52] Similarly, the Federal Circuit found that the background principles of nuisance law were in play when the federal government prohibited a mining operation that allegedly threatened gas explosions, dogs, and small children.[53]

Two consolidated Florida Supreme Court cases are illustrative of how the particulars of the facts can influence a court's finding, or not finding, a background principle of a nuisance. In *Keshbro, Inc. v. City of Miami*,[54] the Florida Supreme Court addressed whether nuisance abatement orders imposed on two different residential properties constituted a regulatory taking. In the *Keshbro* case, there had been repeated drug and prostitution related arrests at the Starwood Motel, which the trial court found to have become "intertwined" with the operation of the motel.[55] In *City of St. Petersburg v. Kablinger*, there were "at least" two instances of cocaine sales within six months at a privately owned apartment complex.[56] But there had been no finding that the drug activity was "persistent."[57] In both cases there were at least temporary deprivations of all economically viable use.[58] Based on the factual distinctions, the drug use being "intertwined," "persistent," and unmanageable in *Keshbro*, while occurring on only two or more occasions in *Kablinger*, the court found takings damages were not due in the first case, but were appropriate in the second.[59]

Despite the broad application of the nuisance doctrine to background principles, these cases remain a minority. After *Lucas*, courts have been reluctant to find a nuisance merely upon the government's assertion of such, unless the finding of a nuisance can be justified under the state's traditional law of property.[60]

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[52] State Dep't of Health v. The Mill, 887 P.2d 993, 1002 (Colo. 1994).

[53] M & J Coal Co. v. United States, 47 F.3d 1148, 1151 (Fed. Cir. 1995), *cert. denied*, 516 U.S. 808 (1995). In addition to gas meters "spinning wildly" there were allegations that the "[m]ining operations had caused large cracks to develop in the surface of his property and a neighbor's dog had fallen into a crack to its death. The resident believed that neighborhood children were at risk of similar harm." *Id.*

[54] 801 So. 2d 864 (Fla. 2001). *Keshbro* was consolidated with *City of St. Petersburg v. Kablinger*, 675 So. 2d 626 (Fla. Dist. Ct. App. 1996).

[55] *Keshbro*, 801 So. 2d at 866–67.

[56] *Id.* at 868.

[57] *Id.* at 876–77.

[58] *Id.* at 871.

[59] *Id.*

[60] In a case that derived its significance from its later developments, the trial court in

B. Evolving Background Principles: The Public Trust Doctrine, the Law of Custom, and Hawaiian Gathering Rights

Background principles may be animated by concerns even more fundamental than the law of nuisance. There are other traditional doctrines from the common (and not so common) law that have profound implications for defining background principles. The doctrine with the most far-reaching impact may be the public trust doctrine. Another doctrine seemingly resurrected from the common law crypt is the law of custom, recently applied in Oregon. Finally, there is the unique adoption in Hawai'i of the ancient Hawaiian tradition of native gathering rights, rights that were rediscovered in *Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission.*[61]

1. The impact of the public trust doctrine on existing water and riparian rights

In *Palazzolo*, at the close of his oral argument, Rhode Island's attorney general made a futile attempt to interest the Court in the public trust doctrine. The issue was not before the Court, and yet the attorney general suggested that under that doctrine Mr. Palazzolo had no right to fill his wetlands:

> [Y]ou do have a common law right to wharf out or build out into the wetlands as against your neighbor, as against the rest of the world. But you don't as against the State because the State from the very first day in Rhode Island has owned all of its wetlands in fee. And still does to this day. The public trust doctrine is alive and well in Rhode Island. My time is up.[62]

It is well established that property rights, including water rights, in riparian areas may be subject to an overriding "public trust."[63] Public trust rights

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Palazzolo found that the filling of Mr. Palazzolo's coastal wetlands would constitute a nuisance because of the eighteen acre development contemplated residential homes and septic systems. *See Palazzolo v. State*, No. 88-0297, 1997 WL 1526546 (R.I. Super. Ct. Oct. 24, 1997). Because septic systems have a tendency of leaching nitrates and nitrates cause algal blooms and eutrophication, the court found a proposal for residential development would cause a nuisance. *Id.* However, the court did not rule that a lesser fill for a beach club with no septic systems would also constitute a nuisance.

[61] 79 Hawai'i 425, 903 P.2d 1246 (1995), *cert. denied*, 517 U.S. 1163 (1996).

[62] Transcript, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (No. 99–2047), 2001 U.S. TRANS LEXIS 18, at *44. On remand, the Rhode Island Supreme Court requested further briefing on the public trust doctrine.

[63] *See, e.g.*, Martin v. Waddell's Lessee, 41 U.S. 367 (1842) (stating that the public has a right over shell-fish beds in navigable waterway); Ill. Cent. R.R. v. Illinois, 146 U.S. 387 (1892) (holding that the government cannot sell public trust waterfront unless the public interest is served). For an excellent treatment of the historical development of the public trust doctrine

traditionally have included the public right to access navigable waterways for fishing and navigation.[64] The point of the public trust doctrine, as initially articulated, was a means to prevent riparian owners from leveraging their riparian land ownership into control over the public's access to and use of navigable waters. The ability of the public to use navigable waters for purposes of fishing and commerce is considered more important than the ability of riparian owners to control the vast reaches of navigable waters. The traditional extent of the public trust's impact was on land adjacent to or underneath navigable waters affected by the ebb and flow of the tides.

More recently, it has been seen, in Mississippi at least, to cover nonnavigable tidelands.[65] In California, the public trust has been extended to nonnavigable tributaries of navigable waters.[66] In Maine, on the other hand, in *Bell v. Town of Wells*,[67] the Maine Supreme Court ruled in favor of property owners in a facial takings challenge to a statute that purported to give the public a right to use privately owned inter–tidal lands. The supreme court held that Maine's attempt to extend the public trust doctrine to private inter–tidal property was void as an unconstitutional taking.[68] It also ruled that the state had not proven any "customary rights" under the law of custom.[69]

The efficacy in using the public trust doctrine to protect the public's right of access to navigable waterways can be an effective tool for those who wish to impose other limitations upon the use of private property. In other words, instead of using the power of eminent domain to take an ecological or other easement on private property, it is simpler and less expensive to claim that the property in question has always, from time immemorial, been impressed with a "public trust." This leads to claims—despite years of contrary

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in the United States and New Jersey (from which much of the nation's public trust theory was derived) in particular, see BONNIE J. MCCAY, OYSTER WARS AND THE PUBLIC TRUST (1998).

[64] *Illinois Central*, 146 U.S. at 387.

[65] Here, Mississippi law appears to have consistently held that the public trust in lands under water includes "title to all the land under tidewater." Cinque Bambini P'ship v. State, 491 So. 2d. 508, 516 (Miss. 1986). Although the Mississippi Supreme Court acknowledged that this case may be the first where it faced the question of the public trust interest in non–navigable tidelands, the clear and unequivocal statements in its earlier opinions should have been ample indication of the State's claim to tidelands. Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 481 (1988).

[66] Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709 (Cal. 1983), *cert. denied*, 464 U.S. 977 (1983) (upholding the protection of the fish habitat in tributaries to Mono Lake to the potential detriment of vested water rights).

[67] 557 A.2d 168 (Me. 1989).

[68] *Id.* at 169.

[69] *Id.* at 169–70. In *Eaton v. Town of Wells*, 760 A.2d 232 (Me. 2000), however, the court found a prescriptive easement of the public in the property that accomplished the same thing as an affirmation of the public trust would have. A similar finding in California can be found at *Gion v. City of Santa Cruz*, 465 P.2d 50 (Cal. 1970).

assumptions—that private land and water resources have always been subject to an ecological "public trust." In the case of water rights, it is said that "instream flows" are protected.[70] Others suggest broader and more grandiose roles for the public trust doctrine.[71] Professor Huffman describes the dilemma best:

> The trick is a simple one. Rather than admitting that public action has affected a private property right and then seeking to justify that effect as a legitimate exercise of the police power, these doctrines lead to the conclusion that a private property right never existed in the first place and thus nothing has been taken as a result of the government action.[72]

The United States Supreme Court's recognition of the public trust doctrine as an impediment to private use of riparian property dates to the 1892 case of *Illinois Central Railroad Co. v. Illinois*.[73] Professor Sax argues the origins are much older.[74] Although it was originally utilized as a mechanism to protect public access to, and use of, navigable waterways, academics in recent years have argued intensely over whether the public trust doctrine must "evolve" into an all-encompassing ecological easement on all private property—which would supposedly limit the reach of the takings doctrine.[75] The debate over how far the public trust doctrine should be used to abrogate traditional and

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[70] *Nat'l Audubon Soc'y*, 658 P.2d at 727.

[71] *See infra* notes 76-93 and accompanying text.

[72] James L. Huffman, *Avoiding the Takings Clause Through the Myth of Public Rights: The Public Trust and Reserved Rights Doctrines at Work*, 3 J. LAND USE & ENVTL. L. 171 (1987) [hereinafter Huffman, *Avoiding the Takings Clause*].

[73] *See* Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892). An earlier precursor can be seen in *Martin v. Waddell's Lessee*, 41 U.S. 367 (1842), that dealt with defining the public's right to gather shellfish in a navigable waterway.

[74] *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970) [hereinafter Sax, *The Public Trust Doctrine*]. *But see* MCCAY, *supra* note 63.

[75] *See, e.g.*, Sax, *The Public Trust Doctrine*, *supra* note 74; Joseph L. Sax, *The Constitution, Property Rights and the Future of Water Law*, 61 U. COLO. L. REV. 257, 269 (1990) (arguing that water rights can be altered or reduced in the public interest without the payment of just compensation) [hereinafter Sax, *The Future of Water Law*]; Alison Rieser, *Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory*, 15 HARV. ENVTL. L. REV. 393 (1991) (critiquing Professors Sax and Huffman and suggesting that ecological values are clearly within the public trust). *But see, e.g.*, Huffman, *Avoiding the Takings Clause*, *supra* note 72; James L. Huffman, *Trusting the Public Interest to Judges: A Comment on the Public Trust Writings of Professors Sax, Wilkinson, Dunning and Johnson*, 63 DENV. U. L. REV. 565 (1986); John S. Harbison, *Waist Deep in the Big Muddy: Property Rights, Public Values, and Instream Waters*, 26 LAND & WATER L. REV. 535 (1991) (arguing that the application of the public trust doctrine can lead to a taking); Lloyd R. Cohen, *The Public Trust Doctrine: An Economic Perspective*, 29 CAL. W. L. REV. 239 (1992) (arguing that the proposed expansions of the public trust doctrine are legally and economically insupportable).

often centuries old understandings of the private property rights, and, more recently, developed legal concepts of water rights, is in large part a reflection over competing legal philosophies.

Where the public trust doctrine was once confined exclusively to protecting the public's access to navigable waters for fishing and commerce,[76] advocates for greater environmental protection, such as Professor Sax, argue that the public trust protects non-economic, socially beneficial goods, such as recreation or a pristine natural environment.[77] California was quick to adopt Sax's notion that the public trust doctrine protects recreational and aesthetic values. For example, whatever element of "navigation" was left in the public trust doctrine pretty much disappeared when the California Supreme Court found in *Marks v. Whitney*[78] that the

> [p]ublic 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 of the tidelands—a use encompassed within the tidelands trust—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 which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.[79]

The doctrine was extended further to "recreational and ecological" values including "the scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding birds."[80]

Any regulation that restricts the ability of an individual to utilize what was assumed to be a private property interest that is found subject to the public trust would not give rise to a cause of action for a taking because, in reality, the private property interest never really existed in the first place. In fact,

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[76] *See Illinois Central*, 146 U.S. at 387.

[77] Based on his early writings on the subject, Professor Sax is widely acknowledged as being the principle guru-advocate for a modern expansion of the public trust doctrine. *See, e.g.*, Sax, *The Public Trust Doctrine*, *supra* note 74; Joseph L. Sax, *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U.C. DAVIS L. REV. 185 (1980).

[78] 491 P.2d 374 (Cal. 1971).

[79] *Id.* at 380.

[80] Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 719 (1983); *accord* State *ex rel.* Sprynczynatyk v. Mills, 592 N.W.2d 591 (N.D. 1999); *see also* J. P. Furlong Enters., Inc. v. Sun Exploration & Prod. Co., 423 N.W.2d 130, 140 (N.D. 1988) (describing "other important aspects of the state's public trust interest, such as bathing, swimming, recreation and fishing, as well as irrigation, industrial and other water supplies"); Brooks v. Wright, 971 P.2d 1025 (Alaska 1999) ("[W]e clarified . . . [that] the purpose of the public trust doctrine was not to grant the legislature ultimate authority over natural resource management, but rather to prevent the state from giving out 'exclusive grants or special privilege as was so frequently the case in ancient royal tradition.'") (citing Owsichek v. State Guide Licensing & Control Bd., 763 P.2d 488, 496 (Alaska 1988)).

some commentators such as Professor Sax posit that *all* property rights should be redefined to make them more akin to water rights and subject to an analogous "ecological public trust."[81]

With respect to water rights, Professor Sax argues that water rights are some kind of lesser property right. He argues that because such rights have always been heavily regulated, there is nothing wrong with regulating them even more—even if that means reallocating water rights.[82]

One problem with promoting a regulatory system that allows prior existing property rights in a resource to be reformulated is that it creates a disincentive for the protection of that resource by its private owners. Why should a private individual expend time and capital to protect a natural resource if the government will ultimately liberate the resource under a public trust argument?

If background principles cannot be "decreed anew,"[83] then there ought to be no place for a radical transformation of property rights. The public trust doctrine should logically have no ability to negate the existence of a regulatory taking of what had traditionally been considered purely private property. As Justice Stewart once opined, if a court redefines such "existing rules and understandings," then a "judicial taking" may occur.[84]

Anticipating this argument, Professor Sax argues that there is nothing wrong with the "retroactive" application of regulations to private property—especially for regulations that take back water allocations in order to prevent "waste" (i.e., provide for instream flows) or which recognize "original limitations" on the property interests in water.[85] Others disagree. For example, Professor Siegan forcefully argues that the courts are much more likely to declare a regulation to be unlawful if it is in fact a retroactive regulation. Siegan notes first that "[a]n owner who is deprived of an existing property interest *retroactively* has a much stronger takings claim than one who

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[81] Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding* Lucas v. South Carolina Coastal Council, 45 STAN. L. REV. 1443 (1993). For a critique of this theory, see James S. Burling, *Protecting Property Rights in Aquatic Resources After Lucas*, *in* WATER LAW–TRENDS, POLICIES, AND PRACTICE (American Bar Ass'n ed., 1995).

[82] *See* Sax, *Future of Water Law*, *supra* note 75.

[83] *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028 (1992).

[84] *See* Hughes v. Washington, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring) ("[A] State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all."); *see also* Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 233-34 (1897) (raising the potential of judicial taking); Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985) (dealing with the question of whether the Hawai'i court's new definition of water rights "takes" old existing rights), *vacated by* 477 U.S. 902 (1986), *remanded to* 854 F.2d 1189 (9th Cir. 1988). *But see* Fort Mojave Indian Tribe v. United States, 23 Cl. Ct. 417, 428 n.4 (1991) (noting that reserved water rights are protected water rights but that courts are not capable of taking property).

[85] *See* Sax, *The Future of Water Law*, *supra* note 75, at 264 n.23.

seeks to restore a property interest that had been eliminated *prospectively*."[86] The rationale against retroactive legislation, Siegan writes, is both moral and pragmatic:[87]

> The rule of law is rooted in protected expectations. . . . Predictability of law protects the individual from arbitrary government rules and rulers. It is unjust for government to penalize a person who has acted in reliance on existing law either by subsequently making the original action illegal or subsequently depriving the person of rights acquired as a result of the action.[88]

Siegan concludes, on a pragmatic note, that under a rule of law that condones retroactive laws "market economics could not function."[89]

Although Sax argues that cases like *Usery v. Turner Elkhorn Mining Co.*[90] and *Connolly v. Pension Benefit Guaranty Corp.*[91] stand for the proposition that retroactive regulation that affects private property is constitutional, he overstates the import of these cases. Neither case involved *real* property. *Usery* upheld requirements that coal companies pay for black lung benefits even though no such requirements existed when the miners were injured. *Connolly* upheld requirements to augment the funding for pensions. Furthermore, the notion that *Connolly* could be extended to apply retroactive liabilities on private entities that are not responsible for the public harm sought to be ameliorated was rejected in *Eastern Enterprises v. Apfel.*[92] Writing for a plurality of four justices, Justice O'Connor distinguished *Connolly* and noted: "[r]etroactivity is generally disfavored by the law . . . in accordance with 'fundamental notions of justice' that have been recognized throughout history."[93]

2. Will the law of custom take over where the public trust doctrine leaves off?

In *Stevens v. City of Cannon Beach*,[94] the Oregon Supreme Court found there was no taking when a property owner was unable to build on a beach dune area because the ownership rights of the dune did not include the right to exclude the public from its customary use of the dunes. Two members of the United States Supreme Court were troubled by what they saw as an

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[86] BERNARD SIEGAN, PROPERTY AND FREEDOM 133 (1997).
[87] *Id.* at 135.
[88] *Id.*
[89] *Id.* at 138.
[90] 428 U.S. 1 (1976).
[91] 475 U.S. 211 (1986).
[92] 524 U.S. 498 (1998).
[93] *Id.* at 532 (citations omitted).
[94] 854 P.2d 449 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994).

abrogation of existing property definitions.[95] The Oregon Supreme Court based its decision on the ancient law of custom. In a nutshell, the law of custom provides that if the public has always used property for a certain purpose, it may continue to do so. Relying on Blackstone's commentaries, the Oregon Supreme Court described seven elements necessary to establish a custom. A custom applies to land used in a certain manner:

> (1) so long that the mind runneth not to the contrary; (2) without interruption; (3) peaceably; (4) where the public use has been appropriate to the land and the usages of the community; (5) where the boundary is certain; (6) where the custom is obligatory (not left up to individual landowners as to whether they will recognize the public's right to access); and (7) where the custom is not repugnant to or inconsistent with other customs or laws.[96]

The court found that the law of custom provided a public right to use the dry sand beach at the expense of the owners' right to develop the property for a motel. A serious problem with the Oregon court's decision, as pointed out in Justice Scalia's dissent from the Court's denial of a writ of certiorari, is that the Oregon Supreme Court had recently rejected the argument that the law of custom applied to dry sand dune areas. In *Stevens*, the Oregon court seemingly reversed itself but without the issue being factually tested in trial court.

A more fundamental problem with the Oregon court's decision is that it is inconsistent with the established parameters of the English law of custom. As discussed exhaustively by both Professors David Bederman and David Callies, the law of custom has had an uneasy history in America, often has been rejected outright by courts fearful of its arbitrary nature, and is irrelevant to our modern era of more formal rules of law.[97]

In a thorough history of the English law of custom, as told through English court decisions, Professor Callies finds that it is quite a narrow rule that has always been strictly construed, and not given to the sort of generous interpretation found in *Stevens*. Furthermore, Professor Bederman points out that the law of custom had been expressly *rejected* by many American jurisdictions seeking to distance themselves from certain British traditions that the Americans saw as antithetical to our embrace of egalitarian values: "American land tenure was fundamentally different from that found in England. To the extent that custom was associated . . . with quintessential community autonomy in a feudal, agrarian society, it was worth declaring that those conditions never

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[95] Stevens v. City of Cannon Beach, 114 S. Ct. 1332 (1994) (Scalia, J., dissenting) (stating that the denial of certiorari was erroneous).

[96] *Id.* at 1333 n.1.

[97] *See* Callies, *supra* note 16; Bederman, *supra* note 16.

existed in the British colonies in North America."[98] As Bederman further points out, recent legislative attempts to revive the law of custom in three New England states were rejected by those states' supreme courts.[99]

Both Bederman and Callies further suggest that even if the law of custom were to be transported to Oregon, the facts of *Cannon Beach* do not support the finding of a custom as to the dry sand beaches of that state.[100] Bederman writes with restraint: "There is a conclusory flavor to this part of the opinion [finding the existence of antiquity and certainty]."[101] Callies writes:

> With all due respect to the courts of the several states which appear to be creating property rights from Blackstonian custom, they ignore the basis and essence of such custom, at least according to the seven criteria which Blackstone describes in his commentaries.[102]

Judicial endeavors to remake the law of custom in order to achieve modern goals and aspirations, such as giving the public the right to walk upon once private and once developable private property, has definite constitutional implications. To some degree it is understandable why the Supreme Court may be reluctant to interfere with state attempts to define background principles of property under state law. After all, the modern Court has led a revolution in a renewed understanding of principles of federalism.[103] Yet one wonders how long this sort of judicial creativity can last. Assuming that the Oregon experience is aberrational, then Hawai'i's embrace of its version of a custom based on traditions resurrected from precontact feudal rights and duties is truly remarkable.

3. A return to yesterday: Gathering up gathering rights at the expense of property rights

In *Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission* ("*PASH*"),[104] the Hawai'i Supreme Court held that land ownership in

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[98] Bederman, *supra* note 16, at 1399.

[99] *Id.* at 1309-12 (*citing* Opinion of the Justices, 313 N.E.2d 561, 563 (Mass. 1974)); Opinion of the Justices, 649 A.2d 604 (N.H. 1994); Bell v. Town of Wells, 557 A.2d 168 (Me. 1989); *see also* State *ex rel.* Haman v. Fox, 594 P.2d 1093, 1101 (Idaho 1979) (declining to extend the law of custom to allow access to private beachfront property on Lake Coeur d'Alene, noting that the use had commenced in 1912, which the court did not consider "time immemorial").

[100] *See* Bederman, *supra* note 16, at 1421-25; Callies, *supra* note 16, at 10,016–17.

[101] Bederman, *supra* note 16, at 1422.

[102] Callies, *supra* note 16, at 10,016.

[103] *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); Alden v. Maine, 527 U.S. 706 (1999); United States v. Lopez, 514 U.S. 549 (1995).

[104] Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n, 79 Hawai'i 425,

Hawai'i is burdened by a Native Hawaiian right to "gather" natural resources in accordance with native custom, which may be incompatible with other utilization rights. Rejecting what it described as "western notions" of property law, the court found that the ancient Hawaiian practices as "established by Hawaiian national usage"[105] complemented the English law of custom. The end result is that any person with any Native Hawaiian blood has the right to gather natural resources on private undeveloped property, whether or not it is owned in fee by others. While the Hawaiian courts had once rejected such expansive interpretations of native gathering rights, and at least confined them to the local neighborhood or *ahapua'a* of the Hawaiians seeking gathering rights,[106] the *PASH* court abandoned these restraints as it "refuse[d] the temptation to place undue emphasis on non-Hawaiian principles of land ownership" relying instead on the "Aloha Spirit."[107]

In contrast to the Oregon experience, which Professor Bederman calls "bare instrumentalism,"[108] Bederman is more ambivalent about the *PASH* decision, noting that it could possibly be justified on Hawai'i's incorporation of a unique Hawaiian tradition.[109] Those who have examined the unique Hawaiian tradition in more detail, however, harbor stronger negative feelings. For example, after an exhaustive review of the history and evolution of the Hawaiian government from feudal times to the modern era, Paul Sullivan concludes:

> "[C]ustomary and traditional Hawaiian rights" . . . [i]n specific cases . . . may not be "customary," because they . . . [may] fail to meet the common law tests for custom. They may likewise not be "traditional," either because in a modern incarnation they would be severed from their . . . feudal context or because they have not been widely practiced (or practiced at all) for generations. . . . Finally, they may not be "rights," at least in the sense that they have a basis in state law.
>
> Thus what *PASH* proposes is revolutionary, and it is *new*.[110]

With respect to the question of whether the gathering rights articulated in *PASH* meet Blackstone's tests for custom, Professor Callies avers:

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903 P.2d 1246 (1995), *cert. denied sub nom.* Nansay Hawai'i, Inc. v. Public Access Shoreline Hawai'i, 517 U.S. 1163 (1996).

[105] Bederman, *supra* note 16, at 1427 n.294 (citing HAW. REV. STAT. § 1-1 (1994)).

[106] Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 656 P.2d 745 (1982).

[107] *PASH*, 79 Hawai'i at 451, 903 P.2d at 1272 n.44. The "Aloha Spirit" is defined as the "working philosophy of native Hawaiians." *Id.*

[108] Bederman, *supra* note 16, at 1434.

[109] *Id.*

[110] Paul M. Sullivan, *Customary Revolutions: The Law of Custom and the Conflict of Traditions in Hawai'i*, 20 U. HAW. L. REV. 99 (1998).

> Hawaii also blithely ignores at least one such criterion in its opinion and ignores others—particularly certainty and reasonableness, and arguably continuity. It also plays fast and loose with the Blackstonian injunction, supported by Coke centuries before, that it is impossible to derive a right to take something from land—[known] as a profit a pendre—from custom.[111]

If the state courts are to persist in inventing pseudo-ancient and pseudo-Blackstonian customs and devising Saxian notions of the public trust, the United States Supreme Court may feel compelled to rise to the challenge and explain, again, that under the federal constitution states may not rewrite the law of property, however artful the rewriting may be. While the ends sought to be achieved, allowing the public to romp on dry sand beaches, allowing fish to swim wild and free in tributaries unencumbered by water diversions, or allowing Native Hawaiians to gather fauna and flora on ancient *ahupua'as*, may be popular ends, "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[112]

V. WHEN DOES AN EXISTING REGULATORY SCHEME BECOME A BACKGROUND PRINCIPLE? THE RISE AND FALL OF THE NOTICE RULE

The last, and perhaps most significant, question of background principles concerns what effect, if any, the existence or anticipation of a regulatory regime has on background principles. In conflict are two diametrically opposed notions of "common wisdom." One the one hand, it has often been said that one who buys property "stands in the shoes" of his or her predecessor.[113] However, it is also common "wisdom," that one who buys property buys it with the knowledge of preexisting regulatory constraints and cannot complain about those limitations.

The difficulty with the latter syllogism is that if the right to develop property is a fundamental right, and a challenge to a permit scheme can be made only upon an application for a permit,[114] then the right to develop the property could devolve to the government at no cost when it is transferred from one owner to the next. Justice O'Connor put the dilemma this way at oral argument in *Palazzolo*:

> Think of this, there is a poor little widow woman who owns it and she can't possibly develop it or deal with it and she puts it on the market. And somebody comes along and knows the regulation is there but says, look, that regulation is

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[111] Callies, *supra* note 16, at 10,016.

[112] Penn. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

[113] Graff v. Smith's Admors, 1 U.S. (1 Dall.) 481, 485 (1789).

[114] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127 (1985).

> going to have to be applied in a reasonable manner, I'm going to pay you X amount for this property and then challenge it. I mean what's the matter with that?[115]

On the other hand, some believe that the "stands in the shoes" argument may have its own conceptual limitations. As Justice Souter put it:

> [I]f rights to land use pass from owner to owner like that, how far back does the chain go? I mean it seems to me that there's no logical stopping place until you get back to Roger Williams and the 17th century settlement. So where do we draw the line?[116]

A. The Development of the Notice Rule in Palazzolo

In *Palazzolo*, Mr. Palazzolo first purchased his property in 1959 and 1960 through a corporation of which he was the president and sole shareholder.[117] The property is mostly wetlands that border a tidal pond to the north and a partially filled roadside property to the south. In the early 1960s, there were no restrictions in place regulating the fill of coastal wetlands, although dredging the pond as a source of fill material would have required a permit.[118] After a series of permit applications to dredge and fill were denied in the 1960s, Mr. Palazzolo appealed and received permission to fill the property in 1971. However, the permits were withdrawn a few weeks later. One can presume that concerns were raised within the Rhode Island administrative agencies, including the nascent Coastal Resources Management Council.[119] In 1976, new regulations were adopted which required landowners to obtain permits before filling coastal wetlands.[120] In 1978, the corporation was dissolved because Mr. Palazzolo tired of paying an annual $100 registration fee. The land devolved to him in his individual capacity by operation of law.[121] In the 1980s, Mr. Palazzolo again sought permission to use his wetlands, this time without dredging the pond, obtaining fill material instead from an upland site.[122] One permit application, filed in 1983, was to fill

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[115] Transcript, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (No. 99–2047), 2001 U.S. TRANS LEXIS 18 at *52.

[116] *Id.* at *15.

[117] *Palazzolo*, 533 U.S. at 612.

[118] *Id.* at 612-15.

[119] *See id.*

[120] *Id.* at 2456; *see also* Petitioner's Opening Brief at *5, Palazzolo v. Rhode Island, 513 U.S. 606 (2001) (No. 99–2047), 1999 U.S. Briefs LEXIS 2047.

[121] *Palazzolo*, 533 U.S. at 614.

[122] Petitioner's Opening Brief at *6, *Palazzolo* (No. 99–2047), 1999 U.S. Briefs LEXIS 2047.

eighteen acres for an unspecified use. It was denied in 1984.[123] The other was to fill 11.4 acres for a lightly developed beach club; it was denied in 1985, in part because it did not serve "a compelling public purpose providing benefits to the public as a whole as opposed to individual or private interests."[124] Mr. Palazzolo then sued for a regulatory taking.[125] After a series of delays and missteps, trial was held in 1997. The trial court ruled against Mr. Palazzolo on a number of grounds and the Rhode Island Supreme Court affirmed the judgment.[126]

Of great significance to the question of background principles was the holding that because Mr. Palazzolo acquired the property in his individual capacity in 1978, two years after the wetlands permitting regulations were put in place, he had no right to challenge the application of the regulations. The Rhode Island Supreme Court reasoned that because he was on notice of the existence of the regulations when he acquired the property (in 1978 from his defunct corporation), he lacked the necessary "investment-backed expectations" needed to pursue a successful regulatory takings claim.[127] The court also found that because he was on notice of the regulations "the right to fill wetlands was not part of the title he acquired."[128] These two intertwined rationales for denying a takings claim based on the existence of regulations at the date of acquisition have become known as the "notice rule." In October of 2000, the United States Supreme Court granted Mr. Palazzolo's petition for writ of certiorari. The first question presented was "[w]hether a regulatory takings claim is categorically barred whenever the enactment of the regulation predates the claimant's acquisition of the property."[129]

To one not intimately familiar with the trends in the law of regulatory takings, it would seem odd that this question would have even arisen. After

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[123] *Id.*

[124] *Id.* at *6-7.

[125] *Id.* at *7-8.

[126] Palazzolo v. Rhode Island, 746 A.2d 707 (R.I. 2000).

[127] *Id.* at 717. The court relied upon *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), which established a multifactor test, including an analysis of the takings claimant's "investment-backed expectation."

[128] *Palazzolo*, 746 A.2d at 716.

[129] Petitioner's Opening Brief at *i, *Palazzolo* (No. 99–2047), 1999 U.S. Briefs LEXIS 2047. The other two questions were:

> 2. Where a land-use agency has authoritatively denied a particular use of the property and the owner alleges that such denial per se constitutes a regulatory taking, whether the owner must file additional applications seeking permission for "less ambitious uses" in order to ripen the takings claim;
>
> 3. Whether the remaining permissible uses of regulated property are economically viable merely because the property retains a value greater than zero.

Id.

all, only a few years earlier in *Nollan v. California Coastal Commission*,[130] the Court had addressed the very issue. In that case the question was whether the Nollans could be forced to dedicate a strip of their private property to the public in order to obtain a permit to rebuild a beachfront home. The California Coastal Commission had put a policy of dedication requirements in place several years before the Nollans had acquired their property. As a result, Justice Brennan surmised that they had no right to complain about the application of the policy to their property.[131] The majority did not agree:

> Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.[132]

The Rhode Island court, and other courts that considered the notice rule, however, largely ignored this language. It was, of course, essential that governments try to downplay the force of this *Nollan* language because it, combined with *Lucas*, would make it very hard to avoid regulatory takings.

The State of Rhode Island had an argument to distinguish *Nollan*. It suggested that *Nollan* was not dispositive because it involved a "physical" taking, as opposed to a regulatory taking.[133]

More important, perhaps, than the particular mechanism used to avoid or ignore *Nollan* was the fact that after *Lucas* there were few avenues left to avoid the compensation requirement other than finding title or background principles did not include the object of the regulation. The notice rule was one of the most efficacious. While there were a few jurisdictions that had adopted the notice rule prior to *Lucas*, an increasing number had begun to do so after that decision was announced.

B. Prior to Palazzolo, *the State and Lower Federal Courts Were in Conflict over the Notice Rule*

One of the first jurisdictions to adopt the notice rule was *Claridge v. New Hampshire Wetlands Board*, where the New Hampshire Supreme Court wrote that "[a]t the time of that purchase, the Claridges had constructive notice that the property was subject to State wetlands statutes."[134] Furthermore, the

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[130] 483 U.S. 825 (1987).

[131] *Id.* at 860 (Brennan, J., dissenting).

[132] *Id.* at 833 n.2.

[133] Brief of Respondent, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (No. 99–2047), 1999 U.S. Briefs LEXIS 2047, at *36 n.51.

[134] Claridge v. New Hampshire Wetlands Bd., 485 A.2d 287, 292 (N.H. 1984).

Claridges "chose to take [the risk] in buying this lot with notice of regulatory impediments and in *waiting* to develop the property in the context of growing public concerns about wetlands."[135]

In the most dramatic adoption of the notice rule, the New York Court of Appeals in 1997 issued four opinions simultaneously that held under a variety of factual circumstances that property owners are not entitled to condemnation damages when a regulation that results in a taking is adopted prior to the purchase of the property.[136] This doctrine was applied to instances where the regulation destroyed all use of the property[137] and where the City of New York physically invaded private property by dumping fill on approximately 2,400 square feet of land.[138] Two owners were found to have no right to compensation when they were unable to use their land because of wetlands restrictions.[139] The essence of the New York court's holdings is that whenever property is transferred, it is encumbered by a new regulatory servitude defined by the maximum scope of all regulations in existence at the instant of transfer.[140]

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[135] *Id.* (emphasis added). It is unclear whether this holding creates a policy incentive in favor of accelerated development of undeveloped property.

[136] Anello v. Zoning Bd. of Appeals, 678 N.E.2d 870 (N.Y. 1997), *cert. denied*, 521 U.S. 1132 (1997); Basile v. Town of Southampton, 678 N.E.2d 489 (N.Y. 1997), *cert. denied*, 522 U.S. 907 (1997); Gazza v. State Dep't of Envtl. Conservation, 679 N.E.2d 1035 (N.Y. 1997), *cert. denied*, 522 U.S. 813 (1997); Kim v. City of New York, 681 N.E.2d 312 (N.Y. 1997), *cert. denied*, 522 U.S. 1008 (1997).

[137] *See Anello*, 678 N.E.2d at 871. Anello purchased property after a steep slope ordinance was adopted. When the application of the ordinance and denial of a variance precluded all use of the lot, Anello was found not to be entitled to takings damages.

[138] *Kim*, 681 N.E.2d at 313. Kim purchased a car wash and service station after the city passed a charter amendment creating a "duty" to provide lateral support for roadways. When the road grade was raised, Kim had a duty to sacrifice her land in order to provide lateral support for raised roadway. Indeed, the facts of this case were troubling enough that Justice Breyer asked government council a series of questions about it in oral argument in *Palazzolo*. Transcript, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (No. 99-2047), 2001 U.S. TRANS LEXIS at *41-42.

[139] *Gazza*, 679 N.E.2d at 1036. In *Gazza*, the purchaser of a wetland was not entitled to a condemnation award because when he purchased the property, he could not have purchased the right to use wetlands contrary to potential application of regulation. In *Basile*, the city condemned a wetlands parcel and only had to pay nominal fair market value. *Basile*, 678 N.E.2d at 490. The court reasoned that because the land was purchased after the wetlands regulations were adopted, the owner did not have the right to put the property to its highest and best use. *Id.* at 491.

[140] Professor Steven J. Eagle is highly critical of the notion that just compensation is not available when the application of a regulation takes private property just because the owner purchased the land subject to an existing regulatory scheme. *See* Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating from the "Rule of Law,"* 42 N.Y.L. SCH. L. REV. 345, 376 (1998). Professor Eagle suggests that the right to bring an inverse condemnation claim must be transferable with the property. Otherwise, the court "converts an important component

Kim was particularly interesting in the mental gymnastics that it used to avoid the force of the *Nollan* footnote:

> However, we think the *Nollan* footnote is readily harmonized with the "logically antecedent inquiry" subsequently elucidated in *Lucas*. Specifically, the property interest allegedly taken in *Nollan* was not subject to any preexisting restriction; rather, the case centered on a State agency's policy of conditioning the grant of building permits on the property owner's surrender of a public easement over the beachfront property. Because plaintiffs' predecessors in interest had neither applied for nor been granted the conditioned permit, the government's interest in the easement was, at the time of plaintiffs' acquisition of the property, a mere "unilateral *claim* of entitlement," not an enforceable property interest. There was simply no existing title restriction which a purchaser took subject to in that case.[141]

To put it charitably, this is nonsense. As Justice Brennan so helpfully pointed out in his *Nollan* dissent, the State of California had a hard and fast policy of exacting easements in exchange for permit applications. This was as much a preexisting regulatory limitation on the use of property as were the wetland regulations in *Palazzolo* or the roadfill easement in *Kim*. True, none of these "preexisting limitations" were actualized until the permit was granted (*Nollan*), denied (*Palazzolo*), or the City decided to raise the roadbed (*Kim*); but then of course there was no ripe take until the relevant governmental action.[142]

In a manner similar to New York, in *City of Virginia Beach v. Bell*,[143] the Virginia Supreme Court applied the notice rule to foreclose a takings challenge to a beach protection ordinance. It held that:

> In contrast to *Lucas*, however, the Ordinance at issue here predated Bell's and the Trustee's acquisition of the property. Therefore, the "bundle of rights" which either Bell or the Trustee acquired upon obtaining title to the property did not include the right to develop the lots without restrictions. Thus, because the regulatory restriction was in Bell's and the Trustee's chain of title, the City did not deprive Bell . . . [of] the right to develop the property since that right was never Bell's or the Trustee's to lose.[144]

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of the fee simple—the right to use one's land—into a personal right that has to be exercised during life or else vanishes." *Id.* at 368.

[141] *Kim*, 681 N.E.2d at 316 n.3.

[142] Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

[143] 498 S.E.2d 414 (Va. 1998), *cert. denied*, 525 U.S. 826 (1998).

[144] *Id.* at 417.

Other state court decisions that had adopted the notice rule included *Hunziker v. Iowa*,[145] *Grant v. South Carolina Coastal Council*,[146] and *State Department of Health v. The Mill*.[147]

One state case that is particularly noteworthy is *McQueen v. South Carolina Coastal Council*.[148] There, even though it was undisputed that a denial of a permit to put in a bulkhead and fill property "deprives respondent of all economically viable use of his property,"[149] and that there were no background principles depriving the owner the right to fill, the court found a lack of a take because the landowner had no investment-backed expectations to develop the property—because he waited several decades before attempting to navigate the permitting process. This reliance upon investment-backed expectations as an independent ground for the application of the notice rule was also articulated by the state Supreme Court in *Palazzolo*. While investment-backed expectations are arguably more relevant to the liability issue than to the underlying title issue, as a practical matter the result is indistinguishable; the landowner loses, albeit more slowly through the process of employing a *Penn Central* balancing test at trial. It is also doubtful whether there is any true theoretical distinction between a notice rule predicated upon an impact on a property's title and one that presupposes that a landowner simply cannot "expect" to do what the naked title ostensibly allows. In the first case the landowner cannot develop the property because the government controls the title to the development rights, while in the second, the landowner cannot develop the property because the government will not allow the development rights to be exercised.

Several federal decisions have adopted this notice rule as well. For example, in *Creppel v. United States*,[150] the Court of Federal Claims found that purchasers of property that had already been allegedly taken by wetlands regulations had no cognizable takings claim. Likewise, in *Forest Properties v. United States*[151] the Federal Circuit found the notice rule dispositive in

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[145] 519 N.W.2d 367 (Iowa 1994), *cert. denied*, 514 U.S. 1003 (1995). In *Hunziker*, the court found no taking where the purchaser of property discovered an Indian burial mound that was protected by preexisting law. As a result, the residential subdivision lot could not be developed because of the mound.

[146] 461 S.E.2d 388 (S.C. 1995) (finding no right to fill a critical area because the owner purchased the land when the statute was in existence).

[147] 887 P.2d 993 (Colo. 1994). "The 'reasonable investment-backed expectations' of the regulated party is the dispositive factor in takings analysis when the regulated party is 'on notice' of the extent of the government's regulatory authority over its property." *Id.* at 1000.

[148] 530 S.E.2d 628, 632 (S.C. 2000), *vacated*, 1212 S. Ct. 2581 (2001) (remanded for consideration in light of *Palazzolo*).

[149] *Id.* at 631.

[150] 33 Fed. Cl. 590, 600 (1995).

[151] 177 F.3d 1360 (Fed. Cir. 1999), *cert. denied sub nom.* RCK Props., Inc. v. United States, 528 U.S. 951 (1999); *accord* Broadwater Farms Joint Venture v. United States, 45 Fed. Cl. 154, 156 (1999) (noting that the owner had actual and constructive knowledge of Clean Water Act of 1972 when the property was acquired).

ruling against a landowners' takings claim. In *M & J Coal Co. v. United States*,[152] the Court of Appeals for the Federal Circuit found that the preexisting federal regulatory environment affected the property rights of a coal mine owner.

One case in particular stands out. In *Good v. United States*,[153] a taking claim against the federal government was denied in part because the owner purchased property after it had already been subjected to extensive state wetlands regulations and because the owner put more money into the project for consultants after he was on notice that there would be regulatory difficulties in developing the property. The rationale of the court was particularly perverse. In *Good*, Lloyd Good acquired property shortly before the passage of the Endangered Species Act. After many years of a regulatory nightmare worthy of Kafka, he was denied federal permits because of the recent discovery of a Silver Rice Rat and the Lower Keys Marsh Rabbit, both endangered species. The Federal Circuit concluded not that he was on notice of the statue or the presence of the species when he acquired his property (he was not), but that he should have known about what was to come due to the nature of the increasingly onerous and confiscatory regulations. Regardless of whether Good had been denied economically viable use of his property, he "could not have had a reasonable expectation that he would obtain approval to fill ten acres of wetlands in order to develop the land."[154] That is because the court concluded that Good was "[s]urely . . . not oblivious" to the trend of "rising environmental awareness translated into ever-tightening land use regulations."[155] In other words, the Federal Circuit adopted the rule of notice plus clairvoyance.

The Court of Federal Claims, however, had it right. When confronted by the notice rule, Judge Smith found that "[u]nder such logic, [government] could pass a law that stated that no one could build on their property. After all property had passed hands once, the right to build on one's property would be lost to everyone."[156]

Prior to *Palazzolo*, several states and the Ninth Circuit rejected this rule. In *Karam v. State*,[157] the New Jersey Supreme Court held to a middle ground, finding that while the new owner acquired the same rights as his predecessor, there were limits:

> We recognize that rights in property pass from one owner to the next. Thus, the right of a property owner to fair compensation when his property is zoned into inutility by changes in the zoning law passes to the next owner despite the latter's knowledge of the impediment to development. But plaintiffs' predecessors in

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[152] 47 F.3d 1148 (Fed. Cir. 1994), *cert. denied*, 516 U.S. 808 (1995).

[153] 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied*, 529 U.S. 1053 (2000).

[154] *Id.* at 1361-62.

[155] *Id.* at 1362.

[156] Store Safe Redlands Assocs. v. United States, 35 Fed. Cl. 726, 735 (1996).

[157] 705 A.2d 1221 (N.J. 1998).

> title, the Schweinerts, never had the absolute right to construct a dock; it was always conditioned on the requirement of obtaining a development permit. While the conditions for obtaining a development permit have undoubtedly become more onerous in the seventy-odd years that have passed since the riparian grant was issued, plaintiffs could not have reasonably expected that they would be immune from all changes in the law during that period.[158]

In *Carson Harbor Village, Ltd. v. City of Carson*,[159] the Ninth Circuit found that an as applied, but not a facial takings challenge, can be brought by a purchaser of regulated property. Likewise, in *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*,[160] the Ninth Circuit allowed a landowner's takings claims to proceed despite the fact that land was purchased with knowledge of permitting requirements. In *Vatalaro v. State Department of Environmental Regulation*,[161] the Florida court held that even though Vatalaro acquired property after a regulatory scheme was adopted, she could still pursue an as-applied takings claim. The court reasoned that no taking occurred until after the state denied Vatalaro's permit application when the state determined her property was suitable only for limited passive recreational use. And in *Cottonwood Farms v. Board of County Commissioners*,[162] the court found that "[t]he majority of courts have held that the fact of prior purchase with knowledge of applicable zoning regulations does not preclude a property owner from challenging the validity of the regulations on constitutional grounds, but does constitute a factor."[163]

C. The Doctrine of Investment-Backed Expectations Does Not Grant Government License to Take Riparian Property

One rationale given by the Rhode Island Supreme Court for its reliance on the notice rule was that Mr. Palazzolo lacked investment-backed expectations to develop his property.[164] This supposedly independent basis of the notice rule, however, lacks a legitimate pedigree. The concept of "investment-backed expectations" was first articulated by the United States Supreme Court in *Penn Central Transportation Co. v. City of New York*,[165] where it noted that an

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[158] *Id.* at 1229.

[159] 37 F.3d 468 (9th Cir. 1994).

[160] 95 F.3d 1422 (9th Cir. 1996), *aff'd*, 526 U.S. 687 (1999).

[161] 601 So. 2d 1223, 1229 (Fla. Dist. Ct. App. 1992), *reh'g denied*, 613 So. 2d 3 (Fla. 1992). *But see* State v. Burgess, 772 So. 2d 540 (Fla. Dist. Ct. App. 2000), *cert denied*, 122 S. Ct. 615 (2001).

[162] 763 P.2d 551 (Colo. 1988).

[163] *Id.* at 555.

[164] Palazzolo v. State, 746 A.2d 707, 717 (R.I. 2000).

[165] 438 U.S. 104 (1978).

analysis of distinct investment-backed expectations is one factor that a court may look to in determining whether there has been a regulatory taking.[166] The Court[167] credited the derivation of this test to an article by Professor Michelman.[168] But Michelman cautions that expectations are not the exclusive way of defining property, for he later said that:

> [T]here seems to be little historical or philosophical basis for a conclusion that constitutional property rights are exclusively reliance-based or expectation-based, that they are purely derivative and in no way direct, and that what counts as constitutionally protected property can at any moment be fully told by deciding what entitlements can from time to time be inferred from official standing law.[169]

Professor Michelman finds the results of a pure expectations theory unsatisfactory when combined with a denial of compensation to riparian owners that would force those riparian owners to discount the value of their property.[170] Instead, Michelman believes there "must be some kind of direct right of property under the Constitution" and cites *Kaiser Aetna v. United States*,[171] as a paradigmatic example where the rights of riparian owners were protected *despite* expectations.[172] Whatever the relevance investment-backed expectations may have to determining takings liability, that relevance certainly cannot work a de facto alteration in the underlying title.[173]

D. The Supreme Court Speaks in Palazzolo*: Neither Background Principles nor Investment-Backed Expectations Justified the Notice Rule*

Mr. Palazzolo argued that to acquiesce to a scheme where purchasers and other acquirers of property lack the same rights to challenge a regulation as their predecessors would require the acceptance of the notion that government would acquire all newly regulated development rights upon passage of title. Eventually, as ever-tightening regulations are combined with the passage of

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[166] As noted in McQueen's petition, the relevance of this test where all economically visible use has been destroyed is questionable in light of this Court's holding in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016-17 (1992).

[167] *See Penn Central*, 438 U.S. at 128.

[168] Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1229-34 (1967).

[169] Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1103 (1981).

[170] *Id.* at 1106.

[171] 444 U.S. 164 (1979).

[172] *See* Michelman, *supra* note 169.

[173] R.S. Radford and J. David Breemer, *Great Expectations: Will* Palazzolo v. State *Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. ENVTL. L. J. 449 (2001).

time (and thus title because all title must pass as individuals die),[174] the government would in the end possess in some fashion virtually all use rights in property. In time, rather than the ability to use property being the bulwark of freedom,[175] it would be just another government benefit to be doled out at will. Put another way, it would be "annexed to the sovereignty the whole power of prescribing the Rules, whereby every man may know, what Goods he may enjoy, and what Actions he may do, without being molested by any of his fellow Subjects."[176] Alternatively, man must "be contented with so much liberty against other men as he would allow other men against himself."[177] The Court agreed with Mr. Palazzolo.

The Supreme Court's opinion in *Palazzolo* put to rest the notion that title to property is altered when it changes hands. The Court first of all rejected the idea that the right to develop property is a right "created by the state,"[178] and the state can redefine property rights of subsequent owners by prospective legislation because "they purchased or took title with notice of the limitation."[179] The Court continued by noting:

> Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.[180]

The State and many amici had suggested that a rule allowing purchasers of regulated property to challenge the application of those regulations would give the purchasers a "windfall," especially if the value of the property had been depressed by the regulations. The Court did not agree:

> The State's rule also would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself.[181]

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[174] Whether property owned by corporations of unlimited life creates an exception, or whether the notice rule applies each time shares trade hands, will not be explored here, except to note that the existence of such a question illustrates the illogic of the notice rule.

[175] *See, e.g.*, Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) (equating property with personal liberty).

[176] THOMAS HOBBES, THE LEVIATHAN ch. 18 (J.M. Dent & Sons 1949) (1651).

[177] *Id.* at ch. 14.

[178] Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001).

[179] *Id.* at 626.

[180] *Id.* at 627.

[181] *Id.*

Furthermore,

> [t]he young owner contrasted with the older owner, the owner with the resources to hold contrasted with the owner with the need to sell, would be in different positions. 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.[182]

And most significantly, the Court reiterated that we follow the Lockean tradition of property rights: "The State may not put so potent a Hobbesian stick into the Lockean bundle."[183]

Some ambiguity, however, remains as to the extent that investment-backed expectations may be driven by preexisting regulations. While the opinion said nothing in particular on this subject, Justices O'Connor and Scalia engaged in dueling concurrences. Justice O'Connor wrote, "[t]iming of the regulation's enactment relative to the acquisition of title is [not] immaterial to the *Penn Central* analysis."[184] She continued that "*[i]nvestment-backed expectations*, though important, are not talismanic . . . instead [they are] one factor that . . . answer[s] . . . whether the application of a particular regulation 'goes too far.'"[185] Furthermore, "if existing regulations do nothing to inform the analysis, then some property owners may reap windfalls."[186] This statement, however, must be at least informed by Justice O'Connor's questioning from the bench at oral argument where she suggested that there might not be anything intrinsically wrong with a purchaser of regulated property pursuing a judicial remedy if permission to develop is denied.[187]

Justice Scalia would have none of Justice O'Connor's equivocation, writing that

> [T]he fact that a restriction existed at the time the purchaser took title (other than a restriction forming part of the "background principles of the State's law of property and nuisance,") . . . should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking. The "investment-backed expectations" . . . do not include the assumed validity of a

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[182] *Id.* at 628.

[183] *Id.* at 627.

[184] *Id.* at 633 (O'Connor, J., concurring). While declining to revisit the issue that notice plays in investment-backed expectations ("we have no occasion to address that particular issue"), the Court in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, ___ S. Ct. ___, 2002 WL 654431, at *6, quoted this passage from Justice O'Connor's concurrence to inform the "'fairness and justice'" inquiry.

[185] *Id.* at 634.

[186] *Id.* at 635.

[187] *See supra* note 115 and accompanying text.

> restriction that in fact deprives the owner of so much of its value as to be unconstitutional.[188]

Four dissenters also agreed, in part, with Justice O'Connor's assertion that preexisting regulations must have some relevance. This relevance is emphasized to some degree by the Court's subsequent and lengthy quotation of Justice O'Connor's *Palazzolo* concurrence in *Tahoe-Sierra*. Nevertheless, neither the dissent in *Palazzolo*, O'Connor's concurrence in *Palazzolo*, nor the *Tahoe-Sierra* dicta, undercut in any way the *Palazzolo* majority's opinion that background principles no longer include the full panoply of statutes and regulations in existence at the time property is transferred.

As noted above, the embers of life in the notice rule that may survive within investment-backed expectations should not be overstated. If the notice rule, operating through investment-backed expectations, were given too much weight, it would have the same practical and theoretical effect as a notice rule based only upon a background principle or title theory. If title includes the right to use property, even when regulations existed at the time of acquisition, then surely notice-delimited investment-backed expectations cannot render the title a hollow and meaningless formalism.

*E. The Post-*Palazzolo *Federal Circuit Evades the Rejection of the Notice Rule*

Not content with its holding in *Good*,[189] the Federal Circuit has been unrepentant. First, in *Commonwealth Edison Co. v. United States*,[190] the Court emphasized Justice O'Connor's concurrence in finding the relevance of preexisting regulations: "[E]ven in that context the regulatory environment at the time of the acquisition of the property remains both relevant and important in judging reasonable expectations."[191] Furthermore in *Rith Energy, Inc. v. United States*,[192] the Federal Circuit referred to the passage from *Nollan* cited above[193] (and approved by the Court in *Palazzolo*),[194] and stated:

> We do not read the passage [from *Nollan*] quoted by Rith to suggest that, in the context of a regulatory taking, the fact that a regulatory regime was in place

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188 *Palazzolo*, 533 U.S. at 637 (Scalia, J., concurring).

189 Good v. United States, 189 F.3d 1355 (Fed. Cir. 1999).

190 271 F.3d 1327 (Fed. Cir. 2001).

191 *Id.* at 1350 n.23.

192 270 F.3d 1347 (Fed. Cir. 2001).

193 *See supra* note 132 and accompanying text.

194 Palazzolo v. Rhode Island, 533 U.S. 606, 629-30 (2001).

before the owner purchased the property is irrelevant to the owner's investment-backed expectations.[195]

The court believed, just as the government had argued in *Palazzolo*, that *Nollan* could be distinguished because it dealt with a "physical taking."[196] This is questionable. There is no logical reason why notice of a "physical invasion" should be less dispositive than notice of a regulatory taking. More importantly, the logic of the *Nollan* rule that notice of a regulation does not destroy a purchaser's right to property should be stronger for instances of regulatory takings. Landowners are much more likely to be aware of the existence and implications of a physical invasion than of a regulatory taking, especially when the existence of a regulatory taking can never be confirmed until the regulation is applied.[197] No doubt, the Federal Circuit's foray back into a limiting notice rule will deserve the Court's attention in a future case.

VI. CONCLUSION

Despite the Court's ambiguity over the continuing relevance of notice on investment-backed expectations, it is clear that preexisting regulations will not animate the background principles of property to the extent that landowners will be unable to challenge the application of preexisting regulations. Because of the emphasis of the majority opinion that owners should not suffer differential burdens depending on their economic status or age,[198] and because of the Court's emphasis on Lockean, as opposed to Hobbesian, principles of property law, the Court will reject the incorporation of the full panoply of regulatory restraints into the "background principles." Thus, while the state of regulations may have some influence in balancing a takings claim under a *Penn Central* analysis, those regulations will not serve to describe the background principles or title to the property itself. And most certainly, the Court is not likely to countenance cases such as *Good* or *McQueen* where post-acquisition regulations were seen to have become part of the title to property, or so limiting of investment-backed expectations that the use was precluded despite title being unaltered (as in *McQueen*).

Perhaps, in time, the Court will view background principles as a backdrop to title that can change, but only very slowly. Just as a determination of fair market value today can consider the effects on value of a current regulatory

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[195] *Rith*, 270 F.3d at 1351.

[196] *Id.* In fact, *Nollan* dealt less with a physical invasion but with a condition placed upon the development of real property.

[197] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127 (1985) (noting that the mere existence of a regulatory permitting requirement does not, in and of itself, constitute a taking).

[198] *See* discussion *supra* Part III.D.

scheme, courts will recognize that background principles reflect the evolving common law, as firmly rooted in centuries past as in the present, with all changes coming gradually like an accreting shoreline, and only after considerable reflection and debate. This would be in marked contrast to the regulation *du jour* standard of legislatures and administrative agencies. In other words, last week's regulation does not become next week's background principle. Or, as Professor Eagle put it, "[l]ike the sea anchor, background principles do not prevent gradual change, but do keep individual rights from being capsized by squalls of legislative passion."[199] The Court has solved a large part of the puzzle; it must tackle next the question of whether an emphasis on investment-backed expectations will permit the resurrection of the notice rule.

[199] Eagle, *supra* note 140, at 399 n.337.

The Regulatory Takings Notice Rule

Steven J. Eagle*

I. INTRODUCTION

A. The "Notice Rule" and Its Variants

In its most general form, the "notice rule" is the doctrine limiting the regulatory takings claims of property owners who acquire their interests after governmental restrictions are promulgated or deemed foreseeable.

One form of the doctrine, the "positive notice rule,"[1] bars such claims absolutely. Another form, the "weak notice rule," treats notice of a pre-acquisition governmental restriction as a factor militating against, although not precluding, judicial vindication of the owner's regulatory takings claim.

The notice rule, in both its positive and weak forms, is derived from two sources. The first is the regulation's effect upon the property right itself, the "background principles notice rule."[2] The second is the regulation's effect upon the subsequent purchaser's expectations, the "expectations notice rule."[3] The "background principles" and "expectations" branches together constitute the notice rule. They also may be asserted separately, in either their positive or weak forms, as bases for denial of an owner's regulatory takings claim.

During the years since the Supreme Court decided *Penn Central Transportation Co. v. City of New York*,[4] and *Lucas v. South Carolina Coastal Council*,[5] a number of courts have ruled on the notice rule, predominantly in its favor.[6]

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[1] Since recognition of the notice rule as a legal category is only emerging, there is no standard terminology to describe its elements. The categorical descriptions employed in this introductory section attempt to fill that gap. I use the label "positive" to implicate the jurisprudential tradition of positivism, often associated with John Austin, which asserts that law is nothing more than the positive command of the sovereign. *See generally*, JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Wilfrid E. Rumble ed. 1995) (1832). It also follows from more contemporary "positivization" of property law. *See infra* Part II.A.2.

[2] The name is derived from the Supreme Court's analysis in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). *See infra* Part II.B.2.

[3] The name is derived most directly from the Supreme Court's analysis in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). *See infra* Part III.B.2.

[4] 438 U.S. 104 (1978).

[5] 505 U.S. 1003 (1992).

[6] *See infra* Parts II.B.3 (background principles notice rule) and III.E (expectations notice rule); *see also* Robert Meltz, *What Role Does the Law Existing when a Property is Acquired Have in Analyzing a Later Taking Claim?: The "Notice Rule,"* SF64 ALI-ABA 381, 384 (2001)

In its recent decision in *Palazzolo v. Rhode Island*,[7] the United States Supreme Court rejected the positive notice rule, limited in dicta the scope of the background principles notice rule, and effectively endorsed the expectations notice rule in some unspecified form. This article considers the underpinnings of the notice rule, its adjudication by the courts, and the development of the notice rule since the *Palazzolo* decision.

B. The Nature of Property Rights

Palazzolo v. Rhode Island found that the background principles notice rule and the expectations notice rule "together amount to a single, sweeping, rule."[8] Both branches of this sweeping rule involve "property." It is the explicit focus of the background principles notice rule and an implicit focus of the expectations notice rule. Hence, a review of the nature of property is a useful predicate to an analysis of the notice rule itself.

The notion of "property" consisting of more than the possession of a thing has its roots deep in the common law.[9] In its most general sense, "property" is "a complex system of recognized rights and duties with reference to the control of valuable objects . . . linked with basic economic processes . . . validated by traditional beliefs, attitudes and values and sanctioned in custom and law."[10] Putting the same proposition in more practical terms: "That is property to which the following label can be attached. To the world: Keep off unless you have my permission, which I may grant or withhold. Signed: Private Citizen. Endorsed: The state."[11]

(listing notice rule cases).

[7] 533 U.S. 606 (2001).

[8] *Id.* at 626 (citing *Lucas*, 505 U.S. at 1015); *Penn Central*, 438 U.S. at 124.

[9] An early example of this evolution of "ownership" is the conversion of the status of a person who had been wrongfully displaced from ownership. The conceptual shift was from the dispossessed person being regarded as the owner of a mere personal claim to reinstatement as owner of realty, to the person instead being regarded as the continuing owner of reality who may bring an action to eject the wrongful occupant. The assize of novel disseisin (1166), which compelled the person ejected to bring an action at law for summary ouster of the occupant and restoration of the person who had been ejected to ownership. *See* THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 358-59 (5th ed. 1956). However, if the ejected person died prior to recovering under assize of novel disseisin, his heir could not pursue it. Since his right was regarded as a chose in action and not as real property, it died with him. *See* CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 100-01 (2d ed. 1988). The conceptual shift was introduced in 1176 of the assize of mort d'ancestor. This permitted the heir to pursue what now was regarded as a continuing claim to real property. *See* PLUCKNETT, *supra*, at 360.

[10] A. Irving Hallowell, *The Nature and Function of Property as a Social Institution*, 1 J. LEG. & POL. SOC. 115 (1943).

[11] Felix Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954).

The U.S. Supreme Court has declared that:

> The term "property" as used in the Taking Clause includes the entire "group of rights inhering in the citizen's [ownership]." It is not used in the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." . . . The constitutional provision is addressed to every sort of interest the citizen may possess.[12]

At the end of the eighteenth century, Lord Coke famously declared: "What is the land but the profits thereof?"[13] This dictum was quoted by the Supreme Court in *Lucas*[14] in connection with the right of use of land, including the right to develop. More generally, however, Coke's dictum stands for the proposition that "ownership" is not possession in and of itself, or something that is framed on a wall or filed in a courthouse. Rather, it is the right to engage in conduct, to exclude others from interfering, and to transfer those rights to others.

The Supreme Court has confirmed that "use" includes reasonable development.[15] Also, it has characterized the right to exclude others as one of the "most essential sticks in the bundle of rights that are commonly characterized as property."[16] Likewise, the Court has accorded the right of disposition constitutional protection, even for miniscule undivided fractional interests.[17] The "value" of property to its owner is subjective and is measured by the consideration that would induce the owner to part with it. However, where the transfer is nonconsensual, an objective standard of value is required. Hence, the Supreme Court has deemed "just compensation" for a taking "normally measured by fair market value."[18] This value, equal to "what a willing buyer would pay in cash to a willing seller,"[19] in turn is equal to the present value of the stream of net income that exercise of the owner's rights are expected to generate. Government actions that affect the owner's conduct are in fact limitations upon the owner's ability to exercise property rights.

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[12] Pruneyard Shopping Ctr. v. Robbins, 447 U.S. 74, 83 n.6 (1980) (quoting United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945) (alteration in original)).

[13] 1 EDWARD COKE, THE INSTITUTES OF LAWS OF ENGLAND ch. 1, § 1 (1st Am. ed. 1812) (1797).

[14] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1017 (1992).

[15] *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 833 n.2 (1987) (noting that "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit'").

[16] Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

[17] Babbitt v. Youpee, 519 U.S. 234 (1997).

[18] United States v. 50 Acres of Land, 469 U.S. 24, 25 (1984).

[19] United States v. Miller, 317 U.S. 369, 374 (1943).

The Court has never been particularly coherent on this point. In *Agins v. City of Tiburon*,[20] it held that a regulation "effects a taking" if it does not "substantially advance legitimate state interests."[21] Likewise, in *Penn Central*,[22] the Court referred to the need to balance the character of the governmental action against the owner's loss.[23] While the suggestion is that governmental acts are apt to be considered takings if they are less legitimate and intense, invocation of the Takings Clause is most appropriate when the governmental action is totally legitimate and urgently necessary.[24] Insofar as there has been a complete deprivation of economically viable use, *Lucas* rejects the notion of balancing property rights against regulations, even if they are of a pressing public character.

While any taking of property requires compensation, courts regularly seek refuge in the fiction that government might regulate the use of property without affecting the owner's underlying property rights.[25] The notion that government can impose stringent regulation on conduct without substantial adverse effect upon property is both a chimera and a principal cause for the universal view that regulatory takings law has been intractable.

It has become common that courts engaging in regulatory takings analysis conduct a bifurcated analysis, using *Lucas*, "background principles" language in considering whether there has been a complete deprivation of economically viable use followed by the invocation of *Penn Central* "expectations" language in considering whether there has been a partial taking.[26] Yet there is no intrinsic relationship between the tests and the circumstances in which they govern. Rather, the distinction derives from the dichotomy between the Supreme Court's physical takings[27] and regulatory takings jurisprudence, and

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[20] 447 U.S. 255 (1980).

[21] *Id.* at 260.

[22] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

[23] *Id.* at 124.

[24] *See* Eastern Enters. v. Apfel, 524 U.S. 498 (1998). "The [Takings] Clause operates as a conditional limitation, permitting the Government to do what it wants so long as it pays the charge. The Clause presupposes what the Government intends to do is otherwise constitutional . . . ." *Id.* at 545 (Kennedy, J., concurring in the judgment and dissenting in part).

[25] To name but one example, the Supreme Court's rent control jurisprudence always has maintained that government is regulating the conduct of a business (which may result in a reduction of the value of that business), but not requiring the transfer of an asset. *See, e.g.*, Block v. Hirsh, 256 U.S. 135, 157-58 (1921); Bowles v. Willingham, 321 U.S. 503, 517 (1944); Yee v. City of Escondido, 503 U.S. 519, 527 (1992). Yet the statutory tenure accorded tenants under rent control ordinances is nothing other than a transfer to the tenant of the landlord's reversion in possession reserved at the end of the limited term for which possession was consensually transferred. *See* Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741, 744-45 (1988).

[26] *See, e.g.*, Gazza v. State Dep't of Envtl. Conservation, 679 N.E.2d 1035 (N.Y. 1997).

[27] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982)

the Court's decision in *Lucas* to treat a deprivation of all economic value as "the equivalent of a physical appropriation."[28]

1. Sources of property rights

The development of Anglo-American property law has been a progression from property as a relationship based on feudal services,[29] through a first recognition of property as an alienable right in the Statute Quia Emptores (1290),[30] through the full flowering of the common law, under which the power of alienation became "an integral part of the fee simple."[31]

2. The notice rule is an unbounded subversion of property rights

The ultimate problem with the notice rule is that it combines aggressive forms of two inconsistent doctrinal principles. The common law system of property rights depended on clearly defined property rules with modest room for equitable departures where the facts of an individual case justified them.[32] The attempt to objectify occasional equitable deviations from well-defined rules through the development of "reasonable" investment-backed expectations has the effect of creating competing sets of legal norms.

The classic virtuous circuity in American law was stated by the principal author of the Constitution: "As a man is said to have a right to his property, he may be equally said to have a property in his rights."[33] The notice rule, on the other hand, may lead to a vicious circuity: "A person's property is limited by

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(concluding that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve").

[28] Lucas v. South Carolina Council, 505 U.S. 1003, 1017 (1992).

[29] *See, e.g.*, De Peyster v. Michael, 6 N.Y. 467 (1852) (surmising that many of the early enfeoffments were made so as to require the feoffee to render personal service).

[30] Statute of Quia Emptores, *reprinted in* 1 SOURCES OF ENGLISH CONSTITUTIONAL HISTORY 174 (Carl Stephenson & Frederick George Marcham eds., rev. ed. 1972).

[31] 1 THOMPSON ON REAL PROPERTY § 29.02 n.83 (David A. Thomas ed., 1994) (citing Coke on Littleton, 201 b. 2 WILLIAM BLACKSTONE, COMMENTARIES ch. 7).

[32] *See* Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000). The article argues that while parties to contracts have great latitude in defining their agreement, third parties desiring not to run afoul of the property rights of others must expend considerable time and resources in ascertaining their nature. "The existence of unusual property rights increases the cost of processing information about all property rights. Those creating or transferring idiosyncratic property rights cannot always be expected to take these increases in measurement costs fully into account, making them a true externality. Standardization of property rights reduces these measurement costs." *Id.* at 8.

[33] James Madison, *Property*, 1 NAT'L GAZETTE, Mar. 29, 1792, at 174, *reprinted in* 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 480 (1865).

an official's determination of his reasonable expectations, and his expectations are limited by the most recent statute, ordinance, or administrative ruling redefining his rights."

3. State conflict of interest

The State is a source of property rights, an adjudicator of property rights, and the entity responsible for paying just compensation. This inherent conflict of interest would be exacerbated vastly if state regulations are treated as defining the ownership rights of subsequent purchasers.[34] The simple, but compelling, reason is greater need for judicial review of State conduct when "the State's self-interest is at stake."[35] If the State might avoid the obligation to pay just compensation by the simple expedient of redefining property, the rule of law itself would be significantly weakened.[36]

II. THE "BACKGROUND PRINCIPLES" NOTICE RULE AND THE REDEFINITION OF PROPERTY

A. The Background of Background Principles

1. The ordinary content of "background principles" of American property law

The Supreme Court's reference to "background principles of the State's law of property and nuisance" in *Lucas v. South Carolina Coastal Council*[37] evinced its recognition of the need for stability in property law. It is clear that, as a "general proposition," property rights are not created or defined by the federal government "in the first instance."[38] As the Court noted in *Board of Regents v. Roth*,[39] "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or

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[34] *See generally* Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating from the "Rule of Law,"* 42 N.Y.L. SCH. L. REV. 345 (1998) [hereinafter *Takings Quartet*].

[35] *Id.* at 359 (quoting United States Trust Co. v. New Jersey, 431 U.S. 1, 26 (1977)).

[36] *See, e.g.*, Richard H. Fallon, *The "Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 8 (1997) (noting general agreement that, inter alia, the law should embody stability and should bind officials as well as citizens).

[37] 505 U.S. 1003, 1029 (1992).

[38] Pruneyard Shopping Ctr. v. Robbins, 447 U.S. 74, 84 (1980) (describing the states as "possessed of residual authority that enables [them] to define 'property' in the first instance").

[39] 408 U.S. 564 (1972).

understandings that stem from an independent source such as state law."[40] The U.S. Court of Federal Claims recently observed that American property law

> is based upon long and venerable case precedent, developed over the last two centuries. It is further clarified in the light of our law's Common Law antecedents. The Anglo-American case precedent is literally made up of tens of thousands of cases defining property rights over the better part of a millennium.[41]

The case law, in turn, finds its roots in both the long common law heritage that colonial settlers understood to be their rights as Englishmen[42] and the necessities of enticing settlers to the New World with the promise of fee-simple ownership of land.[43]

Although the fee simple is the greatest quantum of ownership that a private individual can possess in land, it never has been interpreted as meaning that the owner has unfettered dominion (notwithstanding Blackstone's flight of rhetoric to the contrary).[44] In the largely decentralized process of common law adjudication of the boundaries of property's dominion, the rules propounded by judges, each within a different factual context, must compete with rules devised by other judges. The result was a tendency towards the evolution of legal norms, with only the best rules surviving.[45] This point was implicit in Justice Holmes,[46] amplified by Justice Cardozo,[47] and long explicated by leading scholars.[48]

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[40] *Id.* at 577.

[41] Hage v. United States, 35 Fed. Cl. 147, 151 (1996).

[42] FOREST MCDONALD, NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION 13 (1985).

[43] JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 11 (1992).

[44] Blackstone had referred to "property" as the owner's "sole and despotic dominion." 2 WILLIAM BLACKSTONE, COMMENTARIES *2. "Properly understood, Blackstone's phraseology is not a declaration of the absolute character of private property, but a statement which reveals that unless property could be employed to the complete exclusion of others, it was necessarily qualified—either by the police power or correlative private rights, be they related to access, water, or freedom from manipulation and advantage in the marketplace." Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630, 1639 n.53 (1988).

[45] Arthur Linton Corbin, *The Law and the Judges*, 3 YALE REV. 234, 238 (1914). *See generally*, Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 635-45 (2001) (explicating theory of evolutionary path dependence in law and quoting Corbin, among others).

[46] *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1891) ("The life of the law has not been logic: it has been experience.").

[47] *See* Funk v. United States, 290 U.S. 371, 382-83 (1933) (declaring that "flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law").

[48] *See, e.g.*, Robert Charles Clark, *The Interdisciplinary Study of Legal Evolution*, 90 YALE L.J. 1238, 1250-54 (1981); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC

Under the law of nuisance, to use a highly relevant illustration, judges refined the concept that every owner of property has the obligation not to use his land in a way that unreasonably affects the rights of neighboring landowners to do likewise.[49] Furthermore, where the owner acts so as to unreasonably affect the health, safety, and welfare of a substantial part of the community, public officials are allowed to assert their aggregated rights through the doctrine of "private nuisance."[50] In this context, the flexibility of common law property and nuisance principles has been recognized in such cases as *Lucas v. South Carolina Council*[51] and *Palazzolo v. Rhode Island*.[52]

Similarly, the doctrine of adverse possession works to legitimize land holdings when chains of title have been disrupted.[53] Common law property has been hedged by such doctrines as the prohibition of the creation of novel interests,[54] clogging the equity of redemption,[55] and equitable protection for mortgagors.[56]

In addition, over centuries the common law has evolved to limit government's powers to those benefiting the welfare of the general public while protecting individual property rights. The public trust doctrine, preserving the shore for commerce and fishing,[57] the limited power of the sovereign to quarter troops on private land in time of war,[58] and the right of eminent domain itself, carrying with it the requirement of just compensation,[59] are examples.

In discussing the meaning of background principles, it is important not to lose sight of the fact that numerous Supreme Court decisions have recognized

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STRUCTURE OF TORT LAW (1987).

[49] *See* RESTATEMENT (SECOND) OF TORTS §§ 821F, 822 (1979) and cases cited therein.

[50] *See* RESTATEMENT (SECOND) OF TORTS § 821B (1979) and cases cited therein.

[51] 505 U.S. 1003, 1029 (1992) (observing by way of indicating the flexibility of the common law that the owner of a nuclear generating plant discovered to be located on an earthquake fault could be ordered to remove all its improvements without government incurring takings liability).

[52] 533 U.S. 606, 630 (2001) (noting "shared understandings of permissible limitations derived from a State's legal tradition" enunciated in *Lucas*).

[53] *See* Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667, 673, 676 (1986).

[54] *See* Merrill & Smith, *supra* note 32, at 29-31.

[55] *See* Marshall E. Tracht, *Renegotiation and Secured Credit: Explaining the Equity of Redemption*, 52 VAND. L. REV. 599, 600-01 (1999) (noting that a mortgagor may not cut off his equity of redemption) (citing 4 JOHN D. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1193, at 568-69 (5th ed. 1941)).

[56] *See, e.g.*, PLUCKNETT, *supra* note 9, at 608 (discussing development of equitable redemption).

[57] *See, e.g.*, Douglas L. Grant, *Underpinnings of the Public Trust Doctrine: Lessons from* Illinois Central Railroad, 33 ARIZ. ST. L.J. 849 (2001).

[58] U.S. CONST. amend. III.

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

these and other fundamental background principles of American property law.[60]

While the Supreme Court has repudiated the expansive view of economic substantive due process exemplified by its decision in *Lochner v. New York*,[61] even scholars who are sympathetic towards increased regulation understand that property rights have a fundamental role in the protection of liberty. Professor Cass Sunstein thus recognized that "[i]t would be difficult . . . to abandon those [*Lochner*-like] baselines altogether without reading the contracts and takings clauses out of the Constitution . . . ."[62]

2. Property rights in the post-New Deal era

Since the New Deal, the Supreme Court's jurisprudence generally has posited a hierarchy of rights. In footnote four of *United States v. Carolene Products*,[63] the Court posited that there may be "narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . . [or reflects] prejudice against discrete and insular minorities . . . ."[64] The effect was an assertion that some guarantees within the Bill of Rights are more fundamental than others.[65]

3. The new positivism of Reich and Michelman

If common law property stood for stability and change by slow accretion, the temper of the times of the late 1960s and early 1970s demanded change in many economic and social norms at a quicker pace. One response was the revolution in landlord-tenant law, where the lease, formerly envisioned primarily as the conveyance of an interest in land, became transmuted into a contract for housing services.[66]

More generally, the demand for institutionalization of '60s era benefit programs was popularized by the most cited article ever published in the *Yale*

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[60] *See* Kmiec, *supra* note 44, at 1642.

[61] 198 U.S. 45 (1905).

[62] Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 891 (1987).

[63] 304 U.S. 144 (1938).

[64] *Id.* at 152-53 n.4.

[65] *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 128-29 (1991) (stating that the footnote was an effort to reorient the meaning of the reconstruction amendment in a post-New Deal world); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 75-77 (1980) (asserting the footnote foreshadowed the Warren Court's assumption of a more "activist" or interventionist role).

[66] *See generally* Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517 (1984) (providing a comprehensive summary).

Law Journal,[67] Charles Reich's *The New Property*.[68] Reich later summarized his thesis:

> Under the New Deal increased constitutional powers were assumed by the government in return for societal responsibility to the individuals who gave up their economic independence in recognition of the greater efficiency of large organizations. The New Property argued that, if the new social contract was to be respected, welfare state protections and benefits for the middle class and the poor must be treated as entitlements—a substitute for old forms of property.[69]

While one might say that the new entitlements would be no less protected by law than traditional property rights, one could say with equal validity that traditional property rights would be no more protected than governmental benefit programs. An admission that the inevitable thrust of the "new property" would result in politicization of traditional property rights was contained in Professor Frank Michelman's review of the Supreme Court's 1987 takings cases:[70]

> The bounding of entitlements, however, could not forever remain conceptually and morally obvious, apolitical work. Changed and intensified modes of social interaction dislodged latent complexity and so gave rise to the disintegrative analytical vocabulary, and practice in its use, that enables us today to talk so easily and compellingly about conceptual severance. Such changes, along with the emergence of the economically active and regulatory state with its licenses, franchises, and the like, pushed towards the denaturalization and positivization (implying the politicization) of property. Progressives and legal realists came on the scene to demonstrate how in modern conditions the prime moral and political values associated with property—independence, security, privacy—are as much defeated as they are served by adherence to a highly formal system of highly abstract property rights. There is synergy among these effects. For example, the better we learn the analytical lesson of conceptual severance—that every particle of legally sanctioned advantage is property—the more we are forced to recognize in every act of government a redefinition and adjustment of a property boundary. *The war between popular self-government and strongly constitutionalized property now comes to seem not containable but total.*[71]

In hindsight, the courts might promptly have stated that the asserted "new property" does not reduce the protection accorded traditional property. That point was made succinctly in a recent opinion of the U.S. Court of Appeals for

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[67] *See* Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 CHI.-KENT L. REV. 751, 766 (1996).

[68] Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

[69] Charles A. Reich, *Property Law and the New Economic Order: A Betrayal of Middle Americans and the Poor*, 71 CHI.-KENT L. REV. 817, 817-18 (1996).

[70] Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1627 (1988).

[71] *Id.* at 1627-28 (emphasis added) (citations omitted).

the Ninth Circuit, *Schneider v. California Department of Correction*.[72] That opinion implicitly rejected the background principles notice rule.[73]

The result of the intellectual ferment associated with the ideas of Michelman and Reich affected not only whether property rights are to be protected (or not) by government, but also how property is to be defined one way (or another) by government. Ironically, the catalyst for the assertion of aggressive positivism in redefining property rights came not from Reich and Michelman or their followers, but rather from what in other circumstances might have been an innocuous qualifier in an opinion by Justice Antonin Scalia.

B. Development of the Background Principles Notice Rule

1. Nollan v. California Coastal Commission *and the continuity of rights*

The gravamen of *Nollan v. California Coastal Commission*,[74] decided by the Supreme Court in 1987, is that while owners may surrender their rights through voluntary exchange, the substance of those rights remains intact. Writing for the Court, Justice Scalia rejected the dissent's assertion that the expectations theory of *Ruckelshaus v. Monsanto Co.*[75] precluded subsequent purchasers from succeeding to their sellers' development rights:

> Justice Brennan also suggests that the Commission's public announcement of its intention to condition the rebuilding of houses on the transfer of easements of access caused the Nollans to have "no reasonable claim to any expectation of being able to exclude members of the public" from walking across their beach. He cites our opinion in *Ruckelshaus v. Monsanto Co.* as support for the peculiar proposition that a unilateral claim of entitlement by the government can alter

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[72] 151 F.3d 1194 (9th Cir. 1998). The court stated that:

> The *Roth* Court's recognition of the unremarkable proposition that state law may affirmatively *create* constitutionally protected "new property" interests in no way implies that a State may by statute or regulation *roll back* or *eliminate* traditional "old property" rights.... [T]here is, we think, a "core" notion of constitutionally protected property into which state regulation simply may not intrude without prompting Takings Clause scrutiny. The States' power vis-à-vis property thus operates as a one-way ratchet of sorts: States may, under certain circumstances, confer "new property" status on interests located outside the core of constitutionally protected property, but they *may not* encroach upon traditional "old property" interests found within the core.

Id. at 1200-01 (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 439 (1982)) (citation omitted).

[73] *Id.* at 1201 ("Were the rule otherwise, States could unilaterally dictate the content of—indeed, altogether opt out of—both the Takings Clause and the Due Process Clause simply by statutorily recharacterizing traditional property-law concepts.").

[74] 483 U.S. 825 (1987); *see also infra* Part III.D for discussion of expectations notice rule aspects of *Nollan*.

[75] 467 U.S. 986 (1984).

> property rights. In *Monsanto*, however, we found merely that the Takings Clause was not violated by giving effect to the Government's announcement that application for "*the right to [the] valuable Government benefit*," of obtaining registration of an insecticide would confer upon the Government a license to use and disclose the trade secrets contained in the application. But the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a "governmental benefit." And thus the announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as establishing the voluntary "exchange" that we found to have occurred in *Monsanto*. Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.[76]

To the background principle that buyers succeed to sellers' rights, referred to in *Nollan*, must be added the background principle that the mere passage of time does not immunize from challenge an otherwise invalid regulation,[77] and that successors of the owners at the time invalid regulations are imposed may mount those challenges.[78] Indeed, even cases aggressively asserting the positive notice rule have allowed that postregulatory purchasers could mount facial challenges to the legitimacy of ordinances.[79]

2. *Background principles in* Lucas v. South Carolina Coastal Council

In *Lucas v. South Carolina Coastal Council*,[80] Justice Scalia observed that there inheres in every private land title "restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[81] In light of the elements of the historic framework of property law discussed earlier,[82] the statement would seem unremarkable.

Some sixty years before *Lucas*, in *Pennsylvania Coal Co. v. Mahon*,[83] the Supreme Court held that a regulation may constitute a compensable taking if,

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[76] *Nollan*, 483 U.S. at 833 n.2 (citations omitted) (emphasis in quotations from *Monsanto* added by Court in *Nollan*).

[77] *See, e.g.*, Barney & Carey Co. v. Town of Milton, 87 N.E.2d 9, 14 (Mass. 1949).

[78] *See, e.g.*, Forbes v. Hubbard, 180 N.E. 767, 771 (Ill. 1932); Filister v. City of Minneapolis, 133 N.W.2d 500, 504 (Minn. 1964).

[79] *See*, Gazza v. State Dep't of Envtl. Conservation, 679 N.E.2d 1035, 1040 (N.Y. 1997).

[80] 505 U.S. 1003 (1992).

[81] *Id.* at 1029.

[82] *See supra* Parts I.B., II.A.

[83] 260 U.S. 393 (1922).

in Justice Holmes' Delphic words, it goes "too far."[84] A half century after *Pennsylvania Coal*, the Court grappled with the need to supply some content to its takings jurisprudence in *Penn Central Transportation Co. v. City of New York*.[85] There, the Court described its takings cases as engagements in "essentially ad hoc, factual inquiries."[86] One of the factors that was of "particular significance" was the "character" of the governmental action. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[87] Only four years later, in *Loretto v. Teleprompter Manhattan CATV Corp.*,[88] the Court held that where the character of the governmental act is a "permanent physical occupation," the character "not only is an important factor in resolving whether the action works a taking but also is determinative."[89] In other words, "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."[90] For the time being, at least, the "character of the governmental action" test was stripped of easy to discern content.[91]

In *Lucas*, Justice Scalia dealt with that disparity by fashioning a rule around the suggestion "that total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation."[92]

> Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved . . .
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> . . . . We believe similar treatment must be accorded confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), 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 land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent

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[84] *Id.* at 415.

[85] 438 U.S. 104 (1978).

[86] *Id.* at 124.

[87] *Id.* (citing United States v. Causby, 328 U.S. 256 (1946)).

[88] 458 U.S. 419 (1982).

[89] *Id.* at 426.

[90] *Id.*

[91] The "character of the governmental action" test may have a new referent that is on its way to becoming a new categorical takings test. *See* Eastern Enters. v. Apfel, 524 U.S. 498 (1998); American Pelagic Fishing Co. v. United States, 49 Fed. Cl. 36, 50 (2001); *infra* Part V.C.2.

[92] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1017 (1992) (citing San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting)).

> landowners (or other uniquely affected persons) 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.[93]

In particular, the Court rejected the regulator's assertion "that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture."[94]

It is clear that Scalia did not regard the residential development of Lucas's two beachfront lots, which had been precluded by the South Carolina Beachfront Management Act, as violative of basic principles of American property law.[95] In lawyerly fashion, however, he enunciated the "background principles" limitation to preclude the possibility of a successful claim of a per se taking based on the preclusion of a land use that, while being the only economically viable use of a parcel, nevertheless was a use clearly regarded as injurious to the community under common law nuisance.

3. *Positive notice rule cases between* Lucas *and* Palazzolo

Those post-*Lucas* cases rejecting the positive notice rule reflected the continuity of rights principle enunciated in *Nollan*.[96] As articulated by the Supreme Court of New Jersey, "the right of a property owner . . . passes to the next owner . . . ."[97] As noted by a Florida appellate court, "land is purchased with future development legitimately anticipated and with no existing bar thereto."[98] The buyer's rights are subject to legitimate regulation, but cannot be extinguished by dint of a preexisting statute. Similarly, a Michigan appellate court had declared in *K & K Construction, Inc. v. Department of*

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[93] *Id.* at 1027, 1028-29 (citation omitted).

[94] *Id.* at 1028.

[95] *Id.* at 1018-19 (noting that the many state laws providing for use of eminent domain to obtain servitudes against development on scenic lands "suggest the practical equivalence in this setting of negative regulation and appropriation"). On remand, the state supreme court agreed that no "such common law principle" of state law precluded Lucas from obtaining just compensation. Lucas v. South Carolina Coastal Council, 424 S.E.2d 484, 486 (S.C. 1992).

[96] Nollan v. California Coastal Comm'n, 483 U.S. 825, 833 n.2 (1987); *see also supra* Part II.B.1.

[97] Karam v. State, 705 A.2d 1221, 1229 (N.J. Super. 1998), *aff'd and adopted*, 723 A.2d 943 (N.J. 1999). "We recognize that rights in property pass from one owner to the next. Thus, the right of a property owner to fair compensation when his property is zoned into inutility by changes in the zoning law passes to the next owner despite the latter's knowledge of the impediment to development." *Id.* at 1229.

[98] Vatalaro v. Dep't of Envtl. Regulation, 601 So.2d 1223, 1229 (Fla. Dist. Ct. App. 1992).

Natural Resources,[99] that it did "not agree that the timing of the regulation and ownership would act to preclude just compensation where it would otherwise be due."[100]

4. Background principles notice rule cases between Lucas *and* Palazzolo

Between the U.S. Supreme Court's decisions in *Lucas v. South Carolina Coastal Council*[101] and *Palazzolo v. Rhode Island*,[102] a number of federal and state courts adjudicated the positive background principles notice rule. Most have upheld it without any analysis beyond an invocation of *Lucas*. The line of cases of the South Carolina Supreme Court is archetypical. On remand in *Lucas*,[103] the court had readily found a lack of background principles of state law that might preclude development. The only significant difference in its next case, *Grant v. South Carolina Coastal Council*,[104] was that the rule precluding development predated the landowner's purchase. The court found for the state, declaring that *Lucas* "expressly states no compensable taking occurs when the complained-of restriction on use was part of the owner's original title . . . ."[105] Subsequent holdings in *Wooten v. South Carolina Coastal Council*[106] and *McQueen v. South Carolina Coastal Council*[107] were similar. *McQueen* involved denial of a permit to bulkhead and backfill two lots that were purchased many years prior to statutory prohibitions of these activities. According to the South Carolina appellate court, the case bears "a remarkable similitude to *Lucas*."[108] The state supreme court disagreed, holding that the landowner's "prolonged neglect of the property and failure to seek developmental permits in the face of ever more stringent regulations demonstrate a distinct lack of investment-backed expectations."[109] The vacation of the judgment in *McQueen* by the U.S. Supreme Court and its

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[99] 551 N.W.2d 413 (Mich. App. 1996), *rev'd on other grounds*, 575 N.W.2d 531 (Mich. 1998), *overruled by* Adams Outdoor Adver. Co. v. City of East Lansing, 614 N.W.2d 634 (Mich. 2000).

[100] *Id.* at 417.

[101] 505 U.S. 1003 (1992).

[102] 533 U.S. 606 (2001).

[103] Lucas v. South Carolina Coastal Council, 424 S.E.2d 484 (S.C. 1992).

[104] 461 S.E.2d 388 (S.C. 1995).

[105] *Id.* at 391.

[106] 510 S.E.2d 716 (S.C. 1999).

[107] 530 S.E.2d 628 (S.C. 2000).

[108] McQueen v. South Carolina Coastal Council, 496 S.E.2d 643, 648 (S.C. App. 1998).

[109] McQueen v. South Carolina Coastal Council, 530 S.E.2d 628, 634-35 (S.C. 2000).

remand in light of *Palazzolo*[110] will accord the state court, and possibly the U.S. Supreme Court, with an opportunity to revisit the issue.[111]

Among the federal courts upholding the background principles notice rule have been the U.S. Court of Appeals for the Eighth[112] and Ninth[113] Circuits. State supreme courts upholding the background principles notice rule during this period were those of Iowa,[114] Michigan,[115] New York,[116] Rhode Island,[117] and Virginia.[118]

Some of these cases adopted the background principles notice rule in analyzing the facts as constituting a complete deprivation of economic enjoyment under *Lucas* in tandem with an expectations notice rule approach when alternatively treating the facts as giving rise to a partial takings under *Penn Central*.[119]

Prior to *Lucas*,[120] a number of courts held that a postregulation purchaser had the right to challenge the validity of the land use regulation.[121] Likewise,

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[110] *McQueen v. South Carolina Coastal Council*, 530 S.E.2d 628 (S.C. 2000), *cert. granted, judgment vacated, remanded sub nom.* McQueen v. South Carolina Dep't of Health & Envtl. Control, 121 S. Ct. 2581 (2001).

[111] *See infra* Part V.C.5.

[112] Outdoor Graphics, Inc. v. City of Burlington, 103 F.3d 690 (8th Cir. 1996).

[113] Hoeck v. City of Portland, 57 F.3d 781 (9th Cir. 1995).

[114] Hunziker v. State, 519 N.W.2d 367 (Iowa 1994) (denying development of subdivision based on finding of historically significant ancient human remains as authorized by pre-acquisition statute).

[115] Adams Outdoor Adver. Co. v. City of East Lansing, 614 N.W.2d 634, 638-639 (Mich. 2000), *cert. denied*, 121 S. Ct. 1356 (2001) (denying compensation because lessee did not possess property right to rooftop billboard after regulations to contrary). Furthermore, preexisting regulation meant that the owner could not have had a reasonable expectation that it could have maintained rooftop signs after ordinances prohibiting them. *Id.* at 639-40.

[116] Gazza v. State Dep't of Envtl. Conservation, 679 N.E.2d 1035 (N.Y. 1997) (applying expectations notice rule); Kim v. City of New York, 681 N.E.2d 312 (N.Y. 1997) (applying expectations notice rule).

[117] Palazzolo v. State *ex rel.* Tavares, 746 A.2d 707 (R.I. 2000), *aff'd in part, rev'd in part*, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (also applying expectations notice rule).

[118] City of Virginia Beach v. Bell, 498 S.E.2d 414 (Va. 1998), *cert. denied*, 525 U.S. 826 (1998) (holding denial of development permit under pre-acquisition ordinance not a compensable taking). "In contrast to *Lucas*, however, the Ordinance at issue here predated Bell's and the Trustee's acquisition of the property. Therefore, the 'bundle of rights' which either Bell or the Trustee acquired upon obtaining title to the property did not include the right to develop the lots without restrictions." *Id.* at 417.

[119] *See, e.g.*, Outdoor Graphics, Inc. v. City of Burlington, 103 F.3d 690 (8th Cir. 1996); Kim v. City of New York, 681 N.E.2d 312 (N.Y. 1997); Adams Outdoor Adver. Co. v. City of East Lansing, 614 N.W.2d 634 (Mich. 2000); Palazzolo v. State *ex rel.* Tavares, 746 A.2d 707 (R.I. 2000), *aff'd in part, rev'd in part*, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (applying expectations notice rule).

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

[121] *See, e.g.*, Filister v. City of Minneapolis, 133 N.W.2d 500, 504 (Minn. 1964) (stating

some post-*Lucas* decisions have permitted the postacquisition purchaser to obtain takings damages. Most notably, even though the landowner in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* was aware of the development regulation when it purchased its land, its takings claim was vindicated in both the Ninth Circuit[122] and the Supreme Court.[123] Other cases adopting this approach include the Ninth Circuit decision in *Carson Harbor Village, Ltd. v. City of Carson*,[124] and *Karam v. State, Department of Environmental Protection*.[125] Taking a somewhat different view, a Florida appellate court in *Vatalaro v. Department of Environmental Regulation*,[126] upheld the right of a postregulation purchaser to pursue a takings claim, since the taking did not occur until the sought-after permits were denied. Similarly, some courts have held that a purchaser may seek a hardship variance from preacquisition zoning.[127]

However, a number of post-*Lucas* cases, while affirming that a subsequent purchaser has the right to challenge the validity of a preacquisition regulation, have either suggested or declared that the owner could not seek takings damages. In *Lopes v. City of Peabody*,[128] for instance, the Supreme Judicial Court of Massachusetts declared:

> A rule that a purchaser of real estate takes subject to all existing zoning provisions without any right to challenge any of them would threaten the free transferability of real estate, ignore the possible effect of changed circumstances, and tend to press owners to bring actions challenging any zoning provision of doubtful validity before selling their property. Moreover, such a rule of law

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"[w]e know of no rule of law that creates an estoppel against attack by such purchaser on the validity of a zoning ordinance"); Cottonwood Farms v. Bd. of County Comm'rs, 763 P.2d 551, 555 (Colo. 1988) (stating that a "majority of courts have held that the fact of prior purchase with knowledge of applicable zoning regulations does not preclude a property owner from challenging the validity of the regulations").

[122] Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996), *aff'd sub nom.* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999).

[123] 526 U.S. 687 (1999).

[124] 37 F.3d 468 (9th Cir. 1994) (upholding "as applied" takings claim of post-regulation purchaser).

[125] 705 A.2d 1221 (N.J. Super. 1998), *aff'd by adopting appellate opinion*, 723 A.2d 943 (N.J. 1999) (holding purchaser steps into shoes of original owner).

[126] 601 So.2d 1223, 1229 (Fla. Dist. Ct. App. 1992).

[127] *See, e.g.*, Somol v. Bd. of Adjustment, 649 A.2d 422, 428 (N.J. Super. Ct. 1994) (holding buyer not foreclosed from claiming variance based on knowledge of nonconformity at time of purchase; rather, buyer steps into seller's shoes with respect to whether hardship self created); Hoberg v. City of Bellevue, 884 P.2d 1339, 1342 (Wash. App. 1994) (holding the same).

[128] 629 N.E.2d 1312 (Mass. 1994).

> would in time lead to a crazy-quilt pattern of the enforceability of a zoning law intended to have uniform applicability.[129]

However, *Lopes* did not present a claim for takings damages,[130] and whether a postacquisition purchaser might obtain damages was placed in doubt in the court's subsequent decision in *Leonard v. Town of Brimfield*.[131] The court ruled that the owner had never acquired the contested rights under the background principles notice rule, nor would she prevail under the multi-factor *Penn Central* test.[132] The New York Court of Appeals reached a similar result in *Gazza v. State Department of Environmental Conservation*,[133] declaring that:

> While any party adversely affected by government action may attack such action as unconstitutional and illegitimate, petitioner does not claim that wetlands regulation is beyond the State's power. Rather, petitioner simply claims that the property interest he had in building a dwelling on his land was taken by the State through the denial of the setback variance.[134]

C. The Notice Rule Exacerbates Problems with Background Principles

1. "Background principles" as "backdrop principles"

Those courts that embraced the positive background principles rule subsequent to *Lucas v. South Carolina Coastal Council*[135] implicitly maintained that their decisions were mandated by the reasoning in *Lucas*. In essence, they mistakenly ignored that the "background principles" doctrine embodies an essential limitation of the state's right to redefine property through legislation. Instead, they saw "background principles" as backdrop, as precedent from the past that is mere prelude to legislative action in the present. They asserted that *any* regulation promulgated prior to a landowner's acquisition of title inheres in that title and forms a part of the background principles limiting that title.

Emblematic of this approach was a quartet of interrelated takings cases decided by the New York Court of Appeals in 1997.[136] In one, *Kim v. City of*

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[129] *Id.* at 1315.

[130] *Id.* at 1314.

[131] 666 N.E.2d 1300 (Mass. 1996).

[132] *Id.* at 1303-04.

[133] 679 N.E.2d 1035 (N.Y. 1997).

[134] *Id.* at 1040.

[135] 505 U.S. 1003 (1992).

[136] Anello v. Zoning Bd. of Appeals, 678 N.E.2d 870 (N.Y. 1997); Basile v. Town of Southampton, 678 N.E.2d 489 (N.Y. 1997); Gazza v. Dep't of Envtl. Conservation, 679 N.E.2d

New York,[137] the court rejected in indignant terms the elevation of traditional meaning over contemporary legislation:

> Given the theoretical basis of the logically antecedent inquiry—namely, "the State's power over . . . the 'bundle of rights' that [property owners] acquire when they obtain title"—we can discern no sound reason to isolate the inquiry to some arbitrary earlier time in the evolution of the common law. It would be an illogical and incomplete inquiry if the courts were to look exclusively to common-law principles to identify the preexisting rules of State property law, while ignoring statutory law in force when the owner acquired title. To accept this proposition would elevate common law over statutory law, and would represent a departure from the established understanding that statutory law may trump an inconsistent principle of the common law.[138]

While it is a truism to say that new law may trump old law, neither the legislature nor the judiciary should make or uphold new law without regard for the past. Even in the case of ordinary statutes and public policy, sometimes apparently outmoded rules quietly have assumed unarticulated, but important, functions.[139] In the case of rules of constitutional import, of course, the stakes are greater. Here repudiation of the old rule may deprive individuals of basic rights.

Before exploring this dimension of the background principles notice rule, however, it is useful to examine the rule's implicit premise that, as a practical matter, the rule does not deprive the postregulatory purchaser of value.

2. *Confusion over who bears the cost of regulation*

Is there a fundamental difference in its effect upon a parcel between a regulation that precludes an existing use and one that precludes only a use in which the parcel has not been engaged? As Professor Michelman stated, "a ban on potential uses not yet established may destroy market value as effectively as does a ban on activity already in progress. The ban does not shed its retrospective quality simply because it affects only prospective

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1035 (N.Y. 1997); Kim v. City of New York, 681 N.E.2d 312 (N.Y. 1997); *see also* Eagle, *Takings Quartet*, *supra* note 34.

[137] 681 N.E.2d 312 (N.Y. 1997).

[138] *Id.* at 315 (alteration in original) (citations omitted).

[139] *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 5 (1881).

> The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries, the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career.

Id.

uses."[140] But it is largely on this assumption that some courts that have invoked the notice rule have asserted that the owner at the time of regulation bears all of the loss and that the postregulatory purchaser bears none of the loss. For instance, the New York Court of Appeals asserted:

> The rule that preexisting regulations inhere in a property owner's title will affect the *value* of property, but this should furnish ample incentive to the prior owner—the party whose title has been redefined by the promulgation of a new regulation—to assert whatever compensatory takings claim it might have. If a prior owner, whether immediate or not, fails to assert a takings claim, it is this prior owner who might suffer the potential loss because the purchase price of the property will very likely reflect any restrictions inhering in title. Of course, the parties can condition sale on receipt of the necessary use allowances or prosecution of a takings claim. Any compensation received by a subsequent owner for enforcement of the very restriction that served to abate the purchase price would amount to a windfall, and a rule tolerating that situation would reward land speculation to the detriment of the public fisc. Additionally, the rule advanced by the dissent would have the effect of unsettling property law and other land-use restrictions throughout the State. The bright-line rule articulated in *Kim* and *Gazza*, which allows for a subsequent purchaser to challenge the validity of previously enacted laws (as opposed to pursuing a compensatory takings claim), will enhance certainty and, to that extent, facilitate transferability of title.[141]

I have elsewhere equated the court's faith that its "bright-line" test will facilitate transactions to California Supreme Court Justice Roger Traynor's faith in the middle of the last century that, in tort cases, insurance could be substituted effortlessly for fault.[142] I maintained that this assumption was untenable for a number of reasons, including operation of the regulatory takings ripeness rules, the fact that often the seller would be in a poor position to assert the claim and the buyer a good one, and that in many cases it would be difficult to discern when the claim had matured, even apart from the

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[140] Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1233 (1967) [hereinafter *Property, Utility, and Fairness*].

[141] Anello v. Zoning Bd. of Appeals, 678 N.E.2d 870, 871 (N.Y. 1997) (citing Kim v. City of New York, 681 N.E.2d 312 (N.Y. 1997)); Gazza v. Dep't of Envtl. Conservation, 679 N.E.2d 1035 (N.Y. 1997)) (emphasis in original).

[142] *See* Eagle, *Takings Quartet*, *supra* note 34, at 368 (quoting Escola v. Coca-Cola Bottling Co., 150 P.2d 436 (Cal. 1944) (Traynor, J., concurring). "The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business." *Escola*, 150 P.2d at 441.

ripeness rules. Also, no systematic "windfalls" would be abetted, since windfalls would be fleeting at most.[143]

The U.S. Supreme Court rejected the positive notice rule in *Palazzolo* partly because of problems with ripeness and unfairness to sellers, and those issues will be discussed in that context.[144] Other problems associated with the background principles notice rule remain as important issues after *Palazzolo*.[145]

3. The background principles notice rule is a deprivation of the prior owner's common law right of alienation

One of the most important policies embedded in the development of common law property has been the increasing preference for alienability.[146] Thus, ownership of a fee interest entails not only the rights to make productive use of land and to exclude others from entry, but also includes the right to transfer these interests to another. Even as *Kim v. City of New York*[147] was being decided, for instance, the state law for over a century had been that "[a] grant or devise of real property passes all the estate or interest of the grantor or testator unless the intent to pass a less estate or interest appears by the express terms of such grant or devise or by necessary implication therefrom . . . ."[148] The Supreme Court in *Palazzolo* summarized the comprehensive survey by Professor Robert Ellickson on this point as concluding that the "right to transfer interest in land is a defining characteristic of the fee simple estate."[149]

Ironically, as previously noted, Professor Michelman conceived of the notion of investment-backed expectations in part because he understood the falsity of the notion that landowners are not harmed by a statute imposed during their tenure but applicable only to subsequent owners.[150] This does not deny that government may enact positive law or apply the background principles notice rule so as to truncate the right of purchasers to pursue their

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[143] *See* Eagle, *Takings Quartet*, *supra* note 34, at 367-78.

[144] Palazzolo v. Rhode Island, 533 U.S. 606, 627-28 (2001); *see also infra* Part IV.E.

[145] *See infra* Part V.C.

[146] The Restatement (Second) of Property described the courts of thirteenth, fourteenth, and fifteenth century England as "pursuing, consciously or unconsciously, a policy in favor of the free alienability of land." RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS, Introductory Note, Part II (1983); *see also* PATRICK J. ROHAN, POWELL ON REAL PROPERTY ¶ 839 (rev. ed. 1994).

[147] 681 N.E.2d 312 (N.Y. 1997); *see also supra* note 137 and accompanying text.

[148] N.Y. REAL PROP. LAW § 245 (McKinney 1997).

[149] Palazzolo v. Rhode Island, 533 U.S. 606, 628 (2001) (citing Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1368-69 (1993)).

[150] Michelman, *supra* note 140, at 1233; *see also supra* Part II.C.2.

sellers' takings claims. However, exercise of that right itself results in an additional taking.[151]

4. Analogous legal doctrines protecting continuity between sellers and buyers

The continuity of rights principle enunciated in *Nollan*[152] has been regarded as fundamental in property law. It is reflected in many analogous rules that help ensure that all rights owned by sellers are transferred to their purchasers. Indeed, it is long standing and elemental black letter law that, unless there is an explicit reservation by the seller, all of his rights so devolve.[153] Ensuring that all rights possessed by the seller inhered in the buyer was one way to make real estate transactions more attractive and thus encourage the migration of particular parcels from those who valued them less to those who valued them more.

In many instances, courts will refrain from applying a rule where the effect is unjust deprivation of rights that should inhere in the buyer. A good example is the real estate "shelter rule," whereby a purchaser who himself is not a bona fide purchaser takes priority over an earlier bona fide purchaser who first records.[154] Under the rule, a buyer "who takes an interest in property from a bona fide purchaser, may be sheltered in the latter's protective status."[155] The point of the shelter rule is not that the purchaser with notice deserves to win over an earlier bona fide purchaser, but rather "to give the last bona fide

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[151] *See* Dames & Moore v. Regan, 453 U.S. 654 (1981) (upholding federal seizure of contract claims against the government of Iran and holding takings claim unripe pending statutory claim under the Tucker Act).

[152] Nollan v. California Coastal Comm'n, 483 U.S. 825, 833 n.2 (1987); *see also supra* Part II.B.1.

[153] *See, e.g.*, Blackman v. Striker, 37 N.E. 484 (N.Y. 1894). "The deed must be held to convey all the interest in the lands which the grantor had, unless the intent to pass a less estate or interest appears by express terms or be necessarily implied in the terms of the grant." *Id.* at 485; *see also* 9 THOMPSON, *supra* note 31, at § 82.13(c)(2) (citing cases: "[T]he entire estate or interest of the grantor passes to the grantee, unless there is specific language to the contrary."). Providing symmetry, the correlative principle *nemo dat qui non habet* indicates that a person cannot sell what he does not own.

[154] The doctrine arises where the original owner of an interest in property, *O*, sells first to bona fide purchaser *A*, who does not record. *O* then (wrongfully) sells to a second bona fide purchaser, *B*. *A* then records soon after *B*'s purchase, and *B* subsequently sells to *C*. Since *A*'s deed is recorded prior to *C*'s purchase, *C* has constructive notice of it and therefore cannot be a bona fide purchaser with respect to it.

[155] *See* Sun Valley Land & Minerals, Inc. v. Burt, 853 P.2d 607, 614 (Idaho Ct. App. 1993); Jones v. Indep. Title Co., 147 P.2d 542, 543 (Cal. 1944).

purchaser, who otherwise could not sell what was rightfully his, "the benefit of his bargain by protecting his market."[156]

In truth, of course, individuals in the real estate market are both buyers and sellers, and any interpretation of real estate recording acts that would make properly researched titles less secure would harm everyone dependent upon the efficient use of privately owned resources. This explanation, in turn, simply reflects the more general truth that stable and well-defined property rights benefit the society as a whole.[157]

A further example of the common law's preference for continuity is the adverse possession doctrine of "tacking," in which transferees assumed their transferors' rights even when the transferors lacked legal ownership. The record owner of land will lose the right to eject a wrongful occupant upon the termination of the statutory period to bring the eviction action, at which time the occupant acquires title.[158]

5. The positive background principles rule encourages unrestrained regulation

Without "objective rules and customs that can be understood as reasonable by all parties involved,"[159] a background principles rule degenerates into the sovereign's ipse dixit. The positive background principles doctrine goes far beyond ensuring that government, as Justice Kennedy put it, "should not be prevented from enacting new regulatory initiatives in response to changing conditions." Common law principles are flexible enough to deal with new developments where warranted. The Court in *Lucas* cited potential discoveries relating to safe siting of a nuclear generating plant as an example.[160]

III. THE "EXPECTATIONS" NOTICE RULE—THE REIFICATION OF AN INTUITION

The second branch of the positive notice rule refers to the principle that the purchasers are limited to those exercises of their property rights that they did expect, or should have expected. The notion that landowners do not deserve what they should not have expected invokes the principle of fairness, a

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[156] JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 676 n.10 (4th ed. 1998).

[157] *See, e.g.*, PAUL HEYNE, THE ECONOMIC WAY OF THINKING 366 (7th ed. 1994) (noting that "stable expectations [about property rights] are the foundation of effective cooperation in any large, complex society").

[158] *See, e.g.*, 7 POWELL ON REAL PROPERTY ¶ 1012 (rev. ed. 1996).

[159] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1035 (Kennedy, J., concurring); *see also infra* note 237 and accompanying text.

[160] *Lucas*, 505 U.S. at 1029.

doctrine traditionally the purview of equity. As the notion of "expectations" has become more objectified in succeeding judicial iterations, the question of how or why that concept should substitute for "property" itself becomes both more intriguing and puzzling. The U.S. Supreme Court's recent decision in *Palazzolo v. Rhode Island*[161] increases the role that expectations will play in the Court's takings jurisprudence.[162] Prior to considering *Palazzolo* and the subsequent caselaw, however, it is useful to review how the idea of expectations arose and grew.

A. Equity Historically Has Protected Common Law Property

Over the centuries, equity jurisprudence has protected owners whose property was subject to harsh and unjust deprivation through a literal application of real property law. Even prior to the creation of courts of chancery, for instance, common law courts in the twelfth and thirteenth centuries were ameliorating the unfairness resulting from strict mortgage foreclosure through preservation of the mortgagor's equity of redemption and from the retention of property unfairly taken through the device of restitution.[163]

The application of equitable principles did sometimes constrict the actions of landowners. Neighbors, for instance, could obtain injunctive relief against certain land uses. However, this was to prevent a landowner from impinging upon the right of adjoining owners to make reasonable use of their own property. Likewise, a government action based on public nuisance was not a limitation on property rights, but merely an assertion of the aggregate rights of a substantial number of aggrieved property owners. Thus the nuisance action does not limit property rights, but instead protects them.[164]

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[161] 533 U.S. 606 (2001).

[162] As this article went to press, the Supreme Court decided *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, ____ S. Ct. ____, 2002 WL 654431 (Apr. 23, 2002) (No. 00-1167). The majority opinion reiterates the role of expectations and its prominence in *Palazzolo*.

[163] *See generally* PLUCKNETT, *supra* note 9, at 673-80.

[164] This principle, of course, was one of the "background principles of the State's law of property and nuisance already place upon land ownership" that Justice Scalia declared to inhere in property in *Lucas*, 505 U.S. at 1004.

B. The Development of Expectations as a Limitation on Property Rights

1. Michelman and crystallized expectations

The origin of "expectations" as a critical aspect of takings analysis begins with an influential article by Frank Michelman, *Property, Utility, and Fairness.*[165] Michelman, in rejecting Justice Holmes's conceptualization that there was a taking when government went "too far,"[166] applied a different principle to determine whether compensation was required:

> The customary labels—magnitude of the harm test, or diminution of value test—obscure the test's foundations by conveying the idea that it calls for an arbitrary pinpointing of a critical proportion (probably lying somewhere between fifty and one hundred percent). More sympathetically perceived, however, the test poses not nearly so loose a question of degree; it does not ask "how much," but rather (like the physical-occupation test) it asks "whether or not": whether or not the measure in question can easily be seen to have practically deprived the claimant of some *distinctly perceived, sharply crystallized, investment-backed expectation.*[167]

In support of his thesis, Michelman offered the familiar example of the special provision in newly enacted zoning ordinances for prior nonconforming uses:

> What explains, then, the universal understanding that only those nonconforming uses are protected which were demonstrably afoot by the time the regulation was adopted? The answer seems to be that actual establishment of the use demonstrates that the prospect of continuing it is a discrete twig out of his fee simple bundle to which the owner makes explicit reference in his own thinking, so that enforcement of the restriction would, as he looks at the matter, totally defeat a distinctly crystallized expectation.[168]

The target of Michelman's analysis was not the landowner or a purchaser as such, but rather the speculator, who sees changes in law not as the cause of any genuine loss, but rather as an occasion for pressing a contrived claim for compensation.

> The zoned-out apartment house owner no longer has the apartment investment he depended on, whereas the nearby *land speculator* who is unable to show that he has yet formed any specific plans for his vacant land still has a package of

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[165] *See* Michelman, *Property, Utility, and Fairness*, *supra* note 140.

[166] *Id.* at 1233; *see* Pa. Coal Co. v. Mahon, 260 U.S. 393 (1922). "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415.

[167] Michelman, *supra* note 140, at 1233 (emphasis added).

[168] *Id.* (citation omitted).

> possibilities with its value, though lessened, still unspecified—which is what he had before.[169]

In sum, Michelman argued that, if government has to compensate all owners whose property rights are diminished by a new ordinance, compensation would prove prohibitively expensive. The compromise is to compensate only those owners who could demonstrate that they had suffered the sharp pang of loss.

While the foregoing suggests that Professor Michelman's analysis was based on fairness, it was as least as much a function of pragmatism.[170] His concept of "property" was not based on fundamental notions of rights or duties. Instead, it was based upon utilitarian theory, as advocated by Jeremy Bentham. "Property, according to Bentham, is most aptly regarded as the collection of rules which are presently accepted as governing the exploitation and enjoyment of resources."[171]

Michelman understood that people would not work or invest "unless they know they can depend on rules which assure them that they will indeed be permitted to enjoy a substantial share of the product as the price of their labor or their risk of savings."[172] The redistribution of their anticipated earnings to others would impair this necessary assurance. However, not all redistributions would have this effect.

> [T]he utilitarian's solicitude for security is instrumental and subordinate to his goal of maximizing the output of satisfactions. Security of expectation is cherished, not for its own sake, but only as a shield for morale. Once admit that not all capricious redistributive effects are totally demoralizing, and utilitarian theory can tell us where to draw the line between compensable and noncompensable collective impositions. An imposition is compensable if not to compensate would be critically demoralizing; otherwise, not.[173]

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[169] *Id.* at 1234 (emphasis added).

[170] Michelman's construct is too detailed and subtle to be fully treated here. For a fuller treatment of his balancing of efficiency gains (the excess of benefits produced by the governmental action over the costs it imposes), demoralization costs (the dollar value of the adverse effects upon losers and their sympathizers who observe the failure to compensate), and settlement costs (the dollar value of the time, effort, and resources necessary to reach a settlement that will prevent demoralization costs), see WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 141-58 (1995).

[171] Michelman, *Property, Utility, and Fairness*, *supra* note 140, at 1211 (citing JEREMY BENTHAM, THEORY OF LEGISLATION chs. 7-10 (6th ed. 1890)).

[172] *Id.* at 1212.

[173] *Id.* at 1213.

2. *Brennan and "distinct investment-backed expectations" in* Penn Central

Justice William Brennan's opinion for the Supreme Court in *Penn Central Transportation Co. v. City of New York*,[174] adopted Professor Michelman's thesis.[175] Writing for the Court, Brennan adopted an ad hoc balancing test to determine whether a compensable taking had occurred. In making such determinations, not all factors were of equal significance:

> [T]he Court's decisions have identified several factors that have particular significance. 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, of course, relevant considerations. So, too, is the character of the governmental action.[176]

Justice Brennan did not define "distinct investment-backed expectations" in *Penn Central*. He did, however, assert that the landowner could not demonstrate a taking "simply by showing that [it had] been denied the ability to exploit a property interest" it previously believed it could develop, namely the "air rights" over Grand Central Terminal.[177] Significantly, Brennan's analysis essentially ignored the fact that the framework of the terminal originally had been strengthened, undoubtedly at some expense, for the "express purpose" of permitting construction of just the sort of office building above the terminal that the city's landmark preservation law subsequently forbade.[178] There is no indication that Brennan intended to imply anything more than landowner dessert. Neither *Penn Central* nor the Court's subsequent cases, for instance, have suggested that those obtaining their interests through unexpected inheritance or similar circumstances are bereft of Takings Clause protection on the ground that they had received a windfall instead of established reliance upon an investment.

The lack of clarity in the *Penn Central* investment-backed expectations discussion is evidenced by an early comment of a leading land use scholar:

> Curiously, Justice Brennan did not mention either the estoppel or vested rights doctrines in *Penn Central*. This omission may be an oversight, or may indicate that investment-backed expectations must be considered even though they do not create an estoppel or a vested right. If this interpretation is correct, the

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[174] 438 U.S. 104 (1978).

[175] *See* Robert M. Washburn, *"Reasonable Investment-Backed Expectations" as a Factor in Defining Property Interest*, 49 WASH. U. J. URB. & CONTEMP. L. 63, 66-67 (1996).

[176] *Penn Central*, 438 U.S. at 124 (citation omitted) (emphasis added).

[177] *Id.* at 130.

[178] *Id.* at 115 n.15.

expectations taking factor introduces a landowner tilt in taking theory that did not exist before.[179]

This observation raises the obvious lack of continuity between Justice Brennan's formulation and the historic body of property jurisprudence. There is nothing in the Court's subsequent takings jurisprudence to indicate that the omission of estoppel or vested rights was an oversight.[180] It also suggests that augmentation of the estoppel and vested rights doctrines by investment-backed expectations would lead to a change in the caselaw favoring landowners. In fact, post-*Penn Central* opinions have shown great deference to government regulators. Furthermore, prior to the Supreme Court's decision in *Palazzolo v. Rhode Island*,[181] the very concept of partial regulatory takings had a tenuous existence.[182]

3. Landowner "expectations" become "reasonable expectations"

While the shift from Professor Michelman's crystallized expectations[183] to Justice Brennan's "distinct investment-backed expectations" might simply be a matter of style, the shift from the latter phrase in *Penn Central* to "reasonable investment-backed expectations" in *Kaiser Aetna v. United States*,[184] suggests a change of substance. After all, "expectations" are individualistic and possibly idiosyncratic views of the world. "Reasonableness," on the other hand, implies both the individual judgment and the societal determination that the judgment is at least plausible. Thus, inclusion of the term "reasonable" may "reflect a shift to an objective standard."[185] Facing such a requirement, it might not be enough for Professor Michelman's "speculator" to assert, or even prove, an honest (if naive) understanding of the permissible uses of his land. Rather, he would have to show that the high price he paid for a parcel of raw land, for instance, could be explained only in terms of his intended use

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[179] Daniel R. Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 WASH. U. J. URB. & CONTEMP. L. 3, 5 (1987).

[180] Indeed, estoppel recently has been used to deny compensation. *See, e.g.*, People v. S. Cal. Edison Co., 996 P.2d 711 (Cal. 2000) (estopping landowner from collecting twenty-five years' interest on eminent domain claim when landowner did not pursue its rights for most of that time).

[181] 533 U.S. 606 (2001).

[182] *See* Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994), *on remand*, 45 Fed. Cl. 21 (1999).

[183] Michelman, *Property, Utility, and Fairness*, *supra* note 140, at 1233 (asserting proper test for regulatory taking as "whether or not the measure in question can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation.").

[184] 444 U.S. 164, 175 (1979).

[185] Washburn, *supra* note 175, at 67.

and that the use was feasible and would result in at least as high a rate of return being generated as would be available through alternative investment vehicles.

On the other hand, it is not clear that *Kaiser Aetna* in fact intended to mandate governmental review of the plausibility of owners' views. The author of the opinion, then-Justice William Rehnquist, is not known as an advocate of expanded government powers in the land use area. Subsequent cases do not draw a sharp terminological distinction.[186]

C. Enlarging the Dominion of Expectations

Whether or not intended by *Kaiser Aetna*, the morphing of "investment-backed expectations" to "reasonable investment-backed expectations" suggests an attempt to make the expectations test objective.[187] To the extent that is true, it is necessary to construct a standard for evaluating the purchaser's conduct.

Professor Daniel Mandelker suggested in 1987 that "'[r]easonable' implies that the expectation must be appropriate under the circumstances. Determining whether a regulation is reasonable may also require a balancing test that weighs public benefits against private costs."[188] However, expectations is one of three factors listed by the Supreme Court in *Penn Central*[189] as having "particular significance" in the "essentially ad hoc" takings inquiry,[190] the other two factors being the economic effect on the landowner and the character of the governmental action.[191] It would seem, therefore, that Professor Mandelker suggested a balancing test within a balancing test. Given that such a proposition makes little logical sense, it might be that Mandelker presciently understood that, at least in the minds of some courts, "investment-backed expectations" would crowd out the other prongs of the three-factor test.

Indeed, in a double-barreled victory for legal positivism, a panel of the U.S. Court of Appeals for the Federal Circuit concluded, in *Good v. United States*,[192] that owners are responsible for understanding not only the regulations in force at the time of purchase, but the "regulatory climate" as well.[193] Furthermore, the court rejected the idea that *Lucas* introduced a test

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[186] *Id.* at 67 n.24 (reviewing caselaw and noting that some courts continue to use the term "distinct" investment-backed expectations, that others use both "distinct" and "reasonable" interchangeably, and that some have used "distinct, reasonable, investment-backed expectations").

[187] *See supra* Part III.B.3.

[188] Mandelker, *supra* note 179, at 14.

[189] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

[190] *Id.*

[191] *Id.*

[192] 189 F.3d 1355 (Fed. Cir. 1999).

[193] *Id.* at 1361-62.

for complete deprivations of economic use that was totally independent of the *Penn Central* expectations test.[194]

The owner in *Good* had acquired land that was subject to various federal and state wetlands regulations. The application of these rules to Good's parcel, which was the subject of many years of negotiation and litigation, was determined largely in Good's favor. However, the Endangered Species Act was passed during this period and ultimately resulted in a denial of development. Good argued that he could not have expected to be denied a permit based on a law that did not exist at the time of his purchase.

The court conceded that this position was "not entirely unreasonable,"[195] but asserted that changes in law prior to Good's purchase put him on notice of a "regulatory climate" that could defeat his development application.[196] Even with respect to laws enacted before purchase, landowners may fail to anticipate subsequent developments at their peril. They must discern what statutes mean from the day of their enactment, although those meanings might be ascribed to them by the courts only years later,[197] and although earlier lines of decisions might later be determined to be mistaken.[198] Along the same lines, the Oregon Supreme Court declared, in *Dodd v. Hood River County*,[199] that "to be reasonable, investment-backed expectations must take into account the current state of the law, as well as the government's power to change the law."[200]

Such decisions, as I previously have contended,[201] constitute nothing as much as the reductionist formula of the early Holmes: "Law is prophecy."[202]

D. Roots of the Expectations Notice Rule

While the land use regulatory takings cases established the ground for the expectations notice rule, the rule itself was instantiated in Supreme Court cases

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[194] *Id.* at 1361; *see also infra* note 217 and accompanying text.

[195] *Id.* at 1361.

[196] *Id.*

[197] *See* Brace v. United States, 48 Fed. Cl. 272, 282-83 (2000).

[198] *See* Dep't of Envtl. Prot. v. Burgess, 772 So.2d 540 (Fla. App. 2000) (holding that permit denial did not frustrate any reasonable investment-backed expectations since property was not developed for thirty years and noting that court was not persuaded by owner's reliance on a previous precedent, which it found flawed).

[199] 855 P.2d 608 (Or. 1993).

[200] *Id.* at 616.

[201] Steven J. Eagle, *The Rise and Rise of "Investment-Backed Expectations,"* 32 URB. LAW. 437, 445 (2000).

[202] Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 458 (1897). "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." *Id.* at 461.

not involving real property, *Ruckelshaus v. Monsanto Co.*,[203] *Connolly v. Pension Benefit Guaranty Corp.*,[204] and *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*.[205]

In *Monsanto*, the Supreme Court rejected the claim of a chemical company that release by the Environmental Protection Agency of proprietary information regarding a pesticide constituted a taking. Prior legislative amendments had put the company on notice that the EPA would release its application to register the pesticide, thus denying it an investment-backed expectation of confidentiality.[206] Likewise, in *Concrete Pipe*, past federal pension legislation was deemed to negate the formation of reasonable, investment-backed expectations contrary to subsequent legislation.[207] *Connolly*, in which liability for withdrawal had been mandated after the company had joined an industry pension plan, was treated similarly.[208]

E. Expectations Notice Rule Cases

While cases favoring the expectations notice rule represented the majority view prior to *Palazzolo*,[209] most of those courts did not consider the rule in a coherent fashion, and the decisions largely mix notice rule issues with others.

The U.S. Court of Appeals for the Federal Circuit has been in the forefront of courts applying expectations theory. In *Loveladies Harbor, Inc. v. United States*,[210] it held that the denial of a permit under section 404 of the Clean Water Act[211] constituted a compensable taking.[212] The court's holding was based on the fact that there was a complete deprivation of value with respect to the relevant parcel,[213] and hence a per se taking under *Lucas v. South Carolina Coastal Council*.[214] In the course of its opinion otherwise favoring

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[203] 467 U.S. 986 (1984).

[204] 475 U.S. 211 (1986).

[205] 508 U.S. 602 (1993).

[206] *Monsanto*, 467 U.S. at 1005-06.

[207] *Concrete Pipe*, 508 U.S. at 646 (finding no reasonable expectation in light of Congress's legislation in the pension field).

[208] *Connolly*, 475 U.S. at 226-27 (same).

[209] Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

[210] 28 F.3d 1171 (Fed. Cir. 1994).

[211] Pub. L. No. 92-500, § 2, 86 Stat. 884 (1972), amending the Federal Water Pollution Control Act (codified as amended at 33 U.S.C. § 1344 (1988)).

[212] *Loveladies Harbor*, 28 F.3d at 1183.

[213] *Id.* at 1179-82.

[214] 505 U.S. 1003 (1992).

landowners, however, the court restated the "distinct investment-backed expectations" test of *Penn Central Transportation Co. v. City of New York.*[215]

> In legal terms, the owner who bought with knowledge of the restraint could be said to have no reliance interest, or to have assumed the risk of any economic loss. In economic terms, it could be said that the market had already discounted for the restraint, so that a purchaser could not show a loss in his investment attributable to it.[216]

In its opinion in *Good v. United States*,[217] the Federal Circuit panel rejected the view that *Lucas v. South Carolina Coastal Council*[218] constitutes a categorical test for regulatory takings independent of *Penn Central.*[219] It held instead that *Lucas* negated only the need to apply the "character of the regulation" test. "For *any* regulatory takings claim to succeed, the claimant must show that the government's regulatory restraint interfered with his investment-backed expectations in a manner that requires the government to compensate him."[220] Another Federal Circuit panel rejected this interpretation in *Palm Beach Isles v. United States*,[221] holding that the law of the circuit, as annunciated in *Loveladies Harbor*, was that a categorical taking under *Lucas* trumped the expectations as well as the character test in *Penn Central.*[222] Since the Federal Circuit declined to review *Palm Beach Isles* en banc, the dispute between that panel and the *Good* panel remains unresolved. The Federal Circuit's post-*Palazzolo*[223] use of the expectations notice rule in *Commonwealth Edison Co. v. United States*[224] suggests that it regards *Palazzolo* as a strong affirmance of the circuit's precedent.

In accord with the holding in *Good* that the reasonable investment-backed expectations were required for complete as well as partial takings is the Ninth Circuit ruling in *Hoeck v. City of Portland*,[225] where the court found that the city's demolition of a vacant building was not a complete deprivation of economic use, since the lot still had considerable value. Because the law at the time the owner took title precluded him from maintaining an abandoned building, there was no interference with a reasonable, investment-backed

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[215] 438 U.S. 104 (1978).

[216] *Loveladies Harbor*, 28 F.3d at 1177.

[217] 189 F.3d 1355 (Fed. Cir. 1999).

[218] 505 U.S. 1003 (1992).

[219] Penn Cent. Transp. Co. v. New York, 438 U.S. 104 (1978).

[220] *Good*, 189 F.3d at 1360 (emphasis added).

[221] 208 F.3d 1374, *reh'g denied*, 231 F.3d 1354, *reh'g en banc denied*, 231 F.3d 1365 (Fed. Cir. 2000).

[222] *Id.* at 1358-61.

[223] Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

[224] 271 F.3d 1327 (Fed. Cir. 2001) (en banc); *see also infra* Part V.A.1.

[225] 57 F.3d 781, 787-89 (9th Cir. 1995).

expectation. The result would be the same even if the property interest were narrowed to include only the building.[226] The Eighth Circuit agreed in *Outdoor Graphics, Inc. v. City of Burlington*,[227] which relied upon *Hoeck* and an overly broad reading of the Federal Circuit's holding in *Avenal v. United States*.[228]

In *Avenal*, Judge Plager described the plaintiff's conduct as a "textbook example" of a property owner rushing into a business that took advantage of favorable water salinity levels "created at least in part by earlier government activity," and bringing suit when the levels "were again tampered with to their (this time) disadvantage."[229] It would thus be more accurate to say that in *Avenal* the property owner's expectations were not dependent upon government interpretations of rights, but rather were created by government actions which, by their very nature, were apt to be transient and reversible.

The highest courts of a number of states have adopted the expectations notice rule. These include Michigan,[230] New Hampshire,[231] New Jersey,[232] New York,[233] South Carolina,[234] and Rhode Island.[235]

F. "Reasonable Investment-Backed Expectations" Encourages Circuity

Expectations theory has always been subject to a fundamental flaw—expectations are a function of rights, and rights, in turn, are a function of expectations. In his *Lucas* concurrence, Justice Kennedy warned about the danger of circuity even as he pressed for recognition that "background principles" be permitted to go beyond the common law to some extent:

> The Takings Clause, while conferring substantial protection on property owners, does not eliminate the police power of the State to enact limitations on the use

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[226] *Id.* at 788-89.

[227] 103 F.3d 690 (8th Cir. 1996) (holding that right to erect billboard did not inhere in title, nor constitute reasonable investment-backed expectation, at time of purchase).

[228] 100 F.3d 933 (Fed. Cir. 1996).

[229] *Id.* at 937.

[230] Adams Outdoor Adver. Co. v. City of East Lansing, 614 N.W.2d 634 (Mich. 2000), *cert. denied*, 121 S. Ct. 1356 (2001).

[231] Claridge v. New Hampshire Wetlands Bd., 485 A.2d 287, 291 (N.H. 1984).

[232] Karam v. New Jersey, 705 A.2d 1221, 1229 (N.J. Super. 1998), *aff'd and adopted*, 723 A.2d 943 (N.J. 1999) (adopting background principles notice rule also).

[233] Gazza v. State Dep't of Envtl. Conservation, 679 N.E.2d 1035 (N.Y. 1997) (applying background principles notice rule); Kim v. City of New York, 681 N.E.2d 312 (N.Y. 1997) (applying background principles notice rule).

[234] McQueen v. South Carolina Coastal Council, 530 S.E.2d 628, 633-35 (S.C. 2000) (applying background principles rule).

[235] Palazzolo v. State *ex rel.* Tavares, 746 A.2d 707 (R.I. 2000), *aff'd in part, rev'd in part*, Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (applying background principles notice rule).

> of their property. The rights conferred by the Takings Clause and the police power of the State may coexist without conflict. Property is bought and sold, investments are made, subject to the State's power to regulate. Where a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations.
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> There is an inherent tendency towards circularity in this synthesis, of course; for if the owner's reasonable expectations are shaped by what courts allow as a proper exercise of governmental authority, property tends to become what courts say it is. *Some circularity must be tolerated in these matters, however, as it is in other spheres. The definition, moreover, is not circular in its entirety. The expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved.*
>
> In my view, reasonable expectations must be understood in light of the whole of our legal tradition. The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society. The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source. The Takings Clause does not require a static body of state property law; it protects private expectations to ensure private investment. I agree with the Court that nuisance prevention accords with the most common expectations of property owners who face regulation, but I do not believe this can be the sole source of state authority to impose severe restrictions. Coastal property may present such unique concerns for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit.[236]

If Justice Kennedy means by this that expectations are meant to evolve over decades and centuries, he is recapitulating the common law tradition. If he contemplates a process where positive law has more sway, he fails to square the circle. Judge Stephen Williams of the U.S. Court of Appeals for the District of Columbia Circuit confronted this dilemma unswervingly in his concurrence in *District Intown Properties v. District of Columbia*.[237]

> [I]n its consideration of . . . "reasonable investment-backed expectations," the majority's analysis begs the question whether any landowner, in a world where zoning regulations are prevalent, could ever argue that a particular regulation was "unexpected." The presumption is insurmountable: "Businesses that operate in an industry with a history of regulation have no reasonable expectation that regulation will not be strengthened to achieve established legislative needs." Although the Takings Clause is meant to curb inefficient takings, such a notion

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[236] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1034-35 (1992) (Kennedy, J., concurring) (emphasis added) (citation omitted).

[237] 198 F.3d 874, 886-87 (D.C. Cir. 1999), *cert. denied*, 121 S. Ct. 34 (2000).

> of "reasonable investment-backed expectations" strips it of any constraining sense: except for a regulation of almost unimaginable abruptness, all regulation will build on prior regulation and hence be said to defeat any expectations. Thus regulation begets regulation.[238]

It is the nature of legislation to be prospective and to act through general classifications. On the other hand, it is the nature of common law adjudication to be retrospective and to apply legal principles to specific parties and unique facts.[239] The "reasonable investment-backed expectations" rule tends to obliterate this distinction.

While some advocates of expansive government have argued that public welfare programs are "a necessary part of any system of property rights,"[240] they have recognized that well-defined property rights must be preserved. It is important to devise a framework in which property rights might prove stable through constitutional means, as "[a] well-drafted constitution can guard against a system in which ownership rights are effectively subject to continuous political revision."[241] To be sure, "[i]f property rights are secure, there is a firm limit on what the democratic process is entitled to do."[242] However, "government control of property—through constant readjustment of property rights—simply reintroduces the collective action problem originally solved by property rights."[243]

IV. THE SIGNIFICANCE OF *PALAZZOLO*

A. A Brief Review of the Facts

Anthony Palazzolo, a lifelong resident of Westerly, Rhode Island, brought an inverse condemnation action against the state Coastal Resources Management Council ("CRMC") alleging that its denial of his application to fill some eighteen acres of coastal wetlands constituted a taking under the federal and state constitutions. The trial court found for CRMC.[244] The Rhode

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[238] *Id.* at 886-87 (Williams, J., concurring) (citation omitted).

[239] *See, e.g.*, Landgraf v. USI Film Prods., 511 U.S. 244, 265 (1994) (deeming "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic"); *cf.* Rogers v. Tennessee, 532 U.S. 451 (2001) (approving retroactive reinterpretation of common law permitting murder conviction where victim died more than a year and a day after defendant's act).

[240] CASS SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 210 (1997).

[241] *Id.* at 204.

[242] *Id.* at 208.

[243] *Id.* at 210.

[244] Palazzolo v. Coastal Res. Mgmt. Council, C.A. No. 86-1496, 1995 WL 941370 (R.I. Jan. 15, 1995). This description of the facts relies upon Steven J. Eagle, Palazzolo v. Rhode Island: *A Few Clear Answers and Many New Questions*, 32 ENVTL. L. REP. 10,127, 10,128-29 (2002).

Island Supreme Court affirmed, holding that the case was "not ripe for judicial review," but proceeded to a discussion of the merits nevertheless.[245]

Palazzolo was president of Shore Gardens, Incorporated ("SGI"), since its incorporation on July 29, 1959. On December 2, 1959, Palazzolo, with Natale and Elizabeth Urso, transferred three adjoining parcels in the Town of Westerly to SGI. In 1959, while Palazzolo and Natale Urso were the sole shareholders in SGI, it submitted to the town a new plat subdividing the entire property into eighty lots. Between 1959 and 1961, SGI transferred for value eleven of the lots to various grantees. These lots were apparently in the upland area of the parcel and could be built upon with little alteration to the land. In 1960, Palazzolo acquired Urso's interest and became the sole shareholder. In 1969, five of the previously sold lots were reacquired by SGI. After this transaction, SGI was the record owner of seventy-four of the original eighty lots. Although SGI's corporate charter was revoked in 1978, it remains the record owner, and all taxes on the property are assessed to SGI.[246] However, upon revocation Palazzolo became owner of the parcel by operation of law.[247]

The parcel consists primarily of coastal wetlands and marshlands, including some eighteen acres of wetland and a small, but undetermined amount of upland not exceeding an acre or two. Some of the platted lots are substantially under the waters of Winnipaug Pond. Additional land that is not permanently under water is subject to daily tidal inundation, and "ponding" in small pools occurs throughout the wetlands. The area serves as a refuge and feeding ground for fish, shellfish, and birds, provides a buffer for flooding, and absorbs and filters run-off into the pond.[248]

Between 1962 and 1985, Palazzolo filed several applications with state agencies seeking permission to substantially alter the property. During the same period, state regulations governing alterations to coastal wetlands became increasingly stringent. On March 29, 1962, Palazzolo submitted an application to the Division of Harbors and Rivers ("DHR") of the Department of Natural Resources ("DNR") to dredge the pond and use the dredge to fill the subject property. This application was returned to Palazzolo by DHR because it lacked essential information. On May 16, 1963, Palazzolo filed an application seeking approval to build a bulkhead, to dredge the pond, and to fill the property. At the time of these two applications, there was no statutory requirement that any state agency approve the filling of coastal wetlands, but

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[245] Palazzolo v. State *ex rel.* Tavares, 746 A.2d 707, 709 (R.I. 2000), *aff'd in part, rev'd in part*, Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

[246] *Palazzolo*, 533 U.S. at 614.

[247] *Palazzolo*, 746 A.2d at 716.

[248] *Id.* at 709-10.

a party wishing to dredge a river or pond was required to gain approval of DHR.[249]

In 1965, the Rhode Island Legislature adopted an act on inter-tidal wetlands protection that gave DNR the authority to restrict filling in coastal wetlands. On April 29, 1966, Palazzolo applied for DHR approval to dredge the pond and fill the tidal marshlands so he could construct a recreational beach facility, and, on April 1, 1971, DHR issued a decision approving the applications and giving Palazzolo the option of either constructing a bulkhead and filling the marsh or constructing a beach facility. On November 17, 1971, DHR revoked its assent, and this revocation was not appealed.

In 1971, the Legislature created the Coastal Resources Management Council ("CRMC") and gave it authority to regulate coastal wetlands. In 1977, the CRMC promulgated a set of regulations—the Coastal Resources Management Program—that prohibited the filling of coastal wetlands without a special exception from the CRMC.[250]

In March 1983, Palazzolo filed an application with the CRMC seeking approval to construct a bulkhead on the shore of the pond and fill approximately eighteen acres of salt marsh. That application, nearly identical to the application submitted in 1963, was rejected by the CRMC. Palazzolo did not appeal that decision. In January 1985, Palazzolo filed an application to fill wetlands on the property, again for the purpose of creating a recreational beach facility. This application, nearly identical to the 1966 application, was denied by the CRMC on February 18, 1986. Palazzolo's appeal of this denial itself was denied.[251]

While Palazzolo's appeal of the 1986 CRMC decision was proceeding, he filed the instant action alleging that the CRMC's denial of his application constituted a taking of his property without just compensation, in violation of the Fifth Amendment to the United States Constitution and article 1, section 16, of the Rhode Island Constitution. Palazzolo sought damages in the amount of $3,150,000, based on the profits he claimed he would receive from filling the wetlands and developing the property as seventy-four lots for single-family homes. A jury-waived trial was held in June 1997, and on October 24, 1997, the trial justice issued a thirteen-page decision that made findings of fact and law. The trial justice concluded that Palazzolo's property had not been taken and Palazzolo appealed.[252]

The Rhode Island Supreme Court noted that SGI was the owner of the parcel from its purchase in 1959 until the corporation's charter was revoked

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[249] *Palazzolo*, 533 U.S. at 614.

[250] *Palazzolo*, 746 A.2d at 710-11.

[251] *Id.* at 711 (citing Palazzolo v. Coastal Res. Mgmt. Council, C.A. No. 86-1496, 1995 WL 941370, at *1 (R.I. Jan. 15, 1995)).

[252] *Id.*

in 1978. By that time, when the defunct corporation's assets devolved upon its sole shareholder "the regulations limiting his ability to fill the wetlands were already in place."[253] The court concluded: "[A] regulatory takings claim may not be maintained where the regulation predates the acquisition of the property."[254]

B. The Supreme Court's Holding

The Supreme Court's opinion in *Palazzolo* was written by Justice Kennedy.[255] Four justices dissented.[256] The Court reversed the Rhode Island Supreme Court and held that the case was ripe for decision.[257] It upheld the state court's determination that there was no categorical taking under *Lucas v. South Carolina Coastal Council*.[258] The Court also noted takings damages under its more general takings test in *Penn Central Transportation Co. v. City of New York*[259] had been considered by the Rhode Island Supreme Court. Justice Kennedy stated that, as it did in its *Lucas* analysis, the state court found "the date of acquisition of the parcel . . . determinative, and the court held [petitioner] could have had 'no reasonable investment-backed expectations that were affected by this regulation' because it predated his ownership."[260]

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[253] *Id.*

[254] *Id.*

[255] Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas joined in the opinion. However, the meaning of *Palazzolo* must be interpreted in part with reference to the sharply differing views enunciated in the concurring opinions of Justices O'Connor and Scalia, both of whom are necessary for Justice Kennedy's majority. *See infra* Part IV.D.

[256] Dissenting were Justice Stevens (except on the ripeness issue), Justice Ginsburg, joined by Justices Souter and Breyer. Justice Breyer also wrote a separate dissent.

[257] *Palazzolo*, 533 U.S. at 620. The Court stated that:

> While a landowner must give a land-use authority an opportunity to exercise its discretion, once 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.

Id. Justice Stevens joined the majority's ripeness holding, making the lineup six to three on that issue.

[258] 505 U.S. 1003 (1992). Justice Kennedy noted that petitioner's argument to sever the upland from the lowland part of the parcel, not raised below, was made too late. *Palazzolo*, 533 U.S. at 631-32. Furthermore, petitioner was not left with only a "token interest," since "[a] regulation permitting a landowner to build a substantial residence on an eighteen acre parcel does not leave the property 'economically idle.'" *Id.* at 631 (citation omitted). However, the Court pointedly noted its "discomfort with the logic" of the "parcel as a whole" rule. *Id.* at 631.

[259] 438 U.S. 104, 124 (1978).

[260] *Palazzolo*, 533 U.S. at 616 (citing Palazzolo v. State *ex rel.* Tavares, 746 A.2d 707, 717 (R.I. 2000)).

Since the U.S. Supreme Court rejected the positive notice rule, it remanded petitioner's *Penn Central* claim for further consideration.[261]

C. Rejection of the Positive Notice Rule in Palazzolo

The most significant and unequivocal aspect of the Supreme Court's *Palazzolo* decision is its rejection of the positive notice rule. Justice Kennedy, writing for the Court, declared:

> When the Council promulgated its wetlands regulations, the disputed parcel was owned not by petitioner but by the corporation of which he was sole shareholder. When title was transferred to petitioner by operation of law, the wetlands regulations were in force. The state court held the postregulation acquisition of title was fatal to the claim for deprivation of all economic use and to the *Penn Central* claim. While the first holding was couched in terms of background principles of state property law, and the second in terms of petitioner's reasonable investment-backed expectations, the two holdings together amount to a single, sweeping, rule: A purchaser or a successive title holder like petitioner is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking.
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> The theory underlying the argument that post-enactment purchasers cannot challenge a regulation under the Takings Clause seems to run on these lines: Property rights are created by the State. So, the argument goes, by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value. After all, they purchased or took title with notice of the limitation.
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> The State may not put so potent a Hobbesian stick into the Lockean bundle. The right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land-use restrictions.... The Takings Clause, however, in certain circumstances allows a landowner to assert that a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation. Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title. Were we to accept the State's rule, the postenactment transfer of title would absolve the State of its obligation to defend any action restricting land use, no matter how extreme or unreasonable. A State would be allowed, in effect, to put

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[261] *Id.* The Court's invocation of the partial takings test in *Penn Central* and its remand under it should encourage more use of that test by courts in the future. Indeed, one commentator, fearful of just such a result, styled his discussion "Backhanded Support for 'Partial Takings' Claims." *See* John D. Echeverria, *A Preliminary Assessment of* Palazzolo v. Rhode Island, 31 ENVTL. L. REP. 11,112, 11,114 (2001).

> an expiration date on the Takings Clause. This ought not to be the rule. Future generations, too, have a right to challenge unreasonable limitations on the use and value of land.[262]

Palazzolo thus rejects the positive notice rule, i.e., it states that the petitioner's claim "is not barred by the mere fact that title was acquired after the effective date of the state-imposed restriction."[263] However, this is less than a full-throated affirmation of the crucial sentence in *Nollan*: "So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot."[264]

The importance of the Court's holding can be gleaned by considering the import of a contrary ruling. That would have constituted an open invitation to legislative bodies to redefine property, knowing the inevitable transfers over a modest number of years would attenuate rights extant prior to regulation.

While the rejection of the positive notice rule is important, *Palazzolo* hardly is definitive. While the Court's *Nollan* formulation affirmatively denied that a prior regulation that would effect a taking would have *any* role in limiting property rights, the *Palazzolo* formulation merely denies that the prior status of the regulation would have a *conclusive* role.

D. The Role of the Expectations Notice Rule—Divergence within the Palazzolo *Majority*

Despite his sometimes ardent rhetoric, Justice Kennedy in fact opined upon the notice rule rather sparely. This may well have been prompted by his need to keep his five to four majority intact. Had he adopted the reasoning in the concurring opinion of Justice Scalia, he might well have lost the necessary vote of Justice O'Connor.

1. Justice Kennedy endorses Nollan *(more or less)*

Justice Kennedy's opinion for the Court described *Nollan* as "controlling precedent for our conclusion."[265] He denied that *Nollan*'s "holding was limited" by *Lucas*. While declining to specify the "precise circumstances" under which a regulation becomes a background principle, he asserted: "A law does not become a background principle for subsequent owners by enactment

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[262] 533 U.S. at 627 (citations omitted).

[263] *Id.* at 630.

[264] Nollan v. California Coastal Comm'n, 483 U.S. 825, 833 n.2 (1987); *see also supra* note 76 and accompanying text for the full text of footnote 2.

[265] *Palazzolo*, 533 U.S. at 629.

itself. *Lucas* did not overrule our holding in *Nollan*, which, as we have noted, is based on essential Takings Clause principles."[266]

Nevertheless, the Kennedy opinion did not assert that notice of a regulation in advance of purchase was irrelevant in a partial takings analysis. His lack of definitiveness on the role of notice permitted (or, more likely, resulted from) substantially divergent views of the role of the notice rule in the Scalia and O'Connor concurrences.

2. *Justice Scalia and logical consistency*

The concurring opinion of Justice Scalia declared:

> In my view, the fact that a restriction existed at the time the purchaser took title (other than a restriction forming part of the "background principles of the State's law of property and nuisance") should have no bearing upon the determination of whether the restriction is so substantial as to constitute a taking. The "investment-backed expectations" that 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.[267]

He scoffed at Justice O'Connor's concern about "windfalls," comparing knowledgeable developers, whose ability to discern and overcome regulations that constitute takings exceeds that of their sellers with buyers at stock exchanges and auctions, whose expert knowledge also exceeds that of their sellers.[268] For the courts to treat the developer's advantage as unfair is not, in any event, to return the "windfall" to the "naïve" original owner. Rather,

> Justice O'Connor would eliminate the windfall by giving the malefactor the benefit of its malefaction. It is rather like eliminating the windfall that accrued to a purchaser who bought property at a bargain rate from a thief clothed with the indicia of title, by making him turn over the "unjust" profit *to the thief*.[269]

3. *Justice O'Connor's quest for fairness*

Justice O'Connor began her concurrence by stating that she joined the Court's opinion, "but with my understanding of how the [notice rule] must be considered on remand."[270] After expressing agreement with rejection of the positive notice rule, she added that the "more difficult" issue is the "role the

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[266] *Id.* at 630.

[267] *Id.* at 637 (Scalia, J., concurring) (citations omitted).

[268] *Id.* at 636-37.

[269] *Id.* at 637.

[270] *Id.* at 632 (O'Connor, J., concurring).

temporal relationship between regulatory enactment and title acquisition plays in a proper *Penn Central* analysis."[271]

> If investment-backed expectations are given exclusive significance in the *Penn Central* analysis and existing regulations dictate the reasonableness of those expectations in every instance, *then the State wields far too much power* to redefine property rights upon passage of title. On the other hand, if existing regulations do nothing to inform the analysis, then some property owners *may reap windfalls and an important indicium of fairness is lost.* As I understand it, our decision today does not remove the regulatory backdrop against which an owner takes title to property from the purview of the *Penn Central* inquiry. It *simply restores balance to that inquiry.* Courts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred. As before, the salience of these facts cannot be reduced to any "set formula."[272]

In thus setting excessive state power under the positive notice rule against windfalls resulting from a straight *Nollan* analysis, Justice O'Connor achieves a result she finds just right—permitting courts to take all into account in ad hoc *Penn Central* fashion. While this Goldilocks equilibrium is tidy,[273] it hardly meets Justice Scalia's objections squarely. Why should regulations constituting takings have more "salience" in defining property rights than, say, confessions elicited without *Miranda* warnings have "salience" in establishing criminal guilt?[274] After all, in criminal procedure as well as in property law, there are advocates for abstention from a "set formula" approach.[275]

4. The O'Connor majority on expectations

The view of the expectations notice rule expressed in the O'Connor concurrence has the support of a majority of the Court. Justice Breyer's dissent explicitly agreed with the O'Connor concurrence that the positive notice rule should be rejected, but that preacquisition regulations should be

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[271] *Id.* at 632-33.

[272] *Id.* at 635-36 (emphasis added) (citation omitted).

[273] *Cf.* Michael M. Berger, *Annual Update on Recent Cases*, C997 ALI-ABA 43, 47 (1994) (describing the Court's analysis of the contending "very generalized statements," very precise fit, and "rough proportionality" standards for nexus between harm and ensuing exaction in *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994), as "a Goldilocks and the Three Bears sort of critique").

[274] *See* Miranda v. Arizona, 384 U.S. 436 (1966) (requiring specific warnings respecting right to remain silent and right to counsel before custodial interrogation of criminal suspects).

[275] *See* Dickerson v. United States, 530 U.S. 428 (2000) (rejecting attempt to establish totality-of-the-circumstances test as alternative to mandatory *Miranda* warnings in establishing validity of confessions made during custodial interrogations where suspect is not represented).

considered "within the *Penn Central* framework."[276] The Ginsburg[277] and Stevens opinions[278] also adopted the O'Connor view.

For this reason, Justice Kennedy's invocation of *Nollan* may be seen more as a brake upon future application of the expectations notice rule than as a preclusion of it. The rule appears destined to play an important (albeit undetermined) role in adjudicating partial regulatory takings claims.

E. The Background Principles Notice Rule in Palazzolo

1. Background principles dicta

The Court held in *Palazzolo* that the petitioner did not suffer a per se taking, since "[a] regulation permitting a landowner to build a substantial residence on an 18-acre parcel does not leave the property 'economically idle.'"[279] None of the Justices disputed this finding. Thus, it was unnecessary for the Court to engage in a close analysis of whether the Rhode Island wetland development prohibition constituted a background principle of state law. However, the Court's opinion reiterated its *Lucas* view of how background principles should be defined:

> [A] regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title. This relative standard would be incompatible with our description of the concept in *Lucas*, which is explained in terms of those common, shared understandings of permissible limitations derived from a State's legal tradition. A regulation or common-law rule cannot be a background principle for some owners but not for others. The determination whether an existing, general law can limit all economic use of property must turn on objective factors, such as the nature of the land use proscribed.[280]

This passage, while dicta, does stress the constrained nature of "background principles." The invocation of "shared understandings" seems aimed at precluding novel legal interpretations. The assertion that a rule "cannot be a background principle for some owners but not for others," if taken literally, would preclude differentiation between the owner at the time the regulation was imposed and a subsequent purchaser. Thus it would, by definition, preclude a background principles notice rule.

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[276] *Palazzolo*, 533 U.S. at 655 (Breyer, J., dissenting).

[277] *Id.* at 654 n.3 (Ginsburg, J., dissenting) (joined by Justices Souter and Breyer).

[278] *Id.* at 643 n.6 (Stevens, J., concurring in part and dissenting in part).

[279] *Id.* at 631.

[280] *Id.* at 630 (citation omitted).

2. Interaction with ripeness principles

It might be tempting for a reviewing court otherwise inclined to find for the government in a takings case to surmount the differentiation hurdle by asserting that the burden of a regulation inures only against the owner at the time it was promulgated. That was the position of the state supreme court in *Palazzolo*,[281] and was the reason why Justice Stevens, who otherwise dissented, concurred on the ripeness issue.[282] This casual conclusion seems wrong both as a matter of settled property law and proper fact determination.[283]

A significant impediment to this sort of reasoning is the Court's discussion distinguishing the appropriate treatment for the time of a physical taking as distinguished from the time of a regulatory taking. In the former case, the fact of physical invasion is apparent and the rule is that the owner at the time of the invasion is entitled to compensation.[284]

> A challenge to the application of a land-use regulation, by contrast, does not mature until ripeness requirements have been satisfied, under principles we have discussed; until this point an inverse condemnation claim alleging a regulatory taking cannot be maintained. It would be illogical, and unfair, to bar a regulatory takings claim because of the post-enactment transfer of ownership where the steps necessary to make the claim ripe were not taken, or could not have been taken, by a previous owner.[285]

The Court also noted that restricting takings claims to the owner at the time the restriction was imposed would be "capricious in effect. The young owner contrasted with the older owner, the owner with the resources to hold contrasted with the owner with the need to sell, would be in different positions. The Takings Clause is not so quixotic."[286]

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[281] Palazzolo v. State *ex rel.* Tavares, 746 A.2d 707, 716-17 (R.I. 2000), *aff'd in part, rev'd in part*, Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

[282] Palazzolo v. Rhode Island, 533 U.S. at 638-45 (Stevens, J., concurring in part and dissenting in part).

[283] *See* R.S. Radford & J. David Breemer, *Great Expectations: Will* Palazzolo v. Rhode Island *Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. ENVTL. L.J. 449 (2001). "It is a well-recognized principle in valuing property at either eminent domain or inverse condemnation, that speculative values must be disregarded. Yet in this branch of regulatory takings law, courts freely speculate about conditions 'in a perfect world' en route to arriving at conclusions concerning the relationship between hypothetical values and the imputed economic expectations of plaintiffs." *Id.* at 527 (citation omitted).

[284] *Palazzolo*, 533 U.S. at 628 (citing Danforth v. United States, 308 U.S. 271, 284 (1939); 2 SACKMAN, EMINENT DOMAIN § 5.01[5][d][i] (rev. 3d ed. 2000)).

[285] *Id.*

[286] *Id.*

The immense difficulties faced by landowners in dealing with the Court's Byzantine *Williamson County* ripeness rules[287] have been the subject of considerable discussion.[288] The higher the ripeness barriers, the more difficult it might be for the government defendant to demonstrate that the claim ripenened early, so that the pre-regulatory landowner suffered the taking, as opposed to a successor.

V. THE NOTICE RULE AFTER *PALAZZOLO*

In spite of the Supreme Court's rejection of the positive notice rule in *Palazzolo v. Rhode Island*,[289] it is too soon to predict its practical demise. As William Faulkner observed, "[t]he past is never dead. It's not even past."[290] The materials in this section suggest that much of the positive notice rule might be resurrected in fact by creative courts aggressively applying the background principles and expectations notice rules.

While it is too early to draw any definitive conclusions, the first regulatory takings cases decided after *Palazzolo* present a diversity of approaches.

Most obvious is the realization that *Palazzolo* rejected the positive notice rule.[291] However, some courts have continued to adhere to the idea that less than a complete taking is not compensable.[292] Others have explicitly recognized that *Palazzolo* stands for the proposition that, where there is less than a complete deprivation of economic use, the property owner simply loses the benefit of the *Lucas* per se test and has recourse instead to the *Penn Central* multifactor test.[293] The U.S. Court of Federal Claims found that

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[287] Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) (setting forth "final determination" and "denial of compensation" ripeness prongs).

[288] *See, e.g.*, John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform so Takings Plaintiffs Can Enter the Federal Courthouse*, 31 URB. LAW. 195 (1999).

[289] 533 U.S. 606 (2001).

[290] WILLIAM FAULKNER, REQUIEM FOR A NUN 92 (1951).

[291] E. Cape May Assocs. v. State Dep't of Envtl. Prot., 777 A.2d 1015, 1024 (N.J. Super. Ct. App. Div. 2001) (admonishing that "a regulation that otherwise would be unconstitutional absent compensation is not transformed into a background principle of the State's law by mere virtue of the passage of title") (quoting *Palazzolo*, 533 U.S. at 629-30).

[292] *E.g.*, Zealy v. City of Waukesha, 153 F. Supp. 2d 970 (E.D. Wis. 2001). The *Zealy* court noted that the state supreme court had "concluded that, in determining whether a taking has occurred, a court must consider the parcel of land as a whole and must determine whether the owner has been deprived of all or substantially all of the value of the land," *id.* at 979, and that the ruling "is consistent with" *Palazzolo*. *Id.* at 979 n.7. *See also* Pheasant Bridge Corp. v. Township of Warren, 777 A.2d 334, 344 (N.J. 2001) (describing *Palazzolo* as holding that the "[Rhode Island] Supreme Court did not err in rejecting regulatory takings claim where plaintiff not deprived of all economically beneficial use of parcel").

[293] *See* Cwynar v. City & County of San Francisco, 109 Cal. Rptr. 2d 233, 254 (Cal. Ct.

Palazzolo adopted a "modified" ripeness period respecting regulatory takings.[294]

A. *The Expectations Notice Rule*

1. *Expectations, takings, and due process in* Commonwealth Edison

The role of the expectations notice rule was highlighted and possibly extended in the U.S. Court of Appeals for the Federal Circuit's en banc decision in *Commonwealth Edison Co. v. United States*.[295] While the court noted *Palazzolo*'s rejection of the positive notice rule, it quickly added: "As Justice O'Connor's concurring opinion . . . makes clear, however, even in that context the regulatory environment at the time of the acquisition of the property remains both relevant and important in judging reasonable expectations."[296]

Commonwealth Edison strengthened the expectations notice rule through a two-step process. First, it held that, under the Supreme Court's four-one-four split in *Eastern Enterprises v. Apfel*,[297] "the Takings Clause does not apply to legislation requiring the payment of money."[298] Second, it said that "[w]here a Due Process violation is alleged because the government has ordered the payment of money, we think that reasonable expectations are to be judged as of the point at which the complaining party entered into the activity that triggered the obligation . . . ."[299] Furthermore, "[t]he reasonable expectations test does not require that the law existing at the time of processing would impose liability, or that liability would be imposed only with minor changes in then-existing law. The critical question is whether extension of existing law

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App. 2001); R & Y, Inc. v. Municipality of Anchorage, 34 P.3d 289, 293 n.12 (Alaska 2001); Braunagel v. City of Devils Lake, 629 N.W.2d 567, 573 (N.D. 2001).

[294] *See* Banks v. United States, 49 Fed. Cl. 806, 826 n.29 (2001).

[295] 271 F.3d 1327 (Fed. Cir. 2001) (en banc).

[296] *Id.* at 1350 n.22 (citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 632-36 (2001) (O'Connor, J., concurring)).

[297] 524 U.S. 498 (1998) (holding the imposition of the requirement for a cash payment that was severe, disproportionate, and extremely retroactive to constitute an unconstitutional exaction). A plurality opinion by Justice O'Connor deemed the exaction a taking. *Id.* at 528-29. While four dissenters regarded the exaction as constitutional under the Due Process Clause, Justice Kennedy stated that it was unconstitutional under that clause. *Id.* at 547 (Kennedy, J. concurring in the judgment and dissenting in part). Thus, Kennedy was the fifth vote towards striking the statute, but deeming due process the appropriate analysis. *See also*, Steven J. Eagle, *Substantive Due Process and Regulatory Takings: A Reappraisal*, 51 ALA. L. REV. 977 (2000).

[298] *Commonwealth Edison*, 271 F.3d at 1329.

[299] *Id.* at 1350.

could be foreseen as reasonably possible."[300] Thus the Federal Circuit affirmed, albeit without citation, a panel's "regulatory climate" analysis in *Good v. United States*.[301]

B. The Background Principles Notice Rule

The U.S. Supreme Court's repudiation of the positive background principles rule in *Palazzolo*[302] provides a great incentive for courts to attempt to demonstrate that stringent new regulations really have their genesis in longstanding public trust theory.

1. Foundations of the public trust doctrine

The public trust doctrine is traceable back to the Romans. Under the Justinian Code, certain natural resources, including the sea and its shores, running water, and the air, were deemed the common property of mankind, and navigable waters were legally available for public use in fishing and commerce.[303] The English common law perpetuated those principles, with the gloss that these rights were owned by the sovereign in trust for the public.[304]

In the United States, the doctrine's contours were explicated in *Illinois Central Railroad Co. v. Illinois*,[305] where the Supreme Court in 1892 discussed the purposes of the trust and emphasized its permanence. The Court also held that the common law rights of the sovereign in tidal lands had devolved to the states, and that the criterion for public trust property was navigability. It also established remedies for a breach of the trust obligation by a state.

The notion of expanding the public trust doctrine has been an irresistible lure for those wishing to vitiate traditional private property rights.[306] In *Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission*,[307] for instance, the Supreme Court of Hawai'i extended what had been the customary gathering rights of residents of small districts into generalized rights to extract resources that were to be enjoyed by all Hawaiians. In one stroke, the court

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[300] *Id.* at 1357.

[301] 189 F.3d 1355 (Fed. Cir. 1999); *see also supra* note 192 and accompanying text.

[302] Palazzolo v. Rhode Island, 533 U.S. 606, 627-28 (2001); *see also supra* Part IV.E.

[303] *See* Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the Peoples' Environmental Right*, 14 U.C. DAVIS L. REV. 195, 196-97 (1980).

[304] *See* Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269 (1980).

[305] 146 U.S. 387 (1892).

[306] *See generally* David L. Callies, *Custom and Public Trust: Background Principles of State Property Law?*, 30 ENVTL. L. REP. 10,003 (2000) (analyzing the English antecedents of American public trust law and their misconstruction in some leading cases).

[307] 79 Hawai'i 425, 903 P.2d 1246 (1995).

"accomplished what nearly 150 years of Hawaiian jurisprudence had failed to do: the repudiation of the English common law of custom in favor of an entirely indigenous construction of the doctrine."[308]

While the public trust doctrine traditionally involved access to beach areas below the mean high tide (the "wet sand" area), courts recently have extended those rights to the "dry sand" area above the high tide mark—an area traditionally reserved for private landowners. In *Stevens v. City of Cannon Beach*,[309] the Supreme Court of Oregon held that property owners never possessed the right to obstruct public access to the dry-sand portion of their property and that if such a right had existed it had been extinguished through long usage and custom.[310] In *Matthews v. Bay Head Improvement Ass'n*,[311] the Supreme Court of New Jersey held that the public trust doctrine itself allows a judicial determination that public use of the dry sand above the "ordinary high water mark" is necessary for public trust rights in the wet sand to be enjoyed fully.[312]

In Wisconsin, the state supreme court, in the well-known case of *Just v. Marinette County*,[313] rejected the thesis that land ownership confers development rights. It recently reaffirmed that holding in *Zealy v. City of Waukesha*.[314] *Just* also declared that the "active public trust duty of the state of Wisconsin in respect to navigable waters requires the state not only to promote navigation but also to protect and preserve those waters for fishing, recreation, and scenic beauty."[315]

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[308] David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 COLUM. L. REV. 1375, 1431 (1996).

[309] 854 P.2d 449 (Or. 1993); *see also* Jamee Jordan Patterson, *California Land Use Regulation Post* Lucas*: The History and Evolution of Nuisance and Public Property Laws Portend Little Impact in California*, 11 J. ENVTL. L. 175, 179 (1993).

[310] *Stevens*, 854 P.2d at 456-58; *see also* Erin Pitts, Comment, *The Public Trust Doctrine: A Tool for Enduring Continued Public Use of Oregon Beaches*, 22 ENVTL. L. 731, 732 (1992).

[311] 471 A.2d 355 (N.J. 1984).

[312] *Id.* at 321-26. In cases not referring to the public trust doctrine, state efforts have not been as successful. *See, e.g.*, Sotomura v. County of Hawai'i, 460 F. Supp. 473, 482-83 (D. Haw. 1978) (holding that new state definition of seaward boundary of private ownership at seaweed (high wave) line rather than mean high tide line violated Due Process); *see also* Hughes v. Washington, 389 U.S. 290, 296-98 (1967) (Stewart, J., concurring) (arguing Washington Supreme Court violated federal constitution in holding beach accretions belong to state despite clear precedent that they belong to inland property owners).

[313] 201 N.W.2d 761, 768 (Wis. 1972) (declaring that "[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others").

[314] 548 N.W.2d 528 (Wis. 1996).

[315] *Just*, 201 N.W.2d at 768.

*2. Expanding the public trust doctrine in post-*Palazzolo *cases*

In an early post-*Palazzolo* opinion, a Wisconsin intermediate court implicitly criticized the U.S. Supreme Court's rejection of the positive notice rule, expansively applied the state's public trust doctrine, and rejected a transfer of property rights because it might lead to the formation of incorrect expectations by future owners.

The case, *ABKA Ltd. Partnership v. Wisconsin Department of Natural Resources*,[316] involved a project named Abbey Harbor, consisting of a swimming pool, a parking area, a Harbor House, and 407 boat slips. The slips were created between 1962 and 1987 by the dredging of a creek, permits for which had been issued by the Wisconsin Public Service Commission. The slips had been rented to boat owners, but in 1994 ABKA decided to convert them to condominium ownership. No physical changes were contemplated.[317]

The state Department of Natural Resources ("DNR") insisted that it had jurisdiction over the change of ownership to "dockominium" form and ABKA applied for a permit with the understanding that it reserved the right to challenge DNR jurisdiction. Also, environmental groups objected to issuance of the permit on the ground that it would violate the state's public trust doctrine.[318]

The Wisconsin appellate court decided that it was not bound by the contrary understanding between ABKA and DNR and that, by applying for the permit, ABKA had waived its objection to DNR jurisdiction.[319] On the merits, the court cited the century-old U.S. Supreme Court case delineating the public trust doctrine,[320] but noted: "Although the public trust doctrine was originally designed to protect commercial navigation, it has been expanded to protect the public's use of navigable waters for purely recreational and nonmonetary purposes."[321] It viewed Wisconsin Supreme Court precedent as expansive:

> Public policy factors signifying the public interest include the wish to preserve the natural beauty of our navigable waters, to obtain the fullest public use of these waters, including but not limited to navigation, and to provide for the convenience of riparian owners. Such public interest concerns also include maintaining the safe and healthful condition of the water, protecting spawning grounds and aquatic life, controlling the placement of structures and land uses,

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316 635 N.W.2d 168 (Wis. Ct. App. 2001).

317 *Id.* at 171-72.

318 *Id.* at 173.

319 *Id.* at 178-79.

320 *Id.* at 179 (citing Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 435 (1892)).

321 *Id.* at 177-78 (citing State v. Bleck, 338 N.W.2d 492, 497-98 (Wis. 1983)).

> preserving shore cover and natural beauty, and promoting the general attractiveness and character of the community environment.[322]

In its quest for guidance in applying this essentially boundless set of guidelines, the court looked to the assertion in a recent student note in an environmental law journal: "When conflicts occur over the use of the waters of the state, riparian rights must always surrender to the public interest."[323] While the dockominiums "technically" met the requirements of state condominium law,[324] and did not "adversely impact water quality, quantity or flow,"[325] the court found that their "creative manipulation of riparian rights . . . obstruct[s] the public's complete access to the waterways and creates a claim of private ownership upon water owned by the public."[326] "ABKA's marketing materials do nothing to dispel that expectation."[327]

A definition of the public trust doctrine that encompasses vague standards such as "general attractiveness" and peripheral considerations such as the content of advertising is almost infinitely malleable.

On remand of *Palazzolo* from the U.S. Supreme Court, the Supreme Court of Rhode Island determined that it would have to further remand the case to the Superior Court for the required *Penn Central* analysis.[328] It sought comments from counsel on inclusion in its remand order of the issue of "the relevance of the public trust doctrine to the reasonable investment-backed expectations of plaintiff Palazzolo."[329]

C. *Other Anticipated Post-*Palazzolo *Issues*

1. The tenuous link between prices, intent, and expectations

The Rhode Island Supreme Court also indicated that its remand order would include the solicitation and evaluation of information regarding the initial purchase price paid by Shore Gardens, Inc. ("SGI") and the price received when SGI sold six of the original parcels.[330]

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[322] *Id.* at 177 (citing Sea View Estates Beach Club, Inc. v. State Dep't of Natural Res., 588 N.W.2d 667, 676 (Wis. Ct. App. 1998)).

[323] *Id.* at 179 (citing Karin J. Wagner, Note, *Geneva Lake Dockominiums: An Exercise of Riparian Rights in Violation of the Public Trust Doctrine*, 4 WIS. ENVTL. L.J. 243, 248 (1997)).

[324] *Id.* at 180.

[325] *Id.* at 181.

[326] *Id.*

[327] *Id.*

[328] Palazzolo v. State *ex rel.* Tavares, 785 A.2d 561 (R.I. 2001) (Order).

[329] *Id.* (citing Greater Providence Chamber of Commerce v. State, 657 A.2d 1038 (R.I. 1995)).

[330] *Id.*

Because courts adjudicate rights and not value, the use of such information is questionable. Possibly this information might be relevant to whether SGI received more for the tracts it sold than it had paid for its original parcel, a gain that would be attributable to Palazzolo, upon whom SGI's assets devolved when its charter was revoked for nonpayment of its franchise fee. However, the fact that the landowner sold the parcel for more than it paid for it did not preclude the award of takings damages in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*[331] Possibly the Rhode Island Supreme Court has in mind the "economic impact of the regulation" factor of *Penn Central* (as distinct from the "interfere[nce] with distinct investment-backed expectations" factor).[332] However, the relationship between the absolute amount of a given claimant's loss and whether the government engaged in a regulatory taking never has been made clear.

More likely, and alleviating the need for clarity, the state supreme court might be concerned with issues of "fairness" and "windfalls" enunciated in Justice O'Connor's concurring opinion in *Palazzolo*.[333] Such a use would highlight the subjectivity associated with an amorphous expectations notice rule standard.

2. *Character of the regulation, targeting, and expectations*

In *Penn Central Transportation Co. v. City of New York*,[334] one of the enumerated takings factors was "the character of the governmental action." While the Court in *Penn Central* treated "character" in terms of whether there was a physical appropriation or something akin to it, the meaningful life of that distinction was only two years.[335] However, it may be that other attributes of "character" should be taken into account in discerning the role of preacquisition regulations after *Palazzolo*. In *American Pelagic Fishing Co. v. United States*,[336] the U.S. Court of Federal Claims noted that the plurality opinion in *Eastern Enterprises v. Apfel*[337] "suggests that, in considering the character of a governmental action alleged to constitute a taking, at least two other factors are also relevant: (1) whether the action is retroactive in effect,

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[331] 526 U.S. 687 (1999).

[332] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

[333] Palazzolo, 533 U.S. at 635-36 (O'Connor, J., concurring); *see also supra* Part IV.D.3.

[334] 438 U.S. 104 (1978).

[335] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (making permanent physical occupation categorically a taking, thus removing such cases from the ad hoc test of *Penn Central*).

[336] 49 Fed. Cl. 36 (2001) (holding statute that uniquely precluded fishing by plaintiff's ship to constitute a taking).

[337] 524 U.S. 498 (1998).

and if so, the degree of retroactivity; and (2) whether the action is targeted at a particular individual."[338]

The concern about targeted legislation in *American Pelagic* mirrors the Supreme Court's concern about targeted application as a violation of the Equal Protection Clause in *Village of Willowbrook v. Olech*,[339] and as a violation of the *Agins* "substantially advance" prong[340] in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*[341]

Given the Court's continued concern with fairness, as evidenced by Justice O'Connor's *Palazzolo* concurrence,[342] claimants may be able to make imaginative use of these doctrines.

3. Countervailing concerns for objectivity

As noted previously, concerns regarding circularity in the definitions of expectations and rights have played an important role in the regulatory takings debate.[343] One of the landmark cases in which circularity has been an important issue is *Katz v. United States*,[344] where reasonable expectations of a criminal defendant's privacy both shaped and were shaped by government's investigative powers. As the Supreme Court recently noted in *Kyllo v. United States*,[345] the "*Katz* test . . . has often been criticized as circular, and hence subjective and unpredictable."[346]

Kyllo involved the use of thermal imaging, by which police were able to sense from the public street the use of high-intensity lamps inside the defendant's home consistent with indoor marijuana growth. Justice Stevens's dissenting opinion, in which Justice O'Connor joined, stressed that the imaging did not reach inside the home, but detected heat waves emanating

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[338] *American Pelagic Fishing Co.*, 49 Fed. Cl. at 50 (citing *Eastern Enters.*, 524 U.S. at 532-37).

[339] 528 U.S. 562 (2000).

[340] Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (holding that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land") (citations omitted).

[341] 526 U.S. 687 (1999) (upholding municipality's continual ratcheting up of development requirements as fast as developer met them as basis for jury award based upon the disparity between the city's conduct and its own articulated standards).

[342] Palazzolo v. Rhode Island, 533 U.S. at 635-36 (2001) (O'Connor, J., concurring).

[343] *See supra* Part III.F.

[344] 389 U.S. 347 (1967) (holding that defendant convicted of illegal gambling had a justified reliance in privacy of his business conversations made from a glass-enclosed telephone booth).

[345] 533 U.S. 27 (2001).

[346] *Id.* at 2043 (citing, e.g., 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.1(d), at 393-94 (3d ed. 1996)).

from the home and detected out in the public street.[347] The majority opinion, written by Justice Scalia, held that sense-enhancing technology that is not in general public use, and which gathers information not otherwise obtainable without a physical intrusion into the home, constitutes a search. "This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted."[348]

The limitation of the permissible intrusion so as to protect privacy, as it was understood in 1791, seems quite analogous to the grounding of property rights in, as *Palazzolo* phrased it, "shared understandings of permissible limitations derived from a State's legal tradition."[349] Were the Court to employ *Kyllo* functionality in future property rights cases, the scope for subjectivity would be less, and expectations, to the extent they are a factor, would be shaped accordingly.

4. The effects of anticipatory drafting

Another range of issues that is predictable in future litigation involving the expectations and background principles notice rules involves the extent to which parties to a property purchase and sale might shape their agreements to anticipate regulatory takings problems. One clear illustration is the use of explicit assignments of existing and inchoate regulatory takings claims. The New York Court of Appeals, for instance, had explicitly disclaimed ruling on this issue in its adoption of the positive notice rule.[350]

Likewise, buyers and sellers might be expected to more carefully coordinate their strategies to maximize the value of their aggregate property rights. A contract explaining that the buyer paid the specified price in recognition of the skill and risk entailed in its pursuit of a takings claim, for instance, might dispel the notion that the vindication of the buyer's rights would represent a "windfall."

5. A glimpse at McQueen

As noted previously,[351] the U.S. Supreme Court instructed the South Carolina Supreme Court to reconsider its decision in *McQueen v. South*

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[347] *Id.* at 2048 (Stevens, J., dissenting).

[348] *Id.* at 2043.

[349] Palazzolo v. Rhode Island, 533 U.S. 606, 630 (2001).

[350] Gazza v. State Dep't of Envtl. Conservation, 679 N.E.2d 1035, 1039 n.4 (N.Y. 1997) (declaring that "[t]he entirely separate inquiry of whether an existing taking claim may be donated, sold, inherited or otherwise assigned is not before this Court").

[351] *See supra* note 103 and accompanying text.

Carolina Coastal Council[352] "in light of *Palazzolo*."[353] The state supreme court subsequently ordered the parties to brief the following issues:

> 1. Did the Court of Appeals err in finding Coastal Council's regulation deprived McQueen of all economically valuable use of his property?
>
> 2. Do background principles within South Carolina property or nuisance law absolve the State from compensating McQueen?
>
> 3. May a court use investment-backed expectations to determine McQueen's damages?[354]

The last of these issues is especially intriguing, since it seems to envision that, while there are no background principles that would absolve the state from the just compensation requirement of *Lucas*, nevertheless the expectations notice rule would apply. Thus, a complete wipe-out of value might be coupled with zero damages. The landowner has requested that the court consider other issues relevant to the role of expectations in a taking of all economic use and delay in exercising rights.[355]

D. Ripeness

The Supreme Court has granted certiorari in *Franconia Associates v. United States*,[356] a case involving the statutory termination of the unfettered right of prepayment that had been promised borrowers who constructed government-subsidized low-income rental housing in rural areas. The property owners had received the loans prior to enactment of the restriction and had lost the right to accelerate conversion of their housing into market-rent units because of it. The Federal Circuit held that the owners' takings and contract clause actions accrued with the passage of the statute and that their claims were time-barred under 28 U.S.C. § 2501 for failure to bring suit in the U.S. Court of Federal Claims within six years of the date the statute was enacted.[357]

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[352] 530 S.E.2d 628 (S.C. 2000).

[353] McQueen v. South Carolina Coastal Council, 530 S.E.2d 628 (S.C. 2000), *cert. granted, judgment vacated, remanded sub nom.* McQueen v. South Carolina Dep't of Health & Envtl. Control, 121 S. Ct. 2581 (2001).

[354] Order, January 10, 2002.

[355] *See* Motion, February 15, 2002.

> Does the U.S. Supreme Court's decision in *Palazzolo* . . . mean that Mr. McQueen (A) need not prove that the challenged restriction interferes with his reasonable investment-backed expectations, because he has raised a categorical takings claim, and that (B) even if relevant to a categorical takings claim, his reasonable investment-backed expectations are not extinguished by a delay in seeking development permits?

Id.

[356] 240 F.3d 1358 (Fed. Cir. 2001), *cert. granted*, 122 S. Ct. 802 (2002).

[357] *Id.* at 1362-63.

The grant of certiorari was limited to the following issues:

> 1. Whether a breach of contract claim accrues for purposes of 28 U.S.C. § 2501 when Congress enacts a statute alleged to abridge a contractual right to freedom from regulatory covenants upon prepayment of government mortgage loans.
>
> 2. Whether a Fifth Amendment takings claim accrues for purposes of 28 U.S.C. § 2501 when Congress enacts a statute alleged to abridge a contractual right to freedom from regulatory covenants upon prepayment of government mortgage loans.[358]

Given that the effects of statutory enactments upon existing property rights is more clear in some cases than in others, the statute of limitations issues raised in *Franconia Associates* seem more akin to the regulatory takings issues in *Palazzolo* than to the physical takings it had compared them with.[359]

VI. CONCLUSION

The Supreme Court's notice rule jurisprudence is decidedly a work in progress. Its opinion in *Palazzolo v. Rhode Island*[360] is beneficial in that it clearly rejects the positive notice rule. However, it does little to clarify the background principles notice rule and invites recourse to the amorphous expectations notice rule. The latter result, if not carefully circumscribed in future opinions, poses a substantial threat to sharply defined notions of property and to individual liberty.

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[358] Franconia Assocs. v. United States, 122 S. Ct. 802 (2002).

[359] Palazzolo v. Rhode Island, 533 U.S. 606, 627-28 (2001); *see also supra* Part IV.E.

[360] 533 U.S. 606 (2001).

Time, Space, and Value in Inverse Condemnation: A Unified Theory for Partial Takings Analysis*

Robert H. Freilich**

I. INTRODUCTION

A. *The General Setting of Takings Jurisprudence Today*

Many of the perplexing issues of regulatory takings jurisprudence have slowly but surely been resolved by the United States Supreme Court. The significant milestone cases from *Penn Central Transportation Co. v. City of New York*[1] to *Palazzolo v. Rhode Island*[2] have established four fundamental categories of takings with fairly clear articulation:[3]

(1) a *physical* taking constitutes actual physical intrusion[4] or regulations mandating that owners make physical improvements to property;[5]

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* Regulatory takings are often described and known by the procedural form in which a regulatory taking claim is brought, i.e., "inverse condemnation." *See* Agins v. City of Tiburon, 447 U.S. 255, 258 n.2 (1980).

> [I]nverse condemnation should be distinguished from eminent domain. Eminent domain refers to a legal proceeding in which a government asserts its authority to condemn property. Inverse condemnation is "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted."

Id. (quoting United States v. Clark, 445 U.S. 253, 255-58 (1980)).

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[1] 438 U.S. 104 (1978).

[2] 533 U.S. 606 (2001).

[3] For an early formulation of the multi-part categorization of regulatory takings, see Robert H. Freilich, *Solving The Taking Equation*, 15 URB. LAW. 447 (1983); for later formulations see Robert H. Freilich and David W. Bushek, *Thou Shalt Not Take Title Without Adequate Planning: The Taking Equation After* Dolan v. City of Tigard, 27 URB. LAW. 187 (1995).

[4] Kaiser Aetna v. United States, 444 U.S. 164, 176, 179 (1979).

[5] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (holding a regulation that required a landlord to physically bring cable TV lines to tenant units in the building was a taking).

(2) a *title* taking occurs when an owner is compelled as a condition of development approval to convey specific title by dedication or payment of a monetary exaction;[6]

(3) an *economic* taking occurs when an owner is deprived of (a) all permanent use and value (per se take)[7] or (b) a *Penn Central* partial taking (extent of diminution in the use and value of property);[8] and

(4) the character of governmental action (partial formulation of *Penn Central*)[9] or failure to substantially advance a legitimate state interest (first prong of *Agins v. City of Tiburon*).[10]

Still unclear after the decision of the United States Supreme Court in *Palazzolo* is the critical issue of what will constitute a "partial taking" under *Penn Central*. First, does a temporary moratorium (less than permanent), which deprives an owner of all use of the property for a temporary period constitute a *Lucas* regulatory taking? Second, if the property is deprived of all use during the temporary period, but retains substantial value by reason of the present value and salability of its future use at the termination of the temporary

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[6] Dolan v. City of Tigard, 512 U.S. 374 (1994) (holding that the doctrine of "unconstitutional conditions" may not require a person to give up a constitutional right where the property sought is not "roughly proportional" to the benefit). *But see* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) (holding that *Dolan* may be applicable only to title dedications and not monetary exactions, a position urged upon the Court by this author in his amicus brief on behalf of the American Planning Association); Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck 721 N.E.2d 971 (N.Y. 1999), *cert. denied*, 529 U.S. 1094 (2000).

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

[8] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978). In *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), the Supreme Court held that the second part of the *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), *regulatory* taking test, i.e., "deprivation of all or substantially all use" or value was equivalent to the Lucas per se 100% deprivation and would no longer be used for partial takings; in cases involving "partial economic loss," the *Penn Central* three part test would thereafter be used. *See infra* note 10.

[9] *Penn Central*, 438 U.S. 104.

[10] The *Agins* Court announced a two prong takings test: a regulation constitutes a taking if it: (1) fails to substantially advance a legitimate state interest; or (2) denies an owner viable use of land. *Agins*, 447 U.S. at 260. The first prong of *Agins* remains. It was reiterated in *Nollan v. California Coastal Commission*, 438 U.S. 825 (1987) (finding that a mandatory dedication of beachfront property failed to substantially advance the state interest of protecting the view of the beach from an upland arterial highway). In *Nollan*, the court distinguished the *Agins* first prong from substantive due process, which only requires a rational basis test. The second prong of *Agins*, relating to the loss of all economically viable use, has been subsumed under the *Lucas* per se taking. It has lost all importance as a partial taking test, giving way to the *Penn Central* extent of diminution of use and value. *See Palazzolo*, 533 U.S. 606. *Agins* has never been extensively used for either formulation. *See* Edward J. Sullivan, *Emperors and Clothes: The Geneology and Operation of the* Agins' *Tests*, 33 URB. LAW. 343, 361 (2001).

period, should not the regulation be measured under *Penn Central*'s three-part test as a partial taking? Third, in determining both of these questions, the courts have created a mythical fraction, the numerator of which is the extent of the deprivation, the denominator being the totality of the property interest taken as a whole.[11] If we allow only the portion of the property regulated to calculate the denominator, we have drafted an equation whose denominator is the same as the numerator, i.e., the extent of the diminution of use and value always is 100%.[12] This problem is known as "segmentation."[13] It is the problem of "time" because if the temporary period of deprivation (numerator) is measured against the permanent duration of the property (denominator), there will always be "value" in the property at the present time. It is a problem of "space" because if we hold that a regulation which restricts the floor area ratio, height, or yards of a building is to be measured against a denominator representing only the extent of the airspace, restricted floor area, or yards, the extent of deprivation will always be 100%.[14] If, however, the denominator represents the entire linear and cubic dimensions of the building (length, width, and height), then use may be made of the non-restricted areas, and the property will have present use and value.[15]

This problem was seemingly solved in 1978, when the *Penn Central* Court rejected viewing only the airspace as the denominator.[16] Logically, the restricted spatial aspects of the problem have been resolved to require that the denominator represent the entirety of the property. Nevertheless, in *Lucas*, Justice Scalia posed the famous query:

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[11] *See* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994).

[12] Thus, the *Loveladies* court put the matter this way:

> Loveladies and the amici urge this court to adopt a bright-line rule that the denominator of the takings fraction is that parcel for which the owner seeks a permit. The Government, on the other hand, argues that such bright-line rules would encourage strategic behavior on the part of developers—"conveying away the non-wetlands portions of their parcels prior to applying to the Corps for a permit to fill the remaining wetlands."

Id. at 1181.

[13] *See* Deltona Corp. v. United States, 657 F.2d 1184 (Cl. Ct. 1981) (holding that a ban on filling the remaining three fingers of a five finger tract extending into a navigable waterway is a diminution of only 60%, i.e., three fingers out of five, rather than three fingers out of three fingers, or 100%).

[14] *See* Allingham v. City of Seattle, 749 P.2d 160, 161 (Wash.) (approving the use of the segmentation approach), *amended by* 757 P.2d 533 (Wash. 1988), *overruled by* Presbytery of Seattle v. King County, 787 P.2d 907, 915 (Wash. 1990). In *Allingham*, a regulation prohibiting use of the rear 40% of the property as a "greenbelt" was held to result in a taking of 100% of the 40%. *Id.* at 163-64.

[15] Realizing its mistake, the Washington Supreme Court, only two years later, overruled *Allingham* and required that the totality of the property as a whole be the denominator. *Presbytery*, 787 P.2d at 915.

[16] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978).

> Regrettably, the 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. When, for example, 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 portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole.[17]

One year later, the Supreme Court answered the question—it is 90% of 100% and not a per se taking.[18] Despite this, authors with an ideological bent towards property owner rights continue to maintain that the "temporal" aspects of property are not part of the physical property itself. It is as if Einstein's space and time, the third and fourth dimensions of the universe, had never been elucidated in the general and special theories of relativity. Elucidation of the partial takings issues will be forthcoming in the Supreme Court's decision on *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[19] due to be released this term. This article suggests that the court consider all of the ramifications of the need for long-term and short-term moratoria involving time constraints less than permanent, spatial restrictions less than total, and the value remaining in parcels when non-permanent controls are in place, when deciding *Tahoe-Sierra*, and whether to continue to use these techniques and takings formulations.

B. Factual and Legal Setting of Tahoe-Sierra *as Decided in the Ninth Circuit Court of Appeals*

The Tahoe Regional Planning Agency ("TRPA") adopted Ordinance 81-5, which prohibited development in environmentally sensitive areas from August 1981 through August 1983, in order to carry out studies, establish carrying capacities, and adopt the regional plan required by the amended Tahoe Regional Planning Compact.[20] When it became apparent that final adoption of the new plan required additional time, TRPA adopted Resolution 83-21, which extended the two-year moratorium an additional eight months to April

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[17] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1016 n.7 (1992).

[18] *See* Concrete Pipe & Prods. v. Constr. Laborers Pension Trust, 508 U.S. 602, 642 (1993); *see also* Robert H. Freilich & Elizabeth A. Garvin, *Takings After* Lucas*: Growth Management, Planning, and Regulatory Implementation Will Work Better than Before*, *in* AFTER LUCAS: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION 61 (David L. Callies ed., 1993).

[19] 216 F.3d 764 (9th Cir. 2000).

[20] Pub. L. No. 96-551, 94 Stat. 3233 (1980) (authorizing a thirty-month moratorium).

1984, for a total of thirty-two months—two months longer than the statutory authorization.

On appeal to the Ninth Circuit, after losing the case in district court,[21] TRPA posed the following question: "[W]hether a temporary planning moratorium, enacted by TRPA to halt development while a new regional land use plan was being devised, effected a [facial] taking of each plaintiff's property under the standard set forth in *Lucas v. South Carolina Coastal Council*."[22] Recognizing the critical importance of this question to its taking claim, the Preservation Council petitioned the Ninth Circuit to accept the "conceptual severance" argument when determining the relevant property interest purportedly taken. The Council argued that the property interest to be considered was not the entire fee simple in the property, but rather only the "temporal 'slice' of each fee that covers the time span during which Ordinance 81-5 and Resolution 83-21 were in effect."[23]

Recognizing the inconsistency of Petitioners' argument with well-established United States Supreme Court precedent, the Ninth Circuit held:

> Property interests may have many different dimensions. For example, the dimensions of a property interest may include a physical dimension (which describes the size and shape of the property in question), a functional dimension (which describes the extent to which an owner may use or dispose of the property in question), and *a temporal dimension (which describes the duration of the property interest)*.[24]

The Ninth Circuit explained: "It would make little sense to accept temporal severance and reject spatial or functional severance."[25]

> To not reject the concept of temporal severance, we would risk converting every temporary planning moratorium into a categorical taking. Such a result would

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[21] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226 (D. Nev. 1999), *rev'd in part*, 216 F.3d 764 (9th Cir. 2000), *cert. granted*, 533 U.S. 946 (2001).

[22] *Tahoe-Sierra*, 216 F.3d at 766 (citation omitted).

[23] *Id.* at 774.

[24] *Id.* (emphasis added) (citing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (rejecting "spatial" conceptual severance); Agins v. City of Tiburon, 447 U.S. 255 (1980) (rejecting "temporal" severance); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978) (rejecting "airspace" as spatial severance); Andrus v. Allard, 444 U.S. 51 (1979) (rejecting "functional" severance)). The principles of statutory interpretation present for over 800 years in English common law also reject severance as a concept. *See* FORTUNATUS DWARRIS, A GENERAL TREATISE ON STATUTES: THEIR RULES OF CONSTRUCTION, AND THE PROPER BOUNDARIES OF LEGISLATION AND JUDICIAL INTERPRETATION 188-89 (Platt Potter ed., 1885) ("[O]ne part of a statute must be treated and construed by another that the whole if possible may stand; *ut res magis vajeat quam pereat*—statutes are to be interpreted so as to give effect to all the words therein. Every part of the statute must be viewed in connection with the whole.").

[25] *Tahoe-Sierra*, 216 F.3d at 776.

> run contrary to the Court's explanation that it is "relatively rare" that government "regulation denies all economically beneficial or productive use of land." . . .
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> . . . .
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> . . . The relevant property interests in the present case are the whole parcels of property that the plaintiffs own.[26]

The court also held that "[g]iven the importance and long-standing use [of] temporary moratoria, courts should be exceedingly reluctant to adopt rulings that would threaten the survival of this crucial planning mechanism."[27] The court concluded that the temporary moratorium adopted by TRPA did not deny all use or value of the property. "Given that the ordinance and resolution banned development for only a limited period, these regulations preserved the bulk of the future developmental use of the property. This future use had a substantial present value."[28] "This economic reality is precisely what differentiates a permanent ban on development, even if subsequently invalidated, from a temporary one."[29] The case came to the United States Supreme Court in the posture of a facial taking. As the Court held in *Keystone Bituminous Coal Ass'n v. DeBenedictis*:[30]

> "Because appellees' taking claim arose in the context of a facial challenge . . . the only issue properly before . . . this Court, is whether the 'mere enactment' of the Surface Mining Act constitutes a taking." . . . Petitioners thus face an uphill battle . . . because [they] have not claimed, at this stage, that the Act makes it commercially impracticable for them to [make a profit].[31]

In sum, the Ninth Circuit found that even apart from the Petitioners' assertion of a temporal severance theory, the per se taking argument of Petitioners must fail because sufficient evidence was presented to show that the property had use and value during the moratorium so as to require an as-applied, ad hoc factual determination under *Penn Central*, and Petitioners had waived all as-applied takings claims.[32]

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[26] *Id.* at 777-79 (citations omitted) (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992)).

[27] *Id.* at 777.

[28] *Id.* at 781.

[29] *Id.* at 781 n.26.

[30] 480 U.S. 470 (1987).

[31] *Id.* at 495-96 (citations omitted) (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 295-96 (1981)); *see also* Yee v. City of Escondido, 503 U.S. 519, 533-34 (1992) (citing *Keystone*, 480 U.S. 470).

[32] The Ninth Circuit did not consider whether the development moratorium effected a compensable taking under *Penn Central*. The court explained: "[T]he only question before us is whether the rule set forth in *Lucas* applies—that is, whether a categorical taking occurred because Ordinance 81-5 and Resolution 83-21 denied the plaintiffs 'all economically beneficial or productive use of land.'" *Tahoe-Sierra*, 216 F.3d at 773 (quoting *Lucas*, 505 U.S. at 1015).

Ironically, Petitioners asserted that planning or time-out moratoria are validly used by planning agencies to provide breathing space[33] and contended in the opening brief only that the "dubbed" temporary moratorium in the case was, in fact, a permanent substantive change in the regulations.[34] This type of argument, which strays from the "question presented," may result in the failure of the facial taking claim, because by expressly recognizing that a temporary moratoria is not at issue, it avoids the very question certified by the Court. The Supreme Court may dismiss the case as "improvidently granted."

The Ninth Circuit held that temporary moratoria also constitute a "normal delay" in the planning process and do not constitute a partial or temporary taking. In *First English*, the court limited temporary takings to invalidated permanent restrictions lasting for a temporary period of time—specifically, that once a taking has been found, the period between the time of the taking and the eventual invalidation and rescission of the offending regulation would be a temporary taking,[35] and that *Lucas* is clearly limited to those relatively rare circumstances where all economically viable use and value is *permanently* removed due to the regulatory impact of the challenged regulation.[36] The court held that takings analysis requires consideration of the entirety of the property, including temporal, as well as spatial and use elements,[37] and that, contrary to the arguments asserted by Petitioners, the takings analysis looks at all components of the *fee*.[38] Furthermore, it held that reviewing courts should not

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TRPA only appealed the district court's finding of a categorical taking under *Lucas*, and the Tahoe-Sierra Preservation Council did not appeal the court's finding of no compensable taking under *Penn Central*. "And even if arguments regarding the *Penn Central* test were fairly encompassed by the defendants' appeal, the Plaintiffs have stated explicitly on this appeal that they do not argue that the regulations constitute a taking under the ad hoc balancing approach described in *Penn Central*." *Id.* Petitioners' counsel, Michael Berger, similarly stipulated in oral argument before the United States Supreme Court on January 7, 2002. *See* Transcript of Oral Argument, 2002 WL 43288 (Jan. 7, 2002), Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency (No. 00-1167).

[33] Petitioners essentially conceded that the moratorium met the first prong of *Agins v. City of Tiburon*, 447 U.S. 255 (1980), "[w]hether the regulation fails to substantially advance a legitimate state interest." *Id.* at 260. The first prong of *Agins* was recently approved in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), and earlier in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1012 (1992).

[34] Petitioners' Brief at *4-5, 2001 WL 1692011 (Sept. 12, 2001), *Tahoe-Sierra* (No. 00-1167).

[35] *Tahoe-Sierra*, 216 F.3d at 777-78; *see* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987).

[36] *Tahoe-Sierra*, 216 F.3d at 776; *see Lucas*, 505 U.S. at 1015; *see also* Palazzolo v. Rhode Island, 533 U.S. 606 (2001).

[37] *Tahoe-Sierra*, 216 F.3d at 776 (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130-31 (1978); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 498-99 (1987)).

[38] *Tahoe-Sierra*, 216 F.3d at 778-79.

conceptually sever these interests "into small temporal pieces" any more than they would sever spatial interests (e.g., setbacks) or allowable uses (e.g., traditional zoning restrictions). Rather, courts considering a facial taking claim should look at all elements to determine whether, in totality, "all economically viable use" has been permanently removed from the property.[39]

II. TIME AND SPACE IN LAND USE CONTROLS

A. Long-Term Growth Management Techniques

This article will explore the temporary and spatial aspects of takings theory to demonstrate that if segmentation as a principle is accepted by the Supreme Court, it would lead to an absurd result: the continuous fragmentation of property interests in order to shape the fragments to exactly meet the time and space restrictions of the regulation.[40]

Quite a similar logic propels property rights activists to reject finite environmental limitations to global development. Viewing each piece of property as a finite whole, one never need envision the cumulative impacts of all of the individual pieces.[41]

Before we enter into the temporal aspects of takings theory, we must examine how the courts in the last thirty years have treated the long-term timing and sequencing of development under growth management and smart growth systems. If long-term property regulation does not constitute a taking, then the inevitable question is, how will takings be affected by a short-term moratorium or interim development control. Finally, we will explore a unique subset of cases where a few state appellate courts have found takings, in order to see whether the timing, spatial, and value principles should encompass a unique category. These cases involve closure restrictions for one year or less by nuisance abatement boards on rental properties where drug use has been found.

Thirty years ago, the United States Supreme Court refused to consider *Golden v. Planning Board of Ramapo*.[42] By dismissing the appeal from the New York Court of Appeals,[43] the Court established the constitutionality of

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[39] *Id.*; *see also Lucas*, 505 U.S. at 1012.

[40] *See* Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1181 (Fed. Cir. 1994) ("The Government, on the other hand, argues that such [severance] would encourage strategic behavior on the part of developers—'conveying away the non-wetland portions of their parcels prior to applying to the Corps for a permit to fill the remaining wetlands.'").

[41] *See* Edward O. Wilson, THE FUTURE OF LIFE (Knopf 2002), *excerpted in The Bottleneck*, SCI. AM., Feb. 2002, at 84-89.

[42] 409 U.S. 1003 (1972).

[43] Golden v. Planning Bd. of Ramapo, 285 N.E.2d 291 (N.Y. Ct. App. 1972), *appeal dismissed sub nom.* Rockland County Builders Ass'n v. McAlevey, 409 U.S. 1003 (1972); *see*

controls on the timing and sequencing of growth, the predecessor of all growth management and smart growth systems in the United States.[44] *Ramapo* tied zoning and subdivision of land approvals to the availability of adequate public facilities at the time of development based upon an eighteen-year capital improvement program.[45]

The importance of the fundamental constitutional principle authorizing timing and sequencing growth over periods as long as eighteen years (*Ramapo*) and twenty years (*Minneapolis-St. Paul*) was early recognized as the most important advance in zoning and planning since *Euclid*.[46]

ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING AND ENVIRONMENTAL SYSTEMS 6-7 (1999). The author developed the ordinances and litigated the *Ramapo* system through the courts up to the U.S. Supreme Court. In subsequent years he has worked with over 200 cities, counties, and states in developing growth management and smart growth systems from Seattle-King County to Miami-Dade County and the Florida Keys; from San Diego to the Baltimore-Washington metropolitan region and almost all systems between—Los Angeles, Riverside, and Ventura, California; Summit County, Utah; Minneapolis-St. Paul, Minnesota; Dallas, Fort Worth, Houston, El Paso, and San Antonio, Texas; Lexington-Fayette, Kentucky; Charlotte and Chapel Hill, North Carolina; Jackson, Mississippi; Atlanta, Fulton, Carroll, and DeKalb Counties, Georgia; Sarasota, Palm Beach, Orange (Orlando), and Hillsborough (Tampa) Counties, Florida; Albuquerque, New Mexico; Scottsdale, Fountain Hills, and Mohave County, Arizona; Boulder, Grand Junction, Colorado Springs, and Douglas County, Colorado, to name a few.

[44] *See* PATRICK J. ROHAN, 1 ZONING AND LAND USE CONTROLS § 4.05 (1996).

> [T]he *Ramapo* decision and rationale also permanently altered the courts' perspective of the land use regulatory process and paved the way for subsequent decisions that have favored public regulation over the developer or landowner's immediate right to develop property (irrespective of the harm such development might inflict upon the public good) .... The *Ramapo* decision shifted the balance of power from the developer to the land use agencies. The developer no longer has an absolute right to proceed with development, irrespective of whether public facilities can reasonably accommodate the development. Instead the developer can be made to wait a reasonable period to allow public facilities to catch up or be forced to expend funds to ripen the land for development. At the same time, the *Ramapo* case has expanded the judicial view of just what incidental costs affiliated with development may be shifted to the developer.

Id.

[45] For a detailed history and description of *Ramapo*'s capital improvement programming as a guide to land use planning, see Stuart L. Deutsch, *Capital Improvement Controls As Land Use Devices*, 9 ENVTL. L. 61 (1978) and IRVING SCHIFFMAN, ALTERNATIVE TECHNIQUES FOR MANAGING GROWTH 17 (1989).

[46] Donald G. Hagman, 4 ENVTL. COMMENT. 4 (1978) (nationwide survey of land use professors and practicing planners and attorneys). *Ramapo* continues to be recognized as the leading precedent for growth management and smart growth systems. *See* Maryland Capital Park & Planning Comm'n v. Rosenberg, 307 A.2d 704 (Md. 1973) ("[*Ramapo*'s timing and sequencing controls] are said by professional planners to be the most important advance in planning and zoning law since *Village of Euclid* ...."); Thomas G. Pelham, *Adequate Public Facilities Requirements: Reflections on Florida's Concurrency System for Managing Growth*, 19 FLA. ST. U. L. REV. 973, 996 (1993); DOUGLAS R. PORTER, MANAGING GROWTH IN

The constitutionality of timed and sequenced controls based upon long-term capital improvement programs and comprehensive plans has been upheld against takings challenges involving every type of as-applied implementation considering the issues of: (1) authority to require a zoning special use permit for a residential subdivision tied to an adjusted master plan and an eighteen-year capital improvement program;[47] (2) building permit population allocations over time, based on a comprehensive plan;[48] (3) timing and phasing of utility extensions needed for subdivision approval tied to a ten-year Water and Sewer Master Plan,[49] and tied to an adopted Comprehensive Plan;[50] (4) timing and phasing of an adopted Comprehensive Plan;[51] (5) subdivision regulation phasing;[52] timing based upon facilities scheduling in an intergovernmental agreement;[53] and (6) denial of rezoning site plan approval.[54]

The rationale of each of these cases is basic. If adequate public facilities at established *urban* levels of service are not available to property, and will not be available for the life of the plan (eighteen to twenty years), then the reasonable use of that property for the life of the plan is *rural* or *agricultural* for purposes of regulatory takings analysis.[55] Measured against the three-fold *Penn Central* test, which involves the analysis of (1) character of governmental action, (2) investment backed expectations, and (3) extent of diminution of loss, as long as the timing and sequential controls meet fundamental and significant governmental purposes in controlling sprawl and assuring adequate public facilities prior to urban development, it will not constitute a *Penn Central* taking.[56]

Long-term growth systems will not constitute takings unless the regulatory constraint becomes "permanent" and "total."[57] In *Ramapo*, Golden argued that

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AMERICA'S COMMUNITIES 20 (1997); ERIC D. KELLY, MANAGING COMMUNITY GROWTH: POLICIES, TECHNIQUES AND IMPACTS 30-32 (1993).

[47] *Ramapo*, 285 N.E.2d at 291.

[48] Schenk v. City of Hudson, 114 F.3d 590 (6th Cir. 1997).

[49] Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369 (D. Md. 1975).

[50] Wincamp P'ship v. Anne Arundel County, 458 F. Supp. 1009 (D. Md. 1978).

[51] Giuliano v. Town of Edgartown, 531 F. Supp. 1076 (D. Mass. 1982).

[52] Unity Ventures v. County of Lake, 631 F. Supp. 181 (N.D. Ill. 1986), *aff'd*, 841 F.2d 770 (7th Cir., 1987), *cert. denied sub nom.* Alter v. Schroeder, 488 U.S. 891 (1988).

[53] Larsen v. County of Washington, 387 N.W.2d 902 (Minn. Ct. App. 1986).

[54] Chase Manhattan Mortgage & Realty Trust v. Wacha, 402 So. 2d 61 (Fla. Dist. Ct. App. 1981).

[55] Long Beach Equities v. County of Ventura, 282 Cal. Rptr. 877 (Cal. Ct. App. 1991) (holding that no regulatory taking occurred when a city denied the annexation of a developer's property because its requirements for adequate public facilities were stated in the general plan, even though the county zoning declared property rural unless annexed to a city).

[56] Associated Home Builders v. City of Livermore, 557 P.2d 473 (Cal. 1976).

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

by delaying development of her property for a period of eighteen years, the ordinance had the effect of taking her property without just compensation. The New York Court of Appeals rejected her argument even though the restrictions would severely restrict the property for a full generation.[58] Recognizing that every restriction upon the use of property has an adverse effect upon individual owners, the court found that unless those restrictions are "unreasonable in terms of necessity," or the resulting "diminution in value is such as to be tantamount to a confiscation," the regulation would pass muster.[59] Golden's property was not taken, because although the limitations imposed were "substantial in nature and duration," they were not "absolute."[60] For one thing, all residential property within the township could be subdivided within a maximum period of eighteen years. In addition, Golden could accelerate the date of development of her land by providing, at her expense, the facilities and services required to obtain a special permit. Finally, the restrictions imposed by the ordinance, although they may have had the effect of diminishing the value of Golden's property, were offset by future financial benefit from the orderly development of the township and reduced local property taxes during the period of restriction. Thus, the court concluded that the restrictions imposed were only temporary in nature—the property could be put to a profitable use within a reasonable time—and not sufficient to result in an invalid taking.[61]

By accepting full population and employment growth through timed and sequenced development, property is afforded an urban use when public facilities become available and thus is not deprived of "all" use under the *First English* and *Lucas* decisions.[62] Beginning with *Ramapo* and continuing through current decisions, both state and federal courts have uniformly upheld growth-timing planning techniques against takings challenges. The standard for these cases, and the standard required of a regulation to avoid a taking claim, is "reasonable use over a reasonable period of time" as measured by the comprehensive plan.[63] Land that will not be serviced within the life of the plan

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[58] Golden v. Planning Bd. of Ramapo, 285 N.E.2d 291, 304-05 (N.Y. 1972), *appeal dismissed sub nom.* Rockland County Builders Ass'n v. McAlevey, 409 U.S. 1003 (1972).

[59] *Id.* at 304.

[60] *Id.* at 382.

[61] *See* Robert H. Freilich & Elizabeth A. Garvin, *Takings After* Lucas*: Growth Management, Planning and Regulatory Implementation Will Work Better than Before*, 22 STETSON L. REV. 409 (1993).

[62] First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); *Lucas*, 505 U.S. at 1003.

[63] The concept of "reasonable use" was enunciated in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926), and *Nectow v. City of Cambridge*, 277 U.S. 183, 187 (1928). The reasonable period of time standard was added by *Ramapo*. It is important to distinguish these previously mentioned cases, where time was a factor in determining whether a taking had

is appropriately regulated for nonurban, rural, or agricultural uses and is constitutional for providing a reasonable use—which is non-urban.[64]

B. Short Term Growth Management Techniques: Moratoria and Interim Development Controls

Interim development controls and moratoria are fundamental to a rational, defensible, planning process. Even prior to *Village of Euclid v. Ambler Realty Co.*,[65] courts had recognized the necessity of temporary moratoria of building permit issuance pending planning studies as a prerequisite to a valid planning and regulatory process.[66] Courts since that time have recognized that a temporary halt on development activity during a period of study is not only reasonable, but also ensures that government acts in a manner that is thoughtful and deliberate, not arbitrary and capricious.[67]

The significance of planning on zoning regulation was fully recognized when the United States Department of Commerce issued the Standard State Zoning and Planning Enabling Acts in 1926 and 1928, respectively, both of which included the requirement that zoning be in accordance with a comprehensive plan. Professor Charles Haar has stated that one of the important aspects of planning was to assure that property owners were protected by meaningful standards. "With the heavy presumption of constitutional validity that attaches to legislation . . . and the difficulty in judicially applying a 'reasonableness standard,' there is [a] danger that zoning . . . [would] tyrannize [the] individual property owners."[68]

As the New York Court of Appeals stated in *Udell v. Haas*,[69] "the comprehensive plan is the essence of zoning. Without it there can be no rational allocation of land use. It is the insurance that the public welfare is served and that zoning does not become nothing more than a Gallup poll."[70]

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occurred, from those cases trying to determine the time of the taking, once a taking has been determined to have occurred. *First English* held that once a taking has been determined, compensation is due from the effective date of the take regardless of how short the period of time the take has been in effect. In determining whether a take has occurred in the first place, reasonable timing and sequencing regulations will not effect a take because the property has not been permanently deprived of value or use. It will have an urban use within a reasonable period of time as measured by the comprehensive plan.

[64] Long Beach Equities, Inc. v. County of Ventura, 282 Cal. Rptr. 877 (Cal. Ct. App. 1991).

[65] 272 U.S. 365.

[66] Miller v. Bd. of Pub. Works, 234 P. 381 (Cal. 1925), *cert. denied*, 273 U.S. 781 (1926).

[67] Williams v. City of Central, 907 P.2d 701, 706 (Colo. Ct. App. 1995).

[68] Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1157-58 (1955).

[69] 235 N.E.2d 897 (N.Y. 1968).

[70] *Id.* at 901; *see also* Daniel R. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899 (1976); Geo-Tech Reclamation Indus. v. Hamrick,

Regulatory agencies across the country have used temporary moratoria and interim development controls as a legitimate means of creating breathing space while necessary background data is gathered, analyses conducted, and policies assessed.[71]

The reasonableness of a moratorium is measured by both the length of its duration and its relation to the underlying studies supporting change in the regulations. Thus, an enacting authority must diligently pursue completion of the planning process, including studies, analyses, public participation, and the drafting of legislation.[72] The need for the moratorium is justified by the need to pursue further study of the matter at hand.[73] If, however, having established a legitimate need, the government fails to pursue the necessary studies or to work diligently toward resolution of the matter, the substantive validity of the moratorium can be called into question.[74]

Moratoria have been set aside under substantive due process grounds when the restraint has been determined to be accompanied by studies unreasonable in scope, adopted in bad faith, or otherwise arbitrary or capricious.[75] Where the government enacts a moratorium with the intent of blocking a specific development, with no legitimate, good faith interest in addressing a larger planning or environmental concern, unlawful discrimination may be found.[76] The bad faith cases have not resulted in findings of regulatory takings under the first prong of *Agins*, but rather have been viewed as equal protection violations.[77] If the Court were to find the duration of the moratorium excessive, that the moratorium was entered into in bad faith, that it was not

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886 F.2d 662 (4th Cir. 1989) (holding that land use regulation requires comprehensive planning to avoid "mob rule").

[71] ROHAN, *supra* note 44, § 22.01[1].

[72] *Id.* § 22.02[2].

[73] *Id.*; Williams v. City of Central, 907 P.2d 701, 705 (Colo Ct. App. 1995).

[74] ROHAN, supra note 44, § 22.02[2]; *cf.* Almquist v. Town of Marshan, 245 N.W.2d 819, 826-27 (Minn. 1976); State *ex rel.* SCA Chem. Waste Servs., Inc. v. Konigsberg, 636 S.W 2d 430, 434-35 (Tenn. 1982).

[75] Mitchell v. Kemp, 575 N.Y.S.2d 337 (N.Y. App. Div. 1991) (holding a moratorium unconstitutional on due process grounds, where town gave no satisfactory reason for five-year delay in enacting permanent zoning ordinance); Q.C. Constr. Co. v. Gallo, 649 F. Supp. 1331 (D.R.I. 1986) (finding a due process violation where city imposed moratorium on sewer hookups but made no effort to study or remedy problem giving rise to moratorium), *aff'd*, 836 F.2d 1340 (1st Cir. 1987).

[76] *See Williams*, 907 P.2d at 705; *cf.* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999).

[77] Hilton v. City of Wheeling, 209 F.3d 1005 (7th Cir. 2000); Olech v. Vill. of Willowbrook, 160 F.3d 386 (7th Cir. 1998). *Contra* Greenspring v. Baltimore County, 232 F.3d 887 (4th Cir. 2000); Bryan v. City of Madison, 213 F.3d 267 (5th Cir. 2000). Both *Greenspring* and *Bryan* were severely criticized in Paul Wilson, *What Hath* Olech *Wrought? The Equal Protection Clause in Recent Land-Use Damages Litigation*, 33 URB. LAW. 729, 736-37 (2001).

consistent with a comprehensive plan, or was otherwise arbitrary and capricious, the cause of action would lie in a remedy of invalidation under state statutory or substantive due process grounds.[78]

In *Tahoe-Sierra*, the studies undertaken by TRPA during the thirty-two-month moratorium were specifically tied to the development of standards to slow the eutrophication of Lake Tahoe and to meet the charge given TRPA under the Tahoe Regional Planning Compact to address this problem within a thirty-month period.[79] Four important principles underlie the need for temporary moratoria.[80] First, reasonable moratoria allow the regulating body the necessary time to study and formulate solutions to significant land use and environmental problems affecting society.[81]

The planning and public policy objectives that may necessitate a moratorium on development range from the timing and phasing of development to the provision of adequate public facilities and infrastructure.[82] In their brief, the *Tahoe-Sierra* Petitioners actually conceded the validity of "'a planning' or 'time out' moratorium of the kind sometimes used by planning agencies to provide needed breathing space."[83] By this extraordinary admission, Petitioners stipulated that if *Tahoe-Sierra* involved a temporary moratorium, it would have been valid. Petitioners asserted that: "Although dubbed 'temporary' . . . it was actually a substantive regulation rather than a proce-

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[78] *See* Woodwind Estates, Ltd. v. Gretkowski, 205 F.3d 118 (3d Cir. 2000); Kawaoka v. City of Arroyo Grande, 17 F.3d 1227 (9th Cir. 1994).

[79] TAHOE REGIONAL PLANNING AGENCY, STUDY REPORT FOR THE ESTABLISHMENT OF ENVIRONMENTAL THRESHOLD CARRYING CAPACITIES (1982); Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Comm'n, 216 F.3d 764, 781-82 (9th Cir. 2000) (accepting the district court's finding of fact that "TRPA worked diligently to complete the regional plan as quickly as possible").

[80] Robert H. Freilich, *Interim Development Controls: Essential Tools for Implementing Flexible Planning and Zoning*, 49 J. URB. L. 65, 77-80 (1971), *cited in Tahoe-Sierra*, 216 F.3d at 777.

[81] Elizabeth A. Garvin & Martin L. Leitner, *Drafting Interim Development Ordinances: Creating Time to Plan*, LAND USE L. & ZONING DIG., June 1996, at 3.

[82] *See* Golden v. Planning Bd. of Ramapo, 285 N.E.2d 291 (N.Y. 1972), *appeal dismissed sub nom.* Rockland County Builders Ass'n v. McAlevey, 409 U.S. 1003 (1972) (upholding timed and phased multi-year development controls to assure that adequate public services would be provided in accordance with a long-term capital improvement plan); Schenk v. City of Hudson Vill., 114 F.3d 490 (6th Cir. 1997) (upholding the City's numerical allocation of development permits over multi-year phasing programs based on comprehensive and intensive growth studies and capital improvement analysis); Constr. Indus. Ass'n v. City of Petaluma, 552 F.2d 897, 909 (9th Cir. 1975); *see also* FREILICH, *supra* note 43; *see generally* Timothy J. Dowling, *Reflections on Urban Sprawl, Smart Growth and the Fifth Amendment*, 148 U. PA. L. REV. 873 (2000).

[83] Petitioners' Brief at *4-5, 2001 WL 1692011 (Sept. 12, 2001), Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency (No. 00-1167).

dural planning device and it made a dramatic change in TRPA's land use plan."[84]

The Supreme Court, however, did not accept the case as a challenge to a permanent regulation. The question presented asked "whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property."[85] The case may be dismissed on the basis that certiorari was improvidently granted, or alternatively, the order of the Court of Appeals should be affirmed, since Petitioners concede that a temporary moratorium would be valid and hence would not effect a taking.

Second, temporary moratoria also constitute a valid response to imminent public health and safety threats.[86] Indeed, it was such a concern for the immediate safety of the public that prompted Los Angeles County to enact an interim ordinance prohibiting development within a flood protection area to protect from loss of life: a temporary moratorium that was eventually upheld on remand from this Court even though all use was prohibited during the thirty-month period.[87] In the case *sub judice*, TRPA's thirty-two month moratorium was for a duration directly tied to the task before it, specifically, "to adopt 'environmental threshold carrying capacities.'"[88]

In each of these circumstances, the government was confronted with a planning, environmental, or public safety threat of considerable magnitude and immediacy. It found, in each case, that a temporary halt on development was necessary to accomplish legitimate planning purposes precedent to the eventual regulation.[89]

The third principle underlying the need for temporary planning moratoria is the prevention of nonconforming uses or development inconsistent with the

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[84] *See id.* at *5.

[85] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 533 U.S. 948 (2001).

[86] A taking is less likely to be found when the challenged interference with a property interest arises from a public program assisting the benefits and burdens of economic life to promote a public good. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978); Sadowsky v. City of New York, 732 F.2d 312 (2d Cir. 1984).

[87] First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987), *remanded to*, 258 Cal.Rptr. 893 (Cal. Ct. App. 1989), *cert. denied*, 493 U.S. 1056 (1990); *see also* Orleans Builders & Developers v. Byrne, 453 A.2d 200 (N.J. Super. App. Div. 1982) (upholding eighteen-month moratorium to facilitate environmental protection for the vast area of the New Jersey Pine Barrens); Cappture Realty Corp. v. Bd. of Adjustment, 336 A.2d 30 (N.J. Super. App. Div. 1975) (upholding a temporary moratorium on construction within designated flood prone areas while flood control studies were completed).

[88] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 767-68 (9th Cir. 2000); *see* Lorin K. Hatch, John E. Reuter & Charles R. Goldman, *Stream Phosphorus Transport in the Lake Tahoe Basin*, 69 ENVTL. MONITORING & ASSESSMENT 63-83 (2001).

[89] David G. Heeter, *Interim Zoning Controls: Some Thoughts on Their Uses and Abuses*, *in* 2 MANAGEMENT AND CONTROL OF GROWTH 409, 411 (Randall W. Scott et al. eds., 1975).

purposes and policies of the planning legislation being formulated.[90] When developers expect that a regulating body is studying a particular planning or environmental issue, and, in fact, may adopt regulations to address that issue, there inevitably will be a rush to secure building permits under current regulations.[91] One of the first courts to address temporary moratoria summed up the problem as follows:

> [A]ny movement by the governing body of a city to zone would, no doubt, frequently precipitate a race of diligence between property owners, and the adoption later of the zoning ordinance would in many instances be without effect to protect residential communities—like locking the stable after the horse is stolen.[92]

In fact, as the Ninth Circuit opinion pointed out, a race of diligence occurred prior to the adoption of the Tahoe Regional Planning Compact of 1980.[93]

Courts have recognized the illogical result that would accrue if regulatory bodies were authorized to control and limit the private use of land, but were simultaneously prohibited from imposing temporary prohibitions on use during the development of those controls and limitations. As explained in *Chicago Title & Trust Co. v. Village of Palatine*:[94]

> It would be utterly illogical to hold that, after a zoning commission had prepared a comprehensive zoning ordinance or an amendment thereto, which was on file and open to public inspection and upon which public hearings had been held, and while the ordinance was under consideration, any person could by merely filing an application compel the municipality to issue a permit which would allow him to establish a use which he either knew or could have known would be forbidden

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[90] In a number of circumstances, the federal courts have recognized the authority of federal administrative agencies to place a moratorium on permit applications pending consideration of changes to rule standards. Mobil Oil Exploration & Producing S.E., Inc. v. United Distribution Cos., 498 U.S. 211 (1991); W. Coal Traffic League v. Surface Transp. Bd., 216 F.3d 1168 (D.C. Cir. 2000). Similarly, state courts have upheld the right of administrative officials to hold up permit requests when the proposed use would conflict with a pending change in the zoning ordinance. Russian Hill Improvement Ass'n v. Bd. of Permit Appeals, 423 P.2d 824 (Cal. 1967); A.J. Aberman, Inc. v. City of New Kensington, 105 A.2d 586 (Pa. 1954).

[91] ROHAN, *supra* note 44, §22.01[1]; *see also* State *ex rel.* SCA Chem. Waste Servs., Inc. v. Konigsberg, 636 S.W.2d 430, 436-37 (Tenn. 1982) ("SCA Chemical . . . was engaged in a race to avoid the more stringent zoning and permit requirements . . . contained in the new ordinance.").

[92] Downham v. City Council of Alexandria, 58 F.2d 784, 788 (4th Cir. 1932), *quoted in* City of Dallas v. Crounrich, 506 S.W.2d 654, 660 (Tex. Civ. App. 1974).

[93] *Tahoe-Sierra*, 216 F.3d at 777 n.15; *see also Konigsberg*, 636 S.W.2d at 435 ("[I]t would be destructive of the plan if, during the period of its incubation and consideration, persons seeking to evade its operation should be permitted to enter upon a course of construction that would . . . defeat . . . the ultimate execution of the plan.").

[94] 160 N.E.2d 697, 700 (Ill. App. Ct. 1959).

> by the proposed ordinance, and by so doing nullify the entire work of the municipality in endeavoring to carry out the purpose for which the zoning law was enacted.[95]

The fourth principle underlying temporary planning moratoria is the facilitation of public debate and input into the legislative process.[96] Unless the development industry, landowners impacted by development activity, and public interest groups have ample opportunity to participate in the planning process, regulations likely will fail to protect the full range of community values and to accomplish the intended goals of the governing body. As stated by the Supreme Court of Minnesota, one of the "persuasive reasons for permitting moratorium ordinances [is] to derive the benefits of permitting a democratic discussion and participation by citizens and *developers* in drafting long-range land use plans."[97] The United States Supreme Court has placed the highest value in the principle of democratic participation in the land use process.[98] Indeed, the development of the 1984 Lake Tahoe regional plan entailed "extensive public involvement," including wide participation by affected landowners.[99]

C. Temporary Moratoria Constitute a Normal Delay in the Development Approval Process

In *First English*, the United States Supreme Court expressly recognized the validity of "normal delays" in the development approval process.[100] The subsequent history of *First English* confirms Professor Michelman's reasoning. Upon remand of *First English*, the California Court of Appeals

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[95] *See* Walworth County v. Elkhorn, 133 N.W.2d 257 (Wis. 1965); Miller v. Bd. of Pub. Works, 234 P. 381, 388 (Cal. 1925), *cert. denied*, 273 U.S. 781 (1926).

[96] JULIAN C. JUERGENSMEYER & THOMAS E. ROBERTS, LAND PLANNING CONTROL LAW 233 (1998).

[97] Almquist v. Town of Marshan, 245 N.W.2d 819, 826 (Minn. 1976) (emphasis added); *see also* Collura v. Town of Arlington, 329 N.E.2d 733, 737 (Mass. 1975) (noting that "with the adoption of an interim [moratorium a developer] is made aware that a new plan is in the offing and is thus able to participate in the debate over what that new plan should contain").

[98] In *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), the Court sustained the use of referendum and initiatives in zoning against constitutional challenge. *See* Robert H. Freilich, *Removing Artificial Barriers to Public Participation in Land Use Policy*, 21 URB. LAW. 511 (1989).

[99] California *ex rel.* Van de Kamp v. Tahoe Reg'l Planning Agency, 766 F.2d 1308, 1311 (9th Cir. 1985).

[100] First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987). In a subsequent review of *First English*, Professor Frank Michelman, of Harvard Law School, stated: "[T]he *First English* decision does not reach regulatory enactments, even totally restrictive ones, that are expressly designed by their enactors to be temporary." Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1621 (1988).

found that the thirty-month moratorium to prevent flooding was not a temporary taking,[101] and the Supreme Court denied certiorari.[102] Numerous courts have relied on *First English* to hold that temporary development moratoria constitute "normal delays" in the planning process and do not amount to a taking of property.[103]

The oral argument in *Tahoe* was very illuminating. Justice O'Connor questioned counsel as to what bright line standard could justify normal delays in the "approval" process without simultaneously justifying normal delays in the "planning" process. Mr. Berger responded that the "approval process" leads to an actual use of the property. The planning process in *Tahoe-Sierra*, he stated, led to further permanent restrictions. Mr. Berger, however, failed to point out that the approval process may also lead to denial of the application. Justice Breyer asked if that logic would preclude New York City from adopting a one-year moratorium to determine the uses of the World Trade Center site. Mr. Berger replied that such a moratorium would constitute a taking.

The *First English* "normal delays" holding stems directly from *Agins v. City of Tiburon*,[104] where it was argued that aborted condemnation proceedings that lasted for a year had effected a taking by interfering with the owner's ability to sell or develop the land during the period. The pendency of the condemnation proceedings in *Agins* had a greater restrictive effect than a temporary moratorium: it prevented the owners from selling as well as developing the property until the city determined the appropriate use for the property. The conclusion that no taking occurred in *Agins* directly supports the finding that no taking occurs when the government imposes a temporary moratorium on development. *Agins* specifically rejected the notion that the public should be held liable for losses caused by delays "during the process of governmental decision making."[105] A development moratorium in support of a comprehensive land use planning effort is precisely the type of delay associated with the "process of governmental decision making" referred to in *Agins* and was the progenitor of the phrase attributed to *First English*: normal delays in the development approval process are not takings.[106]

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[101] First English Evangelical Lutheran Church v. County of Los Angeles, 258 Cal. Rptr. 893 (Cal. Ct. App. 1989) (mem.).

[102] First English Evangelical Lutheran Church v. County of Los Angeles, 493 U.S. 1056 (1990).

[103] Woodbury Place Partners v. City of Woodbury, 492 N.W.2d 258 (Minn. Ct. App. 1992); Estate of Scott v. Victoria County, 778 S.W.2d 585 (Tex. App. 1989); Sun Ridge Dev. v. City of Cheyenne, 787 P.2d 583 (Wyo. 1990).

[104] 447 U.S. 255 (1980).

[105] *Id.* at 263 n.9.

[106] First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 321 (1987).

Consistent with this self-evident reading of *Agins*, a number of lower courts have rejected takings challenges to development moratoria. A California court rejected the claim that a moratorium pending completion of an open space preservation study resulted in a taking, stating that the claim was "akin to one rejected in *Agins*."[107]

It is incumbent upon the governing body of any agency imposing a moratorium to limit its duration to an amount of time that is reasonable and necessary.[108] As long as the delay is not extraordinary in light of the severity and complexity of the problem, the duration of the otherwise valid moratorium should constitute a normal delay in the development approval process.[109] The overwhelming weight of decisions by other federal and state courts supports the conclusion that temporary moratoria in effect for reasonable periods of time similar to the duration of the TRPA restriction do not result in a taking.[110] On the other hand, when restrictions became so long in duration that they resembled permanent regulations, the courts have used substantive due process or statutory invalidity to revoke them.[111]

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[107] Zilber v. Town of Moraga, 692 F. Supp. 1195, 1206 (N.D. Cal. 1988); *see also* Williams v. City of Central, 907 P.2d 701, 704 (Colo. Ct. App. 1995) (relying on *Agins* to reject a claim that a development moratorium worked a taking, and observing that "even if the ability to sell or develop . . . property is restricted during [a] moratorium, the landowner is free to continue with sale or development once the regulation is lifted"); *cf.* Kawaoka v. City of Arroyo Grande, 17 F.3d 1227, 1237 (9th Cir.) (relying on *Agins* to reject a substantive due process challenge to a development moratorium), *cert. denied*, 573 U.S. 870 (1994).

[108] ROHAN, *supra* note 44, § 22.02[2].

[109] *Id.*; *cf. First English*, 482 U.S. at 321.

[110] *See* Santa Fe Vill. Venture v. City of Albuquerque, 914 F. Supp. 478 (D.N.M. 1995) (holding that a thirty-month moratorium associated with efforts to create a national monument was not a taking); Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369, 1383 (D. Md. 1975) (holding that a five-year moratorium on sewer hookups did not render land "worthless or useless so as to constitute a taking"); First English Evangelical Lutheran Church v. County of Los Angeles, 258 Cal. Rptr. 893, 906 (Cal. Ct. App. 1989) (holding, on remand, that a thirty-month delay was not a taking); Friel v. Triangle Oil Co., 543 A.2d 863 (Md. Ct. Spec. App. 1988) (holding that a twenty-four-month interim ordinance was not a taking); Woodbury Place Partners v. City of Woodbury, 492 N.W.2d 258 (Minn. Ct. App. 1992) (holding that a two-year moratorium on development pending completion of an interstate intersectional location study was not a taking); Cappture Realty Corp. v. Bd. of Adjustment, 336 A.2d 30 (N.J. Super. App. Div. 1975) (holding that four-year moratorium imposed on construction in flood-prone lands was not a taking); Rubin v. McAlvey, 288 N.Y.S.2d 519 (N.Y. App. Div.1968) (finding two-year interim development ordinance in the Town of Ramapo valid), *aff'g* 282 N.Y.S.2d 564 (N.Y. Sup. Ct. 1967); Estate of Scott, 778 S.W.2d 585 (Tex. App. 1989) (holding that two-year interim ordinance was not a taking).

[111] David Heeter has summarized the potential abuses of interim development controls. "It is far more difficult to rationalize interim zoning restrictions that are adopted in response to specific development proposals [bad faith]. In far too many instances the alleged need for such controls arises from the community's failure to adequately plan for its future—not from the proposed development." Heeter, *supra* note 89, at 411. Other problems have been:

D. Neither the Supreme Court's Remedial Decision in First English, *nor Its Decision in* Lucas, *Involving Permanent Categorical Takings, Undermines, Much Less Contradicts, the Conclusion that a Temporary Moratorium on Land Does Not Effect a Taking*

The United State Supreme Court's decisions in *First English Evangelical Lutheran Church v. County of Los Angeles*[112] and *Lucas v. South Carolina Coastal Council*[113] did not create a new approach that would support the conclusion that a temporary moratorium on development effects a taking. To the contrary, a careful reading of these decisions demonstrates that they would confirm the constitutionality of TRPA's moratorium.

1. First English Evangelical Lutheran Church v. County of Los Angeles

In *First English*, the United States Supreme Court granted review solely to address the issue of the appropriate *remedy* in a regulatory takings case.[114] Accepting a well-pleaded complaint as true on a motion to dismiss, the Court took as true, only for the purposes of the motion, plaintiff's allegations that the restrictions effected a taking.[115] The Court addressed the question "whether

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(1) Lack of statutory authority; *see, e.g.*, Toll Bros., Inc. v. West Windsor Township, 712 A.2d 266 (N.J. Super. Ct. App. Div. 1998) (finding that statute forbade use of moratoria); Kline v. City of Harrisburg, 68 A.2d 182 (Pa. 1949); Matthews v. Bd. of Zoning Appeals, 237 S.E.2d 128 (Va. 1977);

(2) Procedural due process, lack of notice, and compliance with planning act procedures; *see, e.g.*, Lancaster Dev., Ltd. v. Vill. of River Forest, 228 N.E.2d 526 (Ill. App. Ct. 1967); State *ex rel.* Kramer v. Schwartz, 82 S.W.2d 63 (Mo. 1935); and

(3) Excessive period of time; *see, e.g.*, Urbanizadora Versalles, Inc. v. Rivera Rios, 701 F.2d 993 (1st Cir. 1983) (fourteen years); Peacock v. County of Sacramento, 77 Cal. Rptr. 391 (Cal. Ct. App. 1969) (holding that three years was a reasonable time to complete study, but extension beyond that constitutes regulatory taking); Charles v. Diamond, 360 N.E.2d 1295 (N.Y. 1977) (ten years).

[112] 482 U.S. 304 (1987).

[113] 505 U.S. 1003 (1992).

[114] The fact that *First English* involved a temporary moratorium was irrelevant to the holding in the case. The Petitioners' application for certiorari is quite misleading in this regard. *First English*'s only relevance to this case is the dicta regarding "normal delays." The decision in *First English* as to the remedy could easily have been made in any of the cases where the court declined to accept jurisdiction by reason of ripeness. *E.g.*, MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986); Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981); Agins v. City of Tiburon, 447 U.S. 255 (1980); *see* Thomas E. Roberts, *Moratorium and Categorical Regulatory Takings: What* First English *and* Lucas *Say and Don't Say*, 31 ENVTL. L. REP. 11,037 (2001).

[115] *First English*, 482 U.S. at 313.

abandonment [of regulations] by the government [after a judicial order finding a taking] requires payment of compensation for the period of time during which [the] regulations" were in effect.[116] The Court answered the question in the affirmative, holding that, assuming a government regulation works a taking in the first place, subsequent rescission of the regulation does not foreclose a claim for compensation.[117] "We merely hold that where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."[118]

Temporary takings apply to the period of time between application of a permanent restriction and subsequent invalidation,[119] not the period during which a temporary measure is in effect and does not constitute a taking in the first place. The obvious reach of *First English* is to compensate for permanent takings that exist for a temporary period of time, i.e., regulations subsequently rescinded or declared invalid, but not to compensate for commonplace temporal regulations, such as the TRPA thirty-two month temporary moratorium, which have not been held to constitute takings in the first place.[120]

Thus, the *First English* ruling focused exclusively on the appropriate remedy in a regulatory taking case. The *First English* Court did not establish a rule that a restriction temporarily depriving a landowner of the use of property constitutes a taking. Moreover, as the majority made clear, the Court was not addressing "the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning, ordinances, variances, and the like."[121] This reading of *First English* is confirmed by the California Court of Appeals' resolution of the takings issue on remand from the Supreme Court. Addressing, for the first time, the substantive merits of the takings claim, the Court of Appeals ruled that the County's interim ordinance did not effect a taking.[122] Emphasizing the fact that the ordinance was temporary by design, the court concluded:

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[116] *Id.* at 318.

[117] *Id.* at 321.

[118] *Id.*; *see* Corn v. City of Lauderdale Lakes, 95 F.3d 1066, 1073 n.4 (11th Cir. 1996) (holding that *First English* is not applicable to moratoria or other temporary actions; rather, *First English* is applicable only where the ordinance is indefinite in duration and would expire only if declared unconstitutional or repealed).

[119] The opinion presupposes that "temporary regulatory takings" means "regulatory takings . . . which are ultimately invalidated by the courts." *First English*, 482 U.S. at 310.

[120] Linda Bozung & Deborah J. Alessi, *Recent Developments in Environmental Preservation and the Rights of Property Owners: "Moratoria as Regulatory Takings After* First English," 20 URB. LAW. 969, 1014-30 (1998).

[121] *First English*, 482 U.S. at 321.

[122] First English Evangelical Lutheran Church v. County of Los Angeles, 258 Cal. Rptr. 893, 906 (Cal. Ct. App. 1989).

> As an independent and sufficient grounds for our decision, we further hold [that] the interim ordinance did not constitute a "temporary unconstitutional taking" even [if we were] to assume its restrictions were too broad if *permanently imposed* on First English. This interim ordinance was by design a temporary measure—in effect a total moratorium on any construction on First English's property—while the County conducted a study to determine what uses and what structures, if any, could be permitted on this property consistent with considerations of safety. We do not read the U.S. Supreme Court's decision in *First English* as converting moratoriums and other interim land use restrictions into unconstitutional "temporary takings" requiring compensation unless, perhaps, if these interim measures are unreasonable in purpose, duration or scope.[123]

The Supreme Court denied the petition for certiorari filed by the owner in response to that decision.[124] Although the Court's denial of certiorari is not precedential, it clearly affected the ultimate result in *First English*.

Other courts have read *First English* similarly and have refused to hold that temporary moratoria effect a temporary taking.[125] To read *First English* as establishing a new species of "temporary takings" that would support a finding of a taking based on a "temporary" moratorium reflects a fundamental misreading of that decision.

2. *Lucas v. South Carolina Coastal Council*

In *Lucas*, the Supreme Court found a per se taking where a South Carolina coastal protection law permanently barred a landowner from developing the property and reduced the market value of the property to zero.[126] Nothing in the reasoning in *Lucas* suggests that the Court's ruling applies to temporary restrictions on development. Indeed, the Court was quite clear in noting that its ruling was likely to apply only in "rare" cases, a statement which contradicts the idea that *Lucas* could apply to the frequently used moratorium tool.[127]

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[123] *Id.*

[124] First English Evangelical Lutheran Church v. County of Los Angeles, 493 U.S. 1056 (1990).

[125] Corn v. City of Lauderdale Lakes, 95 F.3d 1066, 1073 (11th Cir. 1996) (holding that *First English* is not applicable to temporary moratoria); Dufau v. United States, 22 Cl. Ct. 156 (1990) (following *First English*, and concluding that a sixteen-month delay during Clean Water Act section 404 processing is not a taking); Zilber v. Town of Moraga, 692 F. Supp. 1195, 1206 (N.D. Cal. 1988) (relying on *First English* to support the conclusion that an eighteen-month development moratorium is a "normal delay" that does not result in a taking).

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

[127] *See* Williams v. City of Central, 907 P.2d 701, 706 (Colo. Ct. App. 1995) ("Importantly, the *Lucas* court specifically noted that categorical temporary takings were expected to be a rare event, occurring only under extraordinary circumstances. 'Stop gap' or interim zoning moratoria, however, play an important role in land use planning and are commonly

The *Lucas* per se rule was held to be applicable only where property is permanently rendered without use[128] and thus valueless in perpetuity.[129] Justice Scalia, in *Lucas*, emphasized that the certiorari petition squarely raised the question of whether regulatory prohibitions had rendered Lucas's beachfront land permanently valueless.[130]

The draconian prohibitions of the South Carolina Act were described as the "*complete extinguishment* of the property's value"[131] and a "*permanent* ban on construction insofar as Lucas's lots were concerned,"[132] and government has permanently deprived a landowner of all economically beneficial use.[133] Justice Scalia refused to entertain the argument raised by the dissent that "valueless" meant something less than a complete and total destruction of all use and value or for a period of time less than permanent.[134] As noted above in Part I, a similar rule applies in physical appropriation takings cases.[135]

"All value" as used in *Lucas* means that the regulation has permanently destroyed all economically beneficial use, both in a physical and temporal sense.[136] The *Woodbury* trial court had applied the *Lucas* per se test. The Court of Appeals reversed, relying on both *Lucas* and *Agins*:

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employed."); *see also* Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (confirming that *Lucas* is only applicable in "relatively rare" circumstances).

[128] *Lucas*, 505 U.S. at 1012 (stating that the "taking was unconditional and permanent").

[129] *Id.* at 1018 (noting "the relatively rare situations where the government has deprived the owner of all economically beneficial uses"); *see* ROBERT MELTZ ET AL., THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION 139-41 (1999); DANIEL R. MANDELKER, LAND USE LAW 2.18 (4th ed. 1997); Robert H. Freilich et al., *Regulatory Takings: Factoring Partial Deprivation into the Taking Equation*, *in* TAKINGS 165-88 (David L. Callies ed., 1996). Treating use and value as synonymous in takings analysis is common sense, for if property retains value as determined by the market, by definition it retains economically viable use through sale for market value. *See Lucas*, 505 U.S. at 1017 ("'[W]hat is . . . land but the profits thereof?'" (quoting 1 Edward Coke, INSTITUTES OF THE LAWS OF ENGLAND: COMMENTARY UPON LITTLETON, ch. 1, § 1 (1st Am. ed. 1812)).

[130] *Lucas*, 505 U.S. at 1007, 1020 n.9.

[131] *Id.* at 1009 (emphasis added).

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

[133] *Id.* at 1016 n.7, 1019 n.8.

[134] *Id.* at 1020 n.9, 1016 n.7, 1019 n.8.

[135] "Our holding today is very narrow. We affirm the traditional rule that a *permanent* physical occupation of property is a taking. . . . We do not, however, question the equally substantial authority upholding a [s]tate's broad power to impose appropriate restrictions upon an owner's *use* of his property." Loretto v. Manhattan Teleprompter CATV Corp., 458 U.S. 419, 441 (1982) (first emphasis added).

[136] *Lucas*, 505 U.S. at 1016 n.7, 1019 n.8; *see* Woodbury Place Partners v. City of Woodbury, 492 N.W.2d 258, 260-61 (Minn. Ct. App. 1992) (holding that two-year building moratorium was not a *Lucas* per se take despite stipulated lack of all economically viable use for two years).

> We interpret the phrase "all economically viable use for two years" as significantly different from "all economically viable use" as applied in *Lucas*. The two-year deprivation of economic use is qualified by its defined duration. . . . That the Woodbury property's economic viability was delayed, rather than destroyed, is implicitly recognized in the language of the stipulation. "[A]ll economically viable use from March 23, 1988 to March 23, 1990" recognizes that economic viability exists at the moratorium's expiration. . . .
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> . . . Delaying the sale or development of property during the governmental decision-making process may cause fluctuations in value that, absent extraordinary delay, are incidents of ownership rather than compensable takings.[137]

If the regulation is temporary or if any use or any value remains, the *Lucas* per se rule does not apply.[138] Federal cases have held that the sale of land at significant value constitutes remaining use and may defeat a taking claim. In *Florida Rock Industries, Inc. v. United States*,[139] the Federal Circuit Court of Appeals rejected the argument that "denial of an *immediately* viable use" is a taking regardless of any fair market analysis.[140] Upon receiving evidence that "serious and well informed buyers" were interested and willing to pay a significant figure for the property, the court found that the property retained sufficient use to forestall a taking determination.[141] In *Penn Central*, this Court identified three factors to guide ad hoc factual inquiries: (1) the economic impact of the regulation, (2) the extent to which the regulation interferes with investment-backed expectations, and (3) the character of the government regulation.[142] In the *Tahoe-Sierra* case, Petitioners did not argue, and on a facial attack could not argue, that the moratorium constituted a *Penn Central* take. Nor could they have succeeded with this argument, because the economic impact was minimal due to the temporary nature of the moratorium; Petitioners could have had no investment-backed expectation that it would develop land in an environmentally sensitive area free from reasonable,

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[137] *Woodbury Place*, 492 N.W.2d at 261-62 (emphasis added) (citing Agins v. City of Tiburon, 447 U.S. 255, 263 n.9 (1980)).

[138] *See* Palazzolo v. Rhode Island, 533 U.S. 606 (2001) (rejecting a *Lucas* claim where small residual value was left in the property, and remanding the case for a *Penn Central* review).

[139] 792 F.2d 893 (Fed. Cir. 1987).

[140] Id. at 902.

[141] *Id.* at 903; *see also* Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, 135 F.3d 275, 286-87 (4th Cir. 1998) (finding that a taking claim cannot be sustained where significant *post-regulation* value remains); Pompa Constr. Corp. v. City of Saratoga Springs, 706 F.2d 418, 424 (2d Cir. 1983) (finding that evidence of marketability where others interested in purchasing all or part of the land defeats a taking claim).

[142] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978); Connolly v. Pension Benefit Guar. Corp., 475 U.S. 211, 225 (1986).

temporary delays; and the exercise of TRPA's police power to prevent environmental harm to Lake Tahoe caused by immediate development in sensitive areas is the highest form of governmental action to protect health and safety.[143]

No court has yet held that a temporary moratorium can result in a *Lucas*-type taking. Indeed, all the decisions are to the contrary.[144] Not long ago, the Florida Supreme Court in *Keshbro, Inc. v. City of Miami*,[145] opined, in dicta, that temporary moratoria in the land use and planning arena do not constitute *Lucas* takings, citing the Ninth Circuit Court of Appeals' *Tahoe-Sierra* opinion.[146]

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[143] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1023-24 (1992); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 489-91 (1987); Trobough v. City of Martinsburg, 120 F.3d 262 (4th Cir. 1997) (table).

[144] *See* Kelly v. Tahoe Reg'l Planning Agency, 855 P.2d 1027, 1033-34 (Nev. 1993) (rejecting takings challenge to temporary restrictions which, unlike the restrictions in *Lucas*, "temporarily limit, rather than forever preclude development in environmentally sensitive areas"), *cert. denied*, 510 U.S. 1041 (1994); Santa Fe Vill. Venture v. City of Albuquerque, 914 F. Supp. 478, 483 (D.N.M. 1995) (citing *Lucas* and *First English*, and rejecting a claim a that thirty-four month moratorium resulted in a taking); Williams v. City of Central, 907 P.2d 701, 706 (Colo. Ct. App. 1995) (holding that a moratorium on new development in a gambling district did not effect a taking under *Lucas*).

[145] 801 So. 2d 864 (Fla. Dist. Ct. App. 2001).

[146] *Keshbro* did find that a nuisance abatement board order closing a multi-rental facility for illegal drug operation constituted a *Lucas* taking for the one-year period of the closure. *Id.* at 873 (citing City of Seattle v. McCoy, 4 P.3d 159 (Wash. Ct. App. 2000); State *ex rel.* Pizza v. Rezcallah, 702 N.E.2d 81, 89 (Ohio 1998) (finding such closure orders, where the owner did not have actual or constructive knowledge of drug sales, to fail to substantially advance a legitimate state interest)). *Keshbro* distinguished such closures from temporary moratoria in the "land use and planning arena, where an entirely different set of considerations are implicated from those in the context of nuisance abatement where a landowner is being deprived of a property's dedicated use." *Keshbro*, 801 So. 2d at 874. These two cases and one Washington Intermediate Court of Appeals case differ from temporary moratoria because they find a taking from the government's inability to prove that a nuisance existed or, alternatively, that the owner had knowledge of the drug use. Nevertheless, these cases are wrongly decided because they fail to analyze the holding in *Lucas* properly. *See, e.g.*, Zeman v. City of Minneapolis, 552 N.W.2d 548 (Minn. 1996). The *Zeman* court held that a temporary revocation of an apartment license to abate nuisances was not subject to the *Lucas* per se rule because the apartment license was taken, if at all, only temporarily. Id. at 553 n.4. The court held that temporary nuisance closures should be analyzed using *Penn Central* and concluded that, since the ordinance furthered a legitimate state interest in deterring criminal activity, it prevented a public harm and no taking resulted, even if the circumstances did not compel a finding of public nuisance. *Id.* at 553-55

E. Takings Analysis Requires Consideration of the Property in Its Entirety, Including Time as Well as Spatial and Use Elements, and TRPA's Actions Did Not Constitute Either a Facial Lucas *Per Se Take or a Facial* Penn Central *Take*

In *Penn Central*, the Supreme Court explained that:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and [then] attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses . . . both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . .[147]

Consistent with *Penn Central*, the Supreme Court declined to find a categorical take in *Andrus v. Allard*.[148] It reasoned that "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."[149] When a moratorium temporarily restricts use of property, the rights in only one particular temporal segment have been restricted, not all rights.[150] When the effect of a moratorium is viewed in the context of an owner's entire property, it is apparent that no *Lucas*-type taking has occured.[151]

Property rights amici in *Tahoe-Sierra* have argued that viewing the parcel as a whole was rejected by the Supreme Court in *First English*.[152] They cite to the vigorous dissent of Judge Kozinski on the denial of the motion to rehear the case *en banc*, where he accuses the majority of having adopted the statement made by Justice Stevens in dissent: "Regulations are three

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[147] 438 U.S. at 130-31. The *Penn Central* formalization for takings analysis has been strongly reaffirmed by this Court in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

[148] 444 U.S. 51 (1979).

[149] *Id.* at 65-66.

[150] It is remarkable that at the beginning of the twenty-first century the fundamental scientific principle of our time, Einstein's recognition that space and time are the third and fourth dimensions of physical matter, would not be regarded as reality by the courts.

[151] *See Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring) ("The temptation to adopt what amount to per se rules in either direction must be resisted"); Tedra Fox, *Lake Tahoe's Temporary Moratorium: Why a Stitch in Time Should Not Define the Property Interest in a Takings Claim*, 28 ECOLOGY L.Q. 399 (2001).

[152] *See, e.g.*, Brief of Amici Curiae American Association of Small Property Owners et al., 2001 WL 1131644 (Sept. 19, 2001), Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency (No. 00-1167); Brief of Amicus Curiae Defenders of Property Rights, 2001 WL 1082462 (Sept. 12, 2001), *Tahoe-Sierra*; Brief of Amicus Curiae Institute for Justice, 2001 WL 1082466 (Sept. 12, 2001), *Tahoe-Sierra*; Brief of Amici Curiae Pacific Legal Foundation et al., 2001 WL 1082473 (Sept. 12, 2001), *Tahoe-Sierra*; Brief of Amicus Curiae Washington Legal Foundation, 2001 WL 1077936 (Sept. 12, 2001), *Tahoe-Sierra*.

dimensional; they have depth, width and length. . . . *Finally, and for purposes of this case, essentially, regulations set forth the duration of the restrictions.*"[153] Petitioners asserted that the majority in *First English* rejected Justice Stevens's reasoning: "In *First English*, this Court directly faced the question of whether the length of time made any constitutional difference. The dissent thought it did. The majority, however, decided it did not."[154]

In fact, the *First English* majority did not reject Justice Stevens's dissent on this point at all—it did not rule on this point of on the "parcel as a whole" theory. It merely rejected the dissent's proposition that the remedy for takings was invalidation, not compensation. On the issue of temporary takings, the Court could not have been more explicit. Relying heavily on *United States v. Dow*,[155] and three cases involving direct condemnation of leasehold interests for shorter periods of time,[156] the Court held: "Where this burden results from governmental action *that amounted to a taking*, the Just Compensation Clause of the Fifth Amendment[[157]] requires that the government pay the landowner for the value of the use of the land during this period."[158] It was not the time period that was critical to *First English*, but whether the government action had already amounted to a taking. The same is obviously true of the short-term leasehold condemnation cases, where the government took physical possession of the properties, which constituted a taking. The property at issue in the *Tahoe* case not only retained value, but there was a range of future uses available after the thirty-two month moratorium period. If a regulation is temporary, all reasonable use has *not* been denied, because all future uses remain.[159]

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[153] First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 330 (1987) (Stevens, J., dissenting) (emphasis added).

[154] Petitioner's Brief at *21, 2001 WL 1692011 (Sept. 12, 2001), *Tahoe-Sierra* (No. 00-1167) (citations omitted) (citing *First English*, 482 U.S. at 318, 322).

[155] 357 U.S. 17 (1958) (finding that abandonment of condemnation proceedings already constituted a taking).

[156] *See* United States v. Petty Motor Co., 327 U.S. 372 (1946) (involving the taking of short term leaseholds during war time emergency); *accord* United States v. Gen. Motors Corp., 323 U.S. 373 (1945); *see also* Kimball Laundry Co. v. United States, 338 U.S. 1 (1949) (involving temporary occupancy during war time).

[157] "No person shall be . . . deprived of life, liberty, or property, without due process of law; *nor shall private property be taken for public use, without just compensation.*" U.S. CONST. amend. V (emphasis added).

[158] *First English*, 482 U.S. at 319 (emphasis added) (citing United States v. Causby, 328 U.S. 256, 261 (1946)).

[159] Property interests under the common law explicitly deal with the length of time that an interest lasts. One of the geniuses of the common law system distinguishing it from its European civil law counterparts was the early recognition that estates in land have present and future interests. *See* LEWIS SIMES, *Introduction* to HANDBOOK ON THE LAW OF FUTURE INTERESTS 2-3 (1951) ("In Anglo-American law there are two devices by which the owner of

There are practical planning and administrative reasons for considering the entire property when determining whether regulatory impact amounts to a taking. Reasonable regulation in pursuit of the public interest will necessarily burden *certain pieces* of the owner's physical property. However, for courts to base their taking analysis on just the affected pieces would result in the irrational circumstance of government having to compensate the property owner for the incremental impact of the regulation, regardless of the overall remaining usefulness of the entire parcel.[160] The unworkable application of this reasoning became apparent in Washington, when the state supreme court first held that a greenbelt set-aside that limited the use of only a portion of certain properties amounted to an unconstitutional taking.[161] Just two years later, recognizing the catastrophic nature of its prior holding, the court reversed itself, recognizing that:

> [N]either state nor federal law has divided property into smaller segments of an undivided parcel of regulated property to inquire whether a *piece* of it has been taken. . . . Rather, we have consistently viewed a parcel of regulated property in its *entirety*. Federal case law has also specifically refused to focus its inquiry upon a given portion of a regulated property . . . .
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> . . . To the extent *Allingham* is inconsistent with the foregoing analysis, it is hereby overruled.[162]

Similarly, the temporal element of property ownership must also be viewed in the entirety.[163] Unless the *entire* term of ownership is recognized as the appropriate temporal denominator over which to measure the relative impact of the challenged regulation, results as irrational as those recently recognized by the Washington Supreme Court will characterize takings jurisprudence, and

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property projects his will into the future. They are the trust and the future interest."). The latter, for the most part, are alienable, assignable, and inheritable, and support standing for actions in executory interests and reversions following life estates and terms of years. ASHBEL G. GULLIVER, LAW OF FUTURE INTERESTS 73 (1959). Moreover, on distribution of condemnation awards, future interests are fully compensated, as are landlord reversions following leasehold estates.

[160] *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 495 (1987) (noting that owners claiming facial or per se takings face "an uphill battle"); *see also* Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295-96 (1981).

[161] Allingham v. City of Seattle, 749 P.2d 160, 161 (Wash. 1988), *amended by* 757 P.2d 533 (Wash. 1988).

[162] Presbytery of Seattle v. King County, 787 P.2d 907, 914-15 (Wash. 1990).

[163] *See* Agins v. City of Tiburon, 447 U.S. 255, 258 (1980); Andrus v. Allard, 444 U.S. 51, 65-66 (1979).

accordingly will diminish the traditional rights of state and local governments to regulate land in a reasonable manner.[164]

III. THE NUISANCE CLOSURE CASES: DO THEY CONSTITUTE AN EXCEPTION?

Three recent cases involving short-term closures (not exceeding one year) of rental property that had been used for illegal drug activity[165] have been said by Professor Steven Eagle to have announced a rule that short-term closures constitute a regulatory taking for the period of the closure where the property owner had not participated in the action, condoned it, or had actual knowledge of its presence.[166]

Upon closer examination it is revealed that two of the three opinions, *State ex rel. Pizza v. Rezcallah* and *Seattle v. McCoy*, do not find *Lucas* violations at all. These decisions turn not on whether there is loss of all use and value for the one-year closure period, but rather on whether the owner of the premises had knowledge of the occurrence of the drug transactions. Both courts found regulatory takings only on the first prong of *Agins v. City of Tiburon*,[167] failure to substantially advance a legitimate state interest, because punishing the owner is meaningless if the owner could never have acted to prevent the crimes in the first place.

Following the *Pizza* court precisely,[168] the *McCoy* court stated:

> The Ohio court correctly observed that . . . [r]ather than substantially advancing the goal of encouraging property owners to monitor their property and take all legal steps to abate illegal activities thereon, this provision may actually discourage owners from reporting illegal activity. On that basis. . . . [w]e conclude that the imposition of a closure order . . . does not advance a legitimate state interest when enforced against an innocent owner . . . .[169]

Note that neither case found fault with the time restriction.

Nevertheless, the cases were wrongly decided. The courts held that no state public nuisance existed on the part of the owner without prior knowledge. But

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[164] Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[165] Drug nuisance statutes have become common place across the United States. *See, e.g.*, FLA. STAT. ANN. § 893.138 (2001); OHIO REV. CODE ANN. § 3767.06(A) (2002); WASH. REV. CODE ANN. § 7.43.080 (2002). The statutes provide for establishment of nuisance abatement boards with power to close properties for up to one year for drug related occurrences.

[166] STEPHEN J. EAGLE, REGULATORY TAKINGS § 9-3(e) (2d ed. 2001); Keshbro, Inc. v. City of Miami 801 So. 2d. 864 (Fla. 2001); State *ex rel.* Pizza v. Rezcallah, 702 N.E.2d 81 (Ohio 1998); City of Seattle v. McCoy, 997 P.2d 985 (Wash. Ct. App.), *superseded by* 4 P.3d 159 (Wash. Ct. App. 2000).

[167] 447 U.S. 255 (1980); *see supra* note 10.

[168] *Pizza*, 702 N.E.2d at 92-93.

[169] *McCoy*, 4 P.3d at 171 (citation omitted).

the lack of nuisance affects only *Lucas* per se takes.[170] The state may advance a legitimate state interest with regard to public harms amounting to far less than nuisances.[171] Thus, in the seminal case of *Zeman v. City of Minneapolis*,[172] the Minnesota Supreme Court held that a temporary revocation of an apartment license, whether with knowledge or not, so long as it prevented public harm, did not result in a taking of property.[173] Under the principles of *Penn Central*, an exercise of the police power, whether to address the prevention of harm, such as excessive run-off from a mine site,[174] or to address general public welfare concerns, does not require compensation as failing to substantially advance legitimate state interests.[175] Legitimate state interests are any "conceivable" state interests.[176] In a similar case, the Ohio Appeals Court specifically held that a bar owner's participating in felony drug offenses did not constitute a *Lucas* take.[177]

This leaves only *Keshbro* as holding that an administrative action which fails to address factual findings of nuisance will constitute a *Lucas* take. Yet *Keshbro* failed to address the vast number of cases that have held that regulations affecting the rights of landlords to freely rent are not takings. As early as World War I, rent controls on landlords prohibiting the free exercise to evict tenants were held not to constitute takings.[178] The Supreme Court has recently upheld similar restrictions on leasehold constraints against per se

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[170] *See* Glenn P. Sugamelli, Lucas v. South Carolina Coastal Council*: The "Categorical" and Other Exceptions to Liability for Fifth Amendment Takings of Private Property Far Outweigh the "Rule,"* 29 ENVTL. L. 939 (1999).

[171] Berman v. Parker, 348 U.S. 26 (1954); *see also* Agins v. City of Tiburon, 447 U.S. 255 (1980) (describing a list of urbanization ills for which police power regulation may be advanced).

[172] 552 N.W.2d 548 (Minn. 1996).

[173] *Id.* at 554-55; *see* City of Minneapolis v. Meldah, 607 N.W.2d 168, 173 (Minn. Ct. App. 2000) (explaining *Zeman*).

[174] Rith Energy, Inc. v. United States, 270 F.3d 1347 (Fed. Cir. 2001).

[175] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 488-92 (1987); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978) (holding that a use restriction on property is not a taking if it is "reasonably necessary to the effectuation of a substantial government purpose"); *see also* Moore v. City of Detroit, 406 N.W.2d 488 (Mich. Ct. App. 1987) (housing code enforcement on absentee landlord without knowledge).

[176] Hawai'i Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (1984) ("In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . . ." (internal quotation marks omitted) (quoting *Berman*, 348 U.S. at 32)).

[177] City of Cincinnati *ex rel.* Cosgrove v. Grogan, 753 N.E.2d 256, 270 (Ohio Ct. App. 2001) ("Violation of due process and takings of property without justification do *not* occur . . . unless the law does not require a property owner to participate in felony drug transactions before its property may be closed.").

[178] Block v. Hirsch, 256 U.S. 135 (1921).

facial takings claims.[179] Astonishingly, *Keshbro* leaned upon the confused musings of the district court judge in a muddled presentation of "retroactive" and "prospective" police power regulation—the former creating the attributes of *Lucas* takings.[180]

Lucas itself stated that "all value" as used in the case, means that the regulation has *permanently* destroyed all value.[181] Since the *Kablinger* court accepted the Ninth Circuit's formulation of value in land use moratoria cases, its decision is decidedly weak and contradictory. In temporary nuisance closure cases the correct rule is that such cases must be analyzed using the three-part *Penn Central* formulation.[182]

Nor could there be a *physical* take, because the *Lucas* decision reaffirmed the rule in *Loretto* that a regulatory physical take must be "permanent in nature."[183] It has regularly been held that a "temporary physical taking" is akin to common law tort and trespass.[184] As Professor Eagle puts it:

> In that case, threshold rules, particularly "normal delays" and governmental torts, may be the most practical methods for adjudicating transient and inconsequential incursions. . . . The Court's failure properly to ground the "temporary regulatory taking" in a specific interest taken means that what amounts to a damage remedy might be applied instead of just compensation.[185]

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[179] Yee v. City of Escondido, 503 U.S. 519, 527 (1992) (rejecting a *Loretto* physical taking claim because tenants had a right to occupy the land indefinitely at a sub-market rent).

[180] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226 (D. Nev. 1999), *rev'd in part*, 216 F.3d 764 (9th Cir. 2000), *cert. granted*, 533 U.S. 948 (2001).

[181] *See Tahoe-Sierra*, 216 F.3d 764.

[182] Zeman v. City of Minneapolis, 552 N.W.2d 548 (Minn. 1996).

[183] "Where *permanent* physical occupation of land is concerned we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted 'public interests' involved . . . ." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028 (1992) (emphasis added) (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)).

[184] *See* Hendler v. United States, 952 F.2d 1364, 1376-77 (Fed. Cir. 1991); *accord* Skip Kirchdorfer, Inc. v. United States, 6 F.3d 1573, 1582 (Fed. Cir. 1993).

[185] EAGLE, *supra* note 166, § 11-9(f), at 837. Eagle is quite prescient when he states that it is difficult to determine the specific property interest taken. In *Woodbury Place Partners v. City of Woodbury*, 492 N.W.2d 258 (Minn. Ct. App. 1992) (post *Lucas*), the court rejected the period of a twenty-four-month moratorium as the denominator in partial takings cases, holding that:

> By narrowly defining the measurable property interest as a two-year segment, the partnership equates its loss of use to a "total" taking. *Lucas* acknowledges that the "rhetorical force" of the "no economically viable 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." However, the Supreme Court has repeatedly resisted attempts to narrowly define attributes of property ownership to show total deprivation of economic use through regulation.

Id. at 261 (quoting *Lucas*, 505 U.S. at 1016 n.7).

Delaying the sale or development of property during the governmental decision making process may cause fluctuations in value that, absent extraordinary circumstances, are incidents of ownership rather than compensable takings.[186]

IV. CONCLUSION

We may ask why this article did not await the decision of the Supreme Court in *Tahoe-Sierra* surely to come out no later than June 30, 2002. One reason is that the decision will be arriving so shortly that it will become necessary to inform the legal and planning professions of the potential consequences of that decision as quickly as possible. In the unlikely event that the Court finds that temporary moratoria constitute *Lucas* takes, may it not subsequently extend that reasoning to partial spatial takes? Or drug nuisance closures? Or long-term growth management and smart growth systems and statutes?

The plaintiffs in *Tahoe* cry loudly that environmentalists and planners always see doom when the Takings Clause prevents overreaching solutions from being implemented without compensation. To these plaintiffs and property rights advocates, I offer Justice Brennan's dissent in *San Diego Gas & Electric v. City of San Diego*: "If a policeman must know the Constitution, why not a planner?"[187] Planners, state and local government officials, land use attorneys, and environmentalists can and do live with that reality. What planners cannot abide is the gross extension of the Brennan dicta to assert that every segmented and temporal interest in property must be compensated for when police power regulation seeks to accomplish important growth management and environmental goals and objectives. Just as significant is the fundamental notion that property in our society must accommodate the felt needs of community health, safety, and welfare. The opposite of the Brennan dicta is the oft quoted statement "the property owner necessarily expects the uses of his property to be restricted from time to time, by various measures newly enacted by the [s]tate in legitimate exercise of its police power."[188]

Moreover, shapers of growth management techniques, smart growth systems, and environmentally sensitive land ordinances have recognized that economic compensation must often be built into regulation to maintain fairness and equity where no or little permanent use or value will be left after regulation. Techniques such as zoning with compensation, conservation easements backed by environmental and open space mitigation fees and state

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[186] *See* Agins v. City of Tiburon, 447 U.S. 255, 263 n.9 (1980).

[187] 450 U.S. 621, 661 n.26 (1981).

[188] *Lucas*, 505 U.S. at 1027.

and local bonds, purchase and transfer of development rights, clustering of development, amortization of non-conforming uses, tax preferences, and tax abatements have all been used to create value in lieu of confiscation. There are few absolutes in life and none in the field of land use planning and regulatory taking. The United States Supreme Court must be ever vigilant to assure that compensation does not become the predominant method of achieving quality of life. If we Americans have to buy every inch of ground to assure preservation of the environment and quality of life we will surely leave to our progeny a far less inviting place than we ourselves inherited.

Facial Takings Claims Under *Agins-Nectow*: A Procedural Loose End

Thomas E. Roberts*

I. INTRODUCTION

Establishing ripeness and determining the appropriate forum in regulatory takings litigation requires sorting through a confusing body of law. The process begins with the seemingly straightforward two-pronged decision in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*.[1] A regulatory takings claim is not ripe until the property owner has obtained a final decision from the authorities as to how the property in question can be used. Once ripe, regulatory takings claims against state and local government must be filed in state court, while actions against the federal government go to the Court of Federal Claims.[2]

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[1] 473 U.S. 172 (1985).

[2] Preseault v. Interstate Commerce Comm'n, 494 U.S. 1 (1990). The discussion in this article focuses on actions against state and local government. Some have raised the possibility that states (but not local government) are immune from takings clause liability based on the Supreme Court's recent expansion of states' Eleventh Amendment sovereign immunity. The question will not arise often since most takings claims are filed against local government. Also, takings claims must generally be filed in state court. While the Court has extended state immunity to federal suits in state courts in some instances, *see* Alden v. Maine, 527 U.S. 706 (1999), and it seems likely that the reasoning of those cases would bar a state from being sued in federal court for a taking, it is by no means a given that this reasoning would apply to the Fifth Amendment's takings clause, for to do so would effectively repeal it. For a discussion of this issue, see Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 WASH. L. REV. 1067, 1080 (2001) and Joshua Schwartz & Robert Brauneis, George Washington University, Commentary, *at* http://www.law.georgetown.edu/gelpi/papers/takings.htm (last modified Dec. 19, 2001) (discussing whether states are now immune from liability under the federal Takings Clause based on the Supreme Court's expanded understanding of the scope of state sovereign immunity).

Agencies formed by interstate compact pose an interesting jurisdictional question, particularly with the Tahoe Regional Planning Agency, formed by California-Nevada compact, now before the Court as a defendant in a takings action. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 228 F.3d 998 (9th Cir. 2000), *cert. granted*, 533 U.S. 948 (2001). The same agency was sued in federal court in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 752 (1997). It does not appear that the agency raised the jurisdictional issue in that case. Presumably it preferred federal court to state court. But the Court did, apparently sua sponte, and left open for consideration on remand the question as to whether the takings claim should have been brought in state court. *Id.* at 734 n.8. The Supreme Court noted that the landowner's attorney had stated at oral argument that the Tahoe Regional Planning Agency took the position that it does not have provisions for paying just compensation. *Id.* Yet, the

The requirements have received a significant amount of attention from the courts as the development community has fought them tooth and nail. What makes life difficult for those who challenge land use laws makes life easier for those who are challenged. Thus, local governments have found *Williamson County*'s requirements blessings of a sort and they defend them vigorously.[3]

The final decision requirement compels the developer in most instances to submit multiple applications to the permitting authorities. In effect, this means the developer must negotiate with the government and neighbors and often downsize its development plans. Ultimately, the developer may then have to accept a downsized plan or, if that is not in the offing, suffer a delay in getting to court. The second requirement, that suit be filed in state court, limits by half the developer's choice of forum, preventing it from resorting to federal court when it thinks that court will be more receptive to its claim than the state court.

Efforts to have the final decision rule gutted by the Supreme Court have not succeeded.[4] Likewise, efforts in Congress to ease the developer's burden in establishing ripeness have met a similar fate.[5] While the development

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state courts of Nevada and California have compensation remedies and have heard landowners' takings challenges against the agency. *See* Kelly v. Tahoe Reg'l Planning Agency, 855 P.2d 1027 (Nev. 1993); Tahoe Reg'l Planning Agency v. King, 285 Cal. Rptr. 335 (Ct. App. 1991); *see also* Broughton Lumber Co. v. Columbia River Gorge Comm'n, 975 F.2d 616, 621 (9th Cir. 1992), *cert. denied*, 510 U.S. 813 (1993) (holding that the states of Washington and Oregon retained immunity from suit in federal court when they entered into the Columbia River Gorge Interstate Compact and that, under *Williamson County*, property owners must pursue their compensation claims in state court).

The Supreme Court has jurisdiction in the *Tahoe-Sierra* case, at least with respect to California landowners, because in the early 1980s, when the alleged taking occurred, California did not have a compensation remedy, and it is the date of the alleged taking that governs which forum to use. *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999).

[3] *See* DOUGLAS T. KENDALL ET AL., TAKINGS LITIGATION HANDBOOK: DEFENDING TAKINGS CHALLENGES TO LAND USE REGULATIONS (2000).

[4] The Court has ignored calls to alter *Williamson County*. *See, e.g.*, Brief of Amicus Curiae American Planning Association, Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 752 (1997) (No. 96-243), 1997 WL 9062 (arguing for relaxation and clarification of the meaningful development application rule so that the developer would be the one to decide whether to reapply for a land use approval or risk litigation on her takings claim over the denial of one application); *see also* Brief of Amicus Curiae National Association of Home Builders, Palazzolo v. Rhode Island, 121 S. Ct. 2448 (2001) (No. 99-2047), 2000 WL 1742027; Brief of Amicus Curiae Institute for Justice, *Palazzolo* (No. 99-2047), 2000 WL 1742023, at *20; Rainey Bros. Constr. Co. v. Memphis & Shelby County Bd. of Adjustment, 178 F.3d 1295 (6th Cir. 1999), *cert. denied*, 528 U.S. 871 (1999) (refusing review of case presenting an issue regarding application of claim and issue preclusion in federal proceedings).

[5] House Bill 1534, the Private Property Rights Implementation Act of 1997, would have modified the final decision requirement to limit the time and effort that a property owner must

community may have hoped that *Palazzolo v. Rhode Island*[6] would eliminate final decision ripeness,[7] that did not happen. Although *Palazzolo* may make it a bit easier to establish final decision ripeness, the decision reaffirmed the basics of *Williamson County*.

Like final decision ripeness, the state compensation requirement has been the subject of attack in Congress[8] and the courts.[9] Though the development community condemns the state compensation requirement more strongly than final decision ripeness,[10] the requirement's preservation is more likely since it rests on an even firmer constitutional foundation than final decision ripeness. While final decision ripeness has Article III underpinnings, it is to some extent merely a prudential limitation. In contrast, the state compensation rule is an element of a Fifth Amendment takings claim.[11]

Confusion over the basis and operation of the state compensation rule can be traced to the Supreme Court's *Williamson County* and *First English Evangelical Lutheran Church v. County of Los Angeles*[12] opinions and to the doctrinal confusion over the proper remedy in a takings case. Unaware or unwilling to confront the misleading nature of the ripeness label used in *Williamson County*, courts continue to refer to the state compensation rule as

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spend trying to resolve matters with the local agency and would also have eliminated the requirement that a property owner sue in state court. H.R. 1534, 105th Cong. (1998). H.R. 1534 was a legislative initiative of the National Association of Home Builders. *See* John J. Delaney & Duane J. Desiderio, *Who Will Clean Up the "Ripeness Mess"? A Call for Reform So Takings Plaintiffs Can Enter the Federal Courthouse*, 31 URB. LAW. 195 (1999). For the arguments marshaled by the proponents of change, see *Private Property Rights Implementation Act of 1997: Hearing on H.R. 1534 Before the Senate Judiciary Comm., Subcomm. on Courts & Intellectual Prop.*, 105th Cong. (1997) (testimony of Daniel R. Mandelker), 1997 WL 621739.

[6] 533 U.S. 606 (2001).

[7] *See, e.g.*, Brief of Amicus Curiae Institute for Justice, *Palazzolo* (No. 99-2047), 2000 WL 1742023, at *20.

[8] *See supra* note 5.

[9] *Rainey Bros.*, 178 F.3d at 1295.

[10] *See* Peter Buchsbaum, *Should Land Use Be Different? Reflections on* Williamson County Regional Planning Board v. Hamilton Bank, *in* TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES (Thomas E. Roberts ed., 2002); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 WASH. U. J.L. & POL'Y 99, 103 (2000); Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 URB. LAW. 307, 328 (1998).

[11] When final decision ripeness is an Article III case or controversy issue, which goes to a court's jurisdiction, is not clear. Many courts have dismissed claims for lack of jurisdiction. The Supreme Court in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), noted that "ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction." *Id.* at 734 n.7.

[12] 482 U.S. 304 (1987).

a ripeness rule when it is, in fact, better viewed as an element in the unique Fifth Amendment takings cause of action.[13] Similarly, courts disregard the fact that the remedy for a taking is compensation when they freely entertain takings claims that seek injunctive relief.

Some courts, most notably the Ninth Circuit, have carved out an exception to the state compensation rule for facial takings claims that is difficult to square with either the language of the Fifth Amendment or the Supreme Court's interpretation of it. The source of this exception is the *Agins-Nectow* rule that a regulatory taking can be established by showing that a law does not substantially advance legitimate state interests.[14] This doctrine, a well-known mischief-maker in the substantive law of takings, has now invaded the procedural aspects of takings.

In this article, after laying some groundwork in Part II, I will examine the *Palazzolo* decision's explicit and implicit modifications to final decision ripeness in Part III. Though modest, the news here is positive, in my view, because final decision ripeness has suffered from unjustifiable uncertainty. Then, more critically in Parts IV and V, I will turn to what I view as a misinterpretation of the state compensation rule, looking in particular at the Ninth Circuit's handling of facial takings claims.

II. BACKGROUND ON FINAL DECISION RIPENESS: *WILLIAMSON COUNTY* AND *MACDONALD*

Williamson County and the follow-up decision of *MacDonald, Sommer & Frates v. Yolo County*[15] require that a regulatory takings claimant obtain a final decision on a meaningful application for development to ripen an as-applied takings claim. Physical takings claims are not subject to the final decision requirement since the physical invasion itself establishes what has been taken.[16] Likewise, a property owner making a facial takings claim is not subject to the final decision rule since, by definition, the mere enactment of the law, and not its application, takes the property.[17]

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[13] *See* Thomas E. Roberts, *Procedural Implications of* Williamson County/First English *in Regulatory Takings Litigation: Reservations, Removal, Diversity, Supplemental Jurisdiction,* Rooker-Feldman, *and Res Judicata*, 31 ENVTL. L. REP. (Envtl. L. Inst.) 10,353, 10,355 (Apr. 2001) [hereinafter Roberts, *Procedural Implications*].

[14] Agins v. City of Tiburon, 447 U.S. 255, 260 (1980); Nectow v. City of Cambridge, 277 U.S. 183, 188 (1928).

[15] 477 U.S. 340 (1986).

[16] Sinaloa Lake Owners Ass'n v. City of Simi Valley, 882 F.2d 1398, 1402 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990), *overruled on other grounds*, Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996) (en banc). *But see* Harris v. City of Wichita, 862 F. Supp. 287, 291 (D. Kan. 1994) (stating in dicta that the law is unclear).

[17] Yee v. City of Escondido, 503 U.S. 519, 522-23 (1992).

In *Williamson County*, a developer received preliminary plat approval in 1973 for a cluster home development from the planning commission. The developer then conveyed open space easements to the county and began putting in roads and utility lines. Over the next few years, the commission reapproved the preliminary plans on several occasions. In 1977, the county changed the density provisions of its zoning ordinance, and in 1979, it advised the developer that its project was subject to the 1977 ordinance. The commission rejected revised plans in 1981 for numerous reasons, some based on the new law and some based on the old law. The developer then brought suit in federal court.

The Court found the action unripe, noting that a takings claim is premature until the "government entity charged with implementing the regulation has reached a final decision."[18] This had not occurred since the developer did not "[seek] variances that would have allowed it to develop the property according to its proposed plat."[19] Although the developer contended that it had done everything possible to resolve the matter, the Court was not convinced that a final decision had been obtained. The Court noted that the Board of Zoning Appeals had the authority to grant variances dealing with five of the eight objections, and that the commission itself had the power to grant variances to solve the other objections.[20]

A year after *Williamson County*, the Court muddied the waters in *MacDonald, Sommer & Frates v. Yolo County*. There, a developer submitted a preliminary plan to subdivide its residentially zoned land into 159 lots for single family and multi-family housing. After the planning commission rejected the plan due to inadequacies in access, police protection, and water and sewer services, the developer filed suit asserting that its property was being condemned to open space.

The Court found the action was not ripe since the developer had not obtained a final decision as to the kind of development that would be allowed.[21] The developer failed to convince the Court that it had, with its one application, done enough. "Unfair procedures, [or] futile [ones]" need not be pursued, said the Court, but the "rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews."[22]

MacDonald modified *Williamson County*. By requiring a meaningful application for development, the rule prevents a developer from suing on its

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[18] Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985).

[19] *Id.* at 188.

[20] *Id.* at 188-89.

[21] MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 352-53 n.8 (1986).

[22] *Id.* at 352-53 nn.8-9.

proposed development, as *Williamson County* had envisioned. Since a grandiose, unrealistic proposal would likely lose on the merits, *MacDonald* saves the developer time and money by preventing it from bringing a sure loser of a claim.

The *MacDonald* Court gave a few examples of unrealistic proposals. It referred to the project before it as an "intense type of residential development."[23] It also intimated that the "'five Victorian mansions'" sought in *Agins v. City of Tiburon* and the nuclear power plant in *San Diego Gas & Electric Co. v. City of San Diego* were of the "grandiose" variety.[24] The proposed fifty-five story office tower atop Grand Central Station in *Penn Central Transportation Co. v. City of New York*[25] was also likely "grandiose" in the ripeness sense, since the Court noted that the landmark commission might approve a smaller tower.[26]

Although the developer is theoretically saved the embarrassment of bringing a sure loser of a case, the development community resents the Court's paternalism, which not only compels downsizing, but also injects uncertainty as to the meaning of "grandiose." The dilemma of the reapplication process is deciding when to stop. At some point, downsizing will render the project economically unattractive, but if the developer gains approval of a lesser request, it presumably waives any objection to losses based on the prior denials.[27] *Palazzolo* helps answer this question.

III. *PALAZZOLO*: FINAL DECISION RIPENESS MATURES

Anthony Palazzolo acquired approximately twenty acres of land on the Rhode Island coast in 1959. Eighteen acres of the tract was salt marsh and bordered a pond; the balance of roughly two acres was uplands. Title was initially taken in the name of a corporation that Palazzolo formed with others, but by 1960, Palazzolo was the sole shareholder.[28] Palazzolo's corporation unsuccessfully sought permits to fill the wetlands portion in the 1960s. While the state had no regulations against filling wetlands, a dredging permit was required. The state rejected the first application for failure to provide adequate information, and it rejected the second for environmental reasons. In the 1970s, while Palazzolo made no efforts at development, the state enacted a coastal resources management law that severely limited

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[23] *Id.* at 352-53 n.8.

[24] *Id.* at 353 n.9.

[25] 438 U.S. 104, 137 (1978).

[26] *Id.*

[27] *See* Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. LAND USE & ENVTL. L. 37, 52 (1995).

[28] Palazzolo v. Rhode Island, 533 U.S. 606, 614 (2001).

development of wetlands. In 1978, Palazzolo's corporation lost its charter for failure to pay state taxes, and title to the land passed to Palazzolo in his individual capacity.

Palazzolo's next effort (but the first in his own name) to develop the property came in 1983, when he sought a permit to fill all eighteen acres of wetlands. His application was denied. In 1985, he scaled down his plans, asking to fill eleven acres to create a private beach club. Again, he was denied permission. After an unsuccessful state court suit challenging the propriety of the latter rejection on state administrative law grounds, Palazzolo sued in state court, claiming a taking under the Fifth Amendment and seeking $3,150,000 in compensation. The state courts rejected Palazzolo's takings claim, and he appealed to the Supreme Court.

As to ripeness, the state supreme court, applying *Williamson County* and *MacDonald*, found the lawsuit was premature since the extent of development allowed on Palazzolo's property was not known.[29] Palazzolo had not, for example, sought a permit for a less intensive development (say, filling only five acres). He also had not sought a permit to develop the uplands. Finally, Palazzolo had not made specific application for permission to develop a seventy-four lot subdivision, which was the basis of his claim for compensation.

The Supreme Court disagreed. Rhode Island law was unequivocal, said Justice Kennedy: wetlands could not be filled.[30] State law did allow the coastal council to grant a "special exception" where the proposed activity served a compelling public purpose. However, neither residential use nor the private beach club qualified for this exception. It was true, the Court conceded, that where a landowner is denied approval of a substantial, or "grandiose," project, he must return to the permitting authorities with a more modest proposal before his case is ripe.[31] But that rule did not apply to Palazzolo's case; he had tried twice and failed. There was simply nothing left for Palazzolo to ask of the state. Any further applications would have been futile.

As to the failure to seek a permit to build on the uplands, the Court noted that the state had conceded that "it would be possible to build at least one single-family home" on the upland portion.[32] The state argued that since it was possible to build "at least" one home, other uses might be allowed. For the Court, however, there was no doubt. The state was bound by its

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[29] Palazzolo v. State *ex rel.* Tavares, 746 A.2d 707, 714 (R.I. 2000).

[30] *Palazzolo*, 533 U.S. at 621.

[31] *Id.* at 619 (citing MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 353 n.9 (1986)).

[32] *Id.* at 622.

concession that the uplands might be developed with one home and that, as such, the uplands had a value of $200,000, no less and no more.[33]

The Court said it did not matter that Palazzolo had never applied for approval of the seventy-four lot subdivision that was the basis of his compensation claim.[34] The state worried that Palazzolo was playing "hide the ball," by seeking approval for relatively modest uses, only to seek compensation for a much larger project.[35] The council's practice was to not consider proposals until the applicant had satisfied all other state and local requirements. Here, that would have meant zoning approval from the town and state approval of individual sewage disposal systems. The Court said none of that mattered as far as ripeness was concerned. As far as the coastal council was concerned, no fill would be permitted for any purpose. Second, the state need not worry that Palazzolo could claim damages based on the value of an intensive subdivision unless he could show that the project would have been allowed under other existing, legitimate land use restrictions.[36]

One aspect of the Court's finding of ripeness provides a modicum of hope to frustrated landowners and their lawyers that the ripeness rules might be read in a more pro-landowner manner. The record in *Palazzolo* contained ambiguities as to what development permission the state might have granted Palazzolo. In a detailed examination of the facts, the majority thought the landowner had done everything he *should* have done to ascertain what the state would permit him to do with his land.[37] In contrast, in an equally detailed examination of the facts, the dissenters thought the landowner had not done everything he *could* have done to ascertain what the state would permit him to do with his land.[38]

With a record that was unclear, the majority resolved the doubts in favor of the landowner, while the dissent would have resolved them in favor of the state. The majority observed that there was "no indication the Council would have accepted [Palazzolo's] application"[39] had it proposed filling a smaller area, and there was "no indication that any use involving any substantial structures or improvements would have been allowed."[40] Also, government must have "the opportunity, using its own reasonable procedures, to decide and explain the reach of the challenged regulation,"[41] but here the agency did

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[33] *Id.* at 623.
[34] *Id.* at 624.
[35] *Id.*
[36] *Id.* at 624-25.
[37] *Id.* at 618-27.
[38] *Id.* at 646-55.
[39] *Id.* at 620.
[40] *Id.* at 625.
[41] *Id.* at 620.

not cite non-compliance with state law or its own process as the basis for the permit denials.[42]

The most pro-landowner reading of the case is that these observations as to the failure of the coastal council to explain the reach of its laws give rise a rule that once a landowner has made a reasonable application for development, the burden will then be on the government to indicate possible development options. The Court, however, did not announce such a rule, but rather intimated such by its multiple references to what the government did not do. Whether lower courts will read this rather subtle message as moving the burden to the state remains to be seen, but it is an argument developers may now press.[43]

Less dramatically, the Court's opinion may be seen as an application of *MacDonald*, rather than a modification of it. *MacDonald*, which is cited with approval by *Palazzolo*, recognized that futile applications need not be made.[44] *Palazzolo* also may be of limited reach since it is "so idiosyncratic," to use Professor Vicki Been's description, on the crucial point of what development would be permitted on the uplands portion of the land.[45] The Court's use of the state's defense that the land was worth at least $200,000 as a waiver by the state that the land was worth no more than $200,000 is so unusual that it casts a shadow over the argument that the Court intended to change the rules of final decision ripeness.[46]

The Court's application of the futility exception is not new,[47] but it is another wake up call to governments who place themselves in a bind by enacting restrictions with little or no flexibility.[48] If there is simply, in the state's mind, no way certain land should ever be developed in any fashion, the law should be firm and inflexible. Adoption of such a law, however, makes it easier for a landowner to get the merits of her takings claim heard since ripeness will be easy to establish. If it is conceivable that development might

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[42] *Id.* at 625-26.

[43] The court missed the argument in *RKO Delaware, Inc., v. City of New York*, No. CV-002592 (DGT), 2001 WL 1329060 (E.D.N.Y. Aug. 30, 2001) (holding that a takings claim was unripe and placing the full burden on the landowner). The case came after *Palazzolo*, but does not cite *Palazzolo*.

[44] MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 353 nn.8-9 (1986).

[45] Vicki Been, *The Finality Requirement in Takings Litigation After* Palazzolo, *in* TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES 485, 495 (Thomas E. Roberts ed., 2002).

[46] *See id.* at 495-96.

[47] The Court previously recognized the futility exception in *MacDonald* and applied it in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

[48] Some never learn. *See* Cienga Gardens v. United States, 265 F.3d 1237, 1246 (Fed. Cir. 2001) (following *Palazzolo*, finding futility in a non-land use case where agency lacked discretion).

be permitted on some land (i.e., if all wetlands are not the same), then consideration should be given to allowing a meaningful variance or special exception process to allow a landowner to ask whether her land qualifies for the variance.

A classic example of how not to do it is found in the South Carolina experience in the *Lucas* case, decided in 1992.[49] Lucas owned two beachfront lots on the Isle of Palms. The state's beachfront setback law, when applied to Lucas's parcels, meant no structure could be built on them. Lucas did not seek a variance from the state because state law contained no variance process. The absence of a variance process meant the setback could be relaxed nowhere on the coast of South Carolina. Thus, there was no way the coastal council could look at a particular lot or stretch of beach where the setback fell landward of privately owned land and conclude that building something might not be so bad. Lucas, therefore, had a ripe claim and won his case, since the effect of the setback was to deprive him of any economically viable use of his land. After buying Lucas's lots, the state of South Carolina put the lots on the market. It then sold them for less than it paid for them, permitting residential development on them. One can imagine that had a variance process been available at the outset, the landowner in *Lucas* could have gotten a variance if, as seems to be the case with hindsight,[50] the council thought that erosion considerations would not be meaningfully advanced by being applied to Lucas's lots.

Rhode Island had a special exception process but it was quite narrow. The only time permission to fill could be granted was for a compelling public benefit, which was not the case with Palazzolo's proposals. This process is much too narrow to be helpful in avoiding takings claims.[51]

The *Palazzolo* opinion is an invitation to governments to build some discretion into their inflexible processes.[52] This can, and indeed must, be done without reserving so much discretion that arbitrary decision-making is allowed.[53]

In addition to providing for some degree of discretion in ruling on permit applications, governments might explore the Court's acknowledgment that

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[49] *Lucas*, 505 U.S. at 1003.

[50] Shortly after acquiring title from Lucas, the state of South Carolina sold the lots for residential development. DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE 302 (3d ed. 1999).

[51] *See, e.g.*, Casale v. Durand, 2001 WL 292988 (Mass. Super. Feb. 15, 2001) (finding a case unripe where landowner did not use a procedure that allowed a variance where there was an overriding public interest or where the regulation would result in a taking).

[52] *See* Been, *supra* note 45, at 496-97.

[53] *See* JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW §§ 5.25 & 10.12 E (1998).

states may require applicants to exhaust state procedures and obtain permits from other state or local agencies as conditions precedent to consideration of their application.[54] For example, in this case, the coastal council might have required Palazzolo to obtain local zoning approval first. Sequencing requirements may not, however, be unfair. Multiple agencies cannot all insist on being last. State law should establish a priority system.

Palazzolo, I think, reveals a final decision ripeness rule that has matured to the point where its general contours are known. To be sure, the issue will continue to be litigated, but the fundamentals of *Williamson County* and *MacDonald* have been affirmed. *Palazzolo* plants a seed that might grow into a burden-shifting requirement where the regulator will be required to tell a developer whose development application it has denied what the developer may do. At the same time, state and local governments may pursue *Palazzolo*'s suggestion and develop their own exhaustion requirements that will help clarify what must be done to ripen a claim.

IV. BACKGROUND ON THE STATE COMPENSATION RULE: *WILLIAMSON COUNTY* AND *FIRST ENGLISH*

The Fifth Amendment takings clause requires that just compensation be paid when property is taken for a public use or purpose.[55] This is the basis for the state compensation rule of *Williamson County*[56] and *First English*:[57] if government has taken your property by regulation or physical invasion, but has not paid you, and you wish compensation, you can and must bring an action in state court. The principle that the Fifth Amendment conditions, but does not prohibit, takings is repeated over and over by the courts, but its import does not always sink in, as courts on occasion and without comment hear takings claims where injunctive relief, rather than compensation, is sought. Courts also speak of compensation being irrelevant to certain types of takings claims without explaining how or why that is so.[58]

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[54] *E.g.*, MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 353 n.9 (1986).

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

[56] Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).

[57] First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987).

[58] My comments here relate to takings where the public use or purpose is not contested. Subject to the most relaxed test a court could possibly devise without totally abdicating a judicial role, the Court has made it clear that any conceivable public purpose justifies taking property. *See* Hawai'i Hous. Auth. v. Midkiff, 467 U.S. 229 (1984). In the very rare case where a taking fails this public use test, injunctive relief is permissible. For further discussion of the compensation remedy, see *infra* Part V.D.

A. First English *Modified* Williamson County

As stated above, the state compensation rule is a product of two cases, *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City* and *First English Evangelical Lutheran Church v. County of Los Angeles*. *Williamson County* required that a takings claim be filed in state court *if* the state provided an adequate remedy.[59] Two years later, the Court held that states *must* provide a compensation remedy to those whose property is taken.[60] This mandatory compensation remedy was due to the self-executing nature of the Fifth Amendment.[61] It was no longer a choice. States had to grant such relief.[62]

The exclusion from federal district court is not temporary. When the law of preclusion and other judicial federalism doctrines, such as *Rooker-Feldman*,[63] are added to the equation, the claim and issues that are litigated in state court cannot be attacked collaterally in a subsequent action in federal district court. The consequence, then, is to forever bar takings actions from the lower federal courts. If federal review is to occur, it must come by way of direct review by the Supreme Court.[64]

The combined rule of *Williamson County/First English* is that a landowner with a takings claim has an action for compensation conferred directly by the Constitution, and that such action can and must be brought in state court. It is no accident that almost all Supreme Court land use takings cases seeking compensation involving state or local government have come to the Court from the state courts: *Pennsylvania Coal Co. v. Mahon*,[65] *Penn Central*,[66]

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[59] *Williamson County*, 473 U.S. at 195-96. I refer to claims for compensation for takings where a public use or purpose is acknowledged. If the claim is not for compensation, but, rather, to bar the act on the basis that there is no public purpose, then the second prong of *Williamson County* does not apply. Montgomery v. Carter County, 226 F.3d 758, 765 (6th Cir. 2000); Samaad v. City of Dallas, 940 F.2d 925, 933 (5th Cir. 1991).

[60] In *First English*, 482 U.S. at 315-16, the Court resolved a long running debate over the mandatory nature of the Fifth Amendment compensation remedy. *Id.*

[61] *Id.* at 315. "When the government condemns property for public use, it provides the landowner a forum for seeking just compensation, as is required by the Constitution." City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 714 (1999).

[62] Most courts acknowledge the mandatory nature of the Fifth Amendment. For an odd exception, see *Kruse v. Village of Chagrin Falls*, 74 F.3d 694, 698 n.2 (6th Cir. 1996), where the court says "self-executing" does not mean that the state must provide an inverse condemnation procedure. This view deprives the term "self-executing" of meaning.

[63] District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 425 (1923); *see also* Roberts, *Procedural Implications*, *supra* note 13, at 10,365.

[64] *See* Roberts, *Procedural Implications*, *supra* note 13, at 10,365-69.

[65] 260 U.S. 363 (1922).

[66] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 137 (1978).

Loretto,[67] *Agins*, *Nollan*,[68] *First English*, *Yee*,[69] *Lucas*,[70] *Dolan*,[71] and *Palazzolo*. The only exceptions are *Keystone*[72] and *Del Monte Dunes*,[73] claims which arose pre-*First English* in states which did not grant a compensation remedy, and *Suitum*,[74] where the Court remanded the case for the issue of the proper forum to be considered. The presumably obvious corollary to the rule that one must sue in state court is that one cannot bring suit in federal district court. Yet, due to the large number of takings claims filed directly in federal district court, one must conclude the rule is not as obvious as it seems.[75]

The confusion is due to misleading language used by the Court in *Williamson County*. There, the Court suggested that once the landowner sought compensation in the state court and lost on the merits or was awarded an amount of compensation deemed inadequate, it would then be timely to bring suit in federal court.[76] But, how can a federal court rehear a claim or an issue already litigated in state court? The answer is that it cannot, and the suggestion that a second suit can be filed under the notion that the claim was previously unripe is misleading.

Putting aside the ripeness language of the opinion as ill-considered, *Williamson County* means that no new viable cause of action arises from a state court's finding that the government conduct in question did not rise to the level of a taking. If the property owner wants to dispute the result of the case on the merits,[77] she should appeal to the United States Supreme Court through the state court system. If she fails to do that, she has no other recourse.[78] What *Williamson County/First English* offer a property owner in terms of federal district court relief deals solely with unavailable or inadequate state procedures. If the state does not provide a remedy or uses

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[67] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

[68] Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

[69] Yee v. City of Escondido, 503 U.S. 519 (1992).

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

[71] Dolan v. City of Tigard, 512 U.S. 374 (1994).

[72] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987), discussed *infra* in text accompanying notes 144-50.

[73] City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999).

[74] Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 752 (1997).

[75] Subject to narrow exceptions, they are dismissed. *See* Roberts, *Procedural Implications*, *supra* note 13, at 10,358.

[76] "Until the [landowner] has utilized [the state] procedure, its takings claim is premature." Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 197 (1985).

[77] To ask whether there was a taking, or, if so, whether the compensation awarded was just.

[78] The right asserted is a federal right, and thus claim preclusion bars collateral attack of the state court decision in federal district court. If the right litigated in state court was a state right, issue preclusion would apply to limit a federal district's action on the matter. *See* Roberts, *Procedural Implications*, *supra* note 13, at 10,355.

unfair procedures, an action lies in federal court. These occasions will be rare.[79]

B. Post-Taking Compensation Satisfies the Fifth Amendment

While the state compensation rule has Article III and prudential underpinnings,[80] it is most fundamentally a substantive element of a Fifth Amendment takings claim: no constitutional wrong occurs from taking property for a public use. The wrong is the failure to pay. Since post-taking compensation satisfies the Fifth Amendment,[81] the remedy is a suit for compensation.[82] Application of this rule to regulatory takings claims accords with the long-standing rule in eminent domain law that the Constitution does not require payment of compensation before or at the time of the taking.[83]

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[79] *Id.* at 10,358. Actions challenging state supreme court rules requiring that interest earned on lawyers' trust accounts be used to fund legal services programs are an example of the inadequacy of state court relief. A requirement that one bring these suits, where the defendants include the state supreme court justices, in state court where the rulings would be reviewable by the defendants themselves would not comport with any sense of fairness. In such cases, a takings claim lies in federal court. *See* Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835 (9th Cir. 2001); Wash. Legal Found. v. Tex. Equal Access to Justice Found., 270 F.3d 180 (5th Cir. 2001). In *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), the Court implicitly adopted this view. That case rose through the lower federal courts, and the Court ultimately held that interest income generated by these funds is private property of the client for purposes of the takings clause. *Id.* at 172. The Court did not address the *Williamson County/First English* question.

Also, the pole attachment cases have not addressed jurisdiction. In *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987), which pre-dated *First English* and *Preseault*, the Court held that the FCC-set rate that cable companies paid electric utilities for use of the poles did not amount to an unconstitutional taking. *Id.* at 254. Later, in *Gulf Power Co. v. United States*, 187 F.3d 1324 (11th Cir. 1999), the Eleventh Circuit found that an amendment to the act effected a taking of property, but the court also found the act provided adequate process for obtaining just compensation. *Id.* at 1338.

[80] The line between the constitutional basis of ripeness and the prudential basis is conceded to be a thin one. *See* 14A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3532.1, at 119 (2d ed. 1984).

[81] Hurley v. Kincaid, 285 U.S. 95 (1932).

[82] *See* discussion *infra* Part V.D.

[83] *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985). *Williamson County* did nothing radical in imposing the state compensation requirement. Actually, the United States, in its amicus brief in *Williamson County*, raised the issue, arguing that a "fundamental defect [seemed] not to have been addressed [and that the Fifth Amendment is only violated where there has been a denial of compensation.]" Brief of Amicus Curiae United States at 10-11, Williamson County Reg'l Planning Comm'n. v. Hamilton Bank, 473 U.S. 172 (1984) (No. 84-4). State judicial remedies had to be pursued, said the United States. *Id.*

Procedurally, compensation can be determined by two routes: direct or inverse

As I have pointed out elsewhere,[84] the law could be otherwise.[85] In the regulatory context, a takings claim could be seen as arising by the adoption or application of an excessive ordinance coupled with the failure of the state to pay when regulating. The law, however, is as it is because the Court has chosen to define the cause of action as not coming into being upon the mere failure of the state to pay, but only upon the failure to pay upon proper demand. The demand is made by filing suit in state court.

What rubs some the wrong way is that the state suit that gives rise to the cause of action, via the law of preclusion, terminates it.[86] While this may seem odd, it flows directly from the unique nature of the Fifth Amendment's taking clause. Furthermore, and presuming the competence of state courts in our federal system, it is not unfair. The property owner may be dissatisfied with the state court decision, but collateral attack on the state court judgment or findings is not allowed.[87] The only recourse is to file a direct appeal to the Supreme Court.

V. FACIAL TAKINGS CLAIMS AND THE STATE COMPENSATION RULE

On the face of it, so to speak, the compensation requirement is as applicable to facial takings claims as it is to as-applied claims since the fact that the claim is facial does nothing to alter the fact that the state has not violated the Fifth

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condemnation actions. Which is used depends on how the state acts. The state may directly condemn property, such as for a highway, in which event the state files a condemnation suit to ask the court to decide the public use issue and to award compensation. In the other instance the state does not initiate proceedings, but acts in some manner to invade and take property without offering to pay. The state may build a dam and flood someone's land or grant the public or a third party the right to permanently occupy the land of another. Loretto v. Teleprompter Manhattan CATV Corp., 454 U.S. 938 (1981). Or the state may, through an excessive exercise of the police power, take property by limiting its use. In these cases, the property owner must file suit and ask to be paid. In physical takings cases, the question of whether a taking has occurred is for the courts to decide, but the question is relatively easy. The state or the public is on the land, and the state must pay.

In the regulatory takings inverse condemnation case, the question of whether a taking has occurred is considerably more difficult and unpredictable, but the issues as to when the state has gone too far, and if so how much money is due, are judicial ones. Pennsylvania Coal Co. v. Mahon, 260 U.S. 363 (1922). It is the invocation of the state judicial process to answer these questions that leads to the procedural bar of subsequent federal suits.

[84] Thomas E. Roberts, *Fifth Amendment Taking Claims in Federal Court: The State Compensation Ripeness Requirement and Principles of Res Judicata*, 24 URB. LAW. 479, 482 (1992).

[85] Some think it should be. *See* Kanner, *supra* note 10, at 327 n.86 (referring to the rule as a "positively barbaric nineteenth century notion").

[86] *See* Berger, *supra* note 10; Kanner, *supra* note 10.

[87] As noted above, use of the state courts to litigate the demand for compensation ends the matter. *See* discussion in Roberts, *Procedural Implications*, *supra* note 13, at 10,369.

Amendment until it refuses to pay for what it has taken. State courts are as open to facial takings claims as they are to as-applied claims.[88] But there is some confusion on the point.[89]

A number of federal courts have addressed the merits of facial takings claims without noting the absence of jurisdiction. In *Kittay v. Giuliani*,[90] the Second Circuit found a facial takings claim based on economic impact to fail on the merits. In *Greenspring Racquet Club, Inc. v. Baltimore County, Maryland*,[91] the Fourth Circuit found it lacked jurisdiction over an as-applied takings claim since the property owner had not sought compensation in state court, but the court proceeded to consider an *Agins-Nectow* facial takings claim on the merits. Several federal district courts have acted similarly.[92] The

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[88] A facial takings challenge, like an as-applied one, can be filed in federal court if it would be futile to use the state's procedure. *See* Roberts, *Procedural Implications*, *supra* note 13. In *Esposito v. South Carolina Coastal Commission*, 939 F.2d 165 (4th Cir. 1991), *cert. denied*, 505 U.S. 1219 (1992), the Fourth Circuit heard a facial takings challenge to the South Carolina Beachfront Management Act's setback provision that severely limited what could be built on the tracts owned by the plaintiffs. Under the act, the Espositos were able to continue their existing use for residential purposes, but were prohibited from rebuilding in the event their house was destroyed beyond repair by natural causes. In ruling on the merits, the court implicitly assumed the case was ripe, yet it did not discuss *Williamson County*. Had the issue been raised, the plaintiff could have shown that the South Carolina courts would have denied her claim based on *Lucas v. South Carolina Coastal Council*, 404 S.E.2d 895 (S.C. 1991), *rev'd*, 505 U.S. 1003 (1992), where, earlier in the same year, the state supreme court had held that the act was not a taking even as applied to a landowner with a vacant lot. If the latter restriction is not a taking in the mind of the state court, then one who is allowed to maintain use of an existing structure would likewise lose in state court.

[89] Some confusion is attributable to courts simply failing to distinguish between the two prongs of *Williamson County* when noting properly that a facial claim is not subject to the final decision requirement.

[90] 252 F.3d 645 (2d Cir. 2001). The district court had found the facial takings ripe upon enactment without having to seek a final decision, citing *Pennell v. City of San Jose*, 485 U.S. 1 (1988), a case which originated in state court, and *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227 (9th Cir. 1994), *cert. denied*, 513 U.S. 870 (1994), a substantive due process case. *See* Kittay v. Giuliani, 112 F. Supp. 2d 342 (S.D.N.Y. 2000). Like the circuit court, the district court did not discuss whether suit should have been brought in state court.

[91] 232 F.3d 887 (4th Cir. 2000), *cert. denied*, 532 U.S. 957 (2001) (facial takings claim failed on the merits); *cf.* Gilbert v. City of Cambridge, 932 F.2d 51, 56-57 (1st Cir. 1991), *cert. denied*, 502 U.S. 866 (1991) (finding simultaneously that the court lacked jurisdiction over facial takings claim, and that the claim failed on the merits).

[92] Nat'l Ass'n of Home Builders v. New Jersey Dep't of Envtl. Prot., 64 F. Supp. 2d 354 (D.N.J. 1999) (facial takings claim on merits considered; summary judgment denied); Khodara Envtl., Inc. *ex rel.* Eagle Envtl., L.P. v. Beckman, 91 F. Supp. 2d 827, 830 n.13 (W.D. Pa. 1999), *aff'd in part, vacated in part, & remanded*, 237 F.3d 186 (3d Cir. 2001) (declaring facial claims moot); Cranley v. Nat'l Life Ins. Co., 144 F. Supp. 2d 291 (D. Vt. 2001); West 95 Hous. Corp. v. New York City Dep't of Hous., No. 01-CIV-1345 (SHS), 2001 WL 664628, at *9 (S.D.N.Y. June 12, 2001); Nat'l Ass'n of Home Builders v. Chesterfield County, 907 F. Supp. 166 (E.D. Va. 1995), *aff'd*, 92 F.3d 1180 (4th Cir. 1996), *cert. denied*, 519 U.S. 1056 (1997)

cases are not worth a great deal as precedent for the proposition that facial takings claims are exempt from the state compensation rule since, for the most part, they do not discuss whether the suit should have been filed in state court.[93] The Ninth Circuit, however, has expressly considered the matter, though, I think, not thoroughly.

The Ninth Circuit explicitly holds that a regulatory facial takings claim based on *Agins-Nectow* is not subject to the second prong of *Williamson County* and can be filed in federal district court.[94] In contrast, the Ninth Circuit finds that a facial claim based on alleged excessive economic impact must be filed in state court.[95] While I have no quarrel with the proposition that facial takings claims based on economic impact must be filed in state court, I find unpersuasive the court's exemption of *Agins-Nectow* claims.

A. The Agins-Nectow *Claim*

In *Agins v. City of Tiburon*,[96] the Supreme Court said that the application of a zoning ordinance to property effected a taking if the ordinance did not substantially advance legitimate state interests or denied an owner economically viable use of her land. The entry of the "substantially advance legitimate state interests" language into the takings lexicon can most charitably be described as a mistake, as it was drawn from *Nectow v. City of Cambridge*,[97] a substantive due process case. I label it the *Agins-Nectow* test to distinguish it from the alternative test relating to economic impact.

The property owners in *Agins* owned five acres located in a residential zone that permitted from one to five houses. The Aginses sued for compensation in state court for the loss they suffered from not being able to develop at a greater density. The state supreme court held that compensation was not a

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(finding county acceptance of cash proffers from residential development rezoning applicants and use of the money collected to offset the increased cost of specific capital improvements necessitated by proposed residential developments did not constitute a facial *Agins-Nectow* taking).

For a case following the Ninth Circuit rule and considering an *Agins-Nectow* facial takings claim on the merits, see *Recreational Developments of Phoenix, Inc. v. City of Phoenix*, 83 F. Supp. 2d 1072, 1099 (D. Ariz. 1999).

[93] *But see* Crow-New Jersey 32 Ltd. P'ship v. Township of Clinton, 718 F. Supp. 378 (D.N.J. 1989); *Khodara Environmental*, 91 F. Supp. 2d at 830 n.13 (following Ninth Circuit's *Sinclair* rationale) (facial claims moot).

[94] Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401, 406 (9th Cir. 1996). One district court also reached this conclusion. *See Crow-New Jersey 32*, 718 F. Supp. at 378.

[95] *Sinclair Oil*, 96 F.3d at 407 ("It appears, then, that while the just compensation ripeness requirement does not apply to 'legitimate state interest' facial taking claims, it does apply to claims premised upon the denial of a property's economically viable use.").

[96] 447 U.S. 255 (1980).

[97] 277 U.S. 183 (1928).

remedy for a regulatory taking.[98] The Supreme Court, finding no need to address the propriety of that ruling, viewed the Aginses' claim as facial and proceeded to find there was no taking. The Court said:

> Because the appellants have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy regarding the application of the specific zoning provisions. . . . Thus, the only question properly before us is whether the mere enactment of the zoning ordinances constitutes a taking.
>
> The application of a general zoning law to particular property effects a taking if the ordinance *does not substantially advance legitimate state interests*, *see Nectow v. Cambridge*, . . . or denies an owner economically viable use of his land, *see Penn Central*. . . . The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken, *see Kaiser Aetna*, . . . the question necessarily requires a weighing of private and public interests. *The seminal decision* in *Euclid v. Ambler Co.* . . . is illustrative. In that case, the landowner challenged the constitutionality of a municipal ordinance that restricted commercial development of his property. Despite alleged diminution in value of the owner's land, the Court held that the zoning laws were facially constitutional. They bore a substantial relationship to the public welfare, and their enactment inflicted no irreparable injury upon the landowner.
>
> In this case, the zoning ordinances substantially advance legitimate governmental goals.[99]

As the quoted excerpt indicates, the *Agins* newly minted "substantially advance legitimate state interests" test for takings came directly from *Nectow*, yet the Court's opinion does not note that *Nectow* was a substantive due process case.[100] In addition, the example that *Agins* uses to illustrate its point, *Village of Euclid v. Ambler Realty Co.*,[101] is a 1926 substantive due process case, where again the takings clause was not in issue. Since there is no acknowledgment by the *Agins* Court of the due process parentage of its substantially advance test, one can only speculate as to whether the decision to transfer the Fourteenth Amendment substantive due process test to the Fifth Amendment takings clause was done consciously or by mistake. Since confusion between due process and takings has plagued the law for some

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[98] Agins v. Tiburon, 598 P.2d 25, 26, 32 (Cal. 1979), *aff'd*, 447 U.S. 255 (1980). This California rule was overruled in *First English*.

[99] *Agins*, 447 U.S. at 260-61 (emphasis added, citations omitted).

[100] That *Nectow* was not a takings case is not a matter of dispute. The takings clause was not mentioned in the opinion.

[101] 272 U.S. 365 (1926).

time,[102] I draw the charitable conclusion that it was a mistake. As to why the Court persists in referring to *Agins-Nectow*, Professor Steven Eagle thinks the Court is in denial:

> The Supreme Court's recent property rights cases have demonstrated its proclivity to use substantive due process analysis while steadfastly refusing to confront the fact that it is doing so.[103]

In 1999, the Supreme Court observed in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[104] that it has yet to offer "a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions."[105] In that case, the Court upheld the trial judge's decision to allow the jury to determine the city's takings liability, which included ascertaining whether the city's permit denials substantially advanced the stated purposes of its regulations. The Solicitor General, as amicus, attacked the legitimacy of *Agins-Nectow* as a takings clause test, but, since the city itself had proposed the jury instructions that included the *Agins-Nectow* question, the Court "decline[d] the suggestions of amici"[106] to address the issue.[107]

The *Agins-Nectow* test has been subjected to a good deal of commentary, much of which, though not all,[108] has been critical.[109] Repeating the criticism in detail is not necessary, but the basic point, that *Agins-Nectow* is not well suited to the Fifth Amendment, must be made in order to explore the procedural issue of what forum can entertain such a claim.

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[102] *See* JUERGENSMEYER & ROBERTS, *supra* note 53, at § 10.12.

[103] Steven J. Eagle, *Protecting Property from Unjust Deprivations Beyond Takings: Substantive Due Process, Equal Protection and State Legislation*, *in* TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES 514 (Thomas E. Roberts ed., 2002).

[104] 526 U.S. 687 (1999).

[105] *Id.* at 704.

[106] *Id.*

[107] *See* Eagle, *supra* note 103, at 516.

[108] *See* Douglas W. Kmiec, *The "Substantially Advance" Quandary: How Closely Should Courts Examine the Regulatory Means and Ends of Legislative Applications?*, *in* TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES 371 (Thomas E. Roberts ed., 2002).

[109] Edward J. Sullivan, *Emperors and Clothes: The Genealogy and Operation of the* Agins *Tests*, *in* TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES 391 (Thomas E. Roberts ed., 2002); John D. Echeverria, *Does a Regulation that Fails to Advance a Legitimate Governmental Interest Result in a Regulatory Taking?*, 29 ENVTL. L. 853 (1999); Jarold S. Kayden, *Land Use Regulations, Rationality, and Judicial Review: The RSVP in the* Nollan *Invitation (Part I)*, 23 URB. LAW. 301, 314 (1991).

The *Agins-Nectow* test supposedly was used to find a taking in *Nollan v. California Coastal Commission*,[110] but, in fact, the test was irrelevant to the holding reached in the case. In *Nollan*, when the owners of a beachfront lot sought permission to build a larger house, the state coastal commission conditioned the permit on the granting of an easement to allow the public to walk along the beachfront side of the lot. The state-asserted interest was to protect the public's ability to see the beach from the street, to prevent congestion on the beach, and to overcome psychological barriers to the use of the beach resulting from increased shoreline development. The Court had no quarrel with the legitimacy of the state's goals, but disagreed that the lateral access easement along the beachfront would promote these goals.[111]

The Court then proceeded to focus on the justification for singling out the Nollans to contribute the easement for public use. Finding this causal link lacking, the Court held that if California wanted an easement, it would have to pay for it.[112] This was the heart of the opinion, and the *Agins-Nectow* "substantially advances" language had nothing to do with it. What was important was whether the government was attempting to force the property owners "alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[113] The "substantially advances" test, however, did not require that question to be asked.

The fact that a law may substantially advance a legitimate state interest does not mean a burdened property owner should not be compensated. Assume that when the Nollans sought their permit, the state required them to allow the erection of a concession booth on their lot. The booth would be used to sell refreshments to people using the public beach in front of the Nollans' lot.[114] Many, including, I suspect, Justice Scalia, who authored the *Nollan* opinion, would find the Nollans to have suffered a taking in this hypothetical case. Yet, *Agins-Nectow* would say it was not a taking since the requirement would substantially advance the legitimate state interest of serving the public.

Seawall Associates v. City of New York[115] also illustrates the test's defect. There, a city ordinance prohibited the conversion or demolition of single-room occupancy housing and required the rehabilitation and rental of such units. The New York Court of Appeals found the ordinance constituted a facial

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[110] 483 U.S. 825 (1987); *see also* Dolan v. City of Tigard, 512 U.S. 374 (1994). *See generally* JUERGENSMEYER & ROBERTS, *supra* note 53, at § 10.5.

[111] *Nollan*, 483 U.S. at 834-41.

[112] *Id.* at 841-42.

[113] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[114] This critique is based on, and this hypothetical is similar to, one suggested by Jarold Kayden. Kayden, *supra* note 109, at 313-27.

[115] 542 N.E.2d 1059 (N.Y. 1989).

taking.[116] Aiding the homeless was a legitimate state interest, but the ordinance did not, reasoned the court, substantially advance that goal since the housing units were not earmarked for the homeless. Conceding that the increase in the supply of such housing would benefit some prospective tenants, the court was unwilling to defer to the legislative judgment for "it [was] by no means clear that it would actually benefit the homeless."[117]

From the *Seawall* court's reasoning, one can conclude that had the city earmarked the units for homeless persons, it would have substantially advanced a legitimate state interest and, therefore, would not have effected a taking under *Agins-Nectow*. Yet, this would not make sense without asking whether the property owners who were being required to help solve the homeless problem had a hand in creating it.

The *Agins-Nectow* "substantially advances" test does not require that the fundamental point of "who should bear the burden" be addressed. In the *Seawall* context, the question that should be asked is whether the problem of homelessness is one that can, at least to some degree, be blamed on the property owners. If they can be shown to have created or exacerbated the housing shortage, it might be consistent with the Constitution to require them to alleviate the problem.[118]

When the Supreme Court does examine the "substantially advances" test as a Fifth Amendment test, perhaps it will acknowledge its ill fit with the Fifth Amendment and send it home to the Fourteenth Amendment. Since five members of the Court have indicated dissatisfaction with the test,[119] there is some reason to think this may occur. Should it do that, the Court may limit use of the test to the exactions context.

In the meantime, while clarification awaits, the lower courts by and large recite the "substantially advance" language as a mantra, without questioning it. In so doing, some courts have compounded the misfortunes for takings law when it comes to determining where takings actions can be filed. The Ninth Circuit's cases illustrate this.

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[116] *Id.* at 1065. The court also found the ordinance effected a physical taking. *Id.*

[117] *Id.* at 1068.

[118] The *Seawall* court, in fact, recognized this as an afterthought. Having concluded that the law effected a taking because housing was not earmarked for the homeless, the court added that homelessness was a complex problem and that there was a tenuous connection between the means and the ends, making it unfair to single out the property owners to bear the burden of solving the problem. *Id.* at 1069.

[119] *See* Eastern Enters. v. Apfel, 524 U.S. 498, 545-50 (1998) (Kennedy, J., concurring in the judgment and dissenting in part and Breyer, J., joined by Souter, J., Ginsburg, J., and Stevens, J., dissenting).

B. The Ninth Circuit's Agins-Nectow *Exception to the State Compensation Rule*

In *Sinclair Oil Corp. v. County of Santa Barbara*,[120] a landowner, upset that the county's plan limited it to building seventy homes when it had wanted to build three hundred homes, sued in federal court. Among other claims, it included a facial regulatory takings claim seeking compensation based on the allegation that the ordinance did not substantially advance legitimate state interests.[121] Overcoming the county's assertion that the court lacked jurisdiction, the Ninth Circuit Court of Appeals held that the state compensation prong of *Williamson County* was not applicable to a facial takings claim based on *Agins-Nectow*.[122] The court reached this conclusion by a reasoning process I find curious and, ultimately, unpersuasive.

The court announced at the outset that it had a particular bias against government defendants who make motions to dismiss takings claims.[123] These motions, said the court, must be viewed with "particular skepticism."[124] The court's skepticism was based on the principle applicable to all complaints: none should be dismissed where facts that may support the plaintiff's claim are in dispute. The court's own authorities do not support singling out inverse condemnation suits for particular skepticism.[125] If anything, it is particularly

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[120] 96 F.3d 401 (9th Cir. 1996).

[121] *Id.* at 404.

[122] *Id.* at 406-07; *see also* Chevron USA, Inc. v. Cayetano, 224 F.3d 1030 (9th Cir. 2000); San Remo Hotel v. City and County of San Francisco, 145 F.3d 1095 (9th Cir. 1998); Richardson v. City and County of Honolulu, 124 F.3d 1150 (9th Cir. 1997), *cert. denied*, 525 U.S. 871 (1998). In these cases, the court follows *Sinclair* without reexamining it, and entertains *Agins-Nectow* facial takings claims.

[123] *Sinclair*, 96 F.3d at 404-05.

[124] *Id.* at 405.

[125] *Sinclair* cites *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1401 (9th Cir.1989), *cert. denied*, 494 U.S. 1016 (1990), *overruled on other grounds*, Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996) (en banc). In turn, *Sinaloa* cites *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir.1986), *cert. denied*, 485 U.S. 940 (1988). The court in *Hall* said:

> While dismissal of a complaint for inverse condemnation is not always inappropriate, such a dismissal must be reviewed with particular skepticism to assure that plaintiffs are not denied a full and fair opportunity to present their claims. *See* Whitney Benefits, Inc. v. United States, 752 F.2d 1554, 1558-60 (Fed. Cir. 1985); Yuba Goldfields, Inc. v. United States, 723 F.2d 884, 887 (Fed. Cir. 1983).

Id. at 1274. But this rule is not one that singles out inverse condemnation claims. No complaint is ever to be dismissed on a motion for failure to state a claim or on summary judgment "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Applying that rule in an inverse condemnation case, the Federal Circuit said: "The fact-intensive nature of just compensation jurisprudence to date, however disorienting in other contexts, argues against

inappropriate to single out inverse condemnation complaints where the motion to dismiss raises a jurisdictional defect, a legal question.

Putting the county behind the skeptical eight ball, the court found wanting the county's citation to *Williamson County* as support for its argument that the case should be dismissed from federal court and refiled in state court. After noting that *Williamson County* required an as-applied takings challenger to obtain a final decision and to sue in state court for compensation, the *Sinclair* court said these two requirements were "not so suitable" to facial takings claims.[126] The court did not say why they were less suitable, but as to the final decision requirement, there is no real argument. In *Agins v. City of Tiburon*[127] and *Yee v. City of Escondido*,[128] the Supreme Court *has* said that facial takings claims are exempt from final decision ripeness. That conclusion flows directly from the definition of a facial claim. It is the mere enactment of the law that causes the injury.[129] There is no need to ask the government anything.[130]

The applicability of *Williamson County*'s state court compensation requirement was "less clear,"[131] said the *Sinclair* panel, because in prior decisions, the Ninth Circuit had reached different conclusions on the point.[132] Fundamental considerations, the court found, pointed in the direction of requiring facial takings claimants to sue for compensation in state court. After all, the Fifth Amendment does not proscribe takings, but only takings without

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precipitous grants of summary judgment." *Yuba Goldfields*, 723 F.2d at 887. The *Yuba* comment, however, was not aimed at the legal question of jurisdiction.

[126] *Sinclair*, 96 F.3d at 405.

[127] 447 U.S. 255 (1980).

[128] 503 U.S. 519 (1992).

[129] In *Southern Pacific Transportation Co. v. City of Los Angeles*, 922 F.2d 498 (9th Cir. 1990), *cert. denied*, 502 U.S. 943 (1991), the court notes that facial claims are often impossible to evaluate without some factual information as to how the challenged ordinance will be applied. *Id.* at 506 n.9. This could lead to a requirement that a facial takings claimant seek some indication from the government as to what uses will be allowed in order to ripen her claim. Alternatively, the difficulty in evaluating facial claims where no facts exist may simply reflect the "uphill struggle" such claims face on the merits. As the Ninth Circuit concludes: "[t]he point appears to be that some regulations, by their very nature, are just not subject to facial attack on takings grounds. Prior to their application, in other words, the attacks are simply premature." *Id.*

[130] In this respect, a facial takings claim is like a physical takings claim.

[131] *Sinclair*, 96 F.3d at 406.

[132] *Compare Southern Pacific*, 922 F.2d at 505-06 ("[A] claim alleging that mere enactment of a statute effects an unconstitutional taking is unripe unless and until it is known what, if any, compensation is available.") *with* Christensen v. Yolo County Bd. of Supervisors, 995 F.2d 161, 164-65 (9th Cir. 1993) (court reaches merits of facial challenge, even though the landowners had not satisfied the just compensation requirement, without addressing why it thought a facial claim was exempt).

compensation. The view that all takings claimants must seek compensation from the state "seems to be consistent," observed the court, with the Constitution and *Williamson County*'s reading of it. [133] Nevertheless, the Ninth Circuit itself had been inconsistent, and the *Sinclair* panel felt obliged to resolve the differences.

*1. The pre-*Sinclair *Ninth Circuit apparent conflict*

The conflict was apparent, not real, since the two pre-*Sinclair* cases where the Ninth Circuit heard a facial takings claims did not discuss jurisdiction. In *Lake Nacimiento Ranch Co. v. San Luis Obispo County*,[134] the property owner claimed a zoning ordinance on its face took its property by depriving it of all economic value. The district court had found, however, that the landowner submitted no evidence showing that the permissible uses left the property without economic viability. The court of appeals agreed without addressing the jurisdictional issue. In *Christensen v. Yolo County Board of Supervisors*,[135] the property owner asserted a facial takings claim, arguing both the *Agins-Nectow* test and economic impact. The court found against it on the merits. It did not discuss jurisdiction.

Countering these two cases was *Southern Pacific Transportation Co. v. City of Los Angeles*,[136] where the panel actually discussed jurisdiction and decided that facial takings were no different from as-applied takings when it came to the remedy prescribed by the Fifth Amendment. After a railroad discontinued service, the city rezoned the railroad right of way to allow surface parking only. Without filing any development application or seeking a variance, the railroad commenced suit in federal court claiming a violation of its Fifth Amendment right to just compensation.[137] With respect to the question of whether a facial takings claimant must pursue a state compensation remedy, the court found "ample confusion"[138] since the Supreme Court had heard facial takings claims in four cases in the 1980s without addressing the jurisdictional issue: *Agins v. City of Tiburon*,[139] *Keystone Bituminous Coal Ass'n v. DeBenedictis*,[140] *Hodel v. Virginia Surface Mining & Reclamation Ass'n*,[141]

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[133] *Sinclair*, 96 F.3d at 406.
[134] 841 F.2d 872 (9th Cir. 1987).
[135] 995 F.2d 161 (9th Cir. 1993).
[136] 922 F.2d 498 (9th Cir. 1990), *cert. denied*, 502 U.S. 943 (1991).
[137] *Id.* at 501.
[138] *Id.* at 505.
[139] 447 U.S. 255 (1980).
[140] 480 U.S. 470 (1987).
[141] 452 U.S. 264 (1981).

and *Loretto v. Teleprompter Manhattan CATV Corp.*[142] Upon examination, however, the court found them inapposite.

2. *The Supreme Court's inapposite facial takings claims cases*

The Ninth Circuit distinguished these cases because they involved the question of whether the law effected a taking, not whether compensation was available or, as the court put it, they addressed "only half the inquiry"[143] under the Fifth Amendment. The *Southern Pacific* opinion characterized the railroad's claim to be that the ordinance effected "an unconstitutional, uncompensated taking."[144] This is a bit baffling. Except in cases like *Hawai'i Housing Authority v. Midkiff*,[145] where the challenge goes to the existence of a public purpose, which none of these four Supreme Court cases did, the Ninth Circuit's "half an inquiry" is "half a case" since the Fifth Amendment does not bar takings for a public use, only takings without compensation.

Notwithstanding *Southern Pacific*'s unpersuasive distinction, the Supreme Court cases where facial takings claims were addressed can be distinguished.[146] In *Agins* and *Loretto* the property owners sought monetary compensation in state court and took appeals directly to the Supreme Court from adverse state court determinations. The property owners in those cases did what the claimants in *Southern Pacific* did not do, that is, they sued in state court. The Aginses lost and that was the end of the matter. Loretto won. *Hodel* is inapposite since it was a takings claim against the Secretary of the Interior. The property owners filed suit in federal district court claiming that

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[142] 458 U.S. 419 (1982).

[143] S. Pac. Transp. Co. v. City of Los Angeles, 922 F.2d 498, 506 (9th Cir. 1990), *cert. denied*, 502 U.S. 943 (1991).

[144] *Id.* at 506.

[145] 467 U.S. 229 (1984).

[146] *See also* Pennell v. City of San Jose, 485 U.S. 1 (1988) (dismissing a takings claim on the grounds that it was premature). It is unclear whether the Court in *Pennell* regarded the challenge as a facial or an as-applied attack. *See* Crow-New Jersey 32 Ltd. P'ship v. Township of Clinton, 718 F. Supp. 378, 383 (D.N.J. 1989). The *Pennell* majority appears to rule that facial takings claims are not justiciable per se since it says that the landlord's challenge to the rent control ordinance would not be considered on the merits until it was applied. *Pennell*, 485 U.S. at 10-11. In dissent, Justice Scalia was perplexed, noting that the majority cited as-applied takings cases, *Kaiser-Aetna v. United States*, 444 U.S. 164 (1979) and *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 254 (1981), as support for refusing to hear the landlord's case. *Id.* at 16-18. Justice Scalia observes that *Keystone* is never noted by the majority, yet it was a case where the Court reached the merits without requiring that the ordinance be applied. *Id.* Justice Scalia would have reached the merits and would have found a taking. *Id.* at 16-17. Reaching the merits in *Pennell* would not do violence to *Williamson County* because *Pennell*, like *Agins* and *Loretto*, was filed in, and worked its way to the Supreme Court through, the state courts.

the Surface Mining Control and Reclamation Act of 1977 took property facially and as applied. The Court reached the merits of the facial claim, but dismissed the as-applied claim on ripeness grounds.[147] Today, even the *Hodel* plaintiffs could not repeat the same filing. In *Preseault v. Interstate Commerce Commission*,[148] the Court held that takings claims against the federal government must go the Court of Federal Claims. Thus, a suit like *Hodel* would be premature if filed in district court today.

Only in *Keystone* is there a dilemma for the proposition that facial takings must meet the second prong of *Williamson County* for there the Supreme Court, without discussing jurisdiction, reached the merits of a facial takings claim against state action that came through the federal courts. There are three possible explanations. The first is that *Keystone*'s silence coupled with its reaching the merits means that facial claims are not subject to *Williamson County*. Some read the case this way, arguing that invalidation is the proper remedy in a facial takings case.[149] This, however, flies in the face of the fundamental proposition that the state is allowed to take property if it pays for it.

A second possibility is that the *Keystone* Court simply overlooked the matter. If the matter had been raised by the parties or by the Court itself, the case should have been dismissed on appeal.[150]

The third explanation, and the best one, is that the case was ripe, not because it was a facial attack, but because it met the requirements of *Williamson County* since, at the time the suit was filed, the state lacked an adequate remedy. The act that was challenged was passed in 1966, the case was filed in 1982, and *Keystone* was decided in April 1987, before *First English*. Thus, at the time of the alleged taking, Pennsylvania did not provide

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[147] Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 295 (1981); *see also Pennell*, 485 U.S. at 16.

[148] 494 U.S. 1 (1990).

[149] Brian Blaesser, *Closing the Federal Courthouse Door on Property Owners: The Ripeness and Abstention Doctrines in Section 1983 Land Use Cases*, 2 HOFSTRA PROP. L.J. 73, 82-83 (1988) (citing Agins v. City of Tiburon, 447 U.S. 255 (1980)). But, note that *Agins* left the remedy issue unresolved. *Agins*, 447 U.S. at 263. The Court subsequently answered it in *First English*.

[150] *See* Roe v. Wade, 410 U.S. 113, 125 (1973); S. Pac. Terminal Co. v. Interstate Commerce Comm'n, 219 U.S. 498, 514 (1911). While the finding of, or assumption that there was, subject matter jurisdiction may have been wrong, it is now closed. Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940).

an inverse condemnation remedy,[151] and *Williamson County* only requires the pursuit of available remedies.

While *Southern Pacific*'s handling of the four Supreme Court cases is problematical, it righted its course by grounding its decision on *First English*, a case that followed these four cases. *First English* involved a facial takings claim that had been rejected by the state courts since California did not recognize a compensation remedy. In finding the California rule unconstitutional due to the self-executing compensation remedy of the Fifth Amendment, the Supreme Court expressly noted that the challengers had done what *Williamson County* required.[152] This led the Ninth Circuit back to the fundamental point of the Fifth Amendment: "in the absence of knowledge regarding the availability of compensation, appellants' [railroad's] challenges to the constitutionality of the ordinance are simply unripe—whether they be dressed in their 'as-applied' or 'facial' garb."[153]

These three cases, *Lake Nacimiento*, *Christensen*, and *Southern Pacific*, created doubt as to what the rule was in the Ninth Circuit. With that backdrop, the Ninth Circuit in *Sinclair* found in *Yee v. City of Escondido*[154] a resolution to its apparent conflict.

C. Sinclair*'s Misreading of* Yee v. City of Escondido *to Resolve the Apparent Conflict*

Yee came to the Supreme Court from the state court,[155] and its holding dealt with the physical takings doctrine. Narrowly construing its per se physical takings rule, the Court held that the combination of a local rent control ordinance and a state law limiting a landlord's ability to terminate a mobile home lease did not effect a physical taking.[156] While the laws affected use of the property, no unconsented physical invasion had occurred since the owners had voluntarily leased their property.

Having lost the physical takings argument, the landowners in *Yee* asked the Supreme Court to consider substantive due process and regulatory takings claims. The Court refused to do so. The substantive due process claim had

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[151] *See* de Botton v. Marple Township, 689 F. Supp. 477, 480 n.1 (E.D. Pa. 1988) (allowing a landowner to proceed with a takings claim filed on June 24, 1987, where at the time of the alleged taking, 1980, the state did not recognize an action in inverse condemnation). The court acknowledged that *First English* had changed Pennsylvania law in that regard.

[152] First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 312 (1987).

[153] S. Pac. Transp. Co. v. City of Los Angeles, 922 F.2d 498, 507 (9th Cir. 1990), *cert. denied*, 502 U.S. 943 (1991).

[154] 503 U.S. 519 (1992).

[155] A fact not noted by *Sinclair*.

[156] *Yee*, 503 U.S. at 532.

not been presented below. The regulatory takings claim arguably was presented, said the Court.[157] Nonetheless, the Court declined to consider it because the question presented for review focused on the physical claim, with the Court being asked to resolve a conflict among the lower courts on that point.[158]

Before deciding that the regulatory takings claim was not properly before it, the *Yee* Court, in dicta, discussed whether the claim was subject to the final decision prong of *Williamson County*. The city suggested it was unripe since the owners had not used the law's procedure to seek rent increases. This objection was not to the point, said the Court, since the owners raised a facial takings claim.[159] The final decision rule of *Williamson County* only relates to as-applied challenges.

In making that point, *Yee* injected a seed of confusion, which later took root in the Ninth Circuit in *Sinclair*. The *Yee* Court observed, unnecessarily, that the regulatory takings claim being asserted was that, regardless of how it was applied, the ordinance did not substantially advance a legitimate state interest. Citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*[160] and *Agins v. City of Tiburon*,[161] *Yee* said:

> [a]s this allegation does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property *or the extent to which these particular petitioners are compensated*, petitioners' facial challenge is ripe [as it is exempt from the final decision prong of *Williamson County*].[162]

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[157] Since the basis for the suit was that an unconstitutional taking had occurred, the physical taking claim and the regulatory taking claim were, in the Court's view, simply "separate arguments" in support of the same goal of receiving compensation. *Id.* at 534-35.

[158] Alas, it did not work. In *Hilton v. City and County of San Francisco*, No. C-01-01095 CRB, 2001 WL 1180704 (N.D. Cal. Sept. 28, 2001), the court dismissed what appears to be an *Agins-Nectow* facial takings claim saying the suit should be brought in state court. Not citing *Sinclair*, the *Hilton* court relies on *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680 (9th Cir. 1993), *cert. denied*, 510 U.S. 1093 (1994). There, the Ninth Circuit thought *Williamson County*'s second prong applied to facial takings. *Levald* proceeded, however, to find the facial takings claim properly before it because at the time of the alleged taking, the claim pre-dating *First English*, the state had no procedure to award compensation. "[E]ven though Levald did not seek remedies in state court, it was not required to do so because it would have been futile to seek state court relief at the time the alleged taking occurred." *Id.* at 686.

[159] *Yee*, 503 U.S. at 533.

[160] 480 U.S. 470, 495 (1987).

[161] 447 U.S. 255, 260 (1980).

[162] *Yee*, 503 U.S. at 534 (emphasis added). The Court's cite to *Keystone* does not support its statement. On the page cited, the *Keystone* Court said: "The test to be applied in considering this facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land. . . .' *Agins*, . . . ; see also *Penn Central*, ..." *Keystone*, 480 U.S. at 495. Note that *Keystone* deleted the

The italicized dicta regarding the irrelevance of compensation to final decision ripeness served as the basis for the Ninth Circuit's holding in *Sinclair* that a facial takings claim is exempt from the state compensation rule. As the Ninth Circuit noted, the Supreme Court in *Yee* "indicated that the extent to which a property owner is compensated is irrelevant to a facial taking analysis."[163]

The Ninth Circuit then took this dicta to draw a distinction between facial economic deprivation claims and *Agins-Nectow* substantially advance claims. The requirement of suing in state court only applied to the former. It did not apply to the latter because the dicta of *Yee* suggested compensation was irrelevant and the claimant in *Yee* was arguing an *Agins-Nectow* failure to substantially advance a state interest.

What the *Sinclair* court failed to note was that, one, the *Yee* dicta was not addressing where a takings claimant must file suit. *Yee* was addressing only the final decision prong of *Williamson County*. And, two, the *Yee* claimant in fact brought suit in state court, and the case went to the Supreme Court from the state court.

Finally, a fundamental difficulty is figuring out what the *Yee* Court meant when it dismissed the relevance of compensation. *Yee*, after all, involved a takings claim where the plaintiffs were seeking compensation.[164] Even assuming that *Agins-Nectow* is an appropriate Fifth Amendment test,[165] compensation is not necessarily irrelevant. In the *Agins-Nectow* regulatory takings claim that *Yee* decided not to address, the goal of maintaining a supply of affordable housing would be found legitimate but a court might find that rent control does not substantially advance that goal. Perhaps a court would think that rent control will cause property to be withdrawn from the rental market so that the supply of rental housing will be reduced, and the goal of the legislation thereby undermined. Under the Fifth Amendment, the city could retain the ordinance and compensate the landowner.[166]

D. The Remedy for a Taking is Compensation

The only way the Ninth Circuit's *Sinclair* rule—that one need not seek compensation in state court—makes sense is if the remedy for a facial takings claim is invalidation, not compensation. Some have suggested this,[167] but, in

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"substantially advances" language when it discussed facial ripeness.

[163] Sinclair Oil Corp. v. County of Santa Barbara, 96 F.3d 401, 406 (9th Cir. 1996).

[164] *Yee*, 503 U.S. at 523, 525.

[165] See discussion *supra* Part V.A.

[166] But if a court determined that the goal was impermissible, it could not save the defect by ordering compensation to be paid.

[167] Blaesser, *supra* note 149.

light of the language of the Fifth Amendment, such a remedy would be rather extraordinary. As Chief Justice Rehnquist has said:

> This basic understanding of the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.[168]

And Justice Kennedy:

> The [Takings] Clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge. The Clause presupposes what the government intends to do is otherwise constitutional.[169]

As to injunctive relief, the Court has said it "is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking."[170]

In the unusual situation where monetary relief would be ineffective, the Court has found that equitable and declaratory relief may be in order. In *Eastern Enterprises v. Apfel*,[171] coal companies sued to escape having to pay money into a miners' retirement fund. Finding the act to impose retroactive liability and constitute a taking, a four justice plurality found equitable relief appropriate.[172] The plurality thought it made no sense to have the coal

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[168] First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315 (1987).

[169] E. Enters. v. Apfel, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in the judgment and dissenting in part).

[170] Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016 (1984).

[171] 524 U.S. 498 (1998).

[172] The *Eastern* plurality relied on *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 71 n.15 (1978), for the proposition that the Declaratory Judgment Act "allows individuals threatened with a taking to seek a declaration of the constitutionality of the disputed governmental action before potentially uncompensable damages are sustained." *Eastern Enterprises*, 524 U.S. at 521. But, in *Duke*, ultimately the Court did not address the takings claim:

> Appellees also contend that the Price-Anderson Act effects an unconstitutional "taking" because in the event of a catastrophic nuclear accident their property would be destroyed without any assurance of just compensation. We find it unnecessary to resolve the claim that such an accident would constitute a "taking" as that term has been construed in our precedents since on our reading the Price-Anderson Act does not withdraw the existing Tucker Act remedy, 28 U.S.C. § 1491 (1976 ed.). *See* Regional Rail Reorganization Act Cases, 419 U.S. at 125-36, 95 S. Ct. at 349-354 [1974]. Appellees concede that if the Tucker Act remedy would be available in the event of a nuclear disaster, then their constitutional challenge to the Price-Anderson Act under the Just Compensation Clause must fail. Brief for Appellees 71 n.56. The further question of whether a taking claim could be established under the Fifth Amendment is a matter appropriately left for another day.

Duke Power, 438 U.S. at 94 n.39.

company comply with the law by paying money into the fund (and thus complete the taking) only to turn around and order the fund to give the money back to the coal company as compensation. As Justice Kennedy pointed out in his concurrence, this feature itself suggests that the takings clause was inapposite.[173] But, passing over that problem, even for the plurality, this exception, though possibly applicable in the land use context if the Court were to find that impact fees were subject to a Fifth Amendment takings analysis, would not be applicable to the kind of facial challenges to which the Ninth Circuit has applied its *Sinclair* rule.[174]

VI. CONCLUSION

A. Final Decision Ripeness Today

The final decision ripeness rule has achieved a maturity of sorts where the contours of the issues and the obligations of the parties are relatively clear. Uncertainty over the precise steps that one must take remains, but the fact-intensive nature of final decision ripeness does not lend itself to a high degree of certainty. While the courts will continue to be called upon to decide whether a plaintiff has done enough to secure a final decision from the permitting authorities, and some tweaking here and there will occur, a major change does not seem necessary, and thus, is not likely.

The National Association of Home Builders[175] may continue trying to secure legislation to alter final decision ripeness, but, even if adopted, at least as it has been proposed in the past, it would not bring much certainty. The proposals in the past have called for "one meaningful application" to be filed with any governmental rejection to be accompanied by a written

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[173] As Justice Kennedy said in his concurrence: "The Coal Act does not appropriate, transfer, or encumber an estate in land (e.g., a lien on a particular piece of property), a valuable interest in an intangible (e.g., intellectual property), or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits." *Eastern Enterprises*, 524 U.S. at 540.

[174] In *Sinclair* and *San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095 (9th Cir. 1998), compensation was sought. However, in *San Remo*, a housing trust fund fee was challenged, and thus might have fit the exception of *Eastern Enterprises*. In *Chevron USA, Inc. v. Cayetano*, 224 F.3d 1030 (9th Cir. 2000), injunctive relief from a rent control law was sought, but no mention is made of why compensation would not have been a feasible remedy.

The exception allowing injunctive relief can be applied to actions claiming that state laws that use the interest generated on lawyers' trust accounts for legal services programs are takings. *See* Wash. Legal Found. v. Legal Found. of Wash., 271 F.3d 835 (9th Cir. 2001); Wash. Legal Found. v. Tex. Equal Access to Justice Found., 270 F.3d 180 (5th Cir. 2001).

[175] *See supra* note 4.

explanation.[176] Arguably with *Palazzolo* we are close to that point. Whether an application is meaningful is and has been the standard, so there is nothing new there. One reading of *Palazzolo*[177] approaches the judicial equivalent of the legislative proposal to require a written explanation. There is, to be sure, no clear rule that such is required, but *Palazzolo*'s emphasis on the facts of the particular case and the details of the procedures available suggest that government will find an unclear record to work to its disadvantage.

B. Facial Takings and Suing in Federal Court for Injunctive Relief

The Ninth Circuit's exemption to allow facial takings claims to be brought in federal court is ill-considered. In adopting the rule the Ninth Circuit misreads Supreme Court precedent. Based on the notion that compensation is irrelevant to an *Agins-Nectow* claim, the rule flies in the face of the express language of the Fifth Amendment. So long as compensation is the remedy for a taking, and so long as post-taking compensation satisfies the Fifth Amendment, takings claims, facial and as-applied, belong in state courts. That the compensation remedy may not be to the liking of government defendants, who may prefer federal court or may prefer to face only injunctive relief,[178] does not alter what the Fifth Amendment says.

The Ninth Circuit's rule amends the Fifth Amendment by the backdoor. Without an open discussion of the issue, we have a series of cases extending the takings clause to include, as a matter of course, actions where injunctive relief is sought. In the absence of an extreme extension of the language of the takings clause by the Supreme Court, lower courts would do better to remain faithful to the Fifth Amendment's express language and purpose. To do so requires that they question some of the loose language that appears in cases like *Yee*.

The idea that an *Agins-Nectow* facial takings claimant need not file suit in state court for compensation is but a secondary infection from the primary ill of using *Agins-Nectow* as a Fifth Amendment test. If *Agins-Nectow* is ultimately accepted by the Court as part of the Fifth Amendment takings clause protection, perhaps a standard remedy of declaratory and injunctive relief available under the due process clause should also be transferred to the Fifth Amendment. If, though, the substantially advances question is viewed

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[176] H.R. 1534, 105th Cong. § 6(c) (1997).

[177] *See supra* notes 34-42 and accompanying text.

[178] *See, e.g.*, Philip Morris, Inc. v. Reilly, 267 F.3d 45 (1st Cir. 2001) (in a case in which monetary liability could have been devastating, the defendant, perhaps preferring to face a potential injunction rather than possibly crippling damages, did not object to jurisdiction).

as due process based, a claimant making that complaint and seeking injunctive relief under the rubric of the takings clause is a sure sign of a masquerade.[179]

[179] The "masquerade" analogy is suggested by Judge Posner's phrasing in *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461 (7th Cir. 1988).

> This case presents a garden-variety zoning dispute dressed up in the trappings of constitutional law—a sure sign of masquerade being that the plaintiffs do not challenge the constitutionality of the zoning ordinances of the Village of Hoffman Estates but argue rather that the Board of Trustees had no authority under those ordinances to reject their site plan once the Village Plan Commission had approved it.

Id. at 467.

Loko i'a: A Legal Guide to the Restoration of Native Hawaiian Fishponds Within the Western Paradigm

I. INTRODUCTION

Ancient Hawaiian fishponds change modern peoples' lives. Fishfarmers, preservationists, and chance visitors continue to attest to an inherent magnetism of fishponds.[1] And yet, Hawai'i developers and property owners often curse the fishpond and its attendant burden on coastal development. Restorationists, likewise, have come to fulminate, not about the fishponds themselves, but about the federal and state permitting process required to restore a fishpond to an operational state.[2] Moreover, private owners of fishponds may never feel completely secure in their property interest on these unique coastline enclosures. Considering that a 1990 survey estimated that there were 488 fishponds in the State of Hawai'i, the caselaw on fishponds is remarkably sparse.[3] The absence of caselaw has created legal uncertainties, and all persons with an interest in fishponds should be prepared for more rapid legal developments in this area.

Competing personal and governmental interests come to bear on the usage, development, or destruction of ancient Hawaiian fishponds. The Hawai'i courts have become accustomed to the valuation of disparate social and political goals, including those that fall outside of the traditional Western paradigm. As the State's population burgeons upon finite land resources, the resultant casualty is often the destruction of historic Hawaiian sites.[4]

In the area of ancient Hawaiian fishponds, a renaissance movement has developed to restore the fishponds to their operational states.[5] Fully operational fishponds enjoy certain benefits and protections that more

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[1] *See* CAROL ARAKI WYBAN, TIDE AND CURRENT: FISHPONDS OF HAWAI'I xiii (1992); JOSEPH M. FARBER, ANCIENT HAWAIIAN FISHPONDS: CAN RESTORATION SUCCEED ON MOLOKA'I? 1-5 (1997).

[2] *See generally* FARBER, *supra* note 1, at 49-61.

[3] *Id.* at 12. The 1990 DHM Planners Inc. survey catalogues the fishponds by island: O'ahu (178); Hawai'i (138); Moloka'i (74); Kaua'i (50); Maui (44); and Lana'i (4). Although the current number of fishponds is indeterminably less, the remaining fishponds are not all necessarily appropriate for restoration. In fact, a small minority of the current fishponds are, indeed, appropriate, as evidenced by a list of approximately thirty fishponds earmarked for restoration on Moloka'i. *See infra* note 137 and accompanying text.

[4] FARBER, *supra* note 1, at 23; *see also* WYBAN, *supra* note 1, at xvi.

[5] Telephone Interview with Malia Akutagawa, Attorney, Native Hawaiian Legal Corp. (Jan. 25, 2001). *See generally* FARBER, *supra* note 1, at 37-48.

degraded fishponds do not, including in particular, private ownership.[6] Private ownership of fishponds, which average fifteen acres[7] but are sometimes as large as forty-six acres,[8] has obvious effects on the public's access to the coastline. The resultant coastal ownership claims have brought shifting support and opposition by both the state and federal governments and the public to such unfettered private control of Hawai'i's natural resources. The support for fishpond restoration has its basis, most prominently, in the numerous and profound benefits to Native Hawaiians.[9] Likewise, for those who may have a property or personal interest in a fishpond without a concomitant native interest, the law as it relates to fishponds can have dramatic personal and fiscal impacts.

The restoration *process* has only recently become the subject of litigation, whereas previous disputes relating to fishponds involved, almost exclusively, conflicts over real property interests. Recently, *Wright v. Dunbar*,[10] a 2001 federal case involving a Moloka'i property owner's restoration efforts, brought the modern controversies of fishpond restoration to light. Far from the traditional common law, the parties in *Dunbar* litigated claims stemming from the complexities of the permitting required to restore a fishpond to violations of federal environmental regulations.[11] *Dunbar* is a compelling legal story of a private restorer pitted against a vocal neighbor opposed to such restoration and is indicative of the court's struggle to balance unique fishpond interests within the confines of the Western paradigm.

Because there are remnants of over 400 historic fishponds in Hawai'i, and the majority of the property titles were redistributed in the State after the Great Mahele of 1848,[12] the status and ownership of ancient Hawaiian fishponds remain a quiet, but potentially complex and dense area of law. This paper attempts to use a lineage of Hawai'i caselaw as a medium to catalogue and anticipate legal issues as they may arise in relation to the restoration of the ancient Hawaiian fishpond. Part II introduces a brief cultural and early legal history of ancient Hawaiian fishponds and emphasizes that restoration

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[6] *See* Boone v. United States, 944 F.2d 1489, 1501-02 (9th Cir. 1991).

[7] FARBER, *supra* note 1, at 13.

[8] *Id.* at 36 (citing photograph caption). Some historic fishponds have been recorded as being larger than 523 acres. *Id.* at 11. A more recent study of the most viable fishponds for cultivation estimated the largest to be 124 acres. WILLIAM D. MADDEN & CRAIG L. PAULSEN, THE POTENTIAL FOR MULLET AND MILKFISH CULTURE IN HAWAIIAN FISHPONDS 53 (1977).

[9] *See generally* MELODY KAPILIALOHA MACKENZIE, NATIVE HAWAIIAN RIGHTS HANDBOOK 173-95 (1991) (exploring the *konohiki* fishing rights of Native Hawaiians).

[10] Wright v. Dunbar, No. 99-15792, No. 99-16207, 2001 U.S. App. LEXIS 439 (9th Cir. Jan. 8, 2001).

[11] Telephone Interview with Lance "Kip" Dunbar, Defendant in *Wright v. Dunbar* (Mar. 3, 2001).

[12] *See infra* note 29.

embodies Native Hawaiian tradition and may be a protected cultural right. Part III explores the historical and modern legal developments relating to fishponds and restoration. Part III further uses the most recent litigation in *Wright v. Dunbar* to illustrate the particularly modern legal difficulties of restoration. In conclusion, this paper stresses the importance of attempting to adapt restoration to the Western legal paradigm and illustrates that mindfulness of the current state of the law can result in personal and legal success.

II. BACKGROUND: A BRIEF SUMMARY OF ANCIENT HAWAIIAN FISHPONDS

The rise, decline, and renaissance of ancient Hawaiian fishponds provide a compelling medium to examine social change. Particularly in Hawai'i, the collision of native and Western valuation systems affects the history and survival of fishponds. Likewise, the imposition of a Western legal framework upon the patently Hawaiian utilization of fishpond resources affected the history of Hawai'i law. For nearly seventy-five years, the cultural history of Hawaiian fishponds was guided by the law, and it is only recently that the law has begun to be guided by culture.

A. Cultural History of Fishponds and Fisheries

Nā loko i'a,[13] fishponds, were a fundamental part of the Hawaiian method of subsistence cultivation realized through a complex land and sea farming system.[14] The natural freshwater streams and Hawaiian cultivation in *ahupua'a*[15] tenancies created a fertile runoff at the coastline—an ideal environment for fishfarming.[16] The movement away from catching fish to "growing"[17] fish may have begun earlier than the thirteenth century and continued thereafter until the mid-nineteenth century when construction of fishponds ended.[18]

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[13] NEW POCKET HAWAIIAN DICTIONARY 36, 84, 103 (2d ed. 1992). This paper will use the general term "fishpond" in an effort to better represent the texts that have been written on the topic.

[14] FARBER, *supra* note 1, at 6.

[15] *Id.* *Ahupua'a* is defined as a:

> Land division usually extending from the uplands to the sea, so called because the boundary was marked by a heap (*ahu*) of stones surmounted by an image of a pig (*pua'a*), or because a pig or other tribute was laid on the altar as tax to the chief; the land unit most closely related to the everyday life of the people.

MACKENZIE, *supra* note 9, at 305.

[16] FARBER, *supra* note 1, at 6, 8.

[17] WYBAN, *supra* note 1, at xiv.

[18] FARBER, *supra* note 1, at 7, 21. The last record of the construction of a fishpond dates to 1829 when the Puko'o fishpond was built on Moloka'i. *Id.* at 7.

The walls of fishponds are both naturally produced by land mass and enclosed by man-made formations of rocks abutting the coastline.[19] To the first-time observer, the fishpond will appear as a variable line of rock wall enclosing the ocean.[20] The number of people necessary to build a fishpond could exceed 10,000, but the yield from such an effort provided the Native Hawaiians with an abundant supply of fish that would not have otherwise been available in the natural food chain.[21] Investigative reports, made by the United States Fish Commission as early as 1903, documented the success of the fishpond system of aquaculture established by the Native Hawaiians.[22]

Fishponds, however, served more than just a practical purpose. In particular, fishponds were sacred places "because of their spiritual power and presence of *'akua*, gods, and *'aumakua*, ancestral gods."[23] Many of the fishponds served as shrines to particular gods and were earthly mediums through which people could encourage good fortune and demand punishment for wrongdoings.[24] In war, the fishpond was a coveted target for destruction because it symbolized the agricultural and aquacultural prowess of a chief and his people.[25] In addition to its religious underpinnings, the cultivation of the fishponds reinforced the hierarchical structure of the Native Hawaiians.[26] The *konohiki*[27] were primarily responsible for the stewardship and distribution of the resources of the fishponds.[28] The *konohiki* class would also become the majority of private property owners of the fishponds after the Great Mahele of 1848.[29]

The Great Mahele gave rise to reciprocal quitclaims between the king and the *konohiki*, in which *konohiki* owners had the right to transfer the property, but for the existing tenancies and the appurtenant rights of the respective

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[19] *Id.*

[20] For aerial photographs depicting the varying shapes and sizes of Hawaiian fishponds, see FARBER, *supra* note 1, at x, 6, 36, 48, 53 and RUSSELL ANDERSON APPLE & WILLIAM KENJI KIKUCHI, ANCIENT HAWAII SHORE ZONE FISHPONDS: AN EVALUATION OF SURVIVORS FOR HISTORICAL PRESERVATION 79-131 (1975). *See generally* DHM PLANNERS, INC., THE HAWAII COASTAL ZONE MANAGEMENT PROGRAM, OFFICE OF STATE PLANNING, HAWAIIAN FISHPOND STUDY: ISLANDS OF O'AHU, MOLOKA'I, AND HAWAI'I 28-317 (1989-90).

[21] FARBER, *supra* note 1, at 7-8.

[22] *Id.* at 13-14, 74.

[23] *Id.* at 15.

[24] *Id.* at 16.

[25] *Id.* at 18.

[26] *Id.* at 15.

[27] *Konohiki* is defined as a "[l]and agent of an *ahupua'a* land division under the chief. In modern times, landlord or chief of *ahupua'a*." MACKENZIE, *supra* note 9, at 306.

[28] FARBER, *supra* note 1, at 17.

[29] *Id.* at 20-22. The Great Mahele is defined as the "1848 division of Hawai'i's lands between king and chiefs." MACKENZIE, *supra* note 9, at 307.

tenants.[30] If the property included a fishing ground, tenants could, likewise, transfer their nonexclusive right to fish.[31] These property rights became known colloquially as "*konohiki* fishing rights"[32] and were codified in the Kingdom of Hawai'i statutes, which provided, in part, the basis for property law in Hawai'i today.[33]

The interest in fishponds as private property has continued to this day.[34] Although many of the vested rights in Hawaiian "fisheries" were lost through operation of the Organic Act of 1900,[35] the private property interest in "fishponds" was exempted from the Act.[36] The Organic Act required fisheries to be "established" and claimed in court, and those that were properly claimed have remained vested.[37] Legislative reports indicate that by 1939, only thirty-five owners had established their legal rights in approximately 100 fisheries pursuant to the Organic Act.[38] The beginning of the twentieth century similarly marked a decline in private ownership of fishponds, as well as a decline in the actual use of fishponds for subsistence.[39] Gradually, Native Hawaiians and other island residents began to replace the growing of fish with

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[30] MACKENZIE, *supra* note 9, at 151, 175.

[31] *Id.*

[32] *Id.* at 173 n.1.

[33] *Id.* at 174, 188.

[34] Mark W. Siegel, *Native Rights: Native Hawaiians*, 22 ENVTL. L. 1257, 1261 (1992). Seigel notes that both the Court of Appeals for the Ninth Circuit in *Boone v. United States*, 944 F.2d 1489, 1502 (9th Cir. 1991) and the United States Supreme Court in *United States v. Kaiser Aetna*, 444 U.S. 164, 166-67 (1979) have held that Hawaiian law has always treated fishponds as private property. *Id.*

[35] Hawai'i Organic Act § 95 (1900). The Hawai'i Organic Act states:

> [A]ll laws of the Republic of Hawaii which confer exclusive fishing rights upon any person or persons are hereby repealed, and all fisheries in the sea waters of the Territory of Hawaii not included in any fish pond or artificial inclosure shall be free to all citizens of the United States, subject, however, to vested rights; but no such vested rights shall be valid after three years from the taking effect of this Act unless established as hereinafter provided.

Hawai'i Organic Act, ch. 6, § 95 (2001) (original version at ch. 339, 31 Stat. 141 (2 Supp. R. S. 1141)).

[36] United States v. Kaiser Aetna, 408 F. Supp. 42, 51 (D. Haw. 1976), *aff'd*, 584 F.2d 378 (9th Cir. 1978), *rev'd*, 444 U.S. 164 (1979) (stating that "[t]he Organic Act of 1900, following annexation, repealed all prior laws conferring private rights in *seawater* fisheries (subject to vested rights) but specifically exempted fishponds from its scope") (emphasis in original).

[37] MACKENZIE, *supra* note 9, at 177. Some sources indicate that approximately 240 to 340 fisheries were forfeited due to non-compliance with the Organic Act. The ratio of forfeited fisheries to those established was between four to one and two to one. *Id.*

[38] *Id.*

[39] FARBER, *supra* note 1, at 22; *see also* WILLIAM KENJI KIKUCHI, HAWAIIAN AQUACULTURAL SYSTEM 222 (1973).

local ocean fishing and importation.[40] The coincidence of the Organic Act and the introduction of new means of obtaining fish products may account for the small number of claims of private property interests in fisheries as mandated by the Act. Although facially unaffected by the requirements of the Act,[41] the decline in claims to fishponds was concurrent with that of the Hawaiian fisheries.[42]

The cultural history of the fishpond is also a Western legal history after 1900. Due, in part, to the passage of the Organic Act, the Hawai'i Supreme Court began to alter substantially the fishing and property rights of Hawaiian residents as they related to fisheries and fishponds.[43] Because the rights of tenants in fishponds resembled the system of *konohiki* fishing rights in fisheries,[44] the caselaw divesting rights in fisheries has application to the fishpond.[45]

In 1902, the first case of record dealing with the status of fishing rights after the Organic Act of 1900 reached the Hawai'i Supreme Court. In *Carter v. Territory*,[46] trustees of the Bishop Estate sued to establish *konohiki* fishing rights in certain O'ahu fisheries, but the Hawai'i Supreme Court held that ancient custom and prescription no longer established property and fishing rights after the Great Mahele.[47] The U.S. Supreme Court declined the invitation to reverse the court's holding in that regard,[48] but later contradicted the Hawai'i Supreme Court in a related case, *Carter v. Hawaii*,[49] holding that if a clear conveyance had been made during the Great Mahele, the *konohiki* fishing and property rights were vested.[50] In general, the federal courts appeared to be less willing to strip away Native Hawaiian fishing rights as they related to the Organic Act. In 1933, the U.S. District Court for the District of Hawai'i held in *United States v. Robinson*[51] that fishery tenancies could vest

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[40] *See* KIKUCHI, *supra* note 39, at 222.

[41] *See supra* note 35.

[42] *See* KIKUCHI, *supra* note 39, at xviii.

[43] MACKENZIE, *supra* note 9, at 178.

[44] *See* KIKUCHI, *supra* note 39, at 108-12.

[45] *See* United States v. Kaiser Aetna, 408 F. Supp. 42, 51 (D. Haw. 1976) (recognizing similar rights in fishponds and fisheries, which arise out of "Hawaii's unique feudal system of property rights").

[46] 14 Haw. 465 (1902).

[47] *Id.* at 473.

[48] MACKENZIE, *supra* note 9, at 179 n.52. MacKenzie contrarily points out that "the Court of Claims has expressly ruled that traditional use alone cannot be the basis of a presumed grant of an exclusive fishery." *Id.* (citing Tee-Hit-Ton Indians v. United States, 132 F. Supp. 695, 697 (Ct. Cl. 1955)).

[49] 200 U.S. 255 (1906).

[50] *Id.* at 256-57.

[51] MACKENZIE, *supra* note 9, at 180 (citing United States v. Robinson, Civil No. 292 (D. Haw. 1933)). The *Robinson* case is not found in the traditional District Court reporters and

notwithstanding a certain amount of noncompliance with the Organic Act.[52] The court in *Robinson* claimed to have reached this result by following dicta of the Hawai'i Supreme Court in *Smith v. La'amea*,[53] although the Hawai'i Supreme Court would, three years later, reach the opposite result.[54]

On the issue of fishing rights divestment, the Hawai'i Supreme Court continued on a disparate path from the federal courts for over fifty years, culminating most significantly, in 1964, in *State v. Hawaiian Dredging Co.*[55] The court in *Hawaiian Dredging* held that intervenors in a condemnation action could not preserve their *konohiki* fishing rights via the rights of one established co-owner.[56] Firmly abiding by the Organic Act, the court stated that the intervenors claiming to have *konohiki* fishing rights "had ample opportunity to preserve those rights but, in the face of the mandate of the Organic Act that they take action to preserve them, they did nothing."[57] Simply put, from 1900 to 1970, the Hawai'i Supreme Court created a lineage of caselaw dissolving vested rights of Native Hawaiians in favor of opening the coastline to the general public through State ownership. Remnants of this

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must be obtained from the Federal Archives and Records Center in San Bruno, California.

[52] *Id.* at 181 (citing construal of United States v. Robinson by Damon v. Tsutsui, 31 Haw. 678, 693 (1930)).

[53] *Id.* In *Smith v. La'amea* the court stated:

> "We understand the word tenant, as used in this connection, to have lost its ancient restricted meaning, and to be almost synonymous at the present time with the word occupant, or occupier, and that every person occupying lawfully any part of" an ahupuaa "is a tenant within the meaning of the law. Those persons who formally lived as tenants under the the konohikis but who have acquired fee simple title to their kuleanas, under the operation of the Land Commission, continue to enjoy the same rights of piscary that they had as hoaainas under the old system. . . . If any person who has acquired a kuleana on the ahupuaa of Honouliuli should sell and convey his land, or even a part of it, to another, a common right of piscary would pass to the grantee, as an appurtenance to the land.["]

Smith v. La'amea, 29 Haw. 750, 755-56 (1927) (quoting Haalelea v. Montgomery, 2 Haw. 62, 71 (1858)) (alteration in original).

[54] *See* MACKENZIE, *supra* note 9, at 179 (citing Damon v. Tsutsui, 31 Haw. 678 (1930)).

[55] 48 Haw. 152, 397 P.2d 593 (1964).

[56] *Id.* at 187, 397 P.2d at 612. The court stated:

> [We have] declared that the intent of the Congress in enacting . . . sections [95 and 96 of the Hawai'i Organic Act of 1900] was to destroy, so far as it was in its power to do so, all private rights of fishery and to throw open the fisheries to the people. It would be contrary to that intent to hold that an owner of vested fishing rights was not required to register his own rights but could rely upon and be protected by the registration effected by another person claiming adversely to him.

Id. (citations omitted).

[57] *Id.* at 189, 397 P.2d at 613.

philosophy favoring public access to the coastline continue to exist and permeate state and federal caselaw today.[58]

B. Current Condition of Fishponds

The fishpond is no exception to the casualties of population growth and Western influence in Hawai'i. Much has been written on the perceived injustices occasioned upon the Hawaiian people, and this paper does not endeavor to address this area. Hawaiian fishponds, however, are a definite part of the historical losses of the Hawaiian culture. Much of the current condition of fishponds is a result of the loss of both *konohiki* tenancies and private ownership interests.[59] Lacking the community or personal property interest for decades, many of the fishponds simply have eroded by wave action[60] or mangrove trees.[61] Many of the walls of fishponds have been damaged and left unrepaired, allowing further deterioration of the walls in their entirety.[62] Numerous fishponds have simply been dredged and developed. The military installation of Pearl Harbor and housing developments at Kane'ohe Bay, on the island of O'ahu, are noteworthy examples of fishpond loss.[63] Over a thirty year period ending in 1975, the number of fishponds in Kane'ohe Bay dropped from twenty-four to seven.[64] Today there are even fewer. Statewide, the numbers are less dramatic, but still declining. On Moloka'i, once a sanctuary for Native Hawaiian fishponds, less than 100 remain, a large majority of which are in poor or submerged condition.[65]

Notwithstanding the dramatic reduction in the number of existing fishponds, in the past twenty-five years, both public and private groups have become more interested in the use and revitalization of historic fishponds.[66] This movement is sparked both by native cultural revitalization and private economic interests.[67] Although the cultural reasons are a product of a stronger and more vocal Native Hawaiian movement, it was not expected that Native Hawaiian fishponds would once again be viewed as economically viable.[68]

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[58] *See* discussion *infra* Parts III.A-B.

[59] WYBAN, *supra* note 1, at 138.

[60] *Id.*

[61] FARBER, *supra* note 1, at 23. Mangrove trees, non-native flora, were introduced to the Hawaiian islands by the American Sugar Company. *Id.* Mangrove trees have had seriously adverse impacts on the coastline and fishponds of Hawai'i. *Id.*

[62] *See* FARBER, *supra* note 1, at 21-23.

[63] WYBAN, *supra* note 1, at 138.

[64] *Id.* at 138-39.

[65] FARBER, *supra* note 1, at 14.

[66] *See id.* at 29-33.

[67] WYBAN, *supra* note 1, at 141-42.

[68] FARBER, *supra* note 1, at 62.

The demand for seafood is the primary reason that the fishponds have merited a second look from a market standpoint.[69] The depletion of offshore island fisheries has caused the majority of Hawai'i's seafood to be imported. Now, the impetus to revisit the viability of fishponds is ironically couched in capitalism.[70] As early as 1977, the State of Hawai'i began commissioning studies through the Department of Planning and Economic Development, Aquaculture Planning Program to research the suitability of fishponds for modern aquaculture.[71] And yet, the interest in the economic revitalization of fishponds is tempered by certain, probably justified, fears that urban runoff may contaminate fish stocks.[72] Such runoff could not have been envisaged by the native builders when the ponds were constructed abutting the once pristine shores of the archipelago.

The fishpond has always been a treasured part of the Hawaiian heritage. Thus, any renewed use of the Native Hawaiian fishpond should retain "the cultural and physical integrity of [the water] resources," which provided the basis of the Native Hawaiian *ahupua'a* land system.[73] Some scholars urge that all revitalization be overseen by the Hawaiian community, so as to enable Hawaiians to "reclaim" this aspect of their lost heritage.[74] In fact, such an interplay may be demanded by law. In *Public Access Shoreline Hawai'i v. Hawai'i County Planning Commission* ("*PASH*"),[75] Native Hawaiian interest groups sued to vacate a Special Management Area permit, which allowed construction of a resort complex on the island of Hawai'i. On appeal in 1995, the Hawai'i Supreme Court affirmed the avoidance of the permit and held that land titles in Hawai'i merely conveyed a "limited property interest as compared with typical land patents governed by western concepts of property."[76] The *PASH* decision created a balancing test weighing the significance of the Hawaiian tradition sought to be practiced against the interests of both the practitioner and the landowner.[77] Although the dispute in *PASH* related to gathering rights in *ahupua'a* tenancies, gathering rights have been held to be the same as water and fishing rights.[78]

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[69] *Id.*

[70] *Id.*

[71] *See* MADDEN & PAULSEN, *supra* note 8, at 1-4.

[72] WYBAN, *supra* note 1, at 141.

[73] *Id.* at 157.

[74] *Id.*

[75] 79 Hawai'i 425, 903 P.2d 1246 (1995), *cert denied*, 517 U.S. 1163 (1996).

[76] *Id.* at 447, 903 P.2d at 1268.

[77] D. Kapua Sproat, Comment, *The Backlash Against* PASH*: Legislative Attempts to Restrict Native Hawaiian Rights*, 20 U. HAW. L. REV. 321, 338 (1998).

[78] *Id.* (citing *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 5, 656 P.2d 745, 748 (1982) for the proposition that Hawai'i Revised Statutes ("HRS") section 7-1 confers rights of access, gathering and water); *see also PASH*, 79 Hawai'i at 445-46, 903 P.2d at 1266-67 (examining

Far removed from the decisions during the territorial period, the Hawai'i Supreme Court preceded *PASH* with two other groundbreaking cases. In 1968, the court held in *In re Application of Ashford*,[79] the case of a Moloka'i resident seeking to register title to land, that "Hawai'i's land laws are unique in that they are based on ancient tradition, custom, practice and usage."[80] The court redefined how the shoreline boundaries of the Ashford parcels should be delineated, using tradition, custom, and usage as the basis of their holding.[81] The court reversed the trial court in this regard and permanently changed how shoreline boundaries would be determined in Hawai'i.[82]

Similar reasoning was applied to fishing rights and, in fact, had been adopted by the court fourteen years before *PASH*.[83] In 1982, the Hawai'i Supreme Court recognized in *Reppun v. Board of Water Supply* that there had been unjustified losses of customary Hawaiian rights, including *konohiki* fishing rights.[84] Having recognized their own historical errors,[85] the court held that with regard to water rights, the grant of such water rights to a *konohiki* owner were inseparable from the *konhiki*'s duty to provide for his tenants.[86] The court implied that their holding with regard to water rights had application

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earlier codified protection of tenant gathering rights after the Great Mahele, wherein the Hawai'i Supreme Court quoted a Privy Council resolution, which states, in pertinent part, "the rights of the makaainanas to firewood, timber for house, grass for thatching, ki leaf, *water* for household purposes in said land . . . is hereby sacredly reserved and confirmed to them for their private use . . . ." (citing 3B Privy Council Records 681, 687 (1850) (emphasis added)).

[79] 50 Haw. 314, 440 P.2d 76 (1968).

[80] *Id.* at 315, 440 P.2d at 77 (citations omitted).

[81] *Id.* at 315-16, 440 P.2d at 77-78.

[82] *Id.* at 317, 440 P.2d at 78. The court in *Ashford* set the tone for *PASH*, stating that "[i]t is not solely a question for a modern-day surveyor to determine boundaries in a manner completely oblivious to the knowledge and intention of the king and old-time kamaainas who knew the history and names of various lands and the monuments thereof." *Id.* at 316, 440 P.2d at 77.

[83] *See* Reppun v. Bd. of Water Supply, 65 Haw. 531, 656 P.2d 57 (1982).

[84] *Id.* at 548, 656 P.2d at 68-69. The court in *Reppun* endorsed the reclamation of traditional native rights, stating:

> The freezing of land titles and related irrigation and fishing rights by legalistic procedures and grants in fee simple was wholly a foreign innovation. After this occurred, from the point of view of old Hawaiian principles of land, water, and fishing tenure, the only Hawaiians who maintained land, water, or fishing rights were those who stayed with and continued to use their areas of cultivation, water, and fishing grounds. Those who abandoned and neglected them, leased or sold them, no longer had any rights, namely the continued use and exercise of the right to use.

Id. (citing HANDY & HANDY, NATIVE PLANTERS IN OLD HAWAII 63-64 (1972)).

[85] *Id.* at 547-48, 656 P.2d at 68-69.

[86] *Id.* at 547, 656 P.2d at 68 (stating that, "[w]e cannot continue to ignore what we firmly believe were the fundamental mistakes regarding one of the most precious of our resources").

to the analogous land and fishing rights.[87] *Reppun* represented a marked departure from what had previously been held in *Hawaiian Dredging*.[88] Under *Ashford*, *Reppun*, and *PASH*, Hawaiians with or without vested property interests in fishponds may have judicially enforceable rights to fish at these sites.

The Hawai'i Supreme Court's movement away from earlier decisions condoning divestiture has its basis in the federal civil rights statutes and state statutory law ratified within the last twenty-five years. *PASH* is based on a 1978 constitutional amendment to the Hawai'i State Constitution and statutory precursors,[89] which have provided the basis for most modern Native Hawaiian rights claims. In an effort to protect Native Hawaiian tenant rights, the popularly known Kuleana Act of 1850, amended in 1851, was partially codified in the Hawai'i Revised Statutes ("HRS")[90] section 7-1.[91] HRS section 1-1 also provides a viable, albeit untested, basis for traditional rights of access, stating in part that "Hawaiian usage" should supplement traditional notions of common law property rights.[92] The Hawai'i Supreme Court has interpreted these sections, stating: "Together, HRS [sections] 1-1 and 7-1 represent the codification of traditional and customary Native Hawaiian rights which

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[87] *See supra* note 84 and accompanying text.

[88] *See supra* note 57 and accompanying text.

[89] *See* Sproat, *supra* note 77, at 337-38. Article XII, section 7 of the Hawai'i State Constitution states:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of Native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

HAW. CONST. art. XII, § 7.

[90] *See* MACKENZIE, *supra* note 9, at 214.

[91] HRS section 7-1 provides in part:

> Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and roads shall be free to all on the lands granted in fee simple; provided that this shall not be applicable to well and watercourses, which individuals have made for their own use.

HAW. REV. STAT. § 7-1 (2001).

[92] *See* MACKENZIE, *supra* note 9, at 215-16. HRS section 1-1 provides:

> The common law of England as ascertained by English and American decisions, is declared to be the common law of the State of Hawai'i in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.

HAW. REV. STAT. § 1-1 (2001).

provide the basis for a claim of a constitutionally protected Native Hawaiian right."[93] Native Hawaiian rights claims are also brought under the federal counterpart, 42 U.S.C. § 1983.[94] Despite a movement by the legislature and state courts to revitalize the trust relationship of the State of Hawai'i towards Hawaiian people and places, claims under sections 1-1 and 7-1, and under 42 U.S.C. § 1983, have met with some success, but the continued success under the statute may be ending.[95] The struggle for recognition of the special relationship of the Hawaiian people to the United States government has most recently been rebuffed by the United States Supreme Court in *Rice v. Cayetano*.[96] The movement to protect Native Hawaiian rights, even those unrelated to property interests, has direct effects on the rights of access and restoration of fishponds.[97] Consequently, the rights in fishponds that remain vested or inchoate cannot be fully determined until the legal issues related to Hawaiian sovereignty and the illegal overthrow of the Kingdom of Hawai'i in 1893 are resolved.[98] Some scholars argue that the fishponds can only be saved and restored through Hawaiian sovereignty because restoration cannot be accomplished within the Western paradigm.[99] Although negotiating the Western paradigm has proved to be difficult for the restorer, it has yet to be pursued with consistency and vigor.

C. Restoration and Permitting

Fishponds remain a quiet area of interest despite the attention to the greater movement towards an umbrella protection for Hawaiian historical sites. Greater attention was paid to fishponds after the publication in 1997 of Joseph M. Farber's book, *Ancient Hawaiian Fishponds: Can Restoration Succeed on*

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[93] *See* State v. Hanapi, 89 Hawai'i 177, 186, 970 P.2d 485, 494 (1998).

[94] Civil Action for Deprivation of Rights, 42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (2001).

[95] *See* Sproat, *supra* note 77, at 362 (describing the difficulty of establishing rights based on traditional and customary practices of Hawaiians, particularly, the absence of ancient writings creates a major impediment to Hawaiians with claims that would ostensibly fall under the protective measures of HRS sections 1-1 and 7-1).

[96] 528 U.S. 495 (2000). The Court held that a race-based voting system for elections for offices within the Office of Hawaiian Affairs violated the Fifteenth Amendment. *Id.* at 527.

[97] *See* MACKENZIE, *supra* note 9, at 178.

[98] *See id.*

[99] FARBER, *supra* note 1, at 58.

Moloka'i?.[100] Farber documents the various movements toward restoration beginning in earnest in the mid-1960s.[101] After the destruction of several noteworthy fishponds in the 1960s and 1970s, a grass-roots movement emerged to conserve fishponds.[102] The movement recognized the inherent cultural value in the fishpond, which differed from the economic motive of previous restoration efforts under the auspices of the state.[103] In light of the fact that many of the remaining fishponds are state-owned, the government has remained an interested party in the restoration process, albeit ostensibly for commercial benefit.[104] Even after the state began calling for restoration in the 1930s, only five fishponds had been restored to a functional state by 1995.[105]

A noted writer and previous caretaker of the Lokoea Fishpond on O'ahu, Carol Araki Wyban, advocates the use of fishponds for both cultural and commercial purposes.[106] She has encouraged the restoration of fishponds based on five principles: "1. Hawaiian fishponds are cultural treasures; 2. fishponds should be used for growing fish and seafood; 3. Hawai'i can continue a tradition of innovation with fishpond resources; 4. appropriate technology can increase yields in fishponds; and 5. fishponds are valuable educational tools."[107] Farber, in contrast, posits that it would be unreasonable to believe that restoration of fishponds would be viable from a "purely economic sense of the world market," because fishponds are such labor intensive endeavors.[108] Irrespective of the complex interests behind restoration, restoration continues.

Revitalizing a fishpond is not only an area of divergent philosophies, it is also a legal matter. Although the state government and certain federal government agencies appear to endorse the restoration of fishponds, the permitting process allowing an interested owner to restore a fishpond is both expensive and cumbersome.[109] There are no fewer than seventeen state,

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[100] *See* FARBER, *supra* note 1. Joseph Farber "was part of a team of University of Hawai'i at Mānoa graduate students who did extensive field surveys and environmental assessments of the Moloka'i fishponds." *Id.* at *About the Author*. Farber was further "employed by the State of Hawai'i Department of Land and Natural Resources to formulate and advance the permit requirements necessary to restore the Moloka'i fishponds." *Id.* In 1996, Joseph Farber received his Masters Degree in Urban and Regional Planning from the University of Hawai'i at Mānoa. *Id.*

[101] *See id.* at 24-36.

[102] *Id.* at 29.

[103] *Id.* at 35.

[104] *See id.* at 33-35.

[105] *Id.* at 50.

[106] *See* WYBAN, *supra* note 1, at 155-58.

[107] *Id.* at 155.

[108] FARBER, *supra* note 1, at 34.

[109] *Id.* at 49. Farber notes that merely to call the permitting process "cumbersome is a grave understatement." *Id.*

county, and federal permits required to restore a fishpond to an active aquacultural state.[110] The total cost of obtaining these permits can range from $16,000 to $43,000 per fishpond, notwithstanding the actual physical cost of restoration, which has been estimated at $22,000 in some cases.[111] Farber isolates five fundamental problems associated with permitting, including: (1) permit complexity; (2) permit delays; (3) changes in regulations during planning phases; (4) "miscommunication between regulators and developers"; and (5) project opponents.[112] Citizen streamlining of permits and governmental attempts to reduce permit burdens are some of the continuing measures taken to confront these issues.[113]

Many ironies affect the ability of potential restorers to obtain permits and complete work for restoration. The permit process, itself, is a conundrum. Permitting has created a situation whereby conservationists and restorationists are prevented from taking the necessary steps to restore lawfully because the permits, at present, require such intense environmental impact studies.[114] Additionally, because time-worn fishponds now also serve as habitats for endangered species, permitting has become especially sensitive as it implicates the federal and state endangered species acts.[115] Fishponds have, likewise, been converted into wetlands by flourishing mangrove trees and runoff. The conversion of fishponds into wetlands has given rise to particular problems, not the least of which is the refusal by the U.S. Army Corps of Engineers to approve the necessary permits for fishponds considered to be wetlands.[116] One further example of the restoration dichotomy exists in the government's aversion to the use of machinery to complete work.[117] The Department of Health opposes the use of machinery in the ocean, although modern restoration is unlikely without it.[118] The difficulties of permitting are innumerable for large- and small-scale restorationists alike.[119]

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[110] *Id.*; *see infra* Part II.C.1.

[111] FARBER, *supra* note 1, at 55.

[112] *Id.* at 49.

[113] *See infra* Part II.C.1.

[114] *See* WYBAN, *supra* note 1, at 142-43 (quoting Billy Kalipi, Sr. to illustrate the hypocrisy of such extensive environmental permitting for restoration purposes).

[115] *See* FARBER, *supra* note 1, at 51; *see also* Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1974).

[116] FARBER, *supra* note 1, at 53-54.

[117] *Id.* at 57.

[118] *Id.*

[119] *Id.* Farber notes that "[e]ven Bishop Estate, the largest private owner in the State is doubtful it will ever restore any of their ponds because of . . . expens[e]." *Id.*

1. Present-day permitting

Widespread attention has been paid to the basic permitting required to begin restoration of a fishpond. Specifically, the communities with an interest in fishpond restoration have been strongly adverse to the unmanageable and duplicative nature of the requisite permits. Despite such aversion, the permit process has changed very little since its inception,[120] and there is also a continuing lack of guidance to assist the potential restorer with the permitting system.[121]

Currently, it is estimated that thirteen permits, each of varying complexity, are required to begin restoration.[122] The basic federal permits include: (1) Section 404 Army Corps of Engineers Permit ("404 permit");[123] (2) 401 Water Quality Certification ("401 permit");[124] (3) Coastal Zone Management ("CZM") consistency statement;[125] and (4) Fish and Wildlife Review.[126] The

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[120] Telephone Interview with Joseph M. Farber, Environmental Planner (Apr. 17, 2001).

[121] Telephone Interview with Leonard Young, Aquaculture Specialist, Aquaculture Development Program, Department of Agriculture (Apr. 16, 2001).

[122] Telephone Interview with Joseph M. Farber, *supra* note 120.

[123] The 404 permit is required by section 404 of the Water Pollution Control Act of 1972, as amended. The requirement is triggered by "the placement or removal of any materials or structures in the ocean, rivers, streams, wetlands and other waterbodies. [It is likewise] triggered by dredge and fill activities that may result in a discharge into a waterbody." DAVID KIMO FRANKEL, PROTECTING PARADISE: A CITIZEN'S GUIDE TO LAND & WATER USE CONTROLS IN HAWAI'I 19 (1997). The Army Corps of Engineers has also created a Nationwide and General permit system as a form of the Section 404 permit. *See* United States v. Marathon Development Corp., 867 F.2d 96, 98 (1st Cir. 1989) (citing 33 U.S.C. § 1344); *see also The Historic Fishponds of Moloka'i, Hawaii*, http://www.epa.gov/nep/coastlines/spring98/fishpond.html (last visited Mar. 4, 2002). The General Permit was created "to reduce the cost and time associated with permit processing for fishponds that have relatively few environmental constraints." *Id.* The fishpond restoration at the heart of *Wright v. Dunbar*, No. 99-15792, No. 99-16207, 2000 U.S. App. LEXIS 439 (9th Cir. Jan. 8, 2001), was processed under the general permit system. *See infra* Part III.B.1.

[124] A 401 permit is required for dredge and fill activities authorized under the previous Section 404 permit to ensure that a proposed discharge is in compliance with state water quality standards. GOODSILL ANDERSON QUINN & STIFEL, HAWAII ENVIRONMENTAL LAW HANDBOOK 89-90 (3d ed. 2000). In Hawai'i, the 401 permit is administered by the Hawai'i Department of Health, which provides application packages to assist in completing the certification. *Id.* at 90. Certain expedited treatment for applications relating to fishpond restoration is required by law. *Id.* (citing HRS § 342D-6.5).

[125] The CZM consistency statement arises from the federal Coastal Zone Management Act of 1972 (16 U.S.C. §§ 1451-1464), which is codified in HRS chapter 205A and administered by the Hawai'i Coastal Zone Management Program. *Id.* at 383-84. The CZM program was developed as a cooperative effort between the federal government and the U.S. coastal states to "preserve, protect, [and] develop . . . the resources of the nation's coastal zone." *Coastal Zone Management Program*, Office of Ocean and Coastal Resource Management, http://www.ocrm.nos.noaa.gov/czm/national.html (last visited Mar. 4, 2002). The goals of the

basic state permits[127] include: (1) revocable permit or lease documents, if the pond is state owned; (2) environmental assessment; (3) conservation district use application; (4) historic preservation review; and (5) fishing permit.[128] A more comprehensive list of permits required for aquaculture in Hawai'i was compiled by the Aquaculture Department Program in 1994, but has yet to be updated.[129] Not all fishponds will require an application for each permit, although there is no identifiable process to determine whether a fishpond may be excluded from a particular requirement. Although the state and citizen groups have attempted to streamline the permitting process, discussed below, the negotiation of permitting continues to require guidance. The State Aquaculture Development Program, transferred from under the auspices of the Department of Land and Natural Resources to the Department of Agriculture, is primarily responsible for overseeing permitting for fishponds, but there is no representative with knowledge of permitting specific to fishponds.[130] Restorers have thus been forced to pay for consultants to negotiate the process.[131]

Joseph M. Farber, working as a private environmental consultant with the Pacific American Foundation, is preparing "checklist" type forms to assist in the negotiation of the permitting process by private restorers.[132] The conversion from the current system to an expedited system remains slow due to a lack of knowledgeable professionals.[133] Farber considers himself to be one of a few in Hawai'i familiar with the permitting system, but notes that the Department of Land and Natural Resources has been supportive of his

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CZM program are broad and include restoration of historic and coastal ecosystem resources, such as fishponds. GOODSILL ANDERSON QUINN & STIFEL, *supra* note 124, at 384. In Hawai'i, the CZM consistency statement is administered by the Office of Planning within the Hawai'i Department of Business, Economic Development and Tourism. *Id.*

[126] FARBER, *supra* note 1, at 51.

[127] For a workable guide to permitting in Hawai'i, providing a comprehensive list of required permits, a checklist format, and contact numbers for all state and federal agencies involved in development permitting, see FRANKEL, *supra* note 123, at 112-39; and FARBER, *supra* note 1, at 79-97 (explaining permit requirements in the fishpond context).

[128] *See* FRANKEL, *supra* note 123, at 112-39.

[129] Telephone Interview with Leonard Young, *supra* note 121. The Aquaculture Development Program ("ADP") published *Permits and Regulatory Requirements for Aquaculture in Hawai'i* in 1993. A shortened version, *Permits and Regulations for Aquaculture in Hawaii: A Brief Guide* (1994), which outlines the basic permitting required for aquacultural endeavors, is available from the ADP offices and several Hawai'i libraries.

[130] Telephone Interview with Leonard Young, *supra* note 121.

[131] Telephone Interview with Joseph M. Farber, *supra* note 120.

[132] *Id.*

[133] *Id.*

endeavors to overhaul the current system, as a part of the larger project to streamline all fishpond permitting.[134]

2. Streamlining

In response to the difficulties of permitting, restorationists on Moloka'i and their counterparts have attempted to streamline the process.[135] Moloka'i fishponds are particularly good candidates for restoration, most notably because many are still partially intact. Moloka'i also benefits from both strong community support for the projects and the absence of urban influences.[136] In 1993, the State and the Moloka'i community began to catalogue the remaining fishponds based upon their candidacy for restoration. The goal was to group fishponds with similar characteristics, so as to be able to create a template permit or a general permit covering all of the included fishponds. Although the community and state differed on exactly which fishponds were candidates for restoration, approximately thirty were chosen to be included in the Master Conservation District Use Application.[137] The State paid the majority of the costs associated with obtaining the several permits included in the master application.[138] Although the process began in 1993, it has not yet been completed and promises to be riddled with more hindrances.

The streamlining project has been a partial success. From the original list of thirty fishponds that could be streamlined for restoration purposes, a more limited list of fishponds is now eligible for a Nationwide Permit Program authorization. The nationwide authorization is a mechanism through which many of the state permits are subsumed in a single authorization administered by the U.S. Army Corps of Engineers.[139] In recent history, the State of Hawai'i through the Department of Land and Natural Resources appears willing, if not zealous, to assist in the permitting for fishpond restoration.[140] In the case of *Wright v. Dunbar*, the State authorized the restoration of Dunbar's fishpond by retroactively including the pond in the more limited list of seventeen fishponds eligible for permit streamlining. This recent support by the State could not have been anticipated even in the mid-1990s.[141]

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[134] *Id.*

[135] FARBER, *supra* note 1, at 58.

[136] *Id.* at 42-43.

[137] *Id.* at 47.

[138] *Id.* at 56.

[139] Telephone Interview with Lance "Kip" Dunbar, *supra* note 11.

[140] Plaintiff-Appellants' Opening Brief at 9, Wright v. Dunbar, No. 99-15792, No. 99-16207, 2000 U.S. App. LEXIS 439 (9th Cir. Jan. 8, 2001); *see supra* note 134 and accompanying text.

[141] *See* FARBER, *supra* note 1, at 49-58.

However, even when streamlined, permitting does not solve the problems associated with private restoration of fishponds. Because the bureaucracy of permitting coincided with a renewed interest in the restoration of fishponds, much has been written on overcoming this process. Irrespective of the attempts to expedite permitting, the process remains cumbersome and continues to be the principle obstacle for the prospective restorer.

III. ANALYSIS: LEGAL GUIDE TO RESTORATION

Little has been written as a legal guide to restoration and permitting. The absence of legal analysis may be due, in part, to a small body of caselaw on a number of diverse subjects. The multiplicity of issues and interests involving fishponds have not lent themselves to a preeminent theme upon which scholarly writing might be based. Notwithstanding this absence, it remains important for restorers to be apprised of the current state of the law as it relates to their unique property interests.

A. History of Fishpond Litigation

The renaissance of ancient Hawaiian fishponds has highlighted both their intrinsic and economic value. However, property interests in fishponds can be easily lost. All Hawai'i caselaw on fishponds relates to perpetuating or preventing loss of these property interests. Specifically, the losses of rights in fishponds materialize predictably from adverse possession and navigational servitude claims. Only within the last two years has fishpond litigation addressed any issue other than property rights in the adverse possession or servitude contexts.[142] Surprisingly, the most recent litigation involves *restoration rights* after the property rights had been established.[143] The following parts attempt to catalogue the entirety of caselaw on fishponds over the last 100 years.

1. Historic loss of land: Adverse possession and servitude

A fishpond owner must be made aware that adverse possession is more likely to occur with fishponds than with other real property interests. The requirements to establish an adverse possession claim—actual, open, notorious, continuous, and exclusive possession for the statutory period[144]—

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[142] *See* discussion *infra* Part B.1.

[143] *See* discussion *infra* Part B.

[144] Pai'Ohana v. United States, 875 F. Supp. 680, 693 n.27 (D. Haw. 1995) (citing Lai v. Kukahiko, 58 Haw. 362, 368, 569 P.2d 352, 356-57 (1977)).

arise more often when they involve the customary usages by native peoples.[145] The owner of a fishpond needs to protect against adverse possession by another private claimant as well as by the State.[146] Particularly because the State is the presumptive owner of the submerged land and fast lands below the vegetation line,[147] abandoned or unclaimed fishponds can revert to the State under the doctrine of adverse possession. This would be particularly true of fishponds that remain below the water's surface continually or at high tide.[148] Notably, under the common law, once a fishpond is adversely possessed by the government, it cannot be "repossessed" by the former owner thereafter.[149]

In 1978, the Hawai'i Supreme Court addressed the question of adverse possession as it relates to fishponds in *In re Kamakana*.[150] In *Kamakana*, the petitioner sought to quiet title in the Kanoa Fishpond on the island of Moloka'i.[151] The court held that the Land Commission Award of the Kawela *ahupua'a* by name only included any adjacent fishpond even where the boundary was described as the shoreline and the fishpond was *makai*[152] of the shoreline.[153] The State in *Kamakana* attempted to thwart Kamanaka's quiet title action by claiming that it had title to the property or, in the alternative,

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[145] *See* City and County of Honolulu v. Bennett, 57 Haw. 195, 209, 552 P.2d 1380, 1390 (1976) (citing M. Town & W. Yuen, *Public Access to Beaches in Hawai'i*, 10 HAW. B. J. 5, 21 (1973), among others, for the proposition that adverse possession has been used as a clandestine tool to usurp land in Hawai'i).

[146] *See id.* at 196, 209, 552 P.2d at 1383, 1390 (addressing mixed claims of adverse possession on Mokoli'i island, also known as "Chinaman's Hat," by both the State of Hawai'i and a private intervenor).

[147] *See* Napeahi v. Wilson, No. 85-01523, 1996 U.S. Dist. LEXIS 21851, at *11 (D. Haw. Sept. 5, 1996) citing Bishop v. Mahiko, 35 Haw. 608, 642-45 (1940). In *Bishop*, the Hawai'i Supreme Court held that public lands include all submerged lands surrounding each island to one marine league seaward (three miles). This was further codified in HRS section 171-2 which defines "public lands" as:

> [A]ll lands or interest therein in the State classed as government or crown lands previous to August 15, 1895, or acquired or reserved by the government upon or subsequent to that date by purchase, exchange, escheat, or the exercise of the right of eminent domain, or in any other manner; including submerged lands and lands beneath tidal waters which are suitable for reclamation, together with reclaimed lands which have been given the status of public lands under this chapter . . . .

HAW. REV. STAT. § 171-2 (2001).

[148] Whether a fishpond wall can be breached at high tide involves more issues than the state claim of ownership in submerged lands, but also entails issues of navigational servitude. *See infra* Part III.A.1.

[149] *In re* Kamakana, 58 Haw. 632, 641, 574 P.2d 1346, 1351 (1978).

[150] 58 Haw. 632, 574 P.2d 1346 (1978).

[151] *Id.* at 635, 574 P.2d at 1348.

[152] *Makai* is defined as "[o]n the seaside, toward the sea, in the direction of the sea." MACKENZIE, *supra* note 9, at 307.

[153] *Kamanaka*, 58 Haw. at 641, 574 P.2d at 1351.

adversely possessed the fishpond in question.[154] With regard to the adverse possession claim, the court held that the State could adversely possess the fishpond if it had met the requirements for the statutory period.[155] The sole fact that the State is the owner of lands *makai* of the shoreline is not, alone, sufficient to establish adverse possession as to a private landowner.[156] Without evidence of hostility, required to adversely possess against her predecessors in interest, quiet title was established in Kamanaka.[157]

Not only must a fishpond owner consider the threat of adverse possession by the state, it is also possible for private claims to be likewise asserted. The question of whether fishponds fall within the purview of *PASH*, allowing for customary gathering rights on undeveloped, or "less than fully developed property,"[158] has not been addressed by the Hawai'i Supreme Court. The court declined to define "less than fully developed property" in *PASH*[159] and, again in 1998, declined to answer the question as it related specifically to fishponds in *State v. Hanapi*.[160]

In *Hanapi*, Alapai Hanapi was arrested for criminal trespass after making numerous attempts to hinder grade and fill activities near two fishponds on the island of Moloka'i.[161] The Hawai'i Supreme Court affirmed Hanapi's conviction for criminal trespass in the second degree.[162] In affirming the conviction, the court entertained Hanapi's defense that he was present on the fishpond property in performance of ancient traditional or customary Native Hawaiian practice.[163] The court found that Hanapi had not adduced sufficient evidence to support his claim that "stewardship," not gathering per se, was rooted in traditional or customary Hawaiian practice.[164] Having determined that Hanapi's practice did not conform to the standards as set forth in *PASH*, the court did not reach the question of whether the fishpond would have been

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[154] *Id.* at 635-36, 641, 574 P.2d at 1348, 1351.

[155] *Id.*

[156] *Id.* at 642, 574 P.2d at 1351.

[157] *Id.* at 642-43, 574 P.2d at 1351-52.

[158] Pub. Access Shoreline Haw. v. Haw. County Planning Comm'n, 79 Hawai'i 425, 450, 903 P.2d 1246, 1271 (1995). The *PASH* court annunciated a three part test, requiring that a claimant wishing to exercise Native Hawaiian gathering rights must (1) qualify as a "[N]ative Hawaiian," as defined by the court; (2) establish that the claimed right is constitutionally protected as a customary or traditional Native Hawaiian practice; and (3) prove that the exercise of the right occurred on undeveloped or "less than fully developed property." *See* State v. Hanapi, 89 Hawai'i 177, 185-87, 970 P.2d 485, 493-95 (1998) (interpreting the factors required to establish conduct that is constitutionally protected as a Native Hawaiian right).

[159] *PASH*, 79 Hawai'i at 450, 903 P.2d at 1271.

[160] 89 Hawai'i at 187, 970 P.2d at 495.

[161] *Id.* at 178-79, 970 P.2d at 486-87.

[162] *Id.* at 188, 970 P.2d at 496.

[163] *Id.* at 182-83, 970 P.2d at 490-91.

[164] *Id.* at 187, 970 P.2d at 495.

considered "undeveloped" if the practice had been valid.[165] In dicta, the court stated that "we need not discuss the degree of development on [the fishpond] property because the dispositive issue in the instant case is based on the constitutionality of Hanapi's claimed Hawaiian right."[166]

Thirty years before *Hanapi*, a similar argument was made in *Palama v. Sheehan*.[167] In *Sheehan*, the defendants in a quiet title action claimed fishing rights in a fishpond and a right of way to the Nomilo Pond tract on Kaua'i, basing their claim on both Hawaiian custom and the doctrine of necessity.[168] The court below found that the defendants did not have a right to fish in the fishpond, but that they were entitled to ingress and egress through the plaintiff's land.[169] The defendants did not appeal the court's finding with regard to the fishpond and only appealed the extent of the right to access the plaintiff's land.[170] Avoiding the issue of Hawaiian custom, the Supreme Court of Hawai'i affirmed the lower court's finding that a right of necessity existed, albeit not one of strict necessity.[171] The plaintiffs could not thereafter restrict the right of way "to pedestrian and equestrian use as it existed prior to 1910."[172]

It is unclear how the Supreme Court of Hawai'i would have approached the right to fish in Palama's fishpond if the issue had been preserved on appeal. *Sheehan* is cited by the Supreme Court of Hawai'i in *PASH* for the proposition that Native Hawaiian rights extend beyond the *ahupua'a* of residence, but the court does not address whether their holding in *PASH* would have allowed the result in *Sheehan* to be based on the customary use claimed by the defendants.[173]

The use of a fishpond by a private individual has also formed the direct basis for a successful claim of adverse possession. In a 1902 case, the Hawai'i Supreme Court found that the acts of a non-owner could overcome the interests of the actual land grant awardee.[174] In *Sister Albertina v. Kapiolani Estate*, the court found that because Kapi'olani's claim to the Honuakaha parcel in Honolulu, O'ahu, was evidenced by a history of cleaning the fishpond on the parcel, fishing in the pond, and objecting to various environmental

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[165] *See id.*

[166] *Id.* at 187, 970 P.2d at 495.

[167] 50 Haw. 298, 440 P.2d 95 (1968).

[168] *Id.*

[169] *Id.* at 299, 440 P.2d at 96-97.

[170] *Id.*

[171] *Id.*

[172] *Id.* at 303, 440 P.2d at 99.

[173] *See* Pub. Access Shoreline Haw. v. Haw. County Planning Comm'n, 79 Hawai'i 425, 448, 903 P.2d 1246, 1269 (1995) (citing Palama v. Sheehan, 50 Haw. 298, 300-01, 440 P.2d 95, 97 (1968)).

[174] Sister Albertina v. Kapiolani Estate, 14 Haw. 321 (1902).

hazards affecting the pond over a sufficiently long period of time, she had acquired title to the fishpond property.[175] Because the true owners had not exercised the corollary rights exercised by Kapi'olani, the court felt an actual, open, notorious, continuous, and exclusive possession had occurred for longer than even the required statutory period.[176] For the modern fishpond owner, exclusive use by a non-owner must occur for a period of twenty years to satisfy the statutory requirement for adverse possession.[177] In keeping with *Sister Albertina*, families or individuals who may have used a particular fishpond over generations, and not necessarily as *konohiki* tenants, may someday have an adverse possession claim, depending on the actions of the owner toward the same piece of property. Claims arising from such customary practices are further legitimized in *PASH*, where the court stated that "common law rights ordinarily associated with tenancy do not limit customary rights existing under the laws of this state."[178]

Adverse possession claims may arise unexpectedly and in varying contexts. A vested property interest, such as title to a parcel including a fishpond, does not secure ownership despite being traceable to a specific land grant after the Great Mahele.[179] Although owners' and tenants' predecessors in interest may have inhabited a particular *ahupua`a* since time immemorial, the right to possession through continuous occupation is not sufficient.[180] The importance of guarding against adverse possession was revealed as late as 1981, when private land at Kalua'aha, Moloka'i, including a fishpond, was claimed by a private claimant, Maria Hustace. Lani Lopez Kapuni described the loss of her family's land by adverse possession:

> That is up in Kalua'aha. That is where my mother-in-law was born and raised . . . up there in Kalua'aha . . . . The old days was so free. Okay, this is your land.

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[175] *Id.* at 324-25.

[176] *Id.*

[177] In 1973, Hawai'i extended the statutory period for adverse possession from ten years to twenty years. City and County of Honolulu v. Bennett, 57 Haw. 195, 209, 552 P.2d 1380, 1390 (1976) (citing S.L.H. 1973, c. 26 § 4, amending HRS § 657-31).

[178] *See PASH*, 79 Hawai'i at 448, 903 P.2d at 1269.

[179] Boone v. United States, 944 F.2d 1489, 1491-92 (9th Cir. 1991).

[180] *See* Dowsett v. Maukeala, 10 Haw. 166 (1895). In *Dowsett*, the Hawai'i Supreme Court stated:

> If the Land Commission expired and the hoaainas or native tenants neglected to present their claims for the parcels which they desired, and for which they would ordinarily be awarded kuleana title, showing merely their occupation of the same as a foundation for it, we think they must be considered as content with their prior status as tenants by permission of the land owner.

Id. at 169. *Dowsett* has been cited most recently as good law by the United States District Court for the District of Hawai'i. *See* Pai'Ohana v. United States, 875 F. Supp. 680, 691-92 (D. Haw. 1995).

> You can give to anybody; your word is good . . . . We didn't understand the law of adverse possession, that we have to fight these people, cut the line and stuff. We didn't know that. I really didn't know. We were kept in the dark, really. Maybe some people knew, but nobody said anything . . . my husband was paying the land tax. We were paying the land tax for that land . . . . I lost because I never perform . . . the law of adverse possession. You have to be more or less fighting against these people.[181]

Five years after the interview with Kapuni, the Intermediate Court of Appeals of Hawai'i vacated the circuit court's judgment granting Kapuni's life tenancy interest in the land to the claimants by adverse possession.[182] In this case, the court found that notice to interested parties by publication was flawed because due diligence would have allowed for actual notice to the potential heirs of the land grant.[183] The Intermediate Court of Appeals declined to allow the claimant in *Kapuni* to adversely possess land based on technicalities in the law.

In addition to the open and notorious use of a fishpond, the maintenance of a fishpond over time may also have legal significance for the owner or restorer. Title cannot only be usurped through adverse possession, but also through federal concepts of navigational servitude. Navigational servitude arises out of the Commerce Clause of the United States Constitution,[184] wherein the power to regulate navigable water is "coextensive with . . . the power to regulate commerce generally."[185] The U.S. Court of Appeals for the Ninth Circuit addressed this issue in the 1989 case of *Boone v. United States*.[186] In *Boone*, representatives of the Maud Van Cortland Hill Schroll Trust brought an action against the United States for the right to deny access to the Puko'o Fishpond on Moloka'i,[187] notwithstanding the fact that the fishpond wall had been damaged or destroyed[188] by a 1946 tsunami.[189] The parties were thus required to examine the historical state of the pond to

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[181] WYBAN, *supra* note 1, at 136 (quoting a Center for Oral History Interview with Lani Lopez Kapuni (1991)).

[182] *See* Hustace v. Kapuni, 6 Haw. App. 241, 252, 718 P.2d 1109, 1117 (1986).

[183] *Id.* at 251, 718 P.2d at 1116.

[184] *See* U.S. CONST. art. I, § 8, cl. 3. "'Navigational servitude' derives from the Commerce Clause of the Constitution, and gives the United States Government a 'dominant servitude'—a power to regulate and control the waters of the United States in the interest of commerce." Palm Beach Isles Assocs. v. United States, 208 F.3d 1374, 1382 (Fed. Cir. 2000) (citing United States v. Rands, 389 U.S. 121, 122-23 (1967)).

[185] Boone v. United States, 944 F.2d 1489, 1493 (9th Cir. 1991).

[186] 944 F.2d 1489 (9th Cir. 1991).

[187] *Id.* at 1490. The United States counter-sued for a declaration by the court that Puko'o Fishpond was subject to federal navigational servitude. *Id.*

[188] *Id.* at 1491. The amount of damage or destruction was in dispute. *Id.*

[189] *Id.*

determine prior navigability for the servitude inquiry.[190] The government introduced evidence supporting the navigability of the area encompassed by the remaining fishpond wall, but the trust rebutted the government's claim with contrary evidence of non-navigability.[191] The court of appeals, however, agreed with the district court's finding that the trust's witnesses testifying to the non-navigability of the fishpond were more credible.[192]

Navigability in fact was not dispositive in the *Boone* case. The Ninth Circuit found that the water, although disputedly navigable in fact, was not subject to a navigable servitude.[193] Further, even if the fishpond had been navigable at one time, the fact that it is no longer navigable can mitigate servitude.[194] The court relied on the United States Supreme Court's holding in *Kaiser Aetna v. United States*, decided in 1979.[195] In *Kaiser Aetna*, the lessee of land on O'ahu, including the Kuapa Fishpond, sought to dredge the fishpond and create a private marina in Hawai'i Kai. *Kaiser Aetna*, wherein the Court held that the determination of navigability varies depending on context, continues to represent the baseline for determinations of navigable servitude of Hawaiian fishponds.[196] Refusing to establish a blanket rule imposing servitude on all waters that are navigable in fact, the Court found that the Hawaiian fishpond in question: (1) was "[]capable of private ownership;" (2) had characteristics militating against a finding of navigability; (3) was always considered private property under ancient Hawaiian law; and (4) had investment-backed expectations of privacy.[197] The Ninth Circuit found *Boone* and *Kaiser Aetna* to be indistinguishable as to the inquiry regarding navigational servitude[198] and held that the owners of the Puko'o Fishpond had the right to deny public access.[199] The court agreed that fishponds have historically been considered private property in Hawai'i, but did not reach the question of whether traditional and customary rights of Native Hawaiians are coextensive with that interest.[200]

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[190] *See Boone*, 944 F.2d at 1496-98.

[191] *Id.* at 1496.

[192] *Id.*

[193] *See id.* at 1496-98.

[194] *Id.* at 1502.

[195] *Id.* at 1500-02 (citing Kaiser Aetna v. United States, 444 U.S. 164 (1979)).

[196] *Id.* at 1495 (citing *Kaiser Aetna*, 444 U.S. at 171).

[197] *Id.* at 167-68, 178-79.

[198] *Id.* at 1501-02.

[199] *Id.* at 1502. The Puko'o fishpond was destroyed and turned into a marina. An angry Moloka'i resident stated in regard to the destruction, "[t]hat pond [Puko'o] was built by our *kūpuna*, summoned by the king from Kamalo to Halawa valley. All of our *kūpuna* went over there build [sic] every rock of that wall." WYBAN, *supra* note 1, at 142 (quoting Billy Kalipi, Sr. while attending the Governor's Workshop for Moloka'i on September 1, 1991).

[200] *See Kaiser Aetna*, 444 U.S. at 166-67.

A showing of non-navigability continues to be part of the required proof by a fishpond owner to avert a claim of federal navigable servitude. If a boat can breach the wall of a fishpond or if the water is sufficiently deep within the remnants of a fishpond wall,[201] the pond owner may be vulnerable to a claim of servitude for which there is no compensation.[202] Several courts have likewise endorsed such an analysis for the finding of property interests in fishponds or other shoreline waters.[203]

In 1996, the District Court for the District of Hawai'i in *Napeahi v. Wilson*[204] found that the State of Hawai'i breached its fiduciary responsibility by granting a permit to dredge and fill "ceded"[205] coastal land on the island of Hawai'i.[206] Napeahi claimed that the land could not have been considered submerged and was, thus, still considered "ceded land" within the meaning of the Hawai'i Admission Act.[207] The court reasoned that the property boundary was unascertainable because the state land surveyor had no "evidence in 1984 that a fishpond wall existed on which he could base his conclusion about the location of the shoreline in this area."[208] The court in *Napeahi* indicated that the existence of a fishpond wall,[209] between the ocean and the tidal pond area, was an important factor in determining property rights involving submersion and servitude.[210]

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[201] *Boone*, 944 F.2d at 1500 (describing qualities of a fishpond that weigh against a finding of federal navigational servitude).

[202] *Id.* at 1494 (citing *Lewis Blue Point Cultivation Oyster Co. v. Briggs*, 229 U.S. 82, 87-88 (1913) for the proposition that "because the public right of navigation is a dominant right . . . the plaintiff . . . has, therefore, no such private property right which . . . entitles him to demand such compensation").

[203] *See* Muckleshoot Indian Tribe v. Fed. Energy Regulatory Comm'n, 993 F.2d 1428, 1433 (9th Cir. 1993) (stating that "a stream may retain its navigable character despite the presence of nonnavigable interruptions such as falls, rapids, sand bars, carries, or shifting currents"); Consolidated Hydro, Inc. v. Fed. Energy Regulatory Comm'n, 968 F.2d 1258, 1262 (D.C. Cir. 1992) (endorsing the argument that "navigability turns not on whether a short portage is advisable or required, but rather, on whether such portage was or is feasible"); Sanders v. Placid Oil Co., 861 F.2d 1374, 1378 (5th Cir. 1988) (affirming finding of navigability based, in part, on testimony stating that "he has been a passenger on crew boats as long as 40 feet which have passed into the Black River system from Catahoula Lake, navigating over the Little River weir . . . on several occasions").

[204] No. 85-01523, 1996 U.S. Dist. LEXIS 21851 (D. Haw. Sept. 5, 1996).

[205] Ceded lands refer to lands held in trust for certain uses and purposes pursuant to section 5(f) of the Hawaii Admission Act, 73 Stat. 4, 6 (1959). The trust responsibility was a condition of Hawai'i being admitted to statehood. *Napeahi*, 1996 U.S. Dist. LEXIS 21851, at *11.

[206] *Id.* at *39-40.

[207] *Id.* at *5-6.

[208] *Id.* at *32.

[209] The fishpond wall in the *Napeahi* case was originally a natural channel, which was later altered by the State, creating ostensibly submerged land. *Id.* at *37-38.

[210] *Id.* at *35-40.

2. Considerations beyond adverse possession and servitude

Successful restoration requires meticulous adherence to the terms of state and federal permits. Non-adherence to the strict terms of a permit can create innumerable problems for the potential restorer. Many of the obstacles to restoration are vitiated by the issuance of permits, such as when the restoration of a fishpond may implicate endangered species as determined by the Fish and Wildlife Service.[211] Because the individualized environmental impacts of restoration are not known in all cases, the issued permits serve only as an endorsement to begin restoration, not necessarily a mandate to continue.[212] In *Wright v. Dunbar*,[213] discussed below, the Nationwide Permit[214] granted by the Army Corps of Engineers was revoked for alleged non-conformation to the terms of the authorization, and the fishpond currently remains half completed. The restorer in *Dunbar* was also challenged for non-adherence to the native model of fishponds as a guide for construction or rebuilding of the retention wall.[215]

Most significantly, the State Department of Health 401 Water Quality Certification,[216] the equivalent of a building permit for projects involving state waters, has caused the greatest backlog in permitting and the greatest expense to the potential restorer.[217] To obtain the 401 Certification, the restorer must essentially certify that a restoration project will not lower the water quality in the area to be restored.[218] But how can restorers be sure that they will remain in compliance? It may be a tenuous proposition to think the restorer can restore a fishpond without some water degradation, particularly on Moloka'i, where the waters are classified as class AA (extraordinary).[219] More

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[211] FARBER, *supra* note 1, at 51, 54. The U.S. Army Corps of Engineers section 404 permit has historically been delayed by Fish and Wildlife Service concerns that restoration of fishponds negatively impacts endangered species by destroying their habitats. *Id.*

[212] FARBER, *supra* note 1, at 53.

[213] No. 99-15792, No. 99-16207, 2000 U.S. App. LEXIS 439 (9th Cir. Jan. 8, 2001). See *infra* Part III.B.1., in which the *Dunbar* case is discussed more extensively.

[214] *See supra* note 123.

[215] *See* Defendant-Appellee's Answering Brief at 11-13, *Dunbar* (No. 99-15792, No. 99-16207).

[216] *See supra* note 124.

[217] FARBER, *supra* note 1, at 51-52. An up to three-year backlog in 401 permits has previously caused $800 million in construction projects to sit idle. *Id.* at 52.

[218] *Id.* at 88.

[219] *Id.* at 54-55. In describing the differences between Class AA and Class A marine waters, the HAWAII ENVIRONMENTAL LAW HANDBOOK states that "[c]lass AA waters are intended to remain in their natural state with a minimum of pollution from human caused sources. . . . Uses which are protected in Class AA waters are the conservation of coral reefs and wilderness, support and promulgation of marine life, oceanographic research, aesthetic enjoyment and

troublesome, degradation or turbidity may be the basis of a citizen suit against the restorer for violations of the federal Clean Water Act.[220]

Government or citizen suits against restoration may take the form of:

> 1) failure to certify compliance with State Water Quality Standards pursuant to § 401 of the Clean Water Act; 2) violation of EPA-Corps Guidelines for issuance of a § 401 [sic] dredge and fill permit; 3) violation of the National Environmental Policy Act; 4) failure to remove illegal fill; 5) violation of the Rivers and Harbors Act; and 6) violation of the Hawaii State Constitution Art. XI § 9.[221]

The Clean Water Act implicates both state and federal responsibilities; however, the issuance of a 401 permit under the Act assumes that a state has approved the restoration activities.[222] Thereafter, violation of the Act can be pursued by the Environmental Protection Agency or, under some circumstances, by a citizen suit in federal district court.[223] The state may, however, intervene in a citizen suit if there are cognizable state interests implicated by violations of federal environmental regulations as promulgated by Congress.[224]

In *Wright v. Dunbar*, the only case of record where a citizen claimed violations of the Clean Water Act as they related to restoration of a Hawaiian fishpond, the plaintiff sought damages for daily violations of the Act chargeable at $25,000 a day for a period of over eight years.[225] The claim related to the turbidity caused to adjacent properties by the fishpond.[226] The Court of Appeals for the Ninth Circuit, however, affirmed a district court

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compatible recreation." GOODSILL ANDERSON QUINN & STIFEL, *supra* note 124, at 79.

[220] 33 U.S.C. §§ 1251-1387 (2002). The Clean Water Act provides in pertinent part:

> [A] standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act . . . . Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, [and] recreational purposes . . . .

Id. § 1313(c)(2)(A).

[221] *See* Napeahi v. Paty, 921 F.2d 897, 901 (9th Cir. 1990).

[222] *See* PUD No. 1 of Jefferson County & City of Tacoma v. Washington Dep't of Ecology, 511 U.S. 700, 710 (1994).

[223] *See* Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 209 (2000). The Court stated that "the [Clean Water] Act does not provide a mechanism for individual relief in any traditional sense, but turns over to private citizens the function of enforcing the law. A Clean Water Act plaintiff pursuing civil penalties acts as a self-appointed mini-EPA." *Id.*

[224] *See* Forest Conservation Council v. United States Forest Serv., 66 F.3d 1489, 1492-93 (9th Cir. 1995).

[225] *See* Hanousek v. United States, 528 U.S. 1102 n.1 (2000) (citing 33 U.S.C. § 1319(c)(1)(A)).

[226] Plaintiff-Appellants' Opening Brief at 12, Wright v. Dunbar, No. 99-15792, No. 99-16207, 2000 U.S. App. LEXIS 439 (9th Cir. Jan. 8, 2001).

finding that the navigable waters had not been adversely affected by the restoration of the fishpond.[227]

The *Dunbar* case's value, as it relates to potential Clean Water Act claims, is more profound for what it does not say, namely, that a finding of turbidity or degradation of water not authorized under the 401 permit is a question of fact. The potential restorer who may worry about violations of the Clean Water Act may thus be forced to prove that the respective water quality has not been affected, if challenged.

Albeit another irony in the process of restoration, a 401 permit is not a license to complete a fishpond restoration if it is found to have an adverse water quality impact that was not anticipated. Data collected from previous restoration efforts provides the only baseline, in terms of water quality impact, for the potential restorer. The streamlining process is meant in part to provide models for subsequent restoration and address the environmental impact of altering the coastline.[228] Unlike other areas, the restorer cannot fully anticipate the effects of a restoration project on the environment and, hence, restoration in this regard can be a leap of faith. There are, to date, no clear solutions in the area of water quality, although the continuing attempt to standardize permitting does hold promise for the potential restorer.

B. Modern Trends and Concerns

Common law claims, such as those based on adverse possession, may seem passé in light of the fact that fishponds are no longer mere appurtenances, but rather property interests in their own right. State and private owners alike have come to realize that fishponds are property interests of a limited yet valuable character. Thus, it may be unlikely that an adverse possession claim could be successfully litigated by anyone other than the government. The question, thus, remains: What would a prospective restorer need to worry about if she had obtained the proper permits and began the restoration process? The answer is best illustrated in the reality of the most recent litigation in *Wright v. Dunbar*.

1. Wright v. Dunbar

Lance "Kip" Dunbar, a lifetime resident of Moloka'i and O'ahu, decided to begin restoration on the Ipuka'iole[229] Fishpond on Moloka'i, in which he

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[227] *Dunbar*, 2001 U.S. App. LEXIS 439 at *6.

[228] FARBER, *supra* note 1, at 53.

[229] *Ipuka'iole* is defined as "rat's doorway." Catherine C. Summers, *Moloka'i: A Site Survey*, *in* 14 PACIFIC ANTHROPOLOGICAL RECORDS 145 (1971).

claimed ownership from land grants beginning in 1866.[230] Originally, Ipuka'iole was about 3.2 acres in size, had a 590 foot perimeter wall, and was a smaller *keiki* (baby) pond adjacent to the nineteen acre Kainalu Fishpond.[231] Catherine C. Summers, a noted anthropologist who worked on Moloka'i, stated, in regard to Ipuka'iole, that "[i]n 1938 the wall was broken, and by 1957 it was completely destroyed."[232] Dunbar says he was inspired to restore Ipuka'iole because it was a fishpond he "grew up with," the purpose being that he could return the fishpond to its original majestic state and use it for personal aquaculture.[233] On May 17, 1990, the U.S. Army Corps of Engineers ("Corps") authorized Dunbar to begin restoration of the fishpond,[234] which had been part of his family's *ahapua'a* parcel.[235] On June 28, 1991, Dunbar had completed about 300 feet of the wall[236] when the Corps rescinded its approval for the restoration.[237] The commencement and subsequent halt of the restoration of Ipuka'iole occurred with substantial outside influences.

Harold S. Wright, who owned land two parcels away from Dunbar and Ipuka'iole, believed that the fishpond restoration was adversely affecting his oceanfront property through erosion of the shoreline.[238] The basis of Wright's claim was that the prevailing currents on the Moloka'i coast made the area inappropriate for restoration because it would cause erosion to adjacent properties.[239] In his view, Dunbar's activities constituted a deprivation of his property in violation of the Fifth and Fourteenth Amendments.[240] Wright had attempted several methods of self-help to halt Dunbar's restoration, which

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[230] Telephone Interview with Lance "Kip" Dunbar, *supra* note 11.

[231] *See* SUMMERS, *supra* note 229, at 145-46.

[232] *Id.* at 145.

[233] Telephone Interview with Lance "Kip" Dunbar, *supra* note 11.

[234] Defendant-Appellee's Answering Brief at 10, Wright v. Dunbar, No. 99-15792, No. 99-16207, 2000 U.S. App. LEXIS 439 (9th Cir. Jan. 8, 2001).

[235] *Id.* at 2.

[236] *See Public Hearing on Dunbar's Wall Is Tonight . . . November 20*, MOLOKA'I ADVERTISER-NEWS, Nov. 20, 1992, at cover (containing newspaper photo of a bulldozer working on top of the partially restored Ipuka'iole fishpond wall).

[237] *Id.*

[238] Plaintiff-Appellants' Opening Brief at 7, *Dunbar* (No. 99-15792, No. 99-16207).

[239] Interview with Philip J. Leas, Attorney, Cades Schutte Fleming & Wright, in Honolulu, Haw. (Apr. 18, 2001).

[240] *Id.* Wright specifically claimed that:

> The Dunbar Wall and dredging of the Kainalu delta . . . have caused, are causing and unless enjoined will continue to cause, the erosion of Plaintiffs' properties and the destruction of abutting sandy beaches in violation of Plaintiffs' constitutional rights guaranteed by the Fifth and Fourteenth Amendments to use and enjoy their properties free from deprivation.

Plaintiff-Appellant's Opening Brief at 35, *Dunbar* (No. 99-15792, No. 99-16207).

Dunbar claimed caused the revocation of the Corps' permit.[241] Wright's displeasure with Dunbar's activities formed the basis of the complaint he filed in the United States District Court for the District of Hawai'i. Wright sued both Dunbar and several state actors alleging in his First Amended Complaint that Dunbar's restoration of the partial fishpond wall "violated and continues to violate the [Clean Water Act]," and that "Dunbar and the State Defendants, under color of state law and acting in concert, have subjected Plaintiffs to the deprivation of their constitutional rights within the meaning of 42 U.S.C. § 1983."[242]

Between March and June of 1999, Judge Helen Gillmor granted the entirety of Dunbar's motion to dismiss or, in the alternative, for summary judgment. In a series of orders disposing of the case on an issue-by-issue basis, Gillmor decisively ruled in the defendants' favor.[243] The court found no presence of a state actor to substantiate Wright's § 1983 civil rights claims.[244] Wright had claimed a form of collusion between Dunbar and the state permitting agencies, which allowed him to continue with his restoration activities under a Nationwide Permit by the Army Corps of Engineers.[245] The court found, however, that the state defendants were entitled to qualified immunity under the Eleventh Amendment[246] and that state action could not be imputed through a nexus theory.[247] Wright had also contended that because Dunbar had previously participated in a state-sponsored volunteer stream clean-up, in addition to the restoration of the fishpond wall, Dunbar was acting in a public function capacity.[248] The court declined the invitation to rule that dredging via the stream clean-up, although ostensibly a state activity, was a public function for state action purposes.[249]

Having dismissed Wright's § 1983 claim, the court addressed the more substantial aspects of Wright's claims. Wright asserted that, although Dunbar

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[241] Defendant-Appellee's Answering Brief at 11, *Dunbar* (No. 99-15792, No. 99-16207).

[242] Plaintiff-Appellants' Opening Brief at 3, *Wright v. Dunbar*, 2001 U.S. App LEXIS 439 (9th Cir. 2001) (No. 99-15792, No. 99-16207).

[243] Interview with Jodi L. Kimura, Attorney, Ayabe, Chong, Nishimoto, Sia & Nakamura, in Honolulu, Haw. (Feb. 8, 2001).

[244] Wright v. Dunbar, No. 97-00137 HG, slip op. at 6-8 (D. Haw. Mar. 16, 1999).

[245] Plaintiff-Appellants' Opening Brief at 23-37, *Dunbar* (No. 99-15792, No. 99-16207).

[246] *Dunbar*, No. 97-00137 HG, slip op. at 4.

[247] *Id.* at 7-14.

[248] *Id.* at 9-11. Wright asserted that Dunbar's clean-up activities were part of ongoing conduct constituting state action. Plaintiff-Appellants' Opening Brief at 29-33, *Dunbar* (No. 99-15792) (No. 99-16207). In his brief to the Ninth Circuit, Wright claimed that "[w]ith the participation of the State, Dunbar dredged the state-owned delta fronting *Kainalu* Stream (exposed at low tide) without a permit and a public hearing required by § 183-41 H.R.S." *Id.* at 32.

[249] *Id.*

had obtained some of the permits required for the restoration of Ipuka'iole, he had not obtained the proper permits from the State Department of Land and Natural Resources and had violated the terms of the Army Corps of Engineers permit.[250] Additionally, Wright brought a citizen suit for violations of provisions of the Clean Water Act[251] and alleged that the unfinished wall was a continuing violation of that Act.[252] Because an ongoing violation of the Clean Water Act may be assessed a fine of $25,000 per day,[253] this was an important consideration for Dunbar and his attorneys.[254]

In defense, Dunbar claimed that he was exempted from obtaining certain permits by virtue of the Nationwide authorization and the fact that he had obtained other waivers of requirements by various state actors, including the Governor.[255] In particular, the Department of Land and Natural Resources was facilitative in the restoration of Dunbar's fishpond, in accordance with what the Department construed as a state law "mandate to facilitate the restoration of ancient Hawaiian fishponds."[256] The district court found that Dunbar had substantially complied with the permitting via the Nationwide authorization and that waiver by state agencies was appropriate under the law.[257] In regard to violations of the Clean Water Act, Judge Gillmor found that because the partial wall was completed under a valid permit, additional permits were not necessary to protect its continuing presence.[258] Further, the court made a specific finding of fact that the unfinished wall *did not* release silt or sediment.[259] Wright appealed Gillmor's findings in the defendant's favor.[260]

The Court of Appeals for the Ninth Circuit issued a 2001 unpublished opinion affirming the district court's judgments.[261] Further extinguishing Wright's § 1983 claims, the court refused to decide the property interests in the case, stating that such a decision could "diminish, even extinguish, the State's control over . . . lands and waters long deemed by the State to be an integral part of its territory."[262] Nor did the Ninth Circuit agree that Dunbar was a state

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[250] Plaintiff-Appellants' Opening Brief at 7-9, *Dunbar* (No. 99-15792, No. 99-16207).

[251] *See supra* notes 220, 221 and accompanying text.

[252] *See* Wright v. Dunbar, No. 97-00137 HG, slip op. at 23 (D. Haw. Jun. 16, 1999).

[253] *See supra* note 225 and accompanying text.

[254] Interview with Jodi L. Kimura, *supra* note 243.

[255] Defendant-Appellee's Answering Brief at 10, *Dunbar* (No. 99-15792, No. 99-16207).

[256] Plaintiff-Appellants' Opening Brief at 9, *Dunbar* (No. 99-15792, No. 99-16207).

[257] *Dunbar*, No. 97-00137 HG, slip op. at 18.

[258] *Id.* at 15-18.

[259] *Id.* at 20-23.

[260] Wright v. Dunbar, No. 99-15792, No. 99-16207, 2000 U.S. App. LEXIS 439 at *3 (9th Cir. Jan. 8, 2001) (citing Appeal No. 99-16207).

[261] *Dunbar*, 2000 U.S. App. LEXIS 439.

[262] *Id.* at *4.

actor based on an interdependence or nexus with the State.[263] The appeals court held that Wright's Clean Water Act citizen suit was properly dismissed because the revocation of the permit granted by the Army Corps of Engineers did not invalidate the work already completed in the fishpond restoration.[264] With regard to the continued existence of the unfinished fishpond wall, the heart of Wright's claim, the court agreed with Judge Gillmor's finding of fact that the wall did not constitute "an on-going violation of the [Clean Water Act]."[265] Wright's attorneys did not file a petition for certiorari to the United States Supreme Court.[266]

What can be learned from *Wright v. Dunbar*? First, it is important to note some of the facts not relative to the case. Most notably, Harold S. Wright is a well-known attorney and partner in the second-largest law firm in Honolulu.[267] Few people without such resources would be able to pursue and litigate a claim against restoration activities. On the other hand, few people would be able to defend such a case. Dunbar, himself, is a prominent business leader and was able to use insurance coverage to cover the expenses of his defense against Wright's claims.[268] Not surprisingly, and not unlike restoration itself, success in permitting and in the law is inextricable from the requisite resources. The case also represents a culmination of a litany of "unneighborly" activities.

For the restorationist, *Dunbar* imparts the lesson that permitting is not failsafe. The prospective restorer must make herself aware of the potential for dispute and the politics involved in the stopping or starting of restoration.[269] In *Dunbar*, the courts were primarily faced with deciding the propriety of administrative agency actions and not whether the actual act of restoring Ipuka'iole was proper. Wright's attorneys claim that the State has placed itself in an untenable position by attempting to facilitate the restoration of fishponds through the Conservation District Use Application while concurrently

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[263] *Id.* at *5.

[264] *Id.* at *6.

[265] *Id.* at *6-7.

[266] Interview with Philip J. Leas, *supra* note 239.

[267] *See Cades Schutte Fleming & Wright, at* http://www.cades.com/attorney/attorney.htm#anchor322079 (last visited Mar. 11, 2002); *see also Law firms-Hawaii*, http://www.hierosgamos.org/hg/db_lawfirms.asp?action=list&StateorProvince=Hawaii (last visited Mar. 11, 2002).

[268] Telephone Interview with Lance "Kip" Dunbar, *supra* note 11.

[269] In *Dunbar*, the petitioning of state agencies and actors was the primary avenue through which both parties negotiated their dispute prior to resort to the courts. In Wright's Opening Brief to the Court of Appeals for the Ninth Circuit, he lists numerous contacts with state actors to halt the restoration of Dunbar's fishpond wall, including correspondence with the Governor of the State of Hawai'i, Ben Cayetano. Plaintiff-Appellants' Opening Brief at 7-9, Wright v. Dunbar, No. 99-15792, No. 99-16207, 2000 U.S. App. LEXIS 439 (9th Cir. Jan. 8, 2001).

upholding the public policy to preserve beaches and coastal land.[270] The case also represents the first case of record whereby a litigant attempted to use the federal civil rights statute as a means to stop fishpond restoration, as opposed to the use of the statute to protect Native Hawaiian rights, including the right to restore native sites.[271]

Dunbar, himself, says that the ensuing litigation could not have occurred but for the extrinsic influences of money and politics.[272] Dunbar claims that the point of the litigation was to allow Wright to acquire real property, namely the accretions to his shoreline, by prevailing on a takings claim to property he did not own.[273] Wright claims that Dunbar's intention was, likewise, to accrue sandy shoreline.[274] Regardless of the reason, Dunbar says the experience was "horrible" and that "[his] wife and [he] went through a lot of ordeal over this."[275] Dunbar claims that he will someday continue the restoration of the Ipuka'iole Fishpond.[276]

1. Success stories

Although *Wright v. Dunbar* is the only example of fishpond restoration undertaken by a private property owner,[277] there are several success stories of restoration of fishponds leased by the State. On Moloka'i, the Honouliawai Fishpond wall was finally completed after a three-year process to obtain the permits for this state-owned site.[278] The State undertook this endeavor to provide a working model for potential restorers, emphasizing "a cautious approach to permit approval and compliance."[279] Similarly, the Keawanui Fishpond on Moloka'i and the He'eia[280] Fishpond on O'ahu, have been

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[270] Interview with Philip J. Leas, *supra* note 239.

[271] Dunbar believes that the purpose of bringing a suit for civil rights under 42 U.S.C. § 1983 was to allow Wright to claim the punitive damages authorized for a constitutional violation under this statute. Telephone Interview with Lance "Kip" Dunbar, *supra* note 11.

[272] *Id.*

[273] *Id.*

[274] Interview with Philip J. Leas, *supra* note 239.

[275] *Id.*

[276] *Id.*

[277] Telephone Interview with Joseph M. Farber, *supra* note 120.

[278] *See Coastlines, Information About Estuaries and Near Coastal Waters: The Historic Fishponds of Moloka'i, Hawaii*, http://www.epa.gov/owow/estuaries/coastlines/spring98/fishpond.html (last visited Mar. 11, 2002).

[279] *Id.*

[280] The He'eia fishpond represents one of the most well documented fishpond restoration efforts. The fishpond also has a strong historical record documented by the Bernice Pauahi Bishop Museum. For more information on the He'eia story, see, for example, *Marion Kelly, Loko I'a O He'eia: Heeia Fishpond* (1975); *He'eia: Where Two Waters Meet* ('Ikena Ho'oulu

restored to their functional state and are serving as models for restorers and teaching tools for local universities.[281]

The federal government has also seen fit to subsidize fishpond restoration through the Environmental Protection Agency ("EPA").[282] The Environmental Protection Agency-funded project most recently restored the walls of the Kahinapohaku Fishpond on Moloka'i "to document the environmental impact of restoration and production in Hawaiian fishponds."[283] The U.S. Department of Education has likewise created an adjunct to the EPA sponsored program, Project *Kahea Loko*, to use Native Hawaiian fishponds as a medium for a K-12 science-based curriculum.[284]

Community activists are hopeful that information will be compiled from the operation and maintenance of the working fishponds to assist in determining actual, rather than projected, environmental impacts.[285] A compilation of such information should provide a basis for more successful restorations in the future.[286] Other benefits of fishpond successes include a program initiated by the State Aquaculture Development Program to provide low-interest loans for commercial aquaculture.[287] Such a program would not have been possible without the tested viability of fishpond aquaculture. Today, several fishponds are successfully producing mullet, barracuda, papio, tilapia, blue pincher crab, and salmon crab.[288]

Productions 2000) (video available at the University of Hawai'i at Mānoa, Sinclair Library Audiovisual Center).

[281] *See* A. Frankic & C. Hershner, *Sustainable Aquaculture: Developing the Promise of Aquaculture*, http://www.udel.edu/CMS/csmp/rio+10/pdf/Papers/Frankic%20Paper.pdf (last visited Mar. 12, 2002); *Oceanic Institute Can Help Feed the World*, HONOLULU STAR-BULLETIN, Jan. 5, 1999, *available at* http://starbulletin.com/1999/01/05/editorial/smyser.html.

[282] *Project Kahea Loko*, http://www.thepaf.org/info/KAHEALOKO1.htm. (last visited Feb. 15, 2002); *see also* Press Release, United States Senator Daniel K. Inouye, Inouye Announces Final Approval of $1.7 Million for Hawaii Environmental Initiatives (Oct. 8, 1998) (on file with author) (highlighting approval of $500,000 for the EPA Office of Sustainable Ecosystems and Communities, which assists in the restoration and management of Native Hawaiian fishponds on Moloka'i and Maui).

[283] *See Project Kahea Loko*, *supra* note 282.

[284] *Id.*

[285] FARBER, *supra* note 1, at 73.

[286] *Id.*

[287] *See Aquaculture in Hawaii: Answers to Twenty-Five of the Most Frequently Asked Questions About Hawaii's Aquaculture Industry*, http://www.aloha.com/~aquacult/3q&a.html (last visited Mar. 11, 2002).

[288] *Id.*

C. Successful Restoration Within the Western Paradigm

Concepts of success vary. Fishpond restoration has been touted by some as a model community project and cultural renaissance, a forum whereby interested people work together for a common good.[289] Success may also come in the form of subsistence or aquaculture for the restorer herself.[290] And lastly, success may be the mere act of restoration, a revisiting of the majesty of fishponds in their original state.[291] Irrespective of the restorer's view of success, much depends on adaptation to the legal process required under the current system of government in Hawai'i and the United States.[292] Permitting is difficult in itself, but successful permitting is only one step in a process that is inherently "legal." The days of informally demarcating property interests in Hawai'i by "this is mine and that is yours"[293] have irreversibly been replaced with Western notions of real property under the common law and environmental statutes. Notorious ownership of a fishpond through generations of an *ahupua'a* tenancy no longer conveys the concurrent right to restore.

To achieve legal success, a potential restorer would be wise to consider the legal issues that have thwarted previous endeavors. Learning from past mistakes is a part of success within any paradigm. Although issues of cloud on title, adverse possession, navigable servitude, and federal regulations are uniquely Western concepts, these issues present only one part of the inquiry into successful fishpond restoration. The law of learning to avoid conflict and following one's wiser contemporaries form another important part of the inquiry, and it is these maxims that are particularly Hawaiian.[294] Like the

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[289] *See* FARBER, *supra* note 1, at 37.

[290] Telephone Interview with Lance "Kip" Dunbar, *supra* note 11.

[291] *See* WYBAN, *supra* note 1, at xiv.

[292] For a thorough analysis of the successes and failures of the Hawaiian people within the Western legal construct, see Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95 (1998).

[293] Thus, the defendant in *Wright v. Dunbar* described the foreignness of the Western legal system to Native Hawaiians in regard to their property interests. He believes the "acceptance of the American law bastardiz[ed] our cultural rights." Telephone Interview with Lance "Kip" Dunbar, *supra* note 11. In a legal sense, however, the exclusivity of property interests in the Native Hawaiian system may not be as far removed from English common law as was previously thought. *See, e.g., In re* Boundaries of Pulehunui, 1879 WL 6599 at *5 (Haw. 1879) (accepting *kama'aina* testimony that "[i]f the people of Kula came down *makai* (below) of Pohakiikii it was stealing, and the Waikapu people could take their birds away"); Boundaries of Kaohe, 1892 WL 1085 at *1 (Haw. 1892) (accepting *kama'aina* testimony that "the bird-catchers, retainers of the chief to Humuula was assigned, were limited to this area on which to take the '*oo*,' and could not take the '*uwa'o*,' for those belonged to Kaohe").

[294] *See* Andrew Hiroshi Aoki, *American Democracy in Hawai'i: Finding a Place for Local Culture*, 17 HAW. L. REV. 605, 613-15 (1995).

multi-cultural basis of the law, the varying motivations behind restoration are inextricable from the Western paradigm in which the restorer must function.[295] Ancient Hawaiian fishpond restoration remains important enough that it can, and should, be done within the current system of law. As Carol Araki Wyban wisely notes in her study on fishponds, "[u]ltimately, the restoration of fishponds and the revitalization of fishpond aquaculture depends upon cooperative work among the Hawaiian community, the government, and private and public sectors in the modern-day 'ohana."[296]

IV. CONCLUSION

Success in Hawaiian fishpond restoration may depend on the ability of the restorer to negotiate the Western legal paradigm. Although some feel that the restoration of fishponds within the foreign legal construct is unjust and unwarranted, the success of restoration may very well hinge thereon. This paper has attempted to catalogue the most important legal considerations in regard to fishpond ownership and restoration outside of permitting. Only with increased awareness of this legal foundation can restoration begin to be completed both lawfully and more efficiently.

Ian H. Hlawati[297]

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[295] *See id.*

[296] WYBAN, *supra* note 1, at 145.

[297] Class of 2002, University of Hawai'i, William S. Richardson School of Law. Special thanks for the assistance of Jodi Kimura, Lance Dunbar, Philip Leas, Leonard Young, Joseph Farber, Robert Bruce Graham, Jr., and Malia Akutagawa. Thanks also for the thoughtful comments of Denise Antolini, Chris Kempner, and the 2001-02 University of Hawai'i Law Review Editorial Board. Lastly, special appreciation to the Amy Ching Richardson Memorial Fund and the Hawai'i State Bar Association, Real Property and Financial Services Section for recognizing this paper in their respective annual awards.

Akaka Bill: Native Hawaiians, Legal Realities, and Politics as Usual[1]

"This land is ours, our Hawai'i. Shall we be deprived of our nationality?"[2]

I. INTRODUCTION

More than 104 years have passed since Native Hawaiians[3] united in protest to support their nation—the Hawaiian Kingdom—and to oppose annexation to the United States.[4] The century since has witnessed significant changes that have had a detrimental impact on the Native Hawaiian peoples[5] and their

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[1] It is important to acknowledge, at the outset, a significant legal paradox of the Native Hawaiian situation. Hawai'i became a U.S. territory by unilateral act of Congress. *See* Joint Resolution to Provide for Annexing the Hawaiian Islands to the United States, ch. 55, 30 Stat. 750 (1898) [hereinafter Joint Resolution]. No treaty. No purchase. No conquest. No consent. Based, in part, on this historical fact, many Native Hawaiians advocate for independence from the United States. *See generally* Eric Steven O'Malley, *Irreconcilable Rights and the Question of Hawaiian Statehood*, 89 GEO. L.J. 501 (2001). However, independence from the United States is, in significant ways, an unfashionable remedy for U.S. courts and one that politics dictate cannot be enforced by an international forum. *See, e.g.*, Lance Paul Larsen v. Hawaiian Kingdom, 2001 P.C.A., http://www.pca-cpa.org/PDF/LHKAward.PDF (last visited Mar. 25, 2002) (finding the arbitral proceedings were not maintainable in part because the United States was not a party and had not consented to the proceedings). In a climate of increasing settler racism, Native Hawaiians are left with a choice to hold steadfast to independence and traditional notions of justice, or to race to the federal government for recognition of the political relationship available to Native peoples under domestic law that will protect Native Hawaiians.

[2] Mirriam Michelson, Editorial, *Strangling Hands on the Throat of a Nation*, KE ALOHA 'ĀINA (Honolulu), Oct. 16, 1897, at 6 (quoting Emma Nāwahī, member of Hui Aloha 'Āina's Executive Committee, at a meeting in Hilo, Hawai'i to organize against annexation), *reprinted in* 'ŌIWI: A NATIVE HAWAIIAN JOURNAL, Dec. 1998, at 77, 85, *available at* http://www.homestead.com/akaka/files/articles.htm. Opposing annexation to the United States, ninety-eight percent of the Native Hawaiian population signed and sent petitions to the U.S. Congress, aiding the defeat of the Treaty of Annexation in 1898. *See infra* note 45.

[3] Throughout this piece, "Native Hawaiian" and "Hawaiian" are used to refer to the Native, indigenous peoples of Hawai'i, regardless of blood quantum. However, the Hawaiian Homes Commission Act, Pub. L. No. 34, ch. 42, § 201(a)(7), 42 Stat. 108 (1920) ("HHCA"), defines "native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." *Id.* "Hawaiian," under state law, includes those descendants who are less than the federal statutory one-half part blood. *See infra* notes 83-84 (defining "Native Hawaiian" and "Hawaiian" under state law).

[4] *See generally* Noenoe Silva, *Kanaka Maoli Resistance to Annexation*, *in* 'ŌIWI: A NATIVE HAWAIIAN JOURNAL, *supra* note 2, at 40-75 (examining Native resistance to annexation).

[5] The term "peoples" is used throughout this paper to emphasize the Native Hawaiian peoples' right of self-determination. "Peoples" denotes rights as a cultural collective rather than rights as individuals. *See* Asbjørn Eide & Erica-Irene Daes, *Working Paper on the Relationship*

culture. The United States annexed Hawai'i against the will of the Native people.[6] When Hawai'i became the "Fiftieth State,"[7] the Native Hawaiian peoples were deprived of their right of self-determination.[8] The Hawaiian culture has become the erotic symbol for the tourist industry.[9] In their homeland, Native Hawaiians suffer from the worst statistics on social indicators. For example, Native Hawaiians have the highest rates of breast cancer, the highest rates of adult and juvenile incarceration, and one of the lowest rates for attaining college degrees.[10] And now the Native Hawaiian peoples face a potential onslaught of constitutional challenges to their inherent rights.[11]

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and Distinction Between the Rights of Persons Belonging to Minorities and Those of Indigenous Peoples, ¶ 2(c), U.N. Doc. E/CN.4/sub.2/2000/10 (2000) (observing distinctions between categories of rights: "[t]he special rights of indigenous peoples . . . are mostly rights of groups ('peoples') and therefore collective rights").

[6] *See* Silva, *supra* note 4, at 65, 70.

[7] Hawaii Statehood Admissions Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4 [hereinafter Admissions Act].

[8] *See* S. James Anaya, *The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs*, 28 GA. L. REV. 309, 333-36 (1994).

[9] *See generally* HAUNANI-KAY TRASK, *Lovely Hula Hands: Corporate Tourism and the Prostitution of Hawaiian Culture*, *in* FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI'I 136-47 (rev. ed. 1999) (analyzing the tourist industry and its prostitution of Hawaiian culture).

[10] *See* OFFICE OF HAWAIIAN AFFAIRS, NATIVE HAWAIIAN DATA BOOK (1998), http://www.oha.org/databook.html (last visited Jan. 12, 2002). Native Hawaiians comprise approximately twenty percent of the population of Hawai'i. *Id.* at tbl. 1.4. Yet, Native Hawaiian women suffer from a breast cancer rate of 92.86 per 100,000 while the rate for the state is 85.40 per 100,000. *Id.* at tbl. 6.2. Of the 1,909 sentenced felons in 1996, Native Hawaiians totaled 696 or 36.5% of the felon population. *Id.* at tbl. 7.13. Similarly, in fiscal year 1996, Native Hawaiians comprised 52.0% of the Hawai'i Youth Correctional Facility population. *Id.* at tbl. 7.17. Additionally, while 5.37% of persons aged eighteen to twenty-four years in Hawai'i attained a bachelor's degree or higher, only 2.13% of Native Hawaiians in the same age group had achieved the same educational level in 1990. *Id.* at tbl. 4.15; *see also* HAWAII ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS, RECONCILIATION AT A CROSSROADS: THE IMPLICATIONS OF THE APOLOGY RESOLUTION AND *RICE V. CAYETANO* FOR FEDERAL AND STATE PROGRAMS BENEFITING NATIVE HAWAIIANS 12-18 (2001), *available at* http://www.usccr.gov/hisac/report.htm [hereinafter HAWAII ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS] (discussing the socioeconomic profile of Native Hawaiians); Kekuni Blaisdell & Noreen Mokuau, *Kānaka Maoli, Indigenous Hawaiians*, *in* HAWAI'I: RETURN TO NATIONHOOD 49 (Ulla Hasager & Jonathan Friedman eds., 1994) (analyzing the relationship between Native Hawaiian statistics and cultural conflict).

[11] *See, e.g.*, Barrett v. Hawai'i, Civ. No. 00-00645 DAE-KSC, 3 (D. Haw. July 12, 2001) (challenging the constitutionality of article XII of the Hawai'i State Constitution in its codification of certain Native Hawaiian rights).

Spurred by a sense of urgency following the U.S. Supreme Court decision in *Rice v. Cayetano*,[12] the Akaka Bill[13] (S. 746) was introduced in Congress to establish a government-to-government relationship between the "Native Hawaiian governing entity"[14] and the United States.[15] Using the context of federal Indian law, the Akaka Bill is intended to recognize the Native Hawaiian peoples' right of self-determination within the United States.[16] Several important goals will be achieved by creating a government-to-government relationship. Foremost among these goals is to enable the Native Hawaiian peoples to exercise self-determination within the confines of U.S. law.[17] Additionally, federal recognition of the Native Hawaiian peoples will create parity among Native peoples of the United States.[18] The Native Hawaiian peoples will have increased authority over certain ancestral lands and control over the administration of trust assets.[19] Moreover, Native Hawaiian rights will have greater protection from constitutional challenges in the wake of *Rice*.[20]

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[12] 528 U.S. 495 (2000) (invalidating the voting scheme for the Office of Hawaiian Affairs ("OHA") and questioning the validity of Native Hawaiian trusts); see *infra* notes 69 to 89 and accompanying text for a discussion of the creation of OHA and an analysis of the decision in *Rice v. Cayetano*.

[13] A Bill Expressing the Policy of the United States Regarding the United States['] Relationship with Native Hawaiians and to Provide a Process for the Recognition by the United States of the Native Hawaiian Governing Entity, and for Other Purposes, S. 746, 107th Cong. (2001) [hereinafter Akaka Bill].

Throughout this paper, the "Akaka Bill" refers to S. 746 unless otherwise noted.

Two other versions of the Akaka Bill have been introduced in Congress. The first version, A Bill to Express the Policy of the United States Regarding the United States' Relationship with Native Hawaiians, and for Other Purposes, S. 2899, 106th Cong. (2000) [hereinafter First Version], was reintroduced the following session as A Bill to Express the Policy of the United States Regarding the United States Relationship with Native Hawaiians, to Provide a Process for the Reorganization of a Native Hawaiian Government and the Recognition by the United States of the Native Hawaiian Government, and for Other Purposes, S. 81, 107th Cong. (2001). The Akaka Bill, S. 746, was introduced in April 2001. The third and newest version, A Bill Expressing the Policy of the United States Regarding the United States['] Relationship with Native Hawaiians and to Provide a Process for the Recognition by the United States of the Native Hawaiian Governing Entity, and for Other Purposes, S. 1783, 107th Cong. (2001) [hereinafter Third Version], was introduced in December 2001 in response to "informal" concerns expressed by the Department of the Interior ("DOI").

[14] Akaka Bill § 2(7).

[15] *Id.* § 3(b).

[16] *See id.* § 1(19).

[17] *Id.*

[18] *See id.* § 1(20)(A)-(B).

[19] *See id.* § 8(b).

[20] *See* discussion *infra* Part III.B.2.

Meanwhile, many Native Hawaiians advocate for an international resolution of Native Hawaiian claims and against any dealings with the United States.[21] The international arena is an important forum for the Native Hawaiian peoples on two levels. One level involves standard-setting activities at the United Nations as an indigenous peoples.[22] The other level involves claims to independence rooted in the United States' participation in the overthrow of the Hawaiian Kingdom and encompasses subsequent milestones in United States-Hawai'i relations.[23]

This paper analyzes the relationship the Akaka Bill will create between the Native Hawaiian peoples and the United States. First, this paper argues that a government-to-government relationship with the United States will benefit the Native Hawaiian peoples. Second, this paper maintains that the creation of a government-to-government relationship will not settle the Native Hawaiian peoples' international claims against the United States.

Part II provides an overview of history in Hawai'i, from pre-contact to the changes brought by the U.S. Supreme Court decision in *Rice*, against the backdrop of Native resistance and calls for sovereignty. Part III analyzes the effect of the Akaka Bill—the kind of relationship it creates with the United States, the importance of recognizing a government-to-government relationship for the Native Hawaiian peoples, and the changes to the bill that have caused concern throughout the Native Hawaiian community. Part IV explores what effect the creation of a government-to-government relationship with the United States will have on the Native Hawaiian peoples' international claims. Part V concludes that while the current version of the Akaka Bill creates a government-to-government relationship, which increases the exercise of Native Hawaiian self-determination, creation of the government-to-government relationship with the United States does not settle international claims. The Native Hawaiian peoples must therefore continue to pursue federal recognition and international avenues to maximize the exercise and protection of their rights.

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[21] The case of Native Hawaiians presents a situation that can be addressed on several levels. Under U.S. law, some protection exists for Native Hawaiian rights and entitlements—the Akaka Bill would provide this protection. *See* discussion *infra* Part III. Under international law, Native Hawaiians have claims as indigenous peoples as well as claims to independence from the United States. *See* discussion *infra* Part IV. While these international claims are certainly related, one set stems from status as indigenous peoples while the other stems from the loss of sovereignty and nationhood to the United States in violation of international norms. *See id.*

[22] *See* discussion *infra* Parts IV.A.2, IV.A.4.

[23] *See* discussion *infra* Parts II.B.1-3.i, IV-IV.A.1.

II. HAWAIIAN HISTORY: WHY WE ARE WHERE WE ARE

As in many circumstances, understanding and analyzing the current situation requires an understanding of how the situation came to be. This section provides an overview of Hawaiian history focusing on United States-Hawai'i relations and Native Hawaiian resistance.

A. Western Contact: From Paradise to Paradise Lost

Native Hawaiian tradition teaches that they descend from Papa,[24] earth mother, and Wākea, sky father.[25] Native Hawaiians are siblings with the 'āina[26] (land) and with the kalo[27] (taro), both of which sustain life.[28] Native Hawaiians lived in an organized and distinct society for thousands of years.[29] When Captain Cook arrived in Hawai'i in 1778,[30] he brought a new world that would forever change the land and the Native peoples of Hawai'i. Within 100 years of Cook's arrival, Native Hawaiian society had undergone population collapse,[31] traditional cultural practices had been displaced by Western ways,[32] and the people had been dispossessed of their ancestral lands.[33]

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[24] Native Hawaiian words are not italicized throughout this paper. Although it is convention to italicize "foreign" words, Native Hawaiian words and names are, in fact, not foreign in Hawai'i; the author has chosen to honor that tradition.

[25] See LILIKALĀ KAME'ELEIHIWA, NATIVE LANDS AND FOREIGN DESIRES: PEHEA LĀ E PONO 'AI? (1992), for a discussion of Native Hawaiian cosmology and the relationship that resulted between the Native Hawaiian peoples and the land in an analysis of the history of land tenure in Hawai'i from a Native perspective.

[26] MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY 11 (rev. & enlarged ed. 1986).

[27] *Id.* at 123.

[28] KAME'ELEIHIWA, *supra* note 25, at 24.

[29] *See generally* SAMUEL MANAIAKALANI KAMAKAU, THE WORKS OF THE PEOPLE OF OLD (Dorothy B. Barrère ed., Mary Kawena Pukui trans., 1976); JOHN PAPA II, FRAGMENTS OF HAWAIIAN HISTORY (Dorothy B. Barrère ed., Mary Kawena Pukui trans., 1959); DAVID MALO, HAWAIIAN ANTIQUITIES (Nathaniel B. Emerson trans., 1951).

[30] THE EXPLORATIONS OF CAPTAIN JAMES COOK IN THE PACIFIC AS TOLD BY SELECTIONS OF HIS OWN JOURNALS: 1768-1779, at 215-25 (A. Grenfell Price ed., 1971).

[31] NATIVE HAWAIIAN RIGHTS HANDBOOK 44 (Melody Kapilialoha MacKenzie ed., 1991); *see also* DAVID E. STANNARD, BEFORE THE HORROR: THE POPULATION OF HAWAI'I ON THE EVE OF WESTERN CONTACT 49-52 (1989) (estimating a pre-contact Hawaiian population at 800,000 to 1,000,000 and a depopulation rate of at least seventeen to one, meaning that for every 1700 Hawaiians alive before Western contact, 100 were alive the century following).

[32] *See* KAME'ELEIHIWA, *supra* note 25, at 137-98 (examining the breakdown of traditional Native institutions and replacement with Western models).

[33] One of the most significant events in Hawai'i during the mid-1800s was the dispossession of Native tenants from their ancestral lands. The Māhele (land division) of 1848 transformed land rights in Hawai'i from communal to private property by dividing the land between the

B. United States-Hawai'i Relations: From Treaties of Friendship to Wards of the State

Hawai'i has been referred to as the "islands of neglect" with regard to federal treatment of Native Hawaiian issues.[34] U.S. ambivalence toward its relationship with the Native Hawaiian peoples has lingered for more than a century. The following part recounts significant events that characterize the current United States-Native Hawaiian relationship.

1. Hawai'i: a nation

By the mid-1800s, Hawai'i had a constitutional monarchy recognized as an independent and sovereign nation by nation-states around the world, including the United States.[35] The Kingdom had negotiated treaties of friendship and navigation with several Western nations, including Great Britain, France, and the United States.[36]

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chiefs (1.5 million acres), the government (1.5 million acres), and the crown (1 million acres). MacKenzie, *supra* note 31, at 6-8. After this initial division, the Kuleana Act of 1850 authorized the issuing of land awards in fee to Native Hawaiian tenants who claimed their plots of land. *Id.* at 8. However, few Native tenants did. *Id.* A variety of reasons have been used to explain why so few Natives claimed plots of land, including a lack of understanding of the law, a lack of money to pay for a land survey, and the short amount of time Native tenants had to make their claims. *Id.* What is certain is that this process was done at the urging of foreigners who had substantial interests in agricultural development, and it had the effect of dispossessing the Native Hawaiian peoples of the lands they had tended for generations. *See id.* at 9-10; KAME'ELEIHIWA, *supra* note 25 at 287-318 (analyzing the social and political tensions of the era and the impact of the Māhele on the Native peoples).

[34] DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 944 (4th ed. 1998).

[35] DEP'T OF THE INTERIOR & DEP'T OF JUSTICE, FROM MAUKA TO MAKAI: THE RIVER OF JUSTICE MUST FLOW FREELY, REPORT ON THE RECONCILIATION PROCESS BETWEEN THE FEDERAL GOVERNMENT AND NATIVE HAWAIIANS 22 (2000) [hereinafter FROM MAUKA TO MAKAI].

[36] *See* Miguel Alfonso Martínez, *Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations* ¶ 238, U.N. Doc. E/CN.4/Sub.2/1995/27 (1995) (reporting that the government of the Kingdom of Hawai'i "had obtained formal diplomatic recognition and had concluded treaties with a wide variety of European and other Powers during the nineteenth century, including the Swiss Confederation, the United States, France, and Russia"); *see also* Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95, 102 n.41 (1998) (listing treaties between the Hawaiian Kingdom and the United States); Jennifer M.L. Chock, *One Hundred Years of Illegitimacy: International Legal Analysis of the Illegal Overthrow of the Hawaiian Monarchy, Hawai'i's Annexation, and Possible Reparations*, 17 U. HAW. L. REV. 463, 464 & nn.7-18 (1995) (discussing Kingdom treaties and their significance).

In 1893, the Queen, Lili'uokalani, was illegally[37] overthrown by the "Committee of Safety"—a band of thirteen non-Hawaiian businessmen, including U.S. Foreign Minister to Hawai'i John L. Stevens—aided by U.S. Marines.[38] Fearing both the promulgation of a new constitution to replace the Bayonet Constitution[39] they had forced on King Kalākaua[40] in 1887 and the inevitable decrease in their own political power that the new constitution would bring, thirteen foreign men plotted the overthrow and annexation[41] of Hawai'i.[42]

2. *The Territory of Hawai'i*

Native Hawaiians long opposed increased foreign influence in the Hawaiian government.[43] Accordingly, there was overwhelming Native resistance to

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[37] Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, § 1(1), 107 Stat. 1510 (1993) [hereinafter Apology Resolution]; *see also* LILIUOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN 237-51 (1999) (recounting events of the overthrow from the Queen's perspective).

[38] HAUNANI-KAY TRASK, *Introduction* to FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI'I 12 (rev. ed. 1999). Additionally, the relationship of friendship and commerce between the independent nation-states of Hawai'i and the United States, as well as the involvement of U.S. officials in the overthrow without the authorization of Congress, prompted President Cleveland to describe the overthrow as an "act of war" against a peaceful and friendly people in a message to Congress on December 18, 1893. President Grover Cleveland's Message to Congress (Dec. 18, 1893), http://www.hawaii-nation.org/cleveland.html (last visited Mar. 25, 2002); *partially reprinted in* Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993). In his message to Congress, President Cleveland concluded that, with regard to Hawai'i, a "substantial wrong has thus been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair." *Id.*

[39] See TRASK, *supra* note 38, at 10-12 and KAME'ELEIHIWA, *supra* note 25, at 313-15, for analyses of the politics and history surrounding the Bayonet Constitution. Under the regime created by the Bayonet Constitution,

> (1) voting rights were extended to American and European males, regardless of citizenship; (2) new property requirements effectively excluded Native Hawaiians from voting for the newly formed House of Nobles; and (3) exclusive use of Pearl Harbor was ceded to the United States under the 1887 Reciprocity Treaty in exchange for lifting the tariff on [sugar from Hawai'i].

HAWAII ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 10, at 5-6.

[40] David Kalākaua was elected to the throne and ruled until his death in 1891 when his sister, Lili'uokalani, ascended to the throne. *See* KAME'ELEIHIWA, *supra* note 25, at 313-15 (describing Kalākaua's reign and political philosophies).

[41] Unable to immediately achieve annexation as originally planned, the "Provisional Government" declared itself the "Republic of Hawaii" in 1895 and, in effect, stole the crown and government lands from the Kingdom. MacKenzie, *supra* note 31, at 12-13.

[42] TRASK, *supra* note 38, at 6-16 (detailing the overthrow and annexation).

[43] *See, e.g.*, KAME'ELEIHIWA, *supra* note 25, at 195-97; Silva, *supra* note 4, at 44-54; Mililani B. Trask, *The Politics of Oppression*, *in* HAWAI'I: RETURN TO NATIONHOOD 71, 79-80 (Ulla Hasager & Jonathan Friedman eds., 1994) [hereinafter *Politics of Oppression*].

annexation by the United States. Two groups in particular, Hui Aloha 'Āina and Hui Kālai'āina, formed a coalition and spearheaded opposition.[44] Together these groups organized a petition against annexation, which was signed by ninety-eight percent of the Native Hawaiian population.[45] The petition was successful in aiding to defeat the Treaty of Annexation.[46]

Unable to garner the congressional support necessary to pass the Treaty of Annexation, a joint resolution, which required less support to pass, was adopted by annexationists as the preferred method to annex Hawai'i.[47] A joint resolution, however, is an instrument of domestic law and no substitute for a treaty when acquiring territory.[48] Nevertheless, against the will of the Native people and by legal anomaly, the United States annexed Hawai'i in 1898 with the Newlands Resolution.[49]

3. The State of Hawai'i

Given the illegal events of the overthrow and annexation, there is an argument that statehood is a fallacy.[50] However, the events of statehood have their own bearing on both U.S. responsibility to the Native Hawaiian peoples and Native Hawaiian claims in the international arena. A discussion of these events follow.

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[44] Silva, *supra* note 4, at 59.

[45] *See id.* at 61 n.8 (estimating the Native Hawaiian population in 1898 at approximately 40,000, with 38,000 members of that population providing signatures to support restoring the constitutional monarchy).

[46] *Id.* at 64-65.

[47] *Politics of Oppression*, *supra* note 43, at 72-73; *see also* Silva, *supra* note 4, at 65.

[48] *See Politics of Oppression*, *supra* note 43, at 72-73. Incidentally, the Department of Interior, under the current Bush administration, would now declare annexation "consistent with international law." Memorandum from the United States Department of the Interior, Office of Congressional & Legislative Affairs, to the Hawaii Congressional Delegation § 1(12) (Dec. 6, 2001) (on file with author) [hereinafter DOI Memo].

[49] *See* Joint Resolution, ch. 55, 30 Stat. 750 (1898).

[50] *See* Kekuni Blaisdell, *Regarding the U.S. Relationship with Native Hawaiians*, IN MOTION MAG., *at* http://www.inmotionmagazine.com/akaka1.html (last visited Feb. 1, 2002) (stating "our homeland was unlawfully invaded by [U.S.] armed forces and since 1898, we have been unlawfully occupied by the [U.S.]") [hereinafter *Regarding the U.S. Relationship*]; The Hawaiian Kingdom, *The U.S. Occupation*, *at* http://www.hawaiiankingdom.org/us-occupation.html (last visited Feb. 1, 2002) (asserting that the "United States has remained in the Hawaiian Islands and the Hawaiian Kingdom has since been under prolonged occupation to the present, but its continuity as an independent State remains intact under international law").

i. The list of non-self-governing territories

When Hawai'i was made the fiftieth state in 1959 by the Hawaii Statehood Admissions Act,[51] it was listed on the U.N. list of non-self-governing territories.[52] The list of non-self-governing territories was developed to give force to the principle of self-determination.[53] Listed territories were eligible for a process of decolonization.[54] A valid plebiscite under international law would give voice to the will of the Native population of a territory and would offer all the possible options for a relationship (or no relationship) between the colonizer and the colonized.[55] Hawai'i, however, was removed from the list following a plebiscite, which offered only two options—becoming a state or remaining a territory.[56] Because all U.S. citizens who were Hawai'i residents for at least one year were allowed to vote, the voice of the Native population was effectively silenced.[57] When asked about voting in the plebiscite, Pua

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[51] Admissions Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4 (1959).

[52] *See* Lisa Cami Oshiro, *Recognizing Na Kanaka Maoli's Right to Self-Determination*, 25 N.M. L. REV. 65, 79-82 (1995) (describing the origins of the United Nations list of non-self-governing territories and actions of the United States with regard to de-listing Hawai'i).

[53] *See* Anaya, *supra* note 8, at 331-37 (describing the responsibilities of states administering U.N. non-self-governing territories and U.S. actions regarding the de-listing of Hawai'i). Concerned with the political, social, and economic status of colonized peoples, the U.N. process was aimed at giving effect to the will of the people of the various colonized territories. *Id.* at 333.

[54] *See id.* Some important requirements in the process of decolonization were:

> [1] It must be a process that originates from the people, not the government which has dominated and subjugated them . . . [2] The people must be presented with a choice of all options: complete independence, free association, nation-within-a-nation, commonwealth, total integration, etc. [3] There must be no interference by the government which has illegally dominated the people and has denied the people their rights. The government cannot manipulate the process or place fears in the people about their different choices . . . [4] There should be international supervision of the process to insure a free, fair and impartial process and to insure that the government which has dominated the people will comply with its obligation not to engage in manipulation or interference of any kind.

José Luis Morin, *Questions and Answers About Plebiscites and Decolonization* 6 (Dec. 8, 1995) (unpublished manuscript, on file with author); *see also* Miguel Alfonso Martínez, *Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations* ¶¶ 163-64, U.N. Doc. E/CN.4/Sub.2/1999/20 (1999) [hereinafter *Final Treaty Study*] (recommending "that the case of Hawaii could be re-entered on the [U.N.] list of non-self-governing territories . . . and resubmitted to the bodies of the Organization competent in the field of decolonization").

[55] Anaya, *supra* note 8, at 334-35.

[56] *Id.* at 333-36.

[57] *Id.* at 334-35.

Lindsey, a Native Hawaiian kupuna[58] (respected elder) recalled that many Native Hawaiians who did vote, "voted 'no' to statehood, just like the [Hawaiian] old-timers, because we knew we Hawaiians would lose our rights if Hawai'i became a part of the U.S."[59] Hawai'i was removed from the U.N. list of non-self-governing territories, thereby depriving the Native Hawaiian peoples of the right of self-determination.[60]

ii. The Hawai'i Statehood Admissions Act

As a condition of statehood, the Admissions Act created a land trust to be used for five purposes.[61] Section 5(b) of the Admissions Act conveyed lands to the State of Hawai'i from the United States: lands, which were originally crown and government lands, stolen by the Republic of Hawaii and ceded to the United States at annexation.[62] Section 5(f) of the Admissions Act established a public lands trust, comprised of the land ceded by section 5(b), with five purposes.[63] One of the five purposes was the "betterment of the

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[58] *See* PUKUI & ELBERT, *supra* note 26, at 186. It should be noted that the literal definition of "kupuna" is a "grandparent" or someone "of the grandparent's generation." *Id.* However, the Native Hawaiian people traditionally value their elders for their wisdom and life experiences. Therefore, "kupuna" implies a meaning beyond that of the literal sense.

[59] Interview with Pua Lindsey, Kupuna, in Lahaina, Haw. (Jan. 8, 2002) (record on file with author). Kupuna Lindsey also noted that many Native Hawaiians chose to boycott the plebiscite vote. *Id.*

[60] Anaya, *supra* note 8, at 334-35; *see also* Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993) (admitting that "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through plebiscite or referendum"); Erica-Irene A. Daes, *Report of the Working Group on Indigenous Populations on Its Sixteenth Session*, ¶¶ 105-06, U.N. Doc. E/CN.4/Sub.2/1998/16 (1998) (reporting on the exchange between Special Rapporteur Miguel Alfonso Martínez and the representative from the United States during the discussion of the Treaty Study regarding the de-listing of Hawai'i in 1959, the General Assembly Resolution 1469 (XIV) of 12 Dec. 1959, and the subsequent passage of the Apology Resolution in 1993).

[61] *See* Admissions Act, Pub. L. No. 86-3, § 5, 73 Stat. 4 (1959).

[62] *Id.* § 5(b); *see also* MacKenzie, *supra* note 31, at 28 (discussing the ceded lands trust).

[63] Section 5(f) of the Admissions Act states in relevant part:

> [Ceded lands] shall be held by said State as a public trust [1] for the support of the public schools and other public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownership on as widespread a basis as possible, [4] for the making of public improvements, and [5] for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

Admissions Act § 5(f).

conditions of native Hawaiians."[64] Although authority to address the conditions of Native Hawaiians was delegated to the state, the United States did not relieve itself of responsibility to the Native Hawaiian people. The United States retained the right to sue the state for breaches of trust duties to Native Hawaiians.[65] The United States has never exercised this duty.[66] The Admissions Act, however, only created the trust and delegated its administration to the state.[67] It did not specify how the state should implement the trust.[68]

iii. The State Constitution

With statehood came a push toward urbanization and, thus, an encroachment into rural Hawaiian communities that were long untouched.[69] The ensuing clash between the state and Native Hawaiians resulted in several legal and political assertions by Hawaiians. Native political groups made claims for reparations from the United States for its role in the overthrow and forced annexation, called for accountability for state mismanagement of Hawaiian Home Lands, and brought land claims based on aboriginal rights.[70] As the momentum in asserting aboriginal rights increased, so did calls for sovereignty and Native political control over a land base.[71]

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[64] *See id.* Additional reference to the responsibility of the rehabilitation of Native Hawaiians can be traced to the HHCA. Ahuna v. Dep't of Hawaiian Home Lands, 64 Haw. 327, 336, 640 P.2d 1161, 1167-68 (1982). In 1920, Congress designated approximately 200,000 acres of "ceded" crown and government land for homesteading by "native Hawaiians." MacKenzie, *supra* note 31, at 43. The Admissions Act delegated the administration of Hawaiian Home Lands to the State of Hawai'i. Admissions Act § 4. The United States, however, retained enforcement authority and the exclusive right of consent to any changes in the trust corpus and amendments to the HHCA. *Id.*

[65] Admissions Act § 4.

> Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

Admissions Act § 5.

[66] MacKenzie, *supra* note 31, at 64. There has, however, been ample opportunity. *See id.*

[67] *See* Admissions Act § 5.

[68] *See id.*

[69] HAUNANI-KAY TRASK, *Kūpa'a 'Āina: Native Hawaiian Nationalism in Hawai'i*, *in* FROM A NATIVE DAUGHTER: COLONIALISM AND SOVEREIGNTY IN HAWAI'I 66 (rev. ed. 1999).

[70] *Id.* at 67-68; *see also* Mililani B. Trask, *Historical and Contemporary Hawaiian Self-Determination: A Native Hawaiian Perspective*, 8 ARIZ. J. INT'L & COMP. L. 77, 80-81 (1991) (describing the state of Native Hawaiian land trusts) [hereinafter *A Native Hawaiian Perspective*].

[71] TRASK, *supra* note 69, at 70; *Politics of Oppression*, *supra* note 43, at 80-82.

By the time Hawai'i held a State Constitutional Convention in 1978, Hawaiian issues had become a focal point.[72] As a result, delegates to the convention sought to clarify the language of section 5(f) of the Admissions Act by implementing its trust language and defining the state's role in administering the trust that was established as a condition of statehood.[73] The five trust purposes set forth in section 5(f) were interpreted to have two beneficiaries, "native Hawaiians" and the general public.[74] The result was the addition of three sections[75] to the State Constitution, including article XII, section 5, which established the Office of Hawaiian Affairs ("OHA").[76] OHA was intended to administer twenty percent of the income from ceded lands (the pro rata share for one of five trust purposes) for the benefit of Native Hawaiians[77] and to serve as a mechanism through which Native Hawaiians could exercise a degree of self-determination.[78] OHA, however, is a state agency, not a quasi-sovereign entity, and therefore not an entity of self-determination.[79]

C. Present Day: From Settler Racism to a Nation-Within-a-Nation

Almost twenty years after Hawai'i voters adopted the constitutional amendments establishing OHA and providing for the administration of the ceded lands trust, Harold "Freddy" Rice claimed that the voting qualifications for OHA were based on racial classifications and were therefore in violation of the Fourteenth[80] and Fifteenth[81] Amendments to the U.S. Constitution.[82] A

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[72] *See* MacKenzie, *supra* note 31, at 19.

[73] *Id.*

[74] *Id.*

[75] *See* HAW. CONST. art. XII, § 4 (identifying "native Hawaiians" and the general public as beneficiaries to ceded lands held in trust by the state, with the exception of Hawaiian Home Lands); *id.* § 5 (establishing the OHA with an elected nine-member board of trustees); *id.* § 6 (defining the powers of the board of trustees, including the management and administration of income and proceeds from OHA's pro rata portion of the ceded lands trust).

[76] The Hawai'i State Constitution article XII, section 5 established OHA and provided for the election of trustees to OHA by Native Hawaiian voters. This voting structure was chosen because OHA, through its trustees, was to administer trust revenue for the benefit of the Native Hawaiian people. It follows that as beneficiaries, Native Hawaiians should decide who serves as OHA trustee. *See* MacKenzie, *supra* note 31, at 20.

[77] While OHA was established to serve all Native Hawaiians, revenue from ceded lands was to be used for the benefit of the "native Hawaiian" as defined by the Hawaiian Homes Commission Act. *See* Hawaiian Homes Commission Act, Pub. L. No. 34, ch. 42, § 201(a)(7), 42 Stat. 108 (1920); HAW. REV. STAT. ANN. § 10-2 (Michie 2000).

[78] MacKenzie, *supra* note 31, at 88-90.

[79] Rice v. Cayetano, 528 U.S. 495, 522 (2000).

[80] The Fourteenth Amendment provides, in relevant part:

> No State 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

long-time Hawai'i resident, Freddy Rice was not "Native Hawaiian"[83] or "Hawaiian,"[84] and under state law was therefore ineligible to vote for OHA trustees.[85] Eventually, a majority of the U.S. Supreme Court ruled in favor of Rice based solely on the Fifteenth Amendment.[86]

Although the Court assumed the validity of the underlying trust that led to the creation of OHA, it refused "to conclude that Congress, in reciting the purposes for the transfer of lands to the State[,] . . . has determined that native Hawaiians have a status like that of Indians."[87] The Court also expressed

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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.

[81] The Fifteenth Amendment provides, in relevant part, "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

[82] Rice v. Cayetano, 963 F. Supp. 1547, 1548-49 (D. Haw. 1997).

[83] "Native Hawaiian" is defined by state law as:

> [A]ny descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.

HAW. REV. STAT. ANN. § 10-2 (Michie 2000).

[84] "Hawaiian" is defined by state law as: "[A]ny descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." *Id.* In defining "Native Hawaiian" the state basically adopted the definition articulated in the HHCA. *Compare* Hawaiian Homes Commission Act, Pub. L. No. 34, ch. 42, § 201(a)(7), 42 Stat. 108 (1920) (defining "native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778") *with* HAW. REV. STAT. ANN. § 10-2 (Michie 2000) (adopting the HHCA definition for "native Hawaiian" as that of the state). The state added a broader definition of "Hawaiian" to include any descendant of the original inhabitants of Hawai'i. *See id.*

[85] HAW. CONST. art. XII, § 5.

[86] Rice v. Cayetano, 528 U.S. 495, 511-18 (2000). *Compare id.* at 521-22 (finding that even if the OHA voting provisions were intended to fulfill trust obligations owed to Native Hawaiians and Hawaiians, "elections for OHA trustee are elections of the State, not of a separate quasi-sovereign, and they are elections to which the Fifteenth Amendment applies"), *with* Rice v. Cayetano, 146 F.3d 1075, 1081-82 (9th Cir. 1998), *vacated*, 208 F.3d 1102 (9th Cir. 2000) (assuming the validity of the underlying trust and reasoning that because the OHA voting requirements reflected trustees' fiduciary responsibilities to Native Hawaiians and Hawaiians, Rice's right to vote was not denied or abridged in violation of the Fifteenth Amendment) *and* Rice v. Cayetano, 963 F. Supp. 1547, 1554 (D. Haw. 1997) (concluding that the OHA voting restrictions were not based on race but upon a "unique status of Native Hawaiians" derived from trust obligations "owed and directed by Congress and the State of Hawaii" and therefore not violative of the Fourteenth and Fifteenth Amendments).

[87] *Rice*, 528 U.S. at 518.

uneasiness with the broad definition of "Hawaiian" adopted by the state.[88] However, by assuming the validity of the underlying trust, yet expressing doubt about the existence of a political relationship in the absence of federal recognition, the *Rice* opinion provided a roadmap for those who would protect Native Hawaiian rights and those who would not.[89]

Immediately following the U.S. Supreme Court's decision in *Rice*, several other cases were filed that were intended to build upon the ruling in *Rice* and broaden its impact to all Native Hawaiian entitlements.[90] Significantly, *Barrett v. Hawai'i*[91] was aimed at dismantling Native Hawaiian rights guaranteed by the state. *Barrett* challenged the constitutionality of article XII of the Hawai'i State Constitution in its creation of the Hawaiian Homes Commission and OHA and the codification of Native Hawaiian gathering rights.[92] Barrett claimed that article XII provided benefits only to Native Hawaiians in violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.[93] Because the court granted summary judgment against

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[88] *Id.* at 524-28 (Breyer, J., concurring).

[89] *See id.* at 514-23. In other words, without a quasi-sovereign entity like those of other Native nations within the United States, Native Hawaiian entitlements would be subject to a race-based equal protection analysis. *See id.* at 514-15. *But see* Chris Iijima, *Race over* Rice: *Binary Analytical Boxes and a Twenty-First Century Endorsement of Nineteenth Century Imperialism in* Rice v. Cayetano, 53 RUTGERS L. REV. 91 (2000) (arguing the fundamental difference between the intent of equal protection, to provide for full participation in American society, and government programs meant to remedy harms caused by cultural subordination and loss of sovereignty—programs which ultimately maintain a separateness). The Court's analysis gave an indication that, given an equal protection challenge, the Court would be apt to view Hawaiian rights as race-based and hold them to a strict scrutiny threshold. *See Rice*, 528 U.S. at 514-15. Strict scrutiny requires the government to demonstrate the validity of a race-based program by showing that it is narrowly tailored to serve a compelling government interest. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995). The flip side to the Court's analysis in *Rice* is that if federally recognized, Native Hawaiians may instead be subject to a rational basis analysis. *See Rice*, 528 U.S. at 518-22. A rational basis analysis requires only that the program in question be rationally related to a legitimate government interest. *See* Morton v. Mancari, 417 U.S. 535 (1974). These juxtaposed paths provide a roadmap for those interested in either side of Native Hawaiian issues.

[90] *See, e.g.*, Arakaki v. Hawai'i, Civ. No. 00-00514 HG-BMK (D. Haw. Sept. 19, 2000) (permitting non-Hawaiians to run for and serve as OHA trustees); Carroll v. Nakatani, Civ. No. 00-00641 (D. Haw. filed Oct. 2, 2000) (seeking the halt of state revenue payments to OHA, consolidated with *Barrett v. Hawai'i*); Office of Hawaiian Affairs v. Cayetano, 94 Hawai'i 1, 6 P.3d 799 (2000) (finding the decision in *Rice* did not create vacancies in the office of OHA trustee).

[91] Civ. No. 00-00645 DAE-KSC, 3 (D. Haw. July 12, 2001).

[92] *Id.*

[93] *Id.*

Barrett for lack of standing,[94] the merits of the case were never reached, and Native Hawaiian rights remain vulnerable to a more carefully executed suit.[95]

Also following *Rice* was a more resolute[96] push for federal recognition of the Native Hawaiian peoples and the reconciliation process promised in the Apology Resolution.[97] Hearings held by the Department of the Interior ("DOI") and the Department of Justice ("DOJ") in December of 1999 yielded a report, From Mauka to Makai, with five recommendations aimed at a process of reconciliation.[98] Specifically, recommendation number one from the departments' report states, "To safeguard and enhance Native Hawaiian self-determination over their lands, cultural resources, and internal affairs, the Departments believe Congress should enact further legislation to clarify Native Hawaiians' political status and to create a framework for recognizing a government-to-government relationship with a representative Native Hawaiian governing body."[99]

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[94] Plaintiff Patrick Barrett filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit on October 10, 2001. *See* Manu Boyd, *Barrett Moves Up to Appellate Court*, KA WAI OLA O OHA, Nov. 2001, at 1.

[95] *Barrett*, Civ. No. 00-00645 DAE-KSC, at 32. Summary judgment was granted for OHA because Barrett lacked injury in fact for being "able and ready" to make use of a business loan from OHA. *Id.* at 19-20. With regard to the Hawaiian Homes Commission, the court found it was unable to redress Barrett's claim adequately because Hawaiian Homes is a federal program making the United States, which was not joined, an indispensable party. *Id.* at 26. Finally, Barrett was found to lack standing because he admitted that he had never practiced gathering rights and had no intention of doing so. *Id.* at 30; *see also* Pat Omandam, *Barrett Loses OHA Lawsuit*, HONOLULU STAR-BULLETIN, July 13, 2001, at A1. Similarly, *Carroll v. Nakatani*, which challenged ceded land revenue payments to OHA, was dismissed for lack of standing because "Carroll has a generalized political complaint that must be addressed in the U.S. Congress or the state Legislature . . . ." Pat Omandam, *Ezra Dismisses Carroll Lawsuit Against OHA*, HONOLULU STAR-BULLETIN, Feb. 19, 2002, http://starbulletin.com/2002/02/19/news/story4.html.

[96] The Hawaiian sovereignty movement started to gain momentum in the 1970s. *See* TRASK, *supra* note 69, at 65-80 (recounting the growth of Hawaiian nationalism and the push for sovereignty). Ka Lāhui Hawai'i, the largest Native initiative for Hawaiian sovereignty, advocated for federal recognition of a Hawaiian government by the United States in its Master Plan. *Id.* at 74-79. While federal recognition was perhaps the most viable pre-*Rice* method for an exercise of Native Hawaiian self-determination, a federal bill to extend such recognition was not introduced despite twenty years of urging by Native Hawaiians for inclusion in the federal policy on Native nations. Haunani-Kay Trask, *Racism, Right of Indigenous Peoples Argued: Sovereignty Stolen by U.S. Must Be Restored*, HONOLULU ADVERTISER, Oct. 1, 2000, at B1 [hereinafter *Sovereignty Must Be Restored*]; *see also A Native Hawaiian Perspective*, *supra* note 70, at 88 (stating that "discussions of Hawaiian sovereignty entail a choice among self-governing structures").

[97] Apology Resolution, Pub. L. No. 103-150 § 1(4)-(5), 107 Stat. 1510 (1993).

[98] FROM MAUKA TO MAKAI, *supra* note 35, at 3-4.

[99] *Id.*

With the support of the Apology Resolution, the report issued by the Departments of Interior and Justice, and many within the Native Hawaiian community, Hawai'i's Congressional delegation introduced the First Version, S. 2899,[100] during the 106th session of the U.S. Congress.[101] Although this version of the Akaka Bill was drafted after a consultation process with Native Hawaiians and community members, and received overwhelming support, it failed to make its way through the Senate.[102] A second version of the Akaka Bill, S. 746, was introduced by the Hawai'i delegation in the 107th Congress.[103] Like its predecessor, the Akaka Bill sought to include the Native Hawaiian peoples in the federal policy of government-to-government relationships with Native nations found in federal Indian law.[104] However, it also contained several changes. And, unlike its predecessor, the Native Hawaiian community did not have the same active role in its drafting, an omission that has caused misgivings among (former) supporters.[105] The Third Version, S. 1783, was introduced by Hawai'i's delegation just before the first session of the 107th Congress adjourned.[106] It was said to represent a compromise to "informal" concerns expressed by the DOI.[107] While the second version of the Akaka Bill, S. 746, remains the primary bill supported by the Congressional delegation from Hawai'i, the introduction of the Third Version raised (and continues to raise) serious questions about the executive branch's intent regarding the bill. The following section analyzes the relationship the Akaka Bill creates, its benefits, and tensions it has created within the Native Hawaiian community.

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[100] First Version, S. 2899, 106th Cong. (2000).

[101] Press Release, Senator Daniel Akaka, Native Hawaiian Recognition Bill Introduced, http://www.senate.gov/~akaka/releases/00/07/2000720D04.html (July 20, 2000) [hereinafter Akaka Press Release]; *see also* Le'a Malia Kanehe, Recent Development, *The Akaka Bill: The Native Hawaiians' Race for Federal Recognition*, 23 U. HAW. L. REV. 857 (2001) (analyzing S. 2899 and the community-involved process of drafting the bill that was originally introduced).

[102] *Senators Reintroduce the "Akaka Bill,"* HONOLULU STAR-BULLETIN, Jan. 22, 2001, http://starbulletin.com/2001/01/22/news/briefs.html.

[103] *Id.*

[104] S. REP. NO. 107-66 (2001), at 3; *see also* Akaka Bill, S. 746, 107th Cong. (2001).

[105] Pat Omandam, *Akaka Bill Foes Rally for Hearings*, HONOLULU STAR-BULLETIN, Aug. 16, 2001, http://starbulletin.com/2001/08/16/news/story12.html. The second version, S. 746, has caused concern among Native Hawaiians because significant changes were made without further community input. *Id.*; Christine Donnelly, *Akaka Bill Proponents Prepare to Wait for Passage Amid Weightier Concerns*, HONOLULU STAR-BULLETIN, Oct. 1, 2001, http://starbulletin.com/2001/10/01/news/story2.html; *see also* Letter from Mililani B. Trask to State of Hawaii Federal Delegation (July 2001) (on file with author) (stating "I presented written and oral testimony on the Bills introduced in the 106th congress, but do not support the text of S. 746/H.R. 617").

[106] Third Version, S. 1783, 107th Cong. (2001) (introduced Dec. 7, 2001).

[107] *See* DOI Memo, *supra* note 48.

III. THE AKAKA BILL: RE-DEFINING UNITED STATES-NATIVE HAWAIIAN RELATIONS

The Native Hawaiian peoples are indigenous peoples with the right of self-determination. For over twenty years, Native Hawaiians have been seeking inclusion in the federal policy of self-determination for Native Americans.[108]

The impact of *Rice* has been described as "divest[ing]" the Native Hawaiian peoples of the only entity previously established to give "expression to their rights as indigenous, native people of the United States to self-determination and self-governance."[109] OHA, however, is a state agency, not a quasi-sovereign entity.[110] Expression is given to the rights of indigenous peoples to self-governance within the United States through federal recognition of a government-to-government relationship.[111] The Akaka Bill is designed to provide a means consistent with the "[f]ederal policy of self-determination and self-governance for America's indigenous, native people, for Native Hawaiians to have a status similar to that of the other indigenous, native people of the United States."[112] Inclusion in the federal policy of self-determination will create parity with other Native peoples of the United States. Native Hawaiian rights and entitlements will then have greater protection, and the Native Hawaiian peoples will gain increased authority over certain ancestral lands.

The Clinton administration reaffirmed[113] the federal policy of self-determination for Native peoples first announced by the Nixon administration. The

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[108] *Sovereignty Must Be Restored*, *supra* note 96.

[109] *See* S. REP. NO. 107-66 (2001), at 3.

[110] Rice v. Cayetano, 528 U.S. 495, 522 (2000).

[111] *See* S. REP. NO. 107-66 (2001), at 3.

[112] *Id.*; *see also* FROM MAUKA TO MAKAI, *supra* note 35, at 17 (recommending federal legislation to recognize a government-to-government relationship with Native Hawaiians).

> It is evident from the documentation, statements, and views received during the reconciliation process undertaken by Interior and Justice . . . that the Native Hawaiian people continue to maintain a distinct community and certain governmental structures and they desire to increase their control over their own affairs and institutions. As a matter of justice and equity, the Departments believe [that] the Native Hawaiian people should have self-determination over their own affairs within the framework of Federal law, as do Native American tribes. For generations the United States has recognized the rights and promoted the welfare of Native Hawaiians as an indigenous people within our Nation through legislation, administrative action, and policy statements. To safeguard and enhance Native Hawaiian self-determination over their lands, cultural resources, and internal affairs, Congress should enact further legislation to clarify Native Hawaiians' political status and to create a framework for recognizing a government-to-government relationship with a representative Native Hawaiian governing body.

FROM MAUKA TO MAKAI, *supra* note 35, at 17.

[113] Exec. Order No. 13,175, 3 C.F.R. 304 (2001).

policy is defined through federal Indian law and reflects the history of shifting Indian policy. The basic framework of the government-to-government relationship is discussed in the following section.

A. *The Government-to-Government Relationship*

While the status of Native nations within the United States is subject to Congress's plenary power[114] and the shifting views of dominant institutions,[115] such status is important because it gives Native nations control over their lands, cultural resources, and internal affairs. The relationship that exists between Native peoples and the United States today is one in which recognized Native governments exercise self-determination under U.S. law.[116] Although it has undergone significant modification, this government-to-

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[114] The U.S. Supreme Court articulated that the principle of Congress's plenary power over Indian affairs is subject only to Congress's duty as guardian to act in the best interest of the tribes. United States v. Kagama, 118 U.S. 375, 384 (1886). The inherent contradiction between the concepts of plenary power and the trust responsibility has historically produced legislation with both favorable and detrimental effects on tribes, justified by the proposition of acting in the best interest of the tribes. David E. Wilkins, *The U.S. Supreme Court's Explication of "Federal Plenary Power:" An Analysis of Case Law Affecting Tribal Sovereignty, 1886-1914*, *in* NATIVE AMERICANS AND THE LAW: NATIVE AMERICAN SOVEREIGNTY 97, 100 (John R. Wunder ed., 1996). While there has been much debate among commentators about the meaning of plenary power, Professor Wilkins used three meanings to analyze Congress's plenary power over Indian affairs. *Id.* at 102-03. The first meaning is "exclusive" in which Congress exercises exclusive power to treat Indian nations as distinct political bodies. *Id.* at 102. Second is plenary meaning "preemptive" where federal law preempts state law. *Id.* at 103. The final meaning is "unlimited or absolute." *Id.* It is this final meaning of plenary power that has worked to the detriment of tribes, especially during the assimilation and termination eras in federal Indian policy. *See id.* at 109.

[115] *See* Blake A. Watson, *The Thrust and Parry of Federal Indian Law*, 23 DAYTON L. REV. 437, 490 (1998) (describing federal Indian policy as "cyclic"). The shifts in federal Indian policy can be explained as the "product of the tension between two conflicting forces—separatism and assimilation—and Congress has never made a final choice as to which of the two it will pursue. Thus the laws are not only numerous; they are also conflicting . . . ." *Id.*

[116] Exec. Order No. 13,175, 3 C.F.R. 304 (2001). While Congress has been less active in legislating in the "best interest" of tribes, the Supreme Court has taken to judicial activism in rewriting Indian law, usually to the detriment of tribes. N. Bruce Duthu & Dean B. Suagee, *Supreme Court Strikes Two More Blows Against Tribal Self-Determination*, 16 NAT. RESOURCES & ENV'T 118, 119 (2001); *see also* Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 66 (1999) (describing the effect of Supreme Court decisions on tribal sovereignty as "a retarding, if not retrogressive force"). The current Court has found ways to erode the scope of inherent tribal sovereignty, especially where tribal powers and rights were once accepted as retained, unless explicitly divested by Congress. *Id.*

government relationship still embodies the basic framework established by the cases that comprise the Marshall Trilogy.[117]

From the Marshall Trilogy, the basic tenets of the relationship between the United States and Native peoples within its borders emerged. The federal government holds land in trust for tribes.[118] Tribes are termed "domestic dependent nations" under the protection of the federal government.[119] State intrusion into tribal affairs is limited,[120] though certainly not as clear today as

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[117] The Marshall Trilogy of federal Indian law is comprised of three opinions by Chief Justice John Marshall: *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823), *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

[118] *See Johnson*, 21 U.S. at 574. Applying the doctrine of discovery (which served to legitimize European title to Native lands upon "discovery" of those lands), the Court found that the United States held fee title to Indian lands—title that was acquired from various European powers, most significantly, England. *Id.* at 584-88. Indians, however, retained the right of occupancy. *Id.* at 596. This meant that while Indians were the admitted rightful occupants of the land, with a legal claim to possession, their power to alienate freely their land was denied. *Id.* at 574. The result was a relationship, and arguably a responsibility, in which the United States held fee title to Indian lands subject only to the Indians' right to live on the land. *See* VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 26-27 (1983). In its most basic terms, the relationship created was akin to that of a landlord-tenant. *Id.* at 26. The federal government as landlord could not only "terminate the 'tenancy' of its Indian occupants but also could materially affect the lives of Indians through its control and regulation of land use." *Id.* at 26-27. It was this power that created the first recognized federal responsibility over Indian affairs. *Id.* at 27.

[119] *Cherokee Nation*, 30 U.S. at 17. The Cherokee sued to enjoin the State of Georgia from enforcing state laws designed to infringe on Cherokee land and sovereignty. *Id.* at 15. The Cherokee Tribe was termed a "domestic dependent nation" in a state of pupilage such that "[its] relation to the United States resembles that of a ward to his guardian." *Id.* at 17. Marshall "combined the political and geographical aspects of Cherokee existence." DELORIA & LYTLE, *supra* note 118, at 30. Politically, Indians were recognized as being capable of making treaties with the United States. *Id.* Geographically, the United States held title to Indian lands, and invasion of those lands by another country would be considered a hostile act against the United States. *Id.* The characterization of tribes as domestic dependent nations had several consequences that defined federal policy. As a domestic dependent nation, the Cherokee retained inherent powers of self-government, subject to two significant limitations: "[1] [T]hey could not alienate their lands except to the federal government, and [2] they could not engage in relations with foreign powers." William C. Canby, Jr., *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1, 3 (1987).

[120] *Worcester*, 31 U.S. at 561. The basic proposition from *Worcester* is that state law is inapplicable in Indian Territory and the United States, not individual states, has the sole power to deal with Indian tribes. *Id.* at 561-62. Marshall found that the Cherokee Nation was a "distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force." *Id.* at 561.

the original concept of territorial boundaries,[121] and the federal government remains responsible for dealing with tribes.[122]

The basic history of the government-to-government relationship is indeed chaotic. As previously indicated, Native nations are subject to the plenary powers of Congress, a theory that undermines Native self-determination.[123] And, although the basic principles from the Marshall Trilogy remain valid, the government-to-government relationship has become a maze of legal and political tensions among the federal government, state governments, and Native nations.[124] Currently, Native peoples of the United States face a Supreme Court that construes inherent tribal powers narrowly and in favor of non-member and state interests.[125]

Nevertheless, self-determination is about controlling a peoples' own destiny.[126] The self-determination and self-governance exercised by Native nations within the United States allows for control over internal affairs.[127] Native nations "adopt and operate under a form of government of [their] choosing," independent of state government.[128] Native nations define their own membership.[129] Native nations exercise the inherent right to economic

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[121] The concept of determining tribes' regulatory jurisdiction by the territorial boundaries of the reservation has been significantly modified by a series of judicially created caveats expanding state jurisdiction into reservation boundaries. *See, e.g.*, Montana v. United States, 450 U.S. 544, 565-66 (1981) (finding tribes did not have regulatory jurisdiction over non-members on non-member fee land within the reservation, unless there was either (1) consensual commercial dealings; or (2) non-member conduct that threatened "the political integrity, the economic security, or the health or welfare of the tribe"); Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 411-12 (1989) (deciding, by plurality, that the tribe retained authority to zone allotted land located in the "closed" area of the reservation, but that the tribe lost authority to zone allotted lands that were in the "opened" area of the reservation; stating that because those lands had lost their "Indian-ness" to development, state zoning authority would not threaten the political integrity of the tribe); Nevada v. Hicks, 121 S. Ct. 2304, 2313 (2001) (concluding that "tribal authority to regulate state officers . . . executing process related to the violation, off reservation, of state laws is not essential to tribal self-government").

[122] *See Worcester*, 31 U.S. at 561 (stating the "whole intercourse between the United States and th[e Cherokee] nation, is, by our constitution and laws, vested in the government of the United States").

[123] Hurst Hannum, *Sovereignty and Its Relevance to Native Americans in the Twenty-First Century*, 23 AM. INDIAN L. REV. 487, 493 (1999).

[124] Linda Medcalf, *The Quest for Sovereignty*, *in* NATIVE AMERICANS AND THE LAW: NATIVE AMERICAN SOVEREIGNTY 267, 267-68 (John R. Wunder ed., 1996).

[125] Duthu & Suagee, *supra* note 116, at 122.

[126] Medcalf, *supra* note 124, at 268-69.

[127] *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1988).

[128] *Id.*

[129] *Id.* at 133.

development.[130] Native nations generally have the power to regulate the use of property within their jurisdiction.[131] Native nations design and enforce their legal systems,[132] promote their educational and health care systems,[133] protect their culture and institutions,[134] and advocate for their people.[135]

Given the current condition of the Native Hawaiian peoples and the increased willingness of the settler population in Hawai'i to express racist attitudes towards Native Hawaiians,[136] the government-to-government relationship will benefit the Native Hawaiian peoples socially and legally.

B. The Akaka Bill and the Native Hawaiian Peoples: Legal Realities

Since the *Rice* decision, the Native Hawaiian peoples face yet another era of oppression and the denial of their inherent rights as indigenous, Native peoples. Despite their right to self-determination, the legal reality for Native Hawaiians has become a race between those who would protect Native Hawaiian rights and those who would destroy a peoples and their culture.[137] Constitutional challenges aimed at dismantling Native Hawaiian rights under U.S. law[138] would deprive the Native Hawaiian peoples not only of every "entitlement put in place to ameliorate the results of [Native Hawaiian] historical dispossession"[139] but also inherent access and gathering rights enjoyed since time immemorial.[140] In this climate, the alternative is to create a government-to-government relationship that will protect Native Hawaiian

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[130] *See* GETCHES, *supra* note 34, at 684; *cf.* VINE DELORIA, JR. & CLIFFORD M. LYTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY 258-59 (1984) (discussing achieving economic stability on reservations) [hereinafter NATIONS WITHIN].

[131] COHEN, *supra* note 127, at 143-44.

[132] *See* NATIONS WITHIN, *supra* note 130, at 260-61; DELORIA & LYTLE, *supra* note 118, at 136-38.

[133] NATIONS WITHIN, *supra* note 130, at 250-52.

[134] *Id.* at 252-53.

[135] *Id.* at 253-54.

[136] *See Sovereignty Must Be Restored*, *supra* note 96 (asserting that "[t]he continuing assault on Native Hawaiian entitlements and institutions . . . must be understood as part of the resurgence of a 'white power' movement sweeping across the United States"); *see, e.g.*, H. William Burgess, *Racism, Rights of Indigenous Peoples Argued: Federal Recognition Will Result in Legal Apartheid*, HONOLULU ADVERTISER, Oct. 1, 2000, at B1.

[137] *See* discussion *supra* Part II.C.

[138] *See, e.g.*, Barrett v. Hawai'i, Civ. No. 00-00645 DAE-KSC (D. Haw. July 12, 2001).

[139] *Sovereignty Must Be Restored*, *supra* note 96.

[140] *See* HAW. CONST. art. XII, § 7 (obligating the state to protect Native Hawaiian traditional and customary rights); Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n, 79 Hawai'i 425, 449, 903 P.2d 1246, 1270 (1995) (reaffirming that "[c]ustomary and traditional rights [in Hawai'i] flow from native Hawaiians' pre-existing sovereignty").

rights. The Akaka Bill is a congressional measure designed to create a political relationship that will protect Native Hawaiian rights.

The Court in *Rice* specifically refrained from a substantive discussion about whether Congress has the authority to treat Native Hawaiians in a manner similar to Indian tribes but did state that this was "a matter of some dispute."[141] However, if the Court were to embark on a judicial review of Congress's power to identify groups within the Indian affairs power, it would "mark a dramatic departure from prior case law."[142] Although there has been commentary about whether Native Hawaiians can really be considered "Indians" and "tribes" within Congress's authority,[143] Congress has plenary power to identify communities within the Indian affairs power.[144] And the issue has traditionally been viewed as a political question best left to Congress.[145]

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[141] Rice v. Cayetano, 528 U.S. 495, 518 (2000).

[142] Kimberly A. Costello, Note, Rice v. Cayetano: *Trouble in Paradise for Native Hawaiians Claiming Special Relationship Status*, 79 N.C. L. REV. 812, 845 & nn.129-31 (2001).

[143] *Compare* Van Dyke, *supra* note 36, at 101 (contending that Native Hawaiians constitute a political class and preferential programs should be subject to a rational basis review) *with* Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 539-40 (1996) (arguing that "without a Native Hawaiian political entity that can constitute an 'Indian tribe' for constitutional purposes," Native Hawaiian programs are subject to strict scrutiny).

[144] *See* United States v. Sandoval, 231 U.S. 28, 46 (1913). At issue in *Sandoval* was whether the Santa Clara Pueblo were "Indians" such that Congress could regulate the introduction of liquor to Pueblo territory under its authority over Indian affairs. *Id.* at 38. Following consideration of their course of dealings with the U.S., their common lineage, common culture, and distinctiveness from the rest of society, the Santa Clara Pueblo were found to be "Indians" within Congress's plenary power. *Id.* at 39-47.

Today, most Native nations go through an administrative, rather than legislative, process to be federally recognized. The criteria set forth by the Department of Interior for federal acknowledgement includes "identifi[cation] as an American Indian entity" and maintenance of a "distinct community" as evidenced by "strong patterns of discrimination or other social distinctions by non-members," shared "cultural patterns . . . that are different from those of non-Indian populations" and "distinct community social institutions encompassing most of the members." Mandatory Criteria for Federal Acknowledgement, 25 C.F.R. § 83.7 (2002). The Akaka Bill sets forth findings, which address the criteria used by the DOI as well as considerations articulated by the *Sandoval* Court to establish Native Hawaiians as a group within Congress's authority over Native peoples. *See infra* notes 147-151 & accompanying text (outlining certain relevant findings in the Akaka Bill); *see also* S. REP. NO. 107-66 (2001), at 22-34 (providing insight to the meaning of "Indian" and "tribe" as used in the Constitution as well as the scope of Congress's plenary power over Indian affairs).

[145] *See Sandoval*, 231 U.S. at 47 (finding when identifying and treating communities as tribes that "it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs"); Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903) (stating that "[p]lenary authority over the tribal relations of the Indians has [always] been exercised by Congress . . . and the power has always been deemed a political one, not subject to be controlled by the judicial department").

Accordingly, findings in the Akaka Bill illustrate the common sense rationale[146] behind including the Native Hawaiian peoples within the Indian affairs power.[147] Most significantly, section 1(1) identifies Native Hawaiians as an "indigenous, native people of the United States" within the constitutional authority and plenary power vested in Congress to address the conditions of the indigenous, native people of the United States.[148] Additional findings establish a course of dealings,[149] highlight enduring cultural characteristics,[150] and confirm the maintenance of distinct and separate Native communities.[151]

As indigenous, Native peoples of the United States, the Native Hawaiian peoples are entitled to be treated as other Native peoples within the United States. The Akaka Bill creates a relationship that will achieve parity among Native peoples. The following section analyzes this equal protection-type argument and the remedy provided by the Akaka Bill.

1. Similarly situated with other indigenous, Native peoples within the United States

Unlike more than 500 other Native peoples within the United States, the Native Hawaiian peoples are the only class of Native Americans not included in the federal policy of self-determination for Native peoples.[152] Since statehood, Native Hawaiians have been considered wards of the state without the right to form a governing entity, exercise jurisdiction over their lands and natural resources, generate revenue for Native self-sufficiency, or seek redress in federal court for breaches of trust.[153] Although more than 150 statutes have been enacted for the benefit of Native Hawaiians, many acknowledging Hawaiian Natives as a group of Native Americans, Hawaiians have not been extended federal recognition.[154] Indeed, there is "no rational or historical

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[146] An important lesson from *Sandoval* with respect to Congress's power to identify communities within the Indian affairs power was the limitation that Congress cannot be arbitrary in the exercise of that authority. *Sandoval*, 231 U.S. at 46.

[147] *See* Akaka Bill, S. 746, 107th Cong. § 1 (2001).

[148] *Id.* § 1(1)-(2).

[149] *Id.* § 1(3)-(4).

[150] *Id.* § 1(17)-(18).

[151] *Id.* § 1(5)-(11).

[152] *A Native Hawaiian Perspective*, *supra* note 70, at 84; GETCHES, *supra* note 34, at 944.

[153] *Politics of Oppression*, *supra* note 43, at 75.

[154] *A Native Hawaiian Perspective*, *supra* note 70, at 84. Among statutes treating Native Hawaiians like American Indians and Alaska Natives are: the Native American Programs Act of 1974, Pub. L. No. 93-644, 88 Stat. 2291 (1975); Joint Resolution on American Indian Religious Freedom, Pub. L. No. 95-341, 92 Stat. 469 (1978); Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001-3013 (1998). FROM MAUKA TO MAKAI, *supra* note 35, at 56-57. Statutes that specifically address the conditions of Native Hawaiians include: Native Hawaiian Study Commission Act, Pub. L. No. 98-139, 97 Stat. 871 (1983);

reason . . . to justify the federal government denying Hawaiians a process [enabling] them to establish a government-to-government relationship with the United States."[155] Such a state of affairs "constitute[s] a clear case of discrimination among native peoples found within the borders of [the United States]."[156]

In this context, the equal protection argument follows that as a group of Native Americans similarly situated, the Native Hawaiian peoples should be treated in a manner uniform with other classes of Native Americans.[157] Therefore, the Native Hawaiian peoples must be extended federal recognition of a government-to-government relationship enabling their exercise of self-determination as a peoples.[158]

Enactment of the Akaka Bill will provide for the formation of the Native Hawaiian governing entity by the Native Hawaiian peoples and recognition of that entity by the United States.[159] Native Hawaiians will then enjoy a status similar to that of other Native peoples within the United States.[160]

While the Akaka Bill will place the Native Hawaiian governing entity in a government-to-government relationship with the United States, as is the case with more than 500 American Indian and Alaska Native Nations, the status of Native Hawaiians will still differ slightly. These differences manifest themselves in Native Hawaiian ineligibility for certain programs administered by the Bureau of Indian Affairs ("BIA").[161] This caveat exists because Native Hawaiian programs receive and will continue to receive separate appropria-

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Native Hawaiian Healthcare Act of 1988, Pub. L. No. 100-579, 102 Stat. 4181 (1988); Native Hawaiian Education Act, Pub. L. No. 103-382, 108 Stat. 3518 (1994). *Id.*; *see also* Van Dyke, *supra* note 36, at 106 n.67 (listing some of the federal laws that classify Native Hawaiians as Native Americans).

[155] HAWAII ADVISORY COMMITTEE TO THE U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 10, at 49.

[156] *Id.* at ix.

[157] *A Native Hawaiian Perspective*, *supra* note 70, at 85.

[158] *Id.*

[159] Akaka Bill, S. 746, 107th Cong. §§ 3(b), 6(a) (2001).

[160] The status of a political relationship with the United States provides for not only the exercise of the powers of self-governance, but also certain legal protections. *See supra* notes 126-135 & accompanying text (describing certain powers of Native self-governance within the United States); *infra* Part III.B.2 (applying the political relationship and powers of self-governance to the Native Hawaiian situation).

[161] Akaka Bill § 9(b). *See also A Native Hawaiian Perspective*, *supra* note 70, at 83 (stating that in attaining federal recognition and parity with other classes of Native Americans, Native Hawaiians would not want to take away from the Indian budget or from Indian programs); S. REP. NO. 107-66 (2001), at 41 (explaining that "[a]ppropriations for Native Hawaiian programs have always been separately secured and have had no impact on program funding for American Indians or Alaska Natives").

tions from those budgeted for the administration of BIA programs.[162] Additionally, Native Hawaiians will not be authorized by the Akaka Bill to conduct gaming under the Indian Gaming Regulatory Act ("IGRA").[163]

Native Hawaiians, although precluded from certain programs available for American Indians and Alaska Natives, occupy a unique position among Native Americans in fashioning a government-to-government relationship with the United States. This unique position exists on two levels: one, with the United States, and the other with Native nations and organizations. First, the Akaka Bill provides for the establishment of the United States Office for Native Hawaiian Relations within the DOI.[164] It also provides for the creation of a Native Hawaiian Interagency Coordinating Group, led by the DOI, to be comprised of officials, designated by the President, from federal agencies that administer Native Hawaiian programs and policies.[165] Both of these entities are intended to provide continuity in the administration of programs as well as to ensure proper consultation in policy development.[166] Second, in forming and administering their government structures, Native Hawaiians have the opportunity to learn from and build upon the experiences of other Native peoples within the United States.[167] It is perhaps this type of alliance with

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[162] *Id.* at 41-42.

[163] Akaka Bill § 9(a). *See also* S. REP. NO. 107-66 (2001), at 42 (explaining why Native Hawaiians are not eligible to conduct gaming under the Indian Gaming Regulatory Act ("IGRA")). Interestingly, the issue of legalizing gambling in Hawai'i has lingered in state politics, failing to gain support for several years. *See, e.g.*, Mike Yuen, *Cayetano, Mizuguchi, Souki Met with Gambling Reps*, HONOLULU STAR-BULLETIN, Mar. 31, 1998, http://starbulletin.com/98/03/31/news/story3.html; Pat Omandam, *House Tourism Committee Approves Shipboard Gambling*, HONOLULU STAR-BULLETIN, Feb. 11, 2000, http://starbulletin.com/ 2000/02/11/news/story2.html; Richard Borreca, *Economy Slump Spurs New Gambling Push*, HONOLULU STAR-BULLETIN, Dec. 13, 2001, http://starbulletin.com/2001/12/13/news/story3.html. Following introduction of the Akaka Bill on April 6, 2001 and the addition of section 9(a), clarifying the inapplicability of IGRA to Native Hawaiians, Hawai'i's governor began advocating anew for a State Constitutional amendment to legalize gambling in Hawai'i. *See* Bruce Dunford, *Gov, GOP Squabble Over Gambling*, HONOLULU STAR-BULLETIN, May 27, 2001, http://starbulletin.com/2001/05/27/news/story7.html.

[164] Akaka Bill § 4.

[165] *Id.* § 5. It should be noted that one of the changes proposed by the DOI and incorporated into the Third Version was to delete the provision creating the Interagency Coordinating Group. *See* Third Version, S. 1783, 107th Cong. (2001).

[166] *See* S. REP. NO. 107-66 (2001), at 45.

[167] *See Native Hawaiian Recognition: Hearing on S. 2899 and H.R. 3224 Before the Senate Comm. on Indian Affairs*, 106th Cong. (2000) (statement of Susan Masten, President, National Congress of American Indians), *available at* http://www.ncai.org/main/pages/issues/other_issues/hawaiian.asp (supporting Native Hawaiian recognition); Pat Omandam, *Alaska Natives Praise Federal Recognition*, HONOLULU STAR-BULLETIN, Aug. 29, 2000, http://starbulletin.com/2000/08/29/news/story2.html, (reporting on the Alaska Federation of Natives' testimony in support of federal recognition of Native Hawaiians delivered by AFN President Julie Kitka).

other Native nations that holds the most promise in the exercise of Native self-determination.[168] The broader picture, however, is that enacting the Akaka Bill will facilitate greater Native Hawaiian control over Native Hawaiian issues and lands in a manner similar to American Indians and Alaska Natives.[169]

Achieving parity with other Native peoples within the United States is not the only implication of the Akaka Bill. Creation and recognition of the Native Hawaiian governing entity also provides greater protection for Native Hawaiian rights and entitlements. An analysis of the legal standards applied to political relationships follows.

2. Protection for Native Hawaiian rights and entitlements

Native Hawaiian rights are rooted in those inherent rights held by all indigenous peoples, and the existence of those rights is validated by the unauthorized dispossession of those rights by the United States.[170] Native Hawaiians have long advocated for greater authority over their entitlements and trust lands,[171] especially in light of state mismanagement of Native Hawaiian trusts.[172]

By establishing a political relationship similar to those that exist between the United States and American Indian and Alaska Natives, Native Hawaiian rights and entitlements will receive greater protection and the Native Hawaiian peoples will have increased authority over them.

On one level, greater legal protection will be afforded by including the Native Hawaiian peoples in the federal policy of self-determination and government-to-government relationships with Native nations.[173] The resulting political classification will subject Native Hawaiian entitlements and programs to a rational basis-type analysis under *Morton v. Mancari*.[174] In *Mancari*, the U.S. Supreme Court found that BIA hiring preferences were not racial, but rather based on the political classification of Indians as members of quasi-sovereign tribal entities and were indeed "designed to further the cause of

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[168] *See* Omandam, *supra* note 167.

[169] *See A Native Hawaiian Perspective*, *supra* note 70, at 83-85.

> What we want is our land segregated from the federal and state lands. We want our own court system so that our juveniles and adults will not go to state court. We want to protect our children when they are taken away from our families to be raised in non-native families. We want parity under United States policy . . . .

Id. at 83-84.

[170] *See, e.g.*, MacKenzie, *supra* note 31; TRASK, *supra* note 38.

[171] *See* TRASK, *supra* note 69, at 68-69.

[172] *See* MacKenzie, *supra* note 31, at 30-32, 51-54 (describing state administrative failures and abuses with Native Hawaiian trust lands).

[173] *See* Morton v. Mancari, 417 U.S. 535 (1974).

[174] *Id.* at 555.

Indian self-government."[175] The Court scrutinized the preference under a rational basis-type analysis, finding "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed."[176] Creating a political relationship between the United States and the Native Hawaiian governing entity and its members will subject Native Hawaiian entitlements and programs to a similar analysis under *Mancari*, and therefore increase protection.

On another level, Native Hawaiian rights will receive greater protection by virtue of the establishment of the Native Hawaiian governing entity. Recognition of the right to self-determination means little without exercising the powers of such right.[177] The ability to protect, preserve, and perpetuate rights to maintain a distinctive community, culture, and land base are integral parts of exercising the right to self-determination. Native nations advocate for their own people. The protection articulated in *Mancari* reaffirms the federal government's authority to act on behalf, and to the benefit, of Native nations.[178] Such a relationship enables tribes to advocate for their people on a legislative level. The government-to-government relationship also provides "a place at the table" for dealing with the United States and individual states.[179] Native presence ensures Native interests are considered and not infringed upon. On a social level, Indian tribes administer programs for their people, identifying and prioritizing according to their needs.[180] Judicially, tribal courts and legal systems protect their people and culture by implementing culturally appropriate punishments and standards.[181] These activities protect, preserve, and perpetuate the rights of Native peoples.

Although the relationship the Akaka Bill creates has generally positive implications, many Native Hawaiians question the apparent lack of meaningful process afforded the community regarding recent drafts of the bill.[182] The following section discusses the genesis of this criticism: politics as usual.

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[175] *Id.* at 554.

[176] *Id.* at 555.

[177] Medcalf, *supra* note 124, at 269.

[178] *See Mancari*, 417 U.S. at 551-52.

[179] Omandam, *supra* note 167.

[180] *See* NATIONS WITHIN, *supra* note 130, at 250-54.

[181] *Id.* at 260-61.

[182] *See* Rosemarie Bernardo, *Group Petitions for Bill Hearings*, HONOLULU STAR-BULLETIN, Aug. 30, 2001, http://starbulletin.com/2001/07 /30/news/story4.html.

C. The Akaka Bill and Native Hawaiians: Politics as Usual

The Akaka Bill is the device that will recognize the inherent sovereignty of the Native Hawaiian peoples in the framework of the government-to-government relationship and nation-within-a-nation status found in federal Indian law—a relationship that will benefit Native Hawaiians. The bill, however, is marred by a course that has had the effect of circumventing a meaningful reconciliation process. Native Hawaiians participated in a consultation process that led to the First Version of the bill, S. 2899.[183] Public hearings on the First Version were then held in August 2000 for five days on the island of O'ahu.[184] Since that time, two different versions have been introduced in Congress,[185] both displaying significant changes in the language and neither being subjected to public hearings in Hawai'i, despite community requests.[186] The result is mistrust and confusion within the very community the bill is meant to promote.[187]

The second version of the Akaka Bill, S. 746, is the version reportedly supported by the congressional delegation from Hawai'i.[188] The Third Version, S. 1783, embodies an effort to address "informal" concerns expressed by the DOI but is unlikely to move through Congress because the delegation supports the second version of the Akaka Bill, S. 746.[189] The omission of public hearings on redrafted versions of the bill in some sense again silences the Native Hawaiian voice in a process that should be open and responsive to Native Hawaiian preferences.

In an effort to quell the situation, public meetings were held with the federal delegation's staff to inform Native Hawaiians and the public about the reasons

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[183] Akaka Press Release, *supra* note 101; *see also* Kanehe, *supra* note 101, at 876-77.

[184] *See* Pat Omandam, *Clinton Officials Say They Back Akaka Bill*, HONOLULU STAR-BULLETIN, Aug. 28, 2000, http://starbulletin.com/2000/08/28/news/story1.html.

[185] Akaka Bill, S. 746, 107th Cong. (2001); Third Version, S. 1783, 107th Cong. (2001).

[186] Omandam, *supra* note 105.

[187] *See id.*; *see also* StopAkaka.org, *Questions for Supporters of the Akaka Bill S. 746 and to Our Congressional Delegates*, *at* http://akaka.homestead.com/files/why.html (last visited Mar. 25, 2002) (questioning the changes incorporated into S. 746 and the failure to hold hearings). There are two views of this situation. One, maintained by some community leaders, is that because of the language changes, the Akaka Bill is a different piece of legislation from the First Version and thus deserving of its own hearing. The delegation staff hold that a hearing is not necessary because the Akaka Bill is a reflection of testimony received during the five days of hearings held for the First Version, S. 2899. Remarks at a community meeting at the State Capitol building with delegation staff, Honolulu, Haw. (Jan. 10, 2002).

[188] Susan Roth, *Native Bill's Foes Uncovered*, HONOLULU ADVERTISER, Dec. 13, 2001, http://the.honoluluadvertiser.com/article/2001/Dec/13.

[189] DOI Memo, *supra* note 48; *see also* Christine Donnelly, *Revamped Hawaiian Bill Aims at Compromise*, HONOLULU STAR-BULLETIN, Dec. 14, 2001, http://starbulletin.com/2001/12/14/news/index.html.

behind the re-drafting.[190] Although these meetings were in response to public outcry, they were intended to inform the public of events that had transpired concerning the Akaka Bill. They were not intended as information gathering hearings and therefore did not truly respond to public concerns. Several concerns raised by Native Hawaiians at these meetings were included and clarified in the Committee Report accompanying S. 746.[191] Nonetheless, the legislation is what becomes binding law, not the Committee Report.[192]

In the tapestry of Native Hawaiian views on sovereignty and self-determination, some Native Hawaiians advocate nothing less than complete independence from the United States.[193] Independence proponents predictably oppose the Akaka Bill.[194] An analysis of emerging international standards on the rights of indigenous peoples as well as Native Hawaiian participation in the international arena reveal such opposition is based only on principle. The following section discusses what, if any, impact the Akaka Bill will have on Native Hawaiian claims in the international arena.

IV. INTERNATIONAL SELF-DETERMINATION: A HIGHER CALLING

Developing international standards on the rights of indigenous peoples[195] declare that, among other inherent rights, indigenous peoples have the right of self-determination.[196] Native Hawaiians are an indigenous peoples with the

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[190] One such meeting was held on January 10, 2002. Naomi Sodetani, *Akaka Bill Debated*, KA WAI OLA O OHA, Feb. 2002, at 1.

[191] *See* S. REP. NO. 107-66 (2001), at 42-43 (explaining the amendments).

[192] It should be noted, however, that the Committee Report is important and useful in the implementation of a law, depending upon who is doing the implementing and interpreting.

[193] *See, e.g., Regarding the U.S. Relationship, supra* note 50, at 7-9 (recommending international remedies in lieu of the Akaka Bill); The Hawaiian Kingdom, *Government Re-established, at* http://www.hawaiiankingdom.org/govt-reestablished.shtml (last visited Feb. 1, 2002); The Reinstated Hawaiian Government, *Profile of the Reinstated Hawaiian Government* (2001), *available at* http://www.reinstated.org.

[194] *Regarding the U.S. Relationship, supra* note 50, at 1.

[195] Although "Indigenous peoples" is not officially defined, the U.N. Working Group on Indigenous Populations uses the following as a working definition:

> Indigenous communities, peoples and nations are 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, or parts of them. 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.

José Martinez Cobo, *Study of the Problem of Discrimination Against Indigenous Populations*, ¶ 379, U.N. Doc. E/CN.4/Sub.2/ 1986/7/Add.4 (1986).

[196] *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session*, U.N. Doc. E/CN.4/Sub.2/1994/56, art. 3, (1994)

right of self-determination.[197] United States policy is not a full exercise of self-determination under international standards.[198] Therefore, including the Native Hawaiian peoples in the U.S. policy of self-determination will not preclude Native Hawaiian participation in standard-setting activities aimed at the realization of self-determination among Native peoples as intended by international standards. Nor will the Native Hawaiian peoples' claim to independence from the United States, based on the loss of sovereignty in violation of international norms, be settled by the Akaka Bill.[199] Such a settlement can only be reached through the appropriate international channels.

A. International Claims: Inadequacy of the Akaka Bill

The Native Hawaiian peoples have two related international claims. As indigenous peoples, Native Hawaiians have claims against the United States, which are linked to the draft U.N. Declaration on the Rights of Indigenous Peoples ("U.N. Declaration").[200] The Native Hawaiian peoples also have claims against the United States that stem from the theft of sovereignty and nationhood, in violation of international norms.[201] The Akaka Bill neither precludes nor settles either claim.[202]

[hereinafter U.N. Declaration]. The U.N. Declaration identifies self-determination as a right of indigenous peoples: "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." *Id.*

[197] *See* Anaya, *supra* note 8, at 323-25.

[198] *See* STATEMENT OF THE UNITED STATES DELEGATION TO THE UNITED NATIONS HUMAN RIGHTS COMMISSION INTERSESSIONAL WORKING GROUP ON THE DRAFT DECLARATION OF THE RIGHTS OF INDIGENOUS PEOPLES (1997), *at* http://hookele.com/netwarriors/97/30oct.html (last visited Jan. 3, 2002) (stating "while we have no problem with the concept of self-determination and the accompanying rights as it is understood and used in our domestic context and law, we do have concerns about the implication of stating that all indigenous peoples everywhere have an absolute right to be sovereign independent states") [hereinafter U.S. STATEMENT]; *infra* notes 224-229 and accompanying text.

[199] See *supra* note 1, discussing the likelihood of secession from the United States and the inherent paradox of the Native Hawaiian situation.

[200] *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, 642-43 (1996) (explaining that "[a]ll peoples have the right to govern themselves, and all indigenous peoples also have this right"); *see also* U.N. Declaration, *supra* note 196.

[201] Van Dyke et al., *supra* note 200, at 623-24, 642 n.2. (stating that "[t]he people who inhabit non self-governing territories . . . have a right to self-determination and self-governance under international law"); *see also supra* note 193 (citing examples of pro-independence organizations).

[202] *See* Anaya, *supra* note 8, at 362 (stating that "official response to the demands of Native Hawaiians is governed by international law, not just by domestic standards").

1. International claims and the Akaka Bill

A review of the Akaka Bill under international standards of self-determination reveals its enactment will not settle international claims against the United States. As the Committee Report notes, "the laws of the United States do not affect the rights of any American citizens under international law."[203] Although this is a technically accurate assessment in this situation, the Committee Report does not have the force of law. Additionally, some controversy exists because a disclaimer section was deleted in the second and primary version of the Akaka Bill, S. 746.

The First Version, S. 2899, contained a disclaimer provision, which read: "Nothing in this Act is intended to serve as a settlement of any claims against the United States, or to affect the rights of the Native Hawaiian people under international law."[204] This section was deleted in the Akaka Bill, S. 746, and was instead added under subsection 8(b), "Negotiations."[205] Subsection 8(b) reads:

> Upon the Federal recognition of the Native Hawaiian governing entity by the United States, the United States is authorized to negotiate and enter into an agreement with the State of Hawaii and the Native Hawaiian governing entity regarding the transfer of lands, resources, and assets dedicated to Native Hawaiian use to the Native Hawaiian governing entity. Nothing in this Act is intended to serve as a settlement of any claims against the United States.[206]

The structure of subsection 8(b) leads to the interpretation that the disclaimer applies only to land negotiations. The disclaimer, however, should apply to the entire act, not just land negotiations.[207] Although the separate section strengthened and reaffirmed the unsettled status of international claims, its removal and consolidation did not harm the substantive issues pertaining to Native Hawaiian international claims because the Akaka Bill relates only to issues arising under domestic law.

Additional indication that the Akaka Bill does not settle international claims is found in the DOI's concerns submitted informally to Hawai'i's Congressional delegation. Most of these concerns would rewrite the history of international United States-Hawai'i relations.[208] Among the suggested changes is section 1(20), which says "Native Hawaiians" (as opposed to "the Native

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[203] S. REP. NO. 107-66 (2001), at 43.

[204] First Version, S. 2899, 106th Cong. § 10 (2000).

[205] Akaka Bill, S. 746, 107th Cong. § 8(b) (2001).

[206] *Id.* § 8(b).

[207] Letter from Mililani B. Trask, *supra* note 105, at 5.

[208] *See* DOI Memo, *supra* note 48, at § 1(5), (12), (20) (stating, for example, "U.S. annexation of Hawaii in 1893 was then consistent with international law").

Hawaiian peoples")[209] exercised self-determination when Hawai'i was removed from the list of non-self-governing territories.[210] This proposition is contrary to existing U.S. law[211] and international findings.[212] Although most of the suggested provisions were rejected by the Hawai'i delegation, the DOI's proposals indicate the issue of Native Hawaiian international claims is something the United States prefers did not exist. Further, the proposals illustrate the willingness of the United States to perpetuate lies to deny the Native Hawaiian peoples the inherent right of indigenous peoples to self-determination. Most notably, the DOI's reaction indicates that they are of the opinion that the bill presently does nothing to eliminate international claims.[213] These developments render participation in international standard-setting activities all the more important.

2. *Standard-setting activities at the United Nations*

Although low on the U.N. hierarchy, the Working Group on Indigenous Populations has attracted extensive indigenous participation and has become a "think tank on indigenous questions . . . generat[ing] proposals for studies and expert seminars."[214] Participation in Working Group sessions is "open to representatives of all indigenous peoples and their communities and organizations."[215] This open climate has fostered constructive dialogue between all concerned and has "strengthened the Group's position as a focal point of international action on behalf of indigenous peoples' causes."[216]

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[209] *Id.* at § 1(20). One of the DOI's suggested amendments was to change "Native Hawaiian people" to "Native Hawaiians," globally. *Id.* at 2. This is an attempt to deny the Native Hawaiian peoples collective rights by referring only to individuals who are Native Hawaiian. *See supra* note 5.

[210] DOI Memo, *supra* note 48, at § 1(20).

[211] *See* Apology Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (1993) (concluding that the "indigenous Hawaiian people never directly relinquished their claims to inherent sovereignty as a people").

[212] *See* Final Treaty Study, *supra* note 54, at ¶¶ 163-64.

[213] *See* DOI Memo, *supra* note 48.

[214] Julian Burger, *Indigenous Peoples and the United Nations*, *in* HUMAN RIGHTS OF INDIGENOUS PEOPLES 3, 5 (Cynthia Price Cohen ed., 1998). The Working Group is composed of five members, from the five regions of the world, who are independent experts and members of the Sub-Commission. UNITED NATIONS HIGH COMMISSIONER/CENTRE FOR HUMAN RIGHTS, HUMAN RIGHTS FACT SHEET NO. 9(REV.1): THE RIGHTS OF INDIGENOUS PEOPLES 6 (1998) [hereinafter FACT SHEET].

[215] FACT SHEET, *supra* note 214, at 6.

[216] *Id.*

The U.N. Declaration[217] was drafted by the Working Group during a five-year period.[218] The process involved extensive consultation and consensus among indigenous peoples.[219] The Working Group was also at the forefront in the push for a permanent forum where indigenous peoples act as decision makers rather than observers.[220]

The U.N. Declaration was completed by the Working Group in 1993 and was adopted the following year by the Sub-Commission on Prevention of Discrimination and Protection of Minorities.[221] The U.N. Declaration affirms indigenous peoples' collective and individual rights to culture, education, economic development, land, and self-determination.[222] Indigenous peoples' right to self-determination is the right to "freely determine their political status and freely pursue their economic, social and cultural development."[223]

3. United States' position on "self-determination" and "peoples"

The United States, like many nation-states, fears the terminology of "peoples" and "self-determination," as applied to indigenous peoples, as a possible threat to territorial integrity.[224] The use of "peoples" denotes a collective right of self-determination,[225] including, according to several nation-states, the right to secession.[226] The United States maintains that indigenous peoples within its borders exercise self-determination through the process of federal recognition and the creation of a government-to-government relationship, thereby rendering an analysis of indigenous peoples' self-determination by international standards overly broad.[227] This position, however, is problematic. "Self-determination," according to conditions set by the colonizing government, is hardly an exercise of self-determination.[228] A

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[217] U.N. Declaration, *supra* note 196.

[218] Burger, *supra* note 214, at 6.

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] *See generally* U.N. Declaration, *supra* note 196.

[223] *Id.* art. 3.

[224] *See* U.S. STATEMENT, *supra* note 198.

[225] *See supra* note 5. The affirmation of collective rights is also directly at odds with dominant notions of individual rights that form the foundations of American legal thought. Heather S. Archer, *Effect of United Nations Draft Declaration on Indigenous Rights on Current Policies of Member States*, 5 J. INT'L LEGAL STUD. 205, 223 (1999).

[226] Wiessner, *supra* note 116, at 116.

[227] *See* U.S. STATEMENT, *supra* note 198 (stating "while we have no problem with the concept [sic] self-determination . . . as it is understood and used in our domestic context and law, we do have concerns about the implications of stating that all indigenous peoples everywhere have an absolute right to be sovereign independent states").

[228] *See* U.N. Declaration, *supra* note 196, art. 3.

peoples cannot be truly self-determinative if their choices are limited by others.[229]

4. Native Hawaiians and standard-setting activities in the international arena

Despite U.S. positions on key language of the U.N. Declaration, and partly because the Native Hawaiian peoples have been denied equal treatment as Native Americans, Native Hawaiians have participated in the standard-setting activities of the international arena.[230] Given that progress at the U.N. is incredibly slow, and enforcement often depends largely on the domestic legal systems of nation-states,[231] participation in standard-setting activities may seem counter productive. Small victories, however, make a world of difference.

Among the advances made by indigenous, including Native Hawaiian, participation at the United Nations is that the Permanent Forum is now a reality.[232] Hawai'i was recommended for re-listing on the U.N. list of non-self-governing territories as a direct result of Native Hawaiian participation in the Working Group.[233] The United States now regularly attends the Working Group on Indigenous Populations because of the sheer amount of indigenous participation and the international attention the Working Group has received. Additionally, and most important, failure of indigenous peoples and Native Hawaiians to participate would result in the status quo, at best.[234] It is, therefore, vital to continue to maintain an international record documenting U.S., as well as other nation-states', treatment of Native peoples.

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[229] *See A Native Hawaiian Perspective, supra* note 70, at 88-89 (providing a definition of self-determination from a Hawaiian perspective: "If the principles of sovereignty and self-determination are to mean anything, native peoples must define them.").

[230] *See* TRASK, *Hawaiians and Human Rights, in* FROM A NATIVE DAUGHTER, *supra* note 9, at 32-33.

[231] *See* Wiessner, *supra* note 116, at 124.

[232] *Establishment of a Permanent Forum on Indigenous Issues*, E.S.C. Res. 2000/22, U.N. Doc. E/RES/2000/22 (2000). See FACT SHEET, *supra* note 214, at 18, for additional background information about the Permanent Forum. As indicated, the Permanent Forum enables indigenous peoples to be decisions makers at the U.N. level. Mililani Trask, a Native Hawaiian, is one of the eight indigenous representatives at the Permanent Forum. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, PERMANENT FORUM ON INDIGENOUS ISSUES: 2002 MEMBERSHIP FROM INDIGENOUS ORGANIZATIONS, http://www.unhchr.ch/indigenous/members.htm (last visited Feb. 6, 2002).

[233] Final Treaty Study, *supra* note 54, ¶¶ 163-64.

[234] *Cf.* Archer, *supra* note 225, at 226.

5. Native Hawaiians and the list of non-self-governing territories

Native Hawaiians were denied the exercise of self-determination in the plebiscite for statehood.[235] As a non-self-governing peoples, settlement of Native Hawaiian claims could only occur through a neutral international process, not through domestic U.S. legislation.[236]

Internationally appropriate measures to settle Native Hawaiian assertions must therefore "implement contemporary norms concerning indigenous peoples."[237] Remedial procedures should incorporate meaningful participation by the Native Hawaiian peoples and deference to their choices.[238] In accordance with the U.N. Declaration, provisions would have to include the recognition and perpetuation of individual and collective rights to cultural integrity, economic and social protections, lands and resources, and self-determination and self-government.[239]

V. CONCLUSION

Under U.S. law, the Akaka Bill creates a government-to-government relationship between the United States and the Native Hawaiian governing entity, thus treating the Native Hawaiian peoples in a manner similar to other Native groups within the United States. Such a relationship will empower Native Hawaiian control over specific lands, resources, and social welfare issues facing the Hawaiian community. Native Hawaiian rights will also receive greater protection under the rubric of the political relationship. However, the Akaka Bill is not representative of a full exercise of self-determination under international norms and cannot serve as a settlement of claims between the Native Hawaiian peoples and the United States. Therefore, the Native Hawaiian peoples should continue to pursue federal recognition and should also continue to work for greater recognition of their rights in the international arena.

R. Hōkūlei Lindsey[240]

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[235] *See* discussion *supra* Part II.B.3.i and accompanying notes.

[236] *See* Final Treaty Study, *supra* note 54, ¶¶ 163-64.

[237] Anaya, *supra* note 8, at 362.

[238] *Id.*

[239] U.N. Declaration, *supra* note 196.

[240] Class of 2002, William S. Richardson School of Law, University of Hawai'i. Much appreciation must be extended to Professor Danielle Conway-Jones; I am undoubtedly the luckiest research assistant! Thank you to Professor Chris Iijima for immeasurable support and encouragement. Thank you also to Noelani Kalipi for helpful comments on an earlier draft.

Revisiting *San Francisco Arts & Athletics v. United States Olympic Committee*: Why It Is Time to Narrow Protection of the Word "Olympic"

I. INTRODUCTION

In 1982, Dr. Tom Waddell had a dream. His dream was to bring athletes, gay and straight, together from all over the world to participate in an athletic event he called the "Gay Olympic Games."[1] His dream, however, was partially shattered when the United States Olympic Committee ("USOC") stepped in and asserted its exclusive right to the word "Olympic" under the little known Amateur Sports Act.[2] The USOC took their claim of an exclusive right all the way to the Supreme Court. The Court confirmed the USOC's right and prevented Dr. Waddell from using the word "Olympic" in his "Gay Games."[3] And, though Dr. Waddell's games went on, the implications of this exclusive right conferred on the USOC continue to brew today.

In *San Francisco Arts & Athletics v. United States Olympic Committee* ("*SFAA*"), the Court interpreted the Amateur Sports Act, 36 U.S.C. § 220506 in a manner that gave the USOC an exclusive and broad authority in the word "Olympic."[4] This broad authority manifested itself in the fact that, unlike normal trademark holders, the USOC did not have to prove that an unauthorized use was confusing and that infringers were not permitted to assert the fair use defense.[5] Recent applications of the *SFAA* decision[6] illustrate the confusion this holding still causes courts in the United States fourteen years later.

However, confusion over the exclusive right to the word "Olympic" does not seem to be an international phenomenon.[7] While protection of the Olympic symbol in other countries is also broader than that of the typical trademark, recent international cases concerning the use of the word "Olym-

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[1] *See* Darryl Richards, *Playing Against Stereotype*, DALLAS MORNING NEWS, June 17, 1994, at 16B; Karen Mattias, *L.A. Group to Make Bid to Host 2006 Gay Games*, L.A. TIMES, Sept. 23, 2001, at B6.

[2] 36 U.S.C. § 220506 (2001).

[3] San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987).

[4] *Id.* at 560-61.

[5] *See id.*

[6] *See* United States Olympic Comm. v. Toy Truck Lines, Inc., 237 F.3d 1331 (Fed. Cir. 2001); United States Olympic Comm. v. American Media, Inc., No. 01-K-281, 2001 U.S. Dist. LEXIS 11523 (D. Colo. Aug. 3, 2001).

[7] Robin Jacob, *Trade Marks and the Olympic Games Throughout the Years*, 23 EUR. INTELL. PROP. REV. 1, 2 (2001).

pic" illustrate that there are still limits that prevent an arbitrary exercise of power as seen in the United States through the *SFAA* decision.[8]

This paper analyzes how the broad discretion given to the USOC under the Amateur Sports Act has led to a confusing and unfair application of trademark rights in the word "Olympic" that differ from the rights of normal trademark holders.[9] This paper will contrast the wide protection of the word "Olympic" in the United States with that of four other countries. Part II focuses on United States protection of the word "Olympic," providing a general overview of United States trademark law before moving into a discussion of two key trademark concepts that are absent from the Amateur Sports Act: the "likelihood of confusion test" and the "fair use defense." Part IIB examines the Amateur Sports Act in more detail, focusing on the different protection given to the USOC in the word "Olympic." Part IIC focuses on the *SFAA* decision in detail, examining the reasoning of both the majority and dissent. Part III revisits the implications of the *SFAA* decision by focusing on two recent decisions that used the reasoning of *SFAA*, but arrived at different results. Part IIIB further discusses the relevant statutory and case law in five different countries—England, France, Canada, Australia, and New Zealand—in order to compare the protection of "Olympic" in these countries to that of the United States. Part III concludes by examining the potential for discrimination by the USOC as a result of the *SFAA* decision.

Finally, this paper posits two solutions to prevent the arbitrary exercise of power seen in *SFAA*. The two solutions are to incorporate the likelihood of confusion test and the fair use defense into the Amateur Sports Act or to adopt a combination of the approaches taken by other countries. In sum, the broad power given to the USOC through the *SFAA* decision should be changed to prevent the USOC from continuing to exercise its arbitrary power to allow only certain groups to use the word "Olympic."

II. BACKGROUND

A. Legal Concepts in U.S. Trademark Law

1. General trademark principles

The Lanham Trademark Act of 1946[10] defines a trademark as "any word, name, symbol, or device, or any combination thereof used by a person . . . to

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[8] *See* Robert N. Kravitz, *Trademarks, Speech and the Gay Olympics Case*, 69 B.U. L. REV. 131, 134-35 (1989); Kelly Browne, *A Sad Time for the Gay Olympics*: San Francisco Arts & Athletics v. United States Olympic Committee, 56 U. CIN. L. REV. 1487 (1988).

[9] *See* Kravitz, *supra* note 8.

[10] 15 U.S.C. §§ 1051-1129 (2001).

identify and distinguish his or her goods and . . . to indicate the source or the goods, even if that source is unknown."[11] A holder of a trademark may enforce his or her right to the exclusive use of that mark through damages or an injunction.[12]

Trademark law is designed to protect the compelling interests of both consumers and manufacturers.[13] On the consumer side, the ultimate goal of trademark law is to have symbols that quickly and inexpensively identify products for the purchasers.[14] For manufacturers, an identifiable trademark provides an incentive to produce quality goods.[15] Overall, "[t]he essence of trademark law is to prevent consumer confusion."[16]

An important distinction in trademark law is whether the speech is commercial or non-commercial. In general, the Supreme Court has held that commercial speech is not entitled to full First Amendment protection.[17] Since trademarks are generally seen as commercial in nature, they have received less First Amendment protection than other types of speech.[18] Therefore, "[a] defendant accused of infringement in a business context . . . is unable to claim full first amendment protection as a defense."[19]

The Amateur Sports Act has incorporated the basic trademark principles into the protection it grants the USOC over the word "Olympic." However, the Amateur Sports Act differs with respect to two important exceptions: it does not require that the USOC prove a likelihood of confusion and it does not allow infringers to utilize the fair use defense.[20]

2. *Likelihood of confusion*

Under both the Lanham Act and common law, infringement is determined by the likelihood of confusion test.[21] This requirement "that a plaintiff prove confusion insulates most run-of-the-mill trademark actions from first amendment challenges."[22] The test requires only that a person is confused as

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[11] *Id.* § 1127.
[12] *Id.* § 1117.
[13] Kravitz, *supra* note 8, at 134-35.
[14] *Id.* at 134.
[15] *Id.* at 135.
[16] *Id.*
[17] *Id.* at 137.
[18] *Id.*
[19] *Id.*
[20] *See* San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987).
[21] Kravitz, *supra* note 8, at 135-36.
[22] *Id.* at 136.

to the association or sponsorship of a particular product.[23] A trademark owner must show "a probability of confusion."[24] "Likely" has been defined as "synonymous with probable, but not merely possible, confusion."[25] Confusion has also been seen as not simply limited to "confusion as to the source of goods or services," but has been expanded to include confusion as to "affiliation, connection or association."[26]

The likelihood of confusion analysis requires a court to evaluate a number of factors including: (1) the strength of the mark; (2) the degree of similarity between the two marks; (3) the proximity of the products; (4) likelihood that a prior owner will bridge the gap; (5) proof of actual confusion; (6) defendant's good faith in adopting the mark; (7) quality of the defendant's product; and (8) sophistication of the buyers.[27] This analysis examines the mark in the context from the viewpoint of the ordinary consumer, looking at how the product as a whole is sold in the marketplace.[28]

3. Fair use defense

Under the Lanham Act, infringers are entitled to raise the traditional trademark defense of utilizing a name or symbol that "is descriptive of, and used fairly and in good faith only to describe the goods or services or such party, or their geographic origin."[29] This provision allows "others to use a protected mark to describe aspects of their own goods, provided the use is in good faith and not as a mark."[30] This defense also "illustrates that trademark protection does not give the owner a monopoly on the use of the words or symbols used to make up that mark."[31] However, the Court in *SFAA* decided that under the Amateur Sports Act, the fair use defense was not available to a potential trademark infringer. According to the Court, the language of the

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[23] Universal City Studios, Inc. v. Montgomery Ward & Co., 207 U.S.P.Q. (BNA) 852, 857 (N.D. Ill. 1980).

[24] Shakespeare Co. v. Silstar Corp. of America, 906 F. Supp. 997, 1007 (D.S.C. 1995) (quoting LaCoste Alligator, S.A. v. Bluestein's Men's Wear, Inc., 569 F. Supp. 491, 497 (D.S.C. 1983)).

[25] Alderman v. Iditarod Props., Inc., No. S-9285, 2001 WL 1205319, at *10 (D. Alaska Oct. 12, 2001).

[26] *Id.*

[27] Polaroid Corp. v. Polaroid Elecs. Corp., 287 F.2d 492, 495 (2d Cir. 1961).

[28] *Shakespeare*, 906 F. Supp. at 1007-08 (quoting Anheuser-Busch, Inc. v. L & L Wings, Inc., 962 F.2d 316, 319 (4th Cir. 1992)).

[29] 15 U.S.C. § 1115(b)(4) (2001).

[30] Car-Freshner Corp. v. S.C. Johnson & Son, Inc., 70 F.3d 267, 270 (2d Cir. 1995).

[31] Michael G. Frey, *Is It Fair to Confuse? An Examination of Trademark Protection, the Fair Use Defense, and the First Amendment*, 65 U. CIN. L. REV. 1255, 1265 (1997).

Amateur Sports Act quite obviously only refers to remedies available to the USOC under the Lanham Act, not trademark defenses.[32]

The Second Circuit has held that when the fair use defense is being considered, "what matters is whether the defendant is using the protected word or image descriptively, and not as a mark."[33] In the eyes of the court, "the public's right to use descriptive words or images in good faith in their ordinary descriptive sense must prevail over the exclusivity claims of the trademark owner."[34] The "fair use defense" is only available to those who use the words of description in a manner other than as a mark.[35]

B. Amateur Sports Act

The 1978 Amateur Sports Act was signed into law to resolve numerous problems that existed in amateur athletics at the time.[36] In addition to reaffirming the responsibilities of the USOC in its role in amateur sports and international competitions, the Act also provided the USOC with trademark protection in the word "Olympic."[37]

The Amateur Sports Act was reorganized in 1998 and, although the essence of the Act remained the same, a subsection was added.[38] Subsection 220506(d) was inserted specifically to address users of the word "Olympic" with pre-existing and geographic rights,[39] answering the unique concerns of businesses whose names referred to the Olympic Mountains in Washington State.[40] An additional provision in subsection (d) allowed businesses in the Washington State area west of the Cascade Mountains to continue using the word "Olympic" if they had been doing so prior to February 6, 1998.[41] The businesses were permitted to continue this use as long as sales and marketing outside the geographic area was not substantial and as long as the name was a geographic reference to the Olympic Mountains.[42]

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[32] San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 530 (1987).

[33] *Car-Freshner*, 70 F.3d at 269.

[34] *Id.*

[35] Sunmark, Inc. v. Ocean Spray Cranberries, Inc., 64 F.3d 1055, 1059 (7th Cir. 1995).

[36] Amateur Sports Act, 36 U.S.C. § 220506 (2001); *see* Steven B. Hay, *Guarding the Olympic Gold: Protecting the Marketability of Olympic Trademarks Through Section 110 of the Amateur Sports Act of 1978*, 16 SW. U. L. REV. 461 (1986).

[37] *See* Hay, *supra* note 36, at 463.

[38] *See* Amateur Sports Act § 220506.

[39] *See* S. REP. NO. 105-325, at 6 (1998).

[40] *Id.*

[41] *Id.*

[42] *Id.*

The rest of the Amateur Sports Act remained essentially the same. Section 220506(a) of the Act was used exclusively to describe the protected symbols and words, separating this from the civil action protection granted in § 220506(c).[43] Section 220506(b) allows the USOC to determine who may use or advertise their product using the protected words and symbols.[44] Section 220506(c) further allows the USOC to pursue a civil action for unauthorized use of the words or symbols under the Lanham Act[45] if the person uses such symbols to promote a theatrical or athletic event.[46] The most extensive

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[43] Amateur Sports Act § 220506. This section of the Act provides:

(a) Exclusive right of corporation. Except as provided in subsection (d) of this section, the corporation has the exclusive right to use:

(1) the name "United States Olympic Committee";

(2) the symbol of the International Olympic Committee, consisting of 5 interlocking rings, the symbol of the International Paralympic Committee, consisting of 3 TaiGeuks, or the symbol of the Pan-American Sports Organization, consisting of a torch surrounded by concentric rings;

(3) the emblem of the corporation, consisting of an escutcheon having a blue chief and vertically extending red and white bars on the base with 5 interlocking rings displayed on the chief; and

(4) the words "Olympic", "Olympiad", "Citius Altius Fortius", "Paralympic", "Paralympiad", "Pan-American", "America Espirito Sport Fraternite", or any combination of those words.

Id.

[44] *Id.* § 220506.

(b) Contributors and suppliers. The corporation may authorize contributors and suppliers of goods or services to use the trade name of the corporation or any trademark, symbol, insignia, or emblem of the International Olympic Committee, International Paralymic Committee, the Pan-American Sports Organization, or of the corporation to advertise that the contributions, goods or services were donated or supplied to, or approved, selected, or used by, the corporation, the United States Olympic team, the Paralymic team, the Pan-American team, or team members.

Id.

[45] 15 U.S.C. §§ 1051-1129 (2001).

[46] Amateur Sports Act § 220506.

(c) Civil action for unauthorized use. Except as provided in subsection (d) of this section, the corporation may file a civil action against a person for the remedies provided in the Act of July 5, 1946 (15 U.S.C. 1051 et seq.) (popularly known as the Trademark Act of 1946) if the person, without the consent of the corporation, uses for the purpose of trade, to induce the sale of any goods or services, or to promote any theatrical exhibition, athletic performance, or competition—

(1) the symbol described in subsection (a)(2) of this section;

(2) the emblem described in subsection (a)(3) of this section;

(3) the words described in subsection (a)(4) of this section, or any combination or simulation of those words tending to cause confusion or mistake, to deceive, or to falsely suggest a connection with the corporation or any Olympic, Paralympic, or Pan-American Games activity; or

interpretation of the Amateur Sports Act came in 1987 with the decision in *San Francisco Arts & Athletics v. United States Olympic Committee.*[47]

C. San Francisco Arts & Athletics v. United States Olympic Committee

San Francisco Arts & Athletics v. United States Olympic Committee is the seminal case that has guided protection of the word "Olympic" in the United States for over a decade. To stress the importance of applying normal trademark law standards in both the U.S. and other countries by revisiting this case, it is necessary to examine the details of *SFAA*.

In 1981, San Francisco Arts & Athletics ("SFAA"), a non-profit corporation, began promoting its Gay Olympic Games, a nine-day event scheduled for August 1982.[48] After a Gay Olympic Torch carried by over 2,000 runners arrived in San Francisco, from New York City, a Gay Olympic Flame would be lit for the opening ceremony.[49] Athletes were expected from hundreds of cities all over the world and during the opening ceremony, these athletes would march in uniform behind their respective city flags.[50] After competition in eighteen different contests, medals of gold, silver, and bronze were to be awarded to the appropriate winners.[51]

The executive director of the United States Olympic Committee ("USOC") wrote a letter to the SFAA in late 1981, informing them that the word "Olympic" was the exclusive trademark of the USOC under the Amateur Sports Act. The director requested that the SFAA stop using the word "Olympic" to describe its upcoming games.[52] Although the SFAA at first agreed to use the word "Athletic" instead, they began using the word "Olympic" again one month later.[53] When the USOC learned, through a newspaper article in May 1982, that the SFAA was still using the word "Olympic" to promote its games, the USOC brought suit in United States District Court for the District of California to enjoin its use.[54]

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(4) any trademark, trade name, sign, symbol, or insignia falsely representing association with, or authorization by, the International Olympic Committee, the International Paralympic Committee, the Pan-American Sports Organization, or the corporation.

Id.

[47] 483 U.S. 522 (1987).

[48] *Id.* at 525.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.* at 526.

[53] *Id.* It is not clear why the SFAA began using "Olympic" again.

[54] *Id.*

The district court granted a preliminary injunction that was affirmed by the Ninth Circuit Court of Appeals.[55] The court of appeals found that the Amateur Sports Act granted the USOC exclusive use of the word "Olympic" without having to prove that the use was confusing, and that an infringer had no right to the defenses available under the Lanham Act.[56] The court of appeals further found that the USOC was not a state actor[57] for the purposes of the Constitution.[58] Therefore, the USOC's property right in the word "Olympic" could be protected without violating the First Amendment.[59] The SFAA petitioned for a rehearing en banc, which was denied by the court.[60] Three judges on the court dissented, concerned that the majority's interpretation of the Amateur Sports Act raised First Amendment concerns.[61] The Supreme Court granted certiorari "to review the issues of statutory and constitutional interpretation decided by the Court of Appeals."[62]

The first argument advanced by the SFAA was that the court of appeals had erred by "interpreting the Act as granting the USOC anything more than a normal trademark in the word 'Olympic.'"[63] The Court, in an opinion written by Justice Powell, began its analysis by examining the language of the Amateur Sports Act.[64] Finding the language itself inconclusive, the Court turned to the legislative history and held that the "legislative history demonstrates that Congress intended to provide the USOC with exclusive control of

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[55] *Id.* After the preliminary injunction, the games were held under the name "Gay Games" in 1982 and 1986 in San Francisco. The Gay Games have been held every four years since 1982 in Vancouver, New York, and Amsterdam. The 1994 Games in New York had more than thirty-one events with about 10,000 athletes from forty-four different countries. The New York games had approximately 250,000 spectators and generated about $250 million. The 2002 Gay Games are scheduled to be held in Sydney, Australia. *See* Darryl Richards, *Playing Against Stereotype*, DALLAS MORNING NEWS, June 17, 1994, at 16B; Karen Mattias, *L.A. Group to Make Bid to Host 2006 Gay Games*, L.A. TIMES, Sept. 23, 2001, at B6.

[56] Int'l Olympic Comm. v. San Francisco Arts & Athletics, Inc., 781 F.2d 733, 736 (9th Cir. 1986).

[57] *Id.* at 737.

[58] Had the USOC been within the purview of the Constitution, the restriction on "Olympic" could have been seen as a potential First Amendment violation.

[59] San Francisco Arts & Athletics, 781 F.2d at 737.

[60] *Id.* The first dissent filed by the judges was withdrawn and a new dissent was filed in a separate opinion (the dissent was written by Judge Kozinski who was joined by Judges Pregerson and Norris). *See id.* For the text of the new dissent, see *International Olympic Committee v. San Francisco Arts & Athletics, Inc.*, 789 F.2d 1319 (9th Cir. 1986).

[61] San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 528 (1986).

[62] *Id.*

[63] *Id.*

[64] *Id.*

the word 'Olympic' without regard to whether an unauthorized use of the word tends to cause confusion."[65]

The SFAA also argued that the word "remedies" in the Act should be read as allowing traditional Lanham Act defenses (specifically, the fair use defense).[66] However, the Court disagreed and instead found that neither the clear language of the Act nor the legislative history incorporated Lanham Act defenses; rather, the word "remedies" referred to the specific type of remedies available for trademark infringement under the Lanham Act.[67]

The SFAA further argued that allowing the USOC to have a trademark in the word "Olympic" without having to prove likelihood of confusion in an unauthorized use was a First Amendment violation.[68] The Court returned to the Amateur Sports Act and found that § 220506 allowed the USOC to "prohibit the use of the word 'Olympic' for promotion of theatrical and athletic events."[69] The SFAA, however, claimed that the use of the word "Olympic" in their games was political speech because it was intended to make a statement about the "status of homosexuals in society."[70] Therefore, by preventing them from using the word "Olympic" in this case, the Act was suppressing the SFAA's political speech.[71]

The Court disagreed with the contention that the Act suppressed political speech. Reasoning that the word was only restricted for one particular purpose and that this restriction did not prevent the SFAA from conveying its message,[72] the Court pointed out that the SFAA was still able to keep the format of the athletic event under the name "Gay Games."[73] The Court also read the Act as restricting only the manner in which the word may be used, not one's purely expressive use.[74] Any restriction on expressive speech was thus incidental to the overall congressional purpose in granting the USOC protection under the Act.[75] The Court relied on *United States v. O'Brien*[76] for the premise that the appropriate inquiry in these types of situations is whether the incidental restriction on any First Amendment freedom of expression is broader than necessary.[77]

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[65] *Id.* at 530.
[66] *Id.*
[67] *Id.*
[68] *Id.* at 531-32.
[69] *Id.* at 535.
[70] *Id.*
[71] *Id.*
[72] *Id.* at 536.
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] 391 U.S. 367 (1968).
[77] *San Francisco Arts & Athletics*, 483 U.S. at 537.

The Court continued by examining the reasons Congress had granted the USOC such exclusive control under the Act.[78] The Court found that first, under traditional trademark reasoning, Congress wanted to ensure that the USOC would continue to have an incentive to produce a quality product that benefits the public.[79] The best way to ensure this was to grant the USOC the benefit of its own effort in creating the meaning in the word "Olympic."[80] The Court went further, however, by characterizing the situation with the USOC as a special circumstance where "Congress has a broader public interest in promoting, through the activities of the USOC, the participation of amateur athletes from the United States in [the Olympic Games]."[81] Therefore, according to the Court, any protection granted under the Act directly advances the governmental interest of supplying the USOC with an avenue to raise money for the Olympics.[82]

The Court further held that any restrictions granted by the Act were not broader than necessary because, unlike the Lanham Act, Congress's judgment concerning a specific word, such as "Olympic," is not limited to protecting only against confusing use.[83] Congress could reasonably conclude that not only were most commercial uses of the word "Olympic" confusing, but also that any unauthorized non-commercial use may still be harmful to the USOC.[84] Such use may lessen the distinctiveness and therefore the commercial value of the mark.[85] The Court concluded that because the SFAA was selling products with the title of "Gay Olympic Games," the prospect of sponsorship confusion existed.[86]

The Court also examined the protection granted by the Act for uses that were promotional rather than purely commercial, particularly in connection with athletic events.[87] The Court reasoned that the USOC had created the value in the word "Olympic" through athletic events and that Congress could have reasonably found that use of the word by others to promote an athletic event would be a direct infringement on the USOC's exclusive right.[88] The Court held that the SFAA's use, in particular, the organization of their games, was the perfect example of the type of infringement Congress sought to

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[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.* at 538.
[83] *Id.* at 539.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* at 540.
[88] *Id.*

prevent.[89] The Court further held that the SFAA did not have a First Amendment right to use the word purely because it claimed an expressive use—one still must consider the value that the USOC has created in the word "Olympic."[90]

The strongest justification for revisiting *SFAA* and applying the likelihood of confusion test and the fair use defense is articulated most clearly in the dissent of the case. Written by Justice Brennan, the dissent illustrates the forward-thinking approach that the majority should have taken fourteen years ago.

Justice Brennan contended that the Amateur Sports Act is "both substantially overbroad and discriminates on the basis of content."[91] Brennan first argued that the majority interpretation of the Act created serious First Amendment concerns.[92] According to the dissent, "[t]he statute is overbroad on its face because it is susceptible of application to a substantial amount of non-commercial speech, and vests the USOC with unguided discretion to approve and disapprove others' non-commercial use of the word 'Olympic.'"[93]

The dissent contended that the Amateur Sports Act is overbroad for two main reasons. First, it grants the USOC the traditional remedies of a trademark violation, but does not allow infringers to utilize the defenses to trademark infringement under the Lanham Act.[94] Second, the Act allows the USOC to prohibit even non-commercial or expressive uses of the word the word "Olympic" in theatrical and athletic events.[95] Moreover, the traditional defenses under the Lanham Act are "essential safeguards which prevent trademark power from infringing upon constitutionally protected speech."[96] As Justice Brennan said, "without them, the Amateur Sports Act prohibits a substantial amount of non-commercial speech."[97]

Justice Brennan supported his argument by turning to the Lanham Act itself. He argued that the Lanham Act prevents the substantial regulation of non-commercial speech by requiring that the alleged infringer prove that the use is likely to confuse consumers, and by permitting infringers to use the fair use defense.[98] By not requiring the USOC to prove that an infringer's use would

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[89] *Id.*

[90] *Id.* at 541.

[91] *Id.* at 548 (Brennan, J., dissenting). Justice Brennan was joined by Justice Marshall.

[92] *Id.* at 561.

[93] *Id.* Justice Brennan continued by arguing that "eliminating even non-commercial uses of a particular word, it unconstitutionally infringes on the SFAA's right to freedom of expression. The Act also restricts speech in a way that is not content neutral." *Id.*

[94] *Id.* at 562.

[95] *Id.*

[96] *Id.*

[97] *Id.* at 564.

[98] *Id.* at 564-65.

confuse consumers and by not adding the fair use defense to the Act, Congress has "conferr[ed] an unprecedented right on the USOC."[99]

The dissent further argued that by allowing the USOC to prohibit the use of the word "Olympic" for promoting athletic and theatrical events, which are generally non-commercial in nature, Congress had given the USOC "additional authority to regulate a substantial amount of non-commercial speech that serves to promote social and political ideas."[100] Such broad discretion, according to Brennan, "creates the potential for significant suppression of protected speech."[101]

The dissent further contended that "[t]he Amateur Sports Act gives a single entity exclusive control over a wide range of uses of a word with a deep history in the English language and Western culture."[102] As a result, there is a substantial infringement on the right of an entity, such as the SFAA, to communicate ideas.[103] In this same vein, Justice Brennan also argued that because the Act restricts speech in a manner that is not content neutral,[104] it singles out certain groups that may use the word.[105] Allowing the USOC to endorse certain non-commercial messages while banning others is not permissible under the First Amendment.[106]

Finally, Justice Brennan argued that the restrictions imposed by the Act are "greater than necessary to further a substantial Government interest."[107] To support this assertion, Justice Brennan relied primarily on the fact that there was no evidence in the record containing any proof that the SFAA's use of the word "Olympic" would dilute or weaken the trademark.[108] Further, "there [was] no proof in the record that the Lanham Act inadequately protects the USOC's commercial interest in its image or that the SFAA has harmed the USOC's image by its speech."[109] The dissent concluded that the USOC had

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[99] *Id.* at 565.

[100] *Id.* at 567.

[101] *Id.* at 568.

[102] *Id.* at 569.

[103] *Id.* at 570.

[104] Justice Brennan argued that there may be a wide variety of groups that wish to express their sociopolitical message through the word "Olympic," but the Amateur Sports Act allows certain groups to receive favorable treatment. *Id.*

[105] *Id.* Justice Brennan pointed out that in the Act, Congress encouraged the USOC to use the word in athletic competitions for the youth and the handicapped, but has allowed it to deny use of the word to elderly events and to promote bodybuilding. *Id.*

[106] *Id.* at 570-71.

[107] *Id.* at 571.

[108] *Id.* at 572.

[109] *Id.*

not demonstrated any need for protection greater than that provided by the Lanham Act.[110]

III. ANALYSIS

The broad right to the word "Olympic" given to the USOC through the *SFAA* decision is a departure from the protection given to both the typical U.S. trademark holder and protection of the word "Olympic" in the international realm.[111] However, by treating the USOC differently than other trademark holders, the *SFAA* decision raised concerns that are still prevalent today.

A. Revisiting SFAA *Fourteen Years Later*

SFAA granted the USOC a wide discretion over the word "Olympic" by eliminating two First Amendment buffers in trademark law: "the likelihood of confusion test" and the "fair use defense."[112] Two recent applications of *SFAA* illustrate that lower courts are still having difficulty with this elimination today.

1. Recent applications of SFAA

In *United States Olympic Committee v. Toy Truck Lines, Inc.*,[113] Toy Truck Lines applied to register the mark "Pan American" for a line of miniature toy trucks.[114] The USOC filed an opposition to this registration based on its ownership of the marks "Pan American Games," "USA Pan Am Team," and "Pan Am Games" under the Amateur Sports Act.[115] The Trademark Trial and Appeal Board held that the USOC did not prove that the mark on the toy truck line would "falsely suggest a connection to the USOC or the Pan American Games, and that the USOC did not prove that Toy Truck Line's intended use of this mark would be likely to cause confusion as to the source or sponsorship of the toy and model trucks."[116] As a result, the Board dismissed the USOC's opposition to Toy Truck Line's registration.[117]

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[110] *Id.* at 573.
[111] *See* Kravitz, *supra* note 8; *see also* Jacob, *supra* note 7.
[112] Kravitz, *supra* note 8, at 135, 137.
[113] 237 F.3d 1331 (Fed. Cir. 2001).
[114] *Id.* at 1332.
[115] *Id.*
[116] *Id.* at 1334.
[117] *Id.*

The USOC appealed and the Federal Circuit Court of Appeals subsequently reversed the decision of the Board.[118] The reversal was based on *SFAA*'s interpretation of the Amateur Sports Act that the USOC was not required to prove likelihood of confusion in opposition to another's use of the word "Olympic" under the Act.[119] Therefore, the Board's finding that there was no likelihood of confusion as to the source of the "Pan American" toy trucks or a false suggestion of a connection to the USOC was irrelevant.[120] The court of appeals further held that "as a matter of law the USOC must prevail."[121]

The second recent case based on the *SFAA* decision was brought by the USOC against American Media, Inc. ("AMI").[122] Before the 2000 Summer Olympics, AMI published a magazine entitled *Olympics USA*.[123] The magazine contained several layouts that described the thirty-two Olympic events, including a description of each event and photographs of the various athletes who were participating.[124] The magazine also included a schedule of the events and broadcast times for the Sydney Olympics.[125]

In its action against AMI, the USOC claimed that AMI had violated the Amateur Sports Act with its unauthorized use of the words "Olympic" and "Olympic 2000," which appeared numerous times throughout the magazine.[126] The magazine contained a disclaimer on the table of contents page that denied any affiliation with or sanctioning of the magazine by the USOC.[127]

The United States District Court for the District of Colorado relied on *SFAA*'s interpretation of the Amateur Sports Act as the basis for its decision in this case.[128] The court first examined *SFAA*'s distinction between commercial and non-commercial speech.[129] The court found that while *SFAA*'s interpretation of the Act did allow some incidental restrictions on non-

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[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] United States Olympic Comm. v. American Media, Inc., No. 01-K-281, 2001 U.S. Dist. LEXIS 11523 (D. Colo. Aug. 3, 2001).

[123] *Id.* at *3.

[124] *Id.* at *4.

[125] *Id.*

[126] *Id.* at *5. The USOC further alleged that the magazine contained unauthorized uses of the various Olympic marks, such as the Olympic torch and flame and descriptions of the gold, silver, and bronze medals. This is similar to the games in *SFAA*: the athletes were awarded gold, silver, and bronze medals advertised under a logo of three overlapping rings. However, the similarity of the medals and logo were collateral to the USOC challenge of the SFAA's use of the word "Olympic." *See* San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987).

[127] *American Media, Inc.*, 2001 U.S. Dist. LEXIS 11523, at *5.

[128] *Id.*

[129] *Id.* at *14.

commercial speech if the event was theatrical or athletic, these restrictions were justified and therefore not a First Amendment violation.[130] The court then focused on *SFAA*'s interpretation concerning commercial speech, finding that the phrase "for the purpose of trade, and to induce the sale of goods" in the Amateur Sports Act applied only to commercial speech.[131] Therefore, the court held that the "USOC can only state a claim under the Act . . . if 'Olympics USA' can be characterized as commercial speech."[132]

The court determined that, based on the Supreme Court's definition of "commercial speech," the magazine *Olympics USA* did not qualify.[133] The court found that, at most, the magazine was designed for profit, but that soliciting customers to buy a publication was not enough to constitute "commercial speech."[134] The court also held that to find the magazine was "commercial speech" would broaden the limited definition and raise First Amendment concerns.[135] The court further held that since, per *SFAA*, the Amateur Sports Act grants the USOC such broad rights over the word "Olympic," "the language and scope of the Act must be strictly construed. To extend the Act to give the USOC authority over speech that clearly is not commercial under established First Amendment doctrine would violate this principle."[136] Therefore, the USOC could not pursue a claim against AMI under the Amateur Sports Act.[137]

However, the court found that the USOC did hold traditional trademark rights to the word "Olympic" and could, if they chose, pursue a claim under the Lanham Act: "It is accepted doctrine that the Lanham Act may restrict non-commercial speech 'where the public interest in avoiding consumer confusion outweighs the public interest in free expression.'"[138] If the USOC chose to pursue a claim under the Lanham Act, the court suggested that the AMI must have "explicitly and falsely denoted authorship, sponsorship, or endorsement by the [USOC] or explicitly mislead as to content."[139] This standard could be used to decide whether AMI's use of the Olympic marks in the magazine "either falsely denotes affiliation with or endorsement by the USOC or explicitly misleads the public about the content of the magazine."[140]

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[130] *Id.*

[131] *Id.* at *15.

[132] *Id.* at *15-*16.

[133] *Id.* at *19.

[134] *Id.* at *19-*23.

[135] *Id.* at *24.

[136] *Id.*

[137] *Id.*

[138] *Id.* at *25 (quoting Rogers v. Grimaldi, 875 F.2d 994, 999 (2d Cir. 1989)).

[139] *Id.* at *27 (quoting New Kids on the Block v. News America Publ'g, Inc., 745 F. Supp. 1540, 1545 (C.D. Cal. 1990)).

[140] *Id.*

Therefore, the USOC would have to use the same standards that everyone else must use in a claim for a trademark violation under the Lanham Act.

These two recent applications of *SFAA* illustrate the two paths courts have taken in interpreting the *SFAA* decision. These conflicting interpretations indicate a need to revise the protection granted to the USOC in *SFAA*. In *Toy Truck Lines*,[141] the court chose to strictly apply the reasoning of *SFAA* by holding it was not necessary for the USOC to prove likelihood of confusion.[142] However, in *American Media, Inc.*,[143] the court demonstrated that there are concerns that the wide protection given to the USOC over the word "Olympic" places undue restrictions on speech.[144] As a result, instead of allowing the USOC to pursue a claim based on their broad authority under the Amateur Sports Act, the court treated the USOC as a traditional trademark holder who could pursue a claim under the Lanham Act.[145] Treating the USOC as a traditional trademark holder may indicate that some courts are leaning towards eroding the broad rights in the word "Olympic" given to the USOC under *SFAA* and placing the protection of the word "Olympic" within the same realm as the typical U.S. trademark holder. One could argue that this latter approach is more in line with international protection of the word "Olympic," and is thus a modern rebuff of the United States Supreme Court decision in *SFAA*.

B. International Protection of the Word "Olympic"

1. General international law on the protection of the word "Olympic"

The international protection of the word "Olympic" and its related symbols can be traced to the Olympic Charter, a document that spells out the international practice and rules necessary to govern the Olympic Games.[146] Each country must create its own "national governing body" to administer the Olympics within that nation.[147] The rules and regulations in the Charter are recognized by state and international law as authoritative and therefore binding.[148] The Olympic Charter says, "All rights to the Olympic symbol, the

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[141] United States Olympic Comm. v. Toy Truck Lines, Inc., 237 F.3d 1331 (Fed. Cir. 2001).

[142] *Id.*

[143] *American Media*, 2001 U.S. Dist. LEXIS 11523.

[144] *Id.*

[145] *Id.*

[146] *See* David J. Ettinger, *The Legal Status of the International Olympic Committee*, 4 PACE Y.B. INT'L L. J. 97, 98 (1992).

[147] *Id.*

[148] *Id.* at 104.

Olympic flag, the Olympic motto and the Olympic anthem belong exclusively to the [International Olympic Committee]."[149]

Under the Olympic Charter, the governing body of each country is responsible for protecting the Olympic mark and related symbols on behalf of the International Olympic Committee.[150] However, not all countries have chosen to follow the broad protection found in the United States, as seen in several court decisions more recent than *SFAA*. Five countries of particular interest—Canada, England, France, Australia, and New Zealand—are discussed below.

2. *Protection of the word "Olympic" in Canada*

Much like other countries, Canada affords the Olympic trademark a wider protection than the typical trademark.[151] In a case interpreting the protection of the word "Olympic," the Canadian Olympic Association ("COA") appealed a Registrar of Trade Marks decision that had permitted Gym & Tonic, a Canadian business, to register stylized pictograms of "G" and "T."[152] The COA opposed the registration because the marks were similar to Olympic pictograms that had already been registered.[153]

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[149] *Olympic Charter*, http://www.olympic.org/ioc/e/facts/charter/charter_movement_e.html (last visited Feb. 13, 2002).

[150] *See* Cass. Com., June 29, 1999, E.T.M.R. 2001, 33, note Bezard (Fr.). The Olympic Charter provides:

> Each NOC [National Olympic Committee] is responsible to the IOC for the observance, in its country, of Rules 12, 13, 14, 15, 16 and 17 and of their Bye-law. It shall take steps to prohibit any use of the Olympic symbol, flag, motto or anthem which would be contrary to these Rules or their Bye-law. It shall also endeavour to obtain protection of the designations "Olympic" and "Olympiad" for the benefit of the IOC.

Olympic Charter, http://www.olympic.org/ioc/e/facts/charter/charter_movement_e.html (last visited Feb. 13, 2002).

[151] Canadian Olympic Ass'n v. Gym & Tonic Ltd., [1988] 8 C.P.R. (3d) 353 (Can.). The protection can be found under the Trade Marks Act which states:

> 9.(1) No person shall adopt in connection with a business, as a trade mark or otherwise, any mark consisting of, or so nearly resembling as to be likely to be mistaken for
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> . . . .
>
> (n) any badge, crest, emblem or mark
>
> . . . .
>
> (iii) adopted and used by any public authority in Canada as an official mark for wares or services, in respect of which the Registrar had, at the request of Her Majesty or of the university or public authority as the case may be, given public notice of its adoption and use.

Trade Marks Act, R.S.C., ch. T-13, § 9(1)(n)(iii) (2001) (Can.).

[152] Canadian Olympic Ass'n. v. Gym & Tonic Ltd., [1988] 8 C.P.R. (3d) 353 (Can.).

[153] *Id.*

The court examined Gym & Tonic's design and concluded that it was essentially indistinguishable from the Olympic pictograms.[154] The court found that the public purpose for the wide protection of the word "Olympic" was primarily "to preserve the integrity of these marks against any intrusion."[155] The court also stressed that this wide protection was justified because of the funding needs of the Canadian Olympic Association, stating, "It is no wonder that public policy requires that strong monopoly be given the association with respect to its mark, its symbols and its emblems in order to maximize the financial returns in marketing or licensing them to commercial establishments."[156] By comparing the Gym & Tonic marks with the Olympic pictograms, the Canadian court took an approach similar to that seen in United States courts when applying the likelihood of confusion test. However, the courts in England, France, and New Zealand took a different approach to the protection of the word "Olympic" than that used in the United States under *SFAA*.

3. Protection of the word "Olympic" under English law

In England, the word "Olympic" is protected through the Olympic Symbol Etc. (Protection) Act, 1995.[157] The Act provides guidelines for what constitutes an infringement of the word "Olympic," mostly in the commercial context.[158] Essentially, any representation of the word "Olympic," including one that is similar enough to cause the public to create an association with the

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[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] Olympic Symbol Etc. (Protection) Act, 1995, c. 32 §§ 1-18 (Eng.).

[158] The act provides:

(1) A person infringes the Olympics association right if in the course of trade he uses—
  (a) a representation of the Olympic symbol, the Olympic motto or a protected word, or
  (b) a representation of something so similar to the Olympic symbol or the Olympic motto as to be likely to create in the public mind an association with it.
  (in this Act referred to as "a controlled representation")

(2) For the purposes of this section, a person uses a controlled representation if, in particular, he—
  (a) affixes it to goods or the packaging thereof,
  (b) incorporates it in a flag or banner,
  (c) offers or exposes for sale, puts on the market or stocks for those purposes goods which bear it or whose packaging bears it,
  (d) imports or exports goods which bear it or whose packaging bears it,
  (e) offers or supplies services under a sign which consists of or contains it, or
  (f) uses it on business papers or in advertising.

Id.

Olympics, is a violation.[159] The Act further provides guidelines to determine when an infringement has taken place. It also sets forth potential defenses an infringer can use.[160]

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[159] *Id.*

[160] The section setting out limits on the effect of the act states in relevant part:

(1) The Olympics association right is not infringed by use of a controlled representation where—

(a) the use consists of use in a work of any or the descriptions mentioned in subsection (3) below, and

(b) the person using the representation does not intend the work to be used in relation to goods or services in circumstances which would involve an infringement of the Olympic association right, provided the use in accordance with honest practices in industrial or commercial matters.

(2) The Olympics association right is not infringed by use of a controlled representation where—

(a) the use consists of use of a work of any of the descriptions mentioned in subsection (3) below, and

(b) the use of the work is not in relation to goods or services, provided the use of the representation is in accord with honest practices in industrial or commercial matters.

(3) The descriptions of work referred to in subsections (1)(a) and (2)(a) above are a literary work, a dramatic work, a musical work, an artistic work, a sound recording, a film, a broadcast and a cable programme, in each case within the meaning of Part I of the Copyright, Designs and Patents Act 1988.

(4) For the purposes of subsection (2)(b) above, there shall be disregarded any use in relation to a work which—

(a) is of any of the descriptions mentioned in subsection (3) above, and

(b) is to any extent about the Olympic games or the Olympic movement.

(5) For the purposes of subsection (2)(b) above, use of a work in relation to goods shall be disregarded where—

(a) the work is to any extent about the Olympic games or the Olympic movement, and

(b) the person using the work does not do so with a view to gain for himself or another or with the intent to cause loss to another.

(6) In the case of a representation of a protected word, the Olympics association right is not infringed by use which is not such as ordinarily to create an association with—

(a) the Olympic games or with the Olympic movement, or

(b) a quality ordinarily associated with the Olympic games or the Olympic movement.

(7) In the case of a representation of a protected word, the Olympics association right is not infringed by use which creates an association between the Olympic games or the Olympic movement and any person or thing where the association fairly represents a connection between the two, provided the use is in accordance with honest practices in industrial and commercial matters.

Id. § 4.

The section of the act governing offenses in relation to goods provides in pertinent part:

(4) It shall be a defence for a person charged with an offence under this section to show that he believed on reasonable grounds that the use of the representation in the manner

In comparison to normal trademark protection in England, the Olympic Symbol Etc. (Protection) Act is seen as conferring a wider protection, similar to that of the U.S.[161] However, *unlike* the Amateur Sports Act in the United States, the English Act contains exceptions that allow people to use "Olympic."[162] The English Act also allows infringers a defense that is not incorporated into the Amateur Sports Act.[163] Under the English Act, if one reasonably believes that one's use of the word "Olympic" is not infringing on the right of the Olympic Association, the use may be allowed.[164]

4. Protection of the word "Olympic" in France

In France, protection for the word "Olympic" can be found in the Intellectual Property Code.[165] This Code was applied in *SCA Galec v. CNOSF*, a 1999 case that involved a dispute over Galec's use of the word "Olymprix" in an advertising campaign.[166] The court of appeals[167] determined that Galec's use of "Olymprix" was a violation of the Intellectual Property Code.[168] The court found that infringement of the word "Olympic" could include incorporating it with another term or using a phonetic assonance or semantic representation of the word.[169] The highest court disagreed, finding that this interpretation of the Intellectual Property Code was incorrect—there was no express prohibition on uses of a similar mark within the Intellectual Property Code.[170] Therefore, the judgment was set aside and the case remanded for a rehearing on whether the Intellectual Property Code allows a famous trademark, such as the word "Olympic," to be used in connection with another mark.[171] The approach by the French court in this case indicates that, unlike the U.S. approach, there is more consideration given to the circumstances in which the word "Olympic" is used and more leeway in allowing a person to use some form of the word.

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in which it was used, or was to be used, was not an infringement of the Olympics association right.

Id. § 8.

[161] *See generally* Jacob, *supra* note 7, at 2.

[162] *See id.*

[163] *See* Olympic Symbol Etc. (Protection) Act, 1995, c. 32 § 8 (Eng.).

[164] *Id.*

[165] The French court has interpreted Article L. 713-5, Intellectual Property Code as prohibiting the unauthorized use of a famous trademark, including the word "Olympic." However, the Code does not expressly prevent the suggestion or the use of a similar form or sign. Cass. Com., June 29, 1999, E.T.M.R. 2001, 33, note M. Bezard (Fr.).

[166] *Id.* at 370.

[167] Cour d'appel de Versailles; *see id.* at 368.

[168] *Id.*

[169] *Id.* at 370.

[170] *Id.*

[171] *Id.*

5. Protection for the word "Olympic" in Australia and New Zealand

In Australia, the Olympic Insignia Protection Act gives the Australian Olympic Committee ("AOC") "virtually a statutory monopoly over the use of the Olympic rings and torch and flame."[172] These rights are in addition to the normal trademark rights the AOC would have.[173] However, the Act seems to allow room for a potential user of the Olympic trademark to ensure that an innocent purchaser does not get the false impression that the user's products are endorsed by the AOC or the International Olympic Committee.[174]

Like Australia, New Zealand also allows a potential user of the word "Olympic" to prove that there would be no confusion as to sponsorship. This similar protection can be seen in the 1996 case *New Zealand Olympic & Commonwealth Games Ass'n v. Telecom New Zealand Ltd.*[175] Telecom was utilizing an advertisement that had the word "ring" five times on the page in blue, black, red, yellow, and green with the phrase "with Telecom mobile you can take your own mobile phone to the Olympics."[176] The New Zealand Olympic Association ("NZOA") objected, complaining that the advertisement would convey an association or connection to the New Zealand Olympic team or the Olympic movement.[177]

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[172] Patrick Deane, *Exploitation of Olympic Symbols*, EUR. INTELL. PROP. REV. 17(3) 161 (1995).

Australia's Olympic Insignia Protection Act of 1987 reads in relevant part:

(1) A person infringes the monopoly in a protected design if:

(a) in the case of the design of the Olympic symbol-at any time; or

(b) in the case of a registered olympic design or registered torch and flame design-during the protection period in relation to that design; the person, without the license of the Committee;

. . . .

(d) imports into Australia for sale, or for use for the purposes of any trade or business, any article to which the design or any fraudulent or obvious imitation of it has been applied, whether before or after the commencement of this Act, outside Australia

. . . .

(2) A person does not infringe the monopoly in a protected design by virtue of the application of paragraph (1)(c) or subparagraph (1)(e)(i) in relation to an article if, at the time when the person did the act that, but for this subsection, would have constituted infringement, the person did not intend that the article would be used in Australia at a later time by any person.

Olympic Insignia Protection Act of 1987 (1994) (Austl.).

[173] *See* Deane, *supra* note 172, at 161-62.

[174] *Id.* at 162.

[175] [1996] F.S.R. 757 (N.Z.).

[176] *Id.* at 757.

[177] *Id.*

The court examined this contention by focusing on the potential effects on the reader.[178] The court found that there was not a "significant likelihood of presumption by readers that Telecom [was] connected with or a sponsor of the Olympics."[179] The court further held that "[t]hose who notice the five coloured 'ring' words, then drop their gaze to the next line picking up the reference to the Olympics . . . and then make an association with the five circle Olympic symbol, will be mildly amused."[180] The court reasoned, "it is a long way from that brief mental process to an assumption that this play on the Olympic five circles must have been with the authority of the Olympic organisation, or through sponsorship of the Olympics."[181]

The approaches to protecting the word "Olympic" in Canada, England, France, Australia, and New Zealand illustrate that the word can be protected without the monopoly one finds in the United States under *SFAA*. Perhaps the most important aspect of this narrower international protection is that there is less potential for discrimination. In other words, it would be difficult under the English act, for example, for an Olympic organization to arbitrarily decide which groups they will allow to use the word "Olympic." In addition, this is one area of international trademark law where the United States does not follow the international intellectual property standards as seen in the Trade Related Aspects of International Property Rights Agreement ("TRIPS").[182] One could argue that the importance of following the TRIPS Agreement is a key reason for revisiting and revising the *SFAA* decision.

C. Potential for Discrimination Under SFAA

The new social and judicial attitudes that exist toward gays and lesbians today are yet another reason that *SFAA* deserves to be revisited.[183] Perhaps even more importantly, one could argue that there is a sharper division on gay rights in the U.S. Supreme Court today than in 1985.[184] With such a sharp

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[178] *Id.* at 762.

[179] *Id.* at 763.

[180] *Id.*

[181] *Id.*

[182] International intellectual property protection is currently governed by the TRIPS Agreement. This international agreement holds all World Trade Organization countries to a core of established intellectual property norms with the ultimate goal of creating an international, consistent system of intellectual property rules. *See* J.H. Reichman, *From Free Riders to Fair Followers: Global Competition Under the TRIPS Agreement*, 29 N.Y.U. J. INT'L L. & POL. 11 (1997).

[183] *See* Scott P. Johnson, *An Analysis of the U.S. Supreme Court's Decision Making in Gay Rights Cases (1985-2000)*, 27 OHIO N.U. L. REV. 197 (2001). Johnson contends that the Rehnquist Court has been supportive of gay rights in three cases concerning equality issues. *Id.* at 221.

[184] *Id.* at 227.

division, the replacement of a single Justice could change the balance of the Court.[185] Such a possibility highlights the need to revisit a case like *SFAA* because it grants one organization, the USOC, the power to discriminate against a group like gays and lesbians.[186]

One criticism of *SFAA* has been that it deviated from normal U.S. trademark law by interpreting the Amateur Sports Act as not requiring the USOC to prove "likelihood of confusion" when bringing an infringement action.[187] In addition, an infringer is not allowed to use the typical trademark defense of "fair use."[188] Under § 220506, the USOC has a significantly smaller burden.[189] If an exact copy of the protected item is utilized, the USOC must only prove that such use was unauthorized.[190] Also, if a person uses a simulation of the symbol or words, the USOC must only prove that it tends to confuse, not that it is likely to confuse.[191] Further, the USOC does not need to show that an unauthorized use of the mark has occurred on goods or services that are similar to those used by the USOC.[192] "Therefore, a section [220506] violation occurs the moment a person uses an infringing mark on any good or service, regardless of whether the USOC uses one of its designations on a similar good or service."[193]

The lower courts in *SFAA* examined the language of the Act itself to determine if it contained the "likelihood of confusion" requirement.[194] The District Court for the Northern District of California held that, by using the word "tending" rather than "likely," "Congress must have meant to place less of a burden on a plaintiff under a [§ 220506] cause of action than that placed upon a plaintiff suing under the Trademark Act alone."[195]

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[185] *Id.*

[186] In his dissenting opinion, Justice Kozinski said:

> [I]t seems that the USOC is using its control over the term Olympic to promote the very image of homosexuals that the SFAA seeks to combat: handicapped, juniors, police, Explorers, even dogs are allowed to carry the Olympic torch, but homosexuals are not.

Int'l Olympic Comm. v. San Francisco Arts & Athletics, Inc., 789 F.2d 1319, 1323 (9th Cir. 1986) (Kozinksi, J., dissenting).

[187] *See generally* San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 562 (1987) (Brennan, J., dissenting); *see also* Kravitz, *supra* note 8; Browne, *supra* note 8.

[188] *San Francisco Arts & Athletics*, 483 U.S. at 530.

[189] *See* Hay, *supra* note 36, at 494.

[190] *Id.*; *see* Int'l Olympic Comm. v. San Francisco Arts & Athletics, Inc., 781 F.2d 733 (9th Cir. 1986).

[191] Hay, *supra* note 36, at 494.

[192] *Id.*

[193] *Id.*

[194] *San Francisco Arts & Athletics*, 483 U.S. at 528.

[195] Int'l Olympic Comm. v. San Francisco Arts & Athletics, Inc., No. C-4183, 1982 U.S. Dist. LEXIS 17586, at *16 (N.D. Cal. Aug. 20, 1982).

The Supreme Court found that the USOC has a right to sue for infringement in certain non-commercial situations, such as promotion of theatrical or athletic events.[196] However, the Court held that such a restriction in this non-commercial context was not unreasonable since "in the special circumstance of the USOC, Congress has a broader public interest in promoting, through the activities of the USOC, the participation of amateur athletes from the United States in [the Olympic Games]."[197] The Court further held that "Congress . . . could determine that unauthorized uses, even if not confusing, nevertheless may harm the USOC by lessening the distinctiveness and thus the commercial value of the marks."[198]

The *SFAA* decision essentially allows the USOC to prevent certain groups from using the word "Olympic" while allowing others to use the mark freely. For example, the USOC has allowed youth groups and organizations that sponsor events for handicapped individuals to use the word "Olympic," but has brought suits against a variety of other organizations attempting to use the word.[199] One could argue that this selection of certain groups over others constitutes discrimination particularly if, as in the case of *SFAA*, it is a message with which the USOC does not agree.[200] Most scholars have argued that the *SFAA* decision is disturbing because it targeted a group, stopping it from promoting a message of gay unity and pride.[201] The only way to prevent this arbitrary targeting by the USOC would be to adopt a different approach to the protection that the USOC has over the word "Olympic." The last section of this paper will discuss two potential solutions to this protection problem in more detail.

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[196] *San Francisco Arts & Athletics*, 483 U.S. at 540; *see also* S.T.O.P. the Olympic Prison v. United States Olympic Comm., 489 F. Supp. 1112 (S.D.N.Y. 1980) (holding that there was no violation of the Amateur Sports Act because the poster at issue was not used to induce the sale of goods or promote a theatrical event—the use was strictly non-commercial).

[197] *San Francisco Arts & Athletics*, 483 U.S. at 537.

[198] *Id.* at 539.

[199] The groups that the USOC has prevented from using "Olympic" include a group sponsoring the "Golden Age Olympics," the March of Dimes, and a bus company. *Id.* at 543 n.22. It is also important to note that, at the time the litigation of this case began, over 140 businesses and organizations in the Los Angeles area phone book had "Olympic" in their name, but suits were not brought against any of these organizations. *See* Int'l Olympic Comm. v. San Francisco Arts & Athletics, Inc., 789 F.2d 1319, 1323 n.4 (9th Cir. 1986) (Kozinski, J., dissenting); *see also* Kravitz, *supra* note 8.

[200] *See* Browne, *supra* note 8; *see also* Kravitz, *supra* note 8.

[201] *See* Browne, *supra* note 8; *see also* Kravitz, *supra* note 8.

IV. SOLUTIONS

The likelihood of confusion test and the fair use defense are two buffers in trademark law that help preclude trademark holders from preventing certain groups from utilizing a mark simply because they do not like or agree with the group's message.[202] These two buffers were eliminated for the USOC by the *SFAA* decision.[203] In addition, while other countries also allow wider protection of the word "Olympic," they do so without allowing the Olympic Committee such broad discretion.[204]

As the dissent in *SFAA* suggests, there is no reason why the USOC deserves broader trademark rights than a traditional trademark holder and there is no reason the Court could not have applied the likelihood of confusion test and permitted the fair use defense fourteen years ago.[205] In light of today's awareness of discrimination against groups such as gays and lesbians,[206] it is important to analyze the *SFAA* decision from the viewpoint of traditional trademark law and ensure that the protection of the word "Olympic" is at least consistent with international protection.

A. *Incorporating the Likelihood of Confusion Test and Fair Use Defense into the Amateur Sports Act*

In *SFAA*, the Court chose not to apply the likelihood of confusion test to the SFAA's use of the word "Olympic."[207] The Court also refused to allow the SFAA to assert the fair use defense.[208] However, by applying these two traditional trademark concepts to the facts of *SFAA*, this paper will illustrate how these standards would have been a solution to the controversy that surrounds the case today.

1. Applying the likelihood of confusion test to SFAA

The likelihood of confusion analysis in *SFAA* would determine if the public would have thought that the USOC officially sponsored the Gay Olympic Games. This analysis employs a balancing test that factors in each of eight test elements.

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[202] *See* Kravitz, *supra* note 8.

[203] *San Francisco Arts & Athletics*, 483 U.S. at 522.

[204] *See generally* Jacob, *supra* note 7.

[205] *See generally San Francisco Arts & Athletics*, 483 U.S. at 548-73 (Brennan, J., dissenting).

[206] *See generally* Johnson, *supra* note 183.

[207] *See San Francisco Arts & Athletics*, 483 U.S. at 522.

[208] *See id.*

The first factor in the likelihood of confusion test examines the strength of the USOC's mark.[209] The courts have generally held that "the stronger the mark, the greater the amount of protection" that it should be given.[210] The strength of the mark should also be examined in the market where it is used.[211]

In the instant case, the strength of the mark would fall on the USOC's side. The word "Olympic" is one in which the USOC has created value by "using it in connection with an athletic event."[212] Along with the International Olympic Committee, the USOC has used the word "Olympic" in connection with the quadrennial modern games since 1896.[213] The USOC also allows other organizations, such as the Paralympics,[214] to utilize their mark.[215] In addition, the market of large athletic events with a structure similar to the Olympics is relatively small. It is not unreasonable to imagine that the average consumer, upon seeing the word "Olympic," would assume that it was a part of the various Olympic events sponsored by the USOC.

The second factor examines the degree of similarity between the SFAA's use of the word "Olympic" and the USOC's protected use of the word. To evaluate any similarity, the court would consider whether such similarity is likely to cause confusion.[216] While some courts will examine the design and the font of the two marks, others will consider if one word stands out as dominant from the others.[217] The latter approach seems more appropriate for *SFAA* since the main issue was over the word "Olympic" in the phrase the "Gay Olympic Games." The title of the Games was used to market an athletic event that was remarkably similar in structure to that of the official Olympics.[218] One could argue that this similar structure would help make "Olympic" the dominant word and cause confusion as to the sponsorship of the SFAA games. This factor would likely favor the USOC.

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[209] *See* Packman v. Chicago Tribune Co., No. 01-1016, 2001 U.S. App. LEXIS 21047, at *41 (7th Cir. Sept. 27, 2001).

[210] Shakespeare Co. v. Silstar Corp. of America, 906 F. Supp. 997, 1013 (D.S.C. 1995) (quoting Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159 (1995)); *see also* Nike, Inc. v. "Just Did It" Enters., 6 F.3d 1225, 1231 (7th Cir. 1993).

[211] Morningside Group v. Morningside Capital Group, 182 F.3d 133, 139-40 (2d Cir. 1999).

[212] *San Francisco Arts & Athletics*, 483 U.S. at 540.

[213] *Id.* at 533.

[214] *See id.*

[215] *See* Amateur Sports Act, 36 U.S.C. § 220506 (2001).

[216] *Morningside*, 182 F.3d at 139.

[217] For cases examining font, letters or color, see *Nike, Inc. v. "Just Did It" Enterprises*, 6 F.3d 1225 (7th Cir. 1993) (looking at the one-letter difference between "Mike" and "Nike") and *Packman v. Chicago Tribune Co.*, No. 01-1016, 2001 U.S. App. LEXIS 21047 *1, *33 (7th Cir. Sept. 27, 2001) (examining the style and color of the phrase "joy of six" as it was printed on T-shirts and in a newspaper). However, *Morningside* examined the names of the entities and found it persuasive that "Morningside" was the dominant word. *Morningside*, 182 F.3d at 139.

[218] *San Francisco Arts & Athletics*, 483 U.S. at 540.

The third factor, proximity of services, examines the extent to which the two services compete with each other.[219] Although the two events were similar in structure, they were not in direct competition with each other. The Gay Games were scheduled to be held in 1982, two years after the Lake Placid Olympic Games.[220] It is unlikely that athletes interested in competing in the Olympic Games would stop simply because they had the chance to participate in the Gay Games.[221] It is also unlikely that consumers would not go to the subsequent Olympic Games simply because they had attended the Gay Games two years before.[222] In fact, one could make the argument that the "SFAA's use would also reinforce the distinctive meaning of the word, because the success of the SFAA's use depends on maintaining the unique connotations of the Olympics as a contest of the very best."[223] In light of these facts, it is likely that this factor would weigh in favor of the SFAA.

The next factor examines how likely it would be for the USOC to enter the SFAA's market.[224] While the events are closely related in terms of structure, it does not seem likely that the USOC will begin holding its own Olympic Games exclusively for gays. In fact, if the USOC were to enter this market, it would likely only provide the authorization for a group like the SFAA to hold such games utilizing the word "Olympic" much like the Paralympic Games are run.[225] This factor would also favor the SFAA.

The fifth factor is evidence of actual confusion. This factor examines any actual evidence that demonstrates the public thought that the Gay Olympic Games were officially sponsored by the USOC.[226] In this case, there is nothing in the record that could be construed as actual evidence.[227] This factor would also weigh in favor of the SFAA.

The sixth factor considers whether the SFAA acted in good faith when it used the word "Olympic" to promote its games.[228] This factor will also consider whether the SFAA intended to profit from its use of the word

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[219] *Morningside*, 182 F.3d at 140.

[220] *San Francisco Arts & Athletics*, 483 U.S. at 525.

[221] Kravitz, *supra* note 8, at 184.

[222] *Id.*

[223] *Id.* at 183.

[224] *Morningside*, 182 F.3d at 141.

[225] *See* Amateur Sports Act, 36 U.S.C. § 220506 (2001). The Amateur Sports Act incorporates the Paralympics into the Act, an indication of official USOC sponsorship.

[226] *Morningside*, 182 F.3d at 141.

[227] *See* San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987); Kravitz, *supra* note 8, at 178. Kravitz also points out that with no actual evidence, it is not obvious that the public would confuse the Gay Olympics as officially sponsored by the USOC. He further stresses that once the SFAA heard about the suit, they offered to add disclaimers to their goods, an offer rejected by the USOC.

[228] *Morningside*, 182 F.3d at 141.

"Olympic."[229] The SFAA was clear that it used the word simply to convey a political message, not as a way to invade the USOC's market.[230] However, the USOC pointed out that after they had explained to the SFAA that they had an exclusive right to the word "Olympic," the SFAA continued its use of the word.[231] This continued use could be seen as intentional and therefore in bad faith.

The seventh factor assesses whether the SFAA's games were inferior in quality to that of the Olympic Games and if this inferiority would tarnish the USOC's reputation.[232] There is no evidence in the record concerning the quality of the SFAA's games.[233] However, the USOC pointed out that the value they have created in the word "Olympic" is due, in part, to its limited use.[234] Further, the USOC could be concerned that the value in the word "Olympic" is one that many groups may try to exploit. Allowing the SFAA to use the word to promote games so similar in structure to the Olympics could make it difficult to prevent future groups from the same type of use. This could potentially diminish the importance of the protection Congress granted the word in the Amateur Sports Act.[235]

The SFAA used the word "Olympic" in a non-commercial context as a means to describe their games.[236] Such a use is analogous to that found in *Lucasfilm Ltd. v. High Frontier.*[237] In this case, George Lucas, creator of the popular science fiction movie trilogy "Star Wars," sought to stop the use of "Star Wars" in the political debate surrounding Ronald Reagan's new defensive plan against a potential nuclear attack.[238] Lucasfilm's principle focus was on the defendant's use of the phrase in commercials and literature, and centered on children's responses to the thought of nuclear defenses in space.[239] Lucasfilms contended that this use would "injure the valuable goodwill" in the phrase as well as "detract from the public's association of 'Star Wars' with humor and fantasy."[240] The court, however, disagreed with this contention.

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[229] Downing v. Abercrombie & Fitch, Nos. 00-55363, 00-55834, 2001 WL 1045646, at *11 (9th Cir. Sept. 13, 2001).

[230] *See San Francisco Arts & Athletics*, 483 U.S. at 535.

[231] *Id.* at 526.

[232] *Morningside*, 182 F.3d at 142.

[233] *See San Francisco Arts & Athletics*, 483 U.S. at 522.

[234] *Id.* at 539.

[235] *Id.*

[236] *See id.* at 534-35.

[237] 622 F. Supp. 931 (D.D.C. 1985).

[238] *Id.* at 932-33.

[239] *Id.* at 933.

[240] *Id.*

First, the court found that Lucasfilm's trademark in the phrase "Star Wars" was simply protection against two types of violators: those who try to market similar products or competing services, or those who try to utilize the mark in connection with an enterprise that is sleazy.[241] The court reasoned that the use of "Star Wars" to which Lucas objected was employed to "persuade the public of their viewpoint through television messages" and that this use was done outside the context of trade.[242] "Star Wars" was utilized in a descriptive manner to communicate an idea rather than to create sponsorship confusion.[243] The court held that "[e]ven though the descriptive meaning is originally derived from the trade use, courts obviously cannot regulate the type of descriptive, non-trade use involved here without becoming monitors of the spoken or written English language."[244]

This is analogous to the manner in which the SFAA was using the word "Olympic." The SFAA was using the word to convey a political message, not to confuse the public into thinking that their games were an official part of the Olympic Games.[245] Allowing the USOC such an exclusive right to the word "Olympic" when it is not used in a context designed to capitalize on the value of the word essentially removes an important word from the English language and restricts one's manner of expression.[246]

The last likelihood of confusion factor examines the public's sophistication in recognizing that the Gay Olympic Games were separate from the Olympic Games.[247] If one follows the decision in *S.T.O.P. the Olympic Prison v. United States Olympic Committee*,[248] the SFAA could have made an effort to inform the public that their games were not a part of the official Olympics. With this disclaimer, they still would have been allowed to use the word.[249] One could argue that the public may assume that the Gay Olympics were part of the

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[241] *Id.*

[242] *Id.* at 934.

[243] *Id.*

[244] *Id.* at 935.

[245] San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 535 (1987).

[246] *See id.* at 568-70 (Brennan, J., dissenting); *see generally* Kravitz, *supra* note 8.

[247] *See* Morningside Group v. Morningside Capital Group, 182 F.3d 133, 142 (2d Cir. 1999).

[248] S.T.O.P. the Olympic Prison v. United States Olympic Comm., 489 F. Supp. 1112 (S.D.N.Y. 1980). The court held that the use of the word "Olympic" in a poster opposing the construction of a prison on the site used for the Lake Placid Olympic Games was not a violation of the Amateur Sports Act. *Id.* at 1126. The court found that S.T.O.P. was clearly using the poster for opposition, not to take advantage of the value in the word "Olympic." *Id.* at 1115, 1121.

[249] *Id.* at 1123.

standard Olympic festival. However, it has been pointed out that the Special Olympics does not produce this type of confusion.[250]

It is not completely clear under the likelihood of confusion test which party would prevail. Three of the factors seem clearly to weigh in the SFAA's favor: proximity of services, likelihood that the USOC will enter the SFAA's market, and evidence of actual confusion. Two of the factors—strength of mark and degree of similarity between the marks—favor the USOC. Without more evidence, it is difficult to say where the last three factors will fall. However, revisiting *SFAA* through the likelihood of confusion test illustrates that, had the Court followed the typical trademark infringement examination, the USOC could have nevertheless prevailed without the potential for discrimination and controversy that continues to surround the decision today. Thus, had the Court applied this test, its decision would at least appear to be more legitimate.

2. *Applying the fair use defense to* SFAA

For the SFAA to prevail on the fair use defense, they must show three factors: (1) they used the word "Olympic" in a non-trademark use; (2) the word "Olympic" is descriptive of their games; and (3) they used the word "Olympic" fairly and in good faith only to describe the games.[251]

The first factor examines whether the SFAA used the word "Olympic" in a descriptive manner. In this case, the SFAA used the word "Olympic" within the phrase "Gay Olympic Games."[252] The SFAA also used this phrase on a variety of items including bumper stickers and T-shirts.[253] The USOC argued that this use was clearly designed to take advantage of the commercial value that the USOC had created in the word "Olympic."[254] However, it is important to note that the Court looked only at these activities.[255] The Court did not consider the "nature of the group itself, its motives, goals, or the ways in which its political message was intertwined with its promotions and sales."[256] The SFAA argued, however, that this use of the word was merely an expressive use, and not one designed to take advantage of any value in the

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[250] Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533, 1584 (1993).

[251] *See* Packman v. Chicago Tribune Co., No. 01-1016, 2001 U.S. App. LEXIS 21047, at *19-20 (7th Cir. Sept. 27, 2001).

[252] San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522, 525 (1987).

[253] *Id.* at 539.

[254] *Id.*

[255] Kravitz, *supra* note 8, at 173.

[256] *Id.*

word "Olympic."[257] If the SFAA had been given the opportunity to add a disclaimer to their games to eliminate any sponsor confusion, this factor may have weighed in their favor.

The second fair use factor considers whether the word "Olympic" was indeed descriptive of the SFAA's games.[258] The fact that the Gay Games were similar in their organization to the Olympics may favor the SFAA. Like the Olympic Games, the Gay Olympic Games had a torch, an opening ceremony, a variety of events, participants from all over the world, and gold, silver, and bronze medals.[259] For the SFAA in this particular case, the word "Olympic" was merely descriptive of the type of games they were holding. If one sees the word "Olympic" as simply conjuring up an image of a large athletic event, then the SFAA use would clearly fall into the descriptive category. If the word "Olympic" was truly an accurate description of the SFAA's games, then this accuracy fits into one of the purposes of the fair use defense: to "[ensure] that an individual can accurately describe his products or services."[260] In this case, "[t]he ideas embodied in the word Olympic can, of course, be expressed by other means, but only in a much clumsier fashion without the same nuance of meaning."[261] This factor would also likely weigh in the SFAA's favor.

The last factor examines whether or not the SFAA used the word "Olympic" in bad faith, intending to take advantage of the value already associated with the word.[262] Although the record provides limited evidence, it seems clear that the goal of the Gay Games was to express a political message and that the use of the word "Olympic" was simply the best way to describe the event that the SFAA was holding.[263] The USOC did ask the SFAA to stop using the word, but the SFAA continued to use it one month after the request, a fact that could weigh in the USOC's favor.[264] However, one's good faith is not based simply on their knowledge that the word has some type of commercial value.[265] Rather, the court will look into the purpose the SFAA's use of the word "Olympic."[266] In this case, the SFAA was clear that their purpose was not a commercial exploitation, but an expressive use to send a political message.[267]

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[257] *San Francisco Arts & Athletics*, 483 U.S. at 540.

[258] *See* Packman v. Chicago Tribune Co., No. 01-1016, 2001 U.S. App. LEXIS 21047, at *25 (7th Cir. Sept. 27, 2001).

[259] *See San Francisco Arts & Athletics*, 483 U.S. at 525.

[260] Frey, *supra* note 31, at 1265.

[261] Int'l Olympic Comm. v. San Francisco Arts & Athletics, Inc., 789 F.2d 1319, 1321 (9th Cir. 1986) (Kozinski, J., dissenting).

[262] *See Packman*, 2001 U.S. App. LEXIS 21047, at *28.

[263] *See San Francisco Arts & Athletics*, 483 U.S. at 535.

[264] *Id.* at 526.

[265] *See Packman*, 2001 U.S. App. LEXIS 21047, at *29-30.

[266] *See id.*

[267] *See San Francisco Arts & Athletics*, 483 U.S. at 535.

However, if an infringement is small compared to the new service created, "the fair user is profiting largely from his own creative efforts rather than free-riding on another's work."[268]

It is likely that the SFAA could have prevailed under the fair use defense found in U.S. trademark law. The only potentially disputed factor is whether or not the SFAA's use was in good faith. However, this application of the fair use defense illustrates that by incorporating the fair use defense into the Amateur Sports Act, a balance could be struck between the USOC's financial interest and First Amendment concerns of free expression.[269] "Such a compromise would allow the word Olympic into the public domain as long as the USOC is not financially harmed."[270]

B. Other Countries' Approaches

As discussed earlier, the United States protection of the word "Olympic" deviates from international trademark protection.[271] The biggest difference between the protection of the Olympic symbol in other countries and the United States protection of the word "Olympic" under *SFAA* is the distinction between commercial and non-commercial uses.[272] The five other countries discussed in this paper offer a wider than normal trademark protection for the word "Olympic," but only for uses that are primarily commercial in nature.[273] However, in the United States, *SFAA* extended the trademark protection of the word "Olympic" to certain non-commercial uses of the word.[274]

By differentiating between commercial and non-commercial trademark uses, the international approach avoids the danger seen in *SFAA*. The primary concern in international protection for the Olympic symbol is that of each country's governing Olympic Committee to be able to make money.[275] Naturally, protecting commercial uses of trademarks that have the potential to make money is the best way to address this concern. *SFAA*, however,

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[268] New Kids on the Block v. News America Publ'g, Inc., 971 F.2d 302, 308 n.6 (9th Cir. 1992).

[269] Christopher W. Coffey, International Olympic Committee v. San Francisco Arts and Athletics: *No Olympic Torch for the Gay Games*, 17 GOLDEN GATE U. L. REV. 129, 144 (1987).

[270] *Id.*

[271] *See supra* Part III.B.

[272] For an example of the different types of protection, compare the Amateur Sports Act, 36 U.S.C. § 220506 (2001), with the Olympic Insignia Protection Act of 1987 (1994) (Austl.).

[273] *See generally* Olympic Insignia Protection Act of 1987 (1994) (Austl.); Olympic Symbol Etc. (Protection) Act, 1995, c. 32 §§ 1–18 (Eng.).

[274] San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 483 U.S. 522 (1987); Amateur Sports Act § 220506.

[275] Canadian Olympic Ass'n v. Gym & Tonic Ltd., [1988] 8 C.P.R. (3d) 353 (Can.).

needlessly extended the protection to non-commercial trademark uses of the word "Olympic" and, in doing so, raised First Amendment concerns.[276]

To avoid these First Amendment dangers, as well as the inherent danger of discrimination demonstrated in *SFAA*, this paper suggests that the United States adopt the international approach of protecting the Olympic symbol: Extend the protection only to commercial uses of the word.

Protecting only commercial uses of the word "Olympic" seems to be in line with the approach taken by the United States Court for the District of Colorado in *United States Olympic Committee v. American Media, Inc.*[277] This decision primarily explored the finding that the use of the word "Olympic" was non-commercial.[278] In addition, the court expressed concern over extending protection to the USOC for a use that was non-commercial, reasoning that such discretion could have potential First Amendment implications.[279] This reasoning illustrates the narrow view that one should apply to the *SFAA* decision. Furthermore, the case implements the international approach, which, if followed, could prevent additional discrimination currently possible under the *SFAA* approach.

V. CONCLUSION

An analysis of *San Francisco Arts & Athletics v. United States Olympic Committee* reveals that the omission of the normal trademark standards of the likelihood of confusion test and the fair use defense from the Amateur Sports Act provides the USOC with broad discretion over who can use the word "Olympic." Revisiting *SFAA* from a modern point of view is beneficial because it illustrates how the broad discretion given to the USOC is not appropriate today. In particular, the deviation from traditional United States trademark protection and the disparity with the protection of the word "Olympic" afforded by the international community demonstrate that a change is necessary.[280] Such broad discretion over the word "Olympic" allows the USOC to "censor the speech of groups of which it disapproves."[281] Indeed, the history of the USOC's actions seems to illustrate the selective way in which it allows certain groups to use the word while pursuing infringment actions against others.[282]

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[276] *See* Kravitz, *supra* note 8.

[277] United States Olympic Comm. v. American Media, Inc., No. 01-K-281, 2001 U.S. Dist. LEXIS 11523 (D. Colo. Aug. 3, 2001).

[278] *See id.* at *2.

[279] *Id.*

[280] *See* Johnson, *supra* note 183; *see also* Jacob, *supra* note 7.

[281] Kravitz, *supra* note 8, at 181.

[282] *Id.*

The most troublesome aspect of not revisiting *SFAA* and applying the trademark standards of the likelihood of confusion test and the fair use defense could be the continuation of "an exclusion [of a group] that is invoked pursuant to a subjective assessment of the wholesomeness of the proposed speaker or propriety of the proposed message."[283] Such an exclusion is contrary to the values of our country embedded in the United States Constitution. Extinguishing one's freedom of expression is not a power that should be placed in the hands of one.

Kellie L. Pendras[284]

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[283] Int'l Olympic Comm. v. San Francisco Arts & Athletics, Inc., 789 F.2d 1319, 1323 (9th Cir. 1986) (Kozinksi, J., dissenting).

[284] William S. Richardson School of Law, Class of 2003. Special thanks to Professor Robert N. Davis for the inspiration for this article and to Professor Conway-Jones for her thoughtful comments.

Child Pornography on the Internet: The Effect of Section 230 of the Communications Decency Act of 1996 on Tort Recovery for Victims Against Internet Service Providers

PROLOGUE: THE ORCHID CLUB AND THE WONDERLAND CLUB

In 1996, a ten-year-old girl spent the night at her friend's house in California.[1] The friend's father was Ronald Riva, a member of an international on-line child pornography club known as the Orchid Club.[2] That night Riva led the girl into his basement, and with the help of another club member, he fondled the girl, posed her in sexually explicit positions, and raped her.[3] Riva broadcasted the attack over the Internet to other members of the club.[4] Club members watched the live event on their computers and even e-mailed Riva with suggestions for positions in which to pose the child.[5]

The Riva case dramatically illustrates how the Internet is changing child pornography and child abuse. Individuals in different countries, on different continents, participated in the sexual abuse of a young girl, using the Internet to commit a truly global molestation. Perhaps what is most distressing about this case, however, is that it is not an isolated example, but a widespread phenomenon.

While investigating the Orchid Club, the United States Customs Service became aware of the Wonderland Club,[6] which American law enforcement officials described as the largest, most sophisticated ring of child pornographers discovered to date.[7] Membership was limited to individuals who could prove ownership of at least 10,000 images of child pornography.[8]

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[1] Bob Trebilcock, *Child Molesters on the Internet: Are They in Your Home?*, 188 REDBOOK 100 (1997).

[2] *Id.*

[3] *Id.*; *The Wonderland Club* (BBC News broadcast, Feb. 11, 2001).

[4] Trebilcock, *supra* note 1, at 100.

[5] *Id.*

[6] Lynette Clemetson & Tom Masland, *Cybercops to the Rescue*, NEWSWEEK, Sept. 14, 1998, at 63 ("The Americans include a medical student, an algebra teacher, a technician with America Online and a member of the U.S. Coast Guard.").

[7] Elaine Shannon, *Main Street Monsters: A Worldwide Crackdown Reveals that Child Pornographers Might Just Be the People Next Door*, TIME, Sept. 14, 1998, at 59.

[8] Clemetson & Masland, *supra* note 6, at 63.

> Not just any pervert with a computer could join the wonderland club, according to police: applicants had to provide references and prove ownership of at least 10,000 digitized images of children performing sex acts—hard-core kiddie porn. A special program vetted each collection to ensure that no pictures duplicated those already in the central database.

Id.

An international police raid arrested club members in Europe and Australia, as well as five members in the United States.[9] The police found 500,000 pornographic images depicting everything from live sex shows to the actual rape of children.[10] After police dismantled the Orchid Club, the Wonderland Club changed its organization to avoid detection, assisted by its members' sophistication in Internet use.[11] Computer programmers and hardware specialists enhanced concealment by instituting a complex system of codes and encryption.[12] According to one law enforcement official, "[t]hey took full advantage of all the technological capabilities of the Internet."[13]

I. INTRODUCTION

The Internet is one of the most exciting and powerful technological developments of the twentieth century. This technology has revolutionized the way people communicate and share ideas and information, in much the same way as the printing press or television did.[14] While the Internet appears to have almost unlimited potential for improving lives, it is also helping to further criminal activity. The Orchid Club and the Wonderland Club graphically demonstrate how certain individuals are willing and able to make use of the Internet to facilitate their criminal acts. Society's drive and enthusiasm to enjoy the fruits of the Internet cannot overshadow the potential for individuals to abuse this technology to victimize innocent children.

In the area of child pornography on the Internet, the United States Congress and courts are leading the country down a perilous path with the adoption and interpretation of the Communications Decency Act of 1996 ("CDA").[15] The CDA, designed to protect children on the Internet, actually absolves Internet service providers[16] ("ISPs") of responsibility for the criminal distribution of

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[9] *Id.* ("Of 93 alleged members targeted in the raids, 53 were arrested, five of them in the United States and the rest scattered through Britain, France, Austria, Belgium, Finland, Norway, Sweden, Germany, Italy, Portugal, Australia.").

[10] Shannon, *supra* note 7, at 59.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] Blumenthal v. Drudge, 992 F. Supp. 44, 48 n.7 (D.D.C. 1998).

> Risking overstatement only slightly, the Internet represents a brave new world of free speech. The number of people regularly using the Internet is expected to grow to 100 million by year 2000. Arguably, the Internet will become as prevalent in our daily lives as the printing press, telephone, radio, and television . . . .

Id.

[15] Communications Decency Act of 1996, 47 U.S.C. § 230 (1996).

[16] *See id.* § 230(f).

> Definitions. As used in this section: . . . (2) Interactive Computer Service. The term "interactive computer service" means any information service, system, or access software

child pornography on websites.[17] In addition, the CDA removes any incentive for ISPs to prevent this distribution. Originally intended to make the Internet a safer environment for children, the CDA instead allows ISPs to escape tort liability for any content provided by a third party, including for child pornography. The full ramifications of this immunity are not yet apparent, but early indications are alarming.[18]

This paper argues that ISPs should be subject to tort liability for the negligent distribution of child pornography on their sites. It also argues that the current regime under § 230 of the CDA does not create incentives for ISPs to take responsibility for their sites. Rather, the CDA leaves victims without any hope of recovery for negligence against an ISP. Part II explores the nature of child pornography on the Internet and discusses how the sudden reemergence of child pornography as a serious child protection issue and the growth of the Internet are intricately linked. Part III explores the enactment of § 230 of the CDA and how subsequent interpretation has led to virtual immunity for ISPs when content is provided by third parties. Part IV examines whether § 230 preempts the states' abilities to protect their citizens through private tort actions. Finally, Part V concludes that § 230 is poor public policy and will have a negative impact on the growth of the Internet.

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provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

Id.

[17] *See Child Pornography*, http://www.adultweblaw.com/laws/childporn.htm (last visited Feb. 20, 2002). Child pornography is defined as:

> [A]ny visual depiction, including any photograph, film, video, picture or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct where—(A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct; (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct . . . ."

18 U.S.C. § 2256.

[18] *See* Michelle J. Kane, *Internet Service Provider Liability:* Blumenthal v. Drudge, 14 BERKELEY TECH. L.J. 483, 495 (1999). "[T]he broad immunity Congress has arguably provided in section 230 may have far reaching implications that will not be easily undone. By overruling centuries of common law in response to one case, Congress acted too hastily in the face of new technology." *Id.*

II. CHILD PORNOGRAPHY IN THE AGE OF THE INTERNET

Prior to the development of the Internet, commercial child pornography as a large-scale social problem was a thing of the past.[19] Law enforcement agencies, legislatures, and the courts did a remarkable job of recognizing the problem and took effective steps to control it.[20]

The Internet and related technologies, however, have profoundly changed the way child pornography is produced and distributed.[21] All forms of pornography have re-emerged and are thriving as a result of this new technology.[22] Especially with regard to child pornography, new technologies are serving to ensure its continued existence.[23] Child pornography simply could not exist anywhere near its current magnitude without recent technological advances.

A. A History of Commercial Child Pornography

There was a time in America when child pornography was sold in retail stores.[24] In the United States, the commercial production of child pornography was primarily limited to the *Lolitots*, which consisted of European materials combined with domestically taken pictures.[25] In addition, from 1969 to 1979, Denmark legalized the production of all forms of pornography, including those

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[19] *See* LAURENCE O'TOOLE, PORNOCOPIA PORN, SEX, TECHNOLOGY AND DESIRE 219 (1999) ("There is a history of commercially produced child pornography; it is a grisly story, but one long since ended."); *see also* Trebilcock, *supra* note 1, at 100 ("The resurgence of kiddie porn marks an end to one of law enforcement's success stories.").

[20] *See* TINA M. BERANBAUM ET AL., CHILD PORNOGRAPHY AND SEX RINGS 12 (Ann Wolbert Burgess & Marieanne Lineqvist Clark eds., 1984) ("[O]nce new state and federal child pornography laws were enacted, over-the-counter sale of child pornography was almost eliminated from the Chicago area in virtually no time.").

[21] Madeleine Mercedes Plasencia, *Internet Sexual Predators: Protecting Children in the Global Community*, 4 J. GENDER RACE & JUST. 15, 16 (2000) ("Unlike the physical spaces available for the distribution of pornography and sexual favors for money, the Internet, with its lack of structure, has led to an unimaginable amount of pornography available for any on-line specter.").

[22] *Id.* ("Information necessary for consummation of transactions in the sex economy worldwide is more easily available than ever before.").

[23] *See* Max Taylor, *The Nature and Dimensions of Child Pornography on the Internet*, http://www.asem.org/Documents/99ConfVienna/pa_taylor.html (last visited Feb. 20, 2002).

[24] BERANBAUM, *supra* note 20, at 10.

> During 1976 and 1977 there were approximately sixty retail adult bookstores in the city of Chicago . . . . The variety and coarseness of pornography available through these retailers was increasing. "Adult materials" appeared to be digressing toward more bizarre and unusual forms featuring bondage, sadomasochism, bestiality, and child pornography.

Id.

[25] O'TOOLE, *supra* note 19, at 221.

featuring children.[26] During this period, a number of producers in Denmark published magazines and even films featuring child pornography.[27] Titles included *Children Love*, *Incestuous Love*, *Bambina Sex*, and the infamous *Lolita* series of ten-minute film loops and their stills.[28] These publications were available in the United States where other pornographic materials were sold.[29]

In the mid to late 1970s, the American public became increasingly aware of the problem of child pornography.[30] As a result, legislatures, law enforcement, and courts moved quickly to make the production, distribution, and even possession of child pornography illegal.[31] Indeed, the swift crackdown on the production and distribution of child pornography was a true law enforcement victory[32] and remained so until new technology dramatically altered the landscape.[33]

B. Technological Advances in Production and Distribution

Today, a scanner, digital camera, home computer, and an Internet connection are affordable for the typical American household. Although these technological advances have numerous benefits for the average American, these items also eliminate many of the obstacles that formerly hindered the production and distribution of child pornography.[34] In the past, producers of

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[26] *Id.* at 219.

> In Denmark in the late sixties, the Danish government legalized production of all forms of pornography. During a period lasting between 1969 and 1979, this even included the toleration of a small, commercial output of magazines, as well as some films, of the record of sexual crimes involving children below the age of consent.

Id.

[27] *Id.*

[28] *Id.*

[29] BERANBAUM, *supra* note 20, at 10.

[30] *Id.* at 10-11. "Coinciding with this increased availability was an outcry by civic groups that had become aware of the increase. These concerned individuals alerted the general public and urged local and federal legislators to take action against child pornography." *Id.*

[31] *Id.* at 12.

[32] Trebilcock, *supra* note 1, at 100.

[33] *Id.*

> Indeed, it's never been a better time to be a pedophile: The Internet has opened up a new, anonymous way for pedophiles to exchange and expand their collections of porn, says Don Huycke, program manager of the Child Pornography Enforcement Program for the U.S. Customs Service, the longstanding experts in kiddie porn, since so much of it has been produced overseas.

Id.

[34] *Id.* ("Though most child pornography online has been culled from magazines produced in the seventies and early eighties, some experts hint that the Internet encourages new images to be created.").

child pornography often feared the paper trail they created when developing photographs.[35] Molesters also feared discovery by the postal service when sending and receiving child pornography through the mail.[36] The increasing sophistication of technology eliminated these obstacles by providing child molesters with affordable digital cameras, video conferencing, scanners, computers, and Internet service.[37]

C. *Anonymity and Community: Gifts for the On-line Pedophile*

The ability of technology to make the distribution and production of child pornography easier is disturbing; yet the Internet goes a step further and gives pedophiles two gifts they never had before—anonymity and a sense of community.[38] Previously, child pornography was readily available in specialty stores, but purchasers had to endure the stigma associated with purchasing the material. Purchasers also had to make a face-to-face encounter with another person, even if it was only with the clerk at the store. Thus, the shame associated with entering a store selling pornography served as a strong deterrent for some purchasers.[39]

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[35] *See id.* ("Thanks to new technology, like digital cameras, porn can be produced directly on-line, without leaving the literal paper trail that photos do when developed and published.").

[36] DANIEL S. CAMPAGNA & DONALD L. POFFENBERGER, THE SEXUAL TRAFFICKING IN CHILDREN: AN INVESTIGATION OF THE CHILD SEX TRADE 130 (1988).

> A pedophile is always afraid that the postal inspectors will get their mail. These guys, when they raid a home which deals in child pornography, will take the master list if they find it and start writing to the names on the list. That's how the authorities first became aware of me. I was on somebody's list who got busted. They (postal inspectors) started writing to me under a different name and sending me photos for which I'd send them money. We went back and forth a couple of times. They kept records of it. When they arrested me, they had the evidence right there.

Id. (interviewing a convicted child pornographer).

[37] *See* Rod Nordland & Jeffrey Bartholet, *The Web's Dark Secret*, NEWSWEEK, Mar. 19, 2001, at 44.

> Suddenly, pedophiles could use their own computers to make instant copies of pictures—grabbed from an Internet club on a website located in, say, Moscow—and send them to like-minded friends around the world. . . . No longer did pedophiles have to prowl the seedier sections of the city for photos or films; they could meet friends and download, in their living rooms, child pornography made with film-free digital cameras (no need to risk exposure at a photo store) and home-made CD-ROMs.

Id.

[38] Taylor, *supra* note 23, at 3-4.

[39] Cynthia Guttman, *The Darker Side of the New: Dissemination of Child Pornography*, UNESCO COURIER, Sept. 1, 1999, at 43.

> [O]ne of the most significant factors influencing the growth of child pornography on the Internet is the ease of dissemination and collection. Anonymity and convenience have revealed an extraordinary level of sexual interest in children. Presumably, this interest

On the Internet an individual faces no social disapproval when acquiring child pornography.[40] An individual can now obtain child pornography without ever looking another person in the eye.[41] What makes this anonymity so valuable is that the typical pedophile, in general, does not look like the stereotype of a "dirty man in a trench coat" that most are perceived to be.[42] Child molesters are often trusted members of the community,[43] who rely on the fact that they do not match society's expectation of what a child molester looks like.

Another troubling aspect of child pornography on the Internet is the newfound sense of community it creates for pedophiles.[44] Websites such as the North American Man/Boy Love Association ("NAMBLA") provide validation for the idea that sex with pre-pubescent boys is an acceptable and loving act.[45] Newsgroups provide an arena where pedophiles can meet,

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was *either dormant or latent* on this scale in the past.

Id. (emphasis added).

[40] Tanya Scharbach, *Trend & Development: Child Pornography in Cyberspace*, 2 APPEAL 58, 61 (1996).

[41] *See* Guttman, *supra* note 39, at 43. ("As Martine Brousse, head of the French NGO Voix de l'Enfant, puts it, 'the person who might not have gone through the process of buying a particular magazine to nurture his fantasies can now just go on the Net, it's not difficult.'").

[42] Trebilcock, *supra* note 1, at 100. "Anonymity is so crucial . . . because your average pedophile is not the dirty old man in a trench coat, but a teacher at your local elementary school. The Internet is his outlet." *Id; see also* Catherine Edwards, *Pedophiles Prowl the Internet*, INSIGHT ON THE NEWS, Feb. 28, 2000, at 14 ("The FBI tells Insight that the average online pedophile is a white male age 25 to 40 with no prior convictions."). Among those arrested by the U.S. Customs Service in the Wonderland raids were "a professor at the University of Connecticut; . . . law students; . . . med students; . . . people that you never would have suspected of trading in this type of material." *The Wonderland Club* (BBC News broadcast, Feb. 11, 2001) (interview with Glen Nick, Senior Special Agent, U.S. Customs Service).

[43] *See* Trebilcock, *supra* note 1, at 100. "Successful pedophiles . . . 'are better with your children than you are. They give them more attention. They are your swim coach, your Sunday school teacher—people you trust to come into contact with your child every single day.'" *Id.*

[44] Scharbach, *supra* note 40, at 61.

> Usenet groups and bulletin boards allow people to discuss child pornography in an environment that normalizes it. Related to discussions of child pornography are discussions about child sexual abuse. Such acts, however, are not often characterized as abuse. On the contrary, sexual relationships with children often are portrayed as positive interactions for everyone involved.

Id.

[45] *See* Debbie Mahoney & Dr. Nancy Faulkner, *The Internet Online Summit: Focus on Children*, *at* http://www.prevent-abuse-now.com/pedoweb.htm (last visited Feb. 20, 2002) (quoting material from NAMBLA).

> The Boylove Relationship? In most cases, the attraction between the boylover and the boy is mutual. The boy is drawn to an adult who takes him seriously and treats him respectfully. The boylove relationship is void of the demeaning power struggles and restrictions which are customarily are [sic] part of any child/adult relationship. In a

discuss, and share information on-line, including child pornography. One researcher describes these groups as "cohesive" and "well structured."[46] Pedophiles also share information on the Internet about how to seduce children and avoid detection.[47] One psychologist coined the term "virtual validation" to describe how the Internet has changed pedophilia from what was once an individual and isolated experience into a shared group experience.[48] Potentially, hundreds of other pedophiles on the Internet serve to reinforce the idea that what they are doing is right.[49]

The ease of distribution and production, combined with the gifts of anonymity, and a sense of community, create a dangerous situation. Individuals with only an interest or curiosity in child pornography may rapidly develop into child molesters,[50] who often follow a set developmental pattern.[51] They may begin by looking at child pornography, then shift to voyeuristic behavior, and then finally initiate physical contact.[52] The Internet drastically accelerates this developmental process.[53] Any reservations molesters may have had because of society's disapproval of adult-child sexual relationships

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boylove relationship, the boy is afforded the chance to experience himself as a person. . . . What Are Our Demands? We demand freedom of individual sexuality for boys and boylovers. We demand that current standards of sexuality are reconsidered. These standards infringe upon basic human rights, because they prohibit children and those who love them from even thinking about engaging in any sexual intimacy.

Id.

[46] Guttman, *supra* note 39, at 43.

[47] *See id.*

[48] Trebilcock, *supra* note 1, at 100.

The quest for acceptance is precisely what concerns law enforcement officers and mental health professionals. Chris Hatcher, Ph.D., a clinical professor of psychology at the University of California in San Francisco who studies pedophiles and child abductors, has coined the phrase "virtual validation" to describe the burgeoning network of pedophiles on-line. "They're able to be in contact with sometimes hundreds of other people with similar beliefs," explains Dr. Hatcher. "That is a level of validation they were never able to obtain before."

Id.

[49] *See* Taylor, *supra* note 23, at 4 ("This virtual community is an important source of support, justification, information, and self-help, as well as facilitating the exchange and distribution of sexually attractive images, and sometimes of course children.").

[50] Trebilcock, *supra* note 1, at 100 ("Coupled with the availability of child pornography on the 'Net, Dr. Hatcher [a clinical professor of psychology at the University of California in San Francisco] argues that virtual validation pedophiles find on-line may encourage someone who has not yet molested a child to do so.").

[51] *Id.*

[52] *Id.* ("[The pattern] begins with fantasy, moves to gratification through pornography, then voyeurism, and finally to contact.").

[53] *See id.*

are quickly eased via the anonymity and validation they receive from the on-line pedophile community.[54]

D. Child Pornography Victimizes Children

Each image of child pornography is the picture of a crime in commission.[55] Each time the picture is republished, the child is re-victimized.[56] Once a picture of a child is on the Internet, the picture may be reproduced thousands of times without any way to stop further distribution.[57] In fact, a good deal of the pornography on the Internet dates back to the 1970s.[58] The children in those images are being re-victimized today even though their abuse originally occurred thirty years ago. Recently, some pictures first appeared on the Internet after the abuser, who took the original photographs, was incarcerated for the offense.[59]

Moreover, child pornography on the Internet is a way for molesters to victimize and lure additional children. Molesters use on-line pictures in several different ways.[60] They are used to lower the inhibitions of a new child

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[54] *Id.*

[55] Taylor, *supra* note 23, at 5 ("The central and important quality of child pornography that must be emphasized is that at its worst it is a picture of the commission of a sexual assault on a child. That is to say, it is a picture of the scene of crime.").

[56] Guttman, *supra* note 39, at 43 ("The circulation of these photographs revictimizes the child.").

[57] Taylor, *supra* note 23, at 7 ("[O]nce a picture is in the public domain, it remains in circulation . . . .").

[58] *Id.*

[59] *Id.*

> New pictures from a recent obscene picture series continued to appear after the producer had been convicted and sentenced, and these pictures continue to circulate. New people are constantly, therefore, seeing this child in the most intimate way possible. Even after the case was closed and finished, therefore, this poor child cannot escape the humiliation of providing a source of sexual fantasy for an ever widening circle of people.

Id.

[60] CAMPAGNA & POFFENBERGER, *supra* note 36, at 117-18.

> There are a number of uses associated with child pornography . . . including the following:
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> (1) *Blackmail*: [A] pedophile may use photographs or films of his underage victims to blackmail them into silence. . . .
>
> (2) *Profit*: Many who participate in child pornography do so because it generates wealth. . . .
>
> (3) *Instructional Aids*: An exploitive adult often uses adult and child pornography as an instructional aid to indoctrinate victims into various sexual practices. The exploitive adult also uses the pictures to demonstrate that such behavior is permissible: "If other adults and other children do this sort of thing, then it must be alright. . . ."

by convincing him or her that the activity portrayed is normal.[61] They serve as a visual aid to the molester to get the child to pose like the child in the image, or mimic the behavior of the child in the image.[62] In addition, when new photos are taken of a child, the molester may use the images to blackmail the child to prevent the child from reporting the abuse.[63]

E. How Much Child Pornography Is on the Internet?

Because child pornography is illegal and secretive, it is difficult to determine precise figures regarding the amount of child pornography on the Internet.[64] One way to assess the problem is by looking at the number of children involved.[65] By examining a database of known child pornography, one expert determined that approximately 300 to 350 children have been photographed within the past ten to fifteen years in a manner portraying serious sexual abuse.[66] Furthermore, an additional 1,600 to 1,800 children appear nude in photographs, often in a sexually explicit manner.[67] The organization that compiles the database downloads between two and four thousand pictures a week from various newsgroups.[68] The ages of the children depicted in pictures on the Internet are typically between seven and eleven years of age.[69] A recent trend, however, shows children as young as five or six appearing in disturbing pictures.[70]

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(4) *Self-Gratification*: Child pornography either sparks or contributes to a heightened state of arousal preparatory to masturbation. . . .

(5) *Conditioning*: The exploitive adult uses kiddie porn to lower a minor's inhibitions and resistance to sex. . . .

(6) *Advertising*: A procurer often uses pornographic or suggestive pictures of his hustlers to entice customers. . . .

(7) *Collections*: Most hard-core pedophiles posses an extensive collection of adult and child pornography. . . .

(8) *Sexual Record*: Some exploiters use pornographic photographs or films of victims to record their sexual encounters.

(9) *Access*: The mere possession of child pornography is frequently sufficient to provide an exploiter with access to other offenders and markets.

Id.

[61] *Id.* at 118.

[62] *Id.*

[63] *Id.*

[64] *See* Taylor, *supra* note 23, at 7.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

Investigations and prosecutions by law enforcement officials are also on the rise.[71] This increase is due, in part, to a growing recognition of child pornography and an equally growing commitment to fighting it.[72] In 1998, the FBI investigated 700 cases dealing with on-line pedophilia.[73] A mere two years later, in 2000, the number rose to 2,856 cases.[74]

III. THE COMMUNICATIONS DECENCY ACT OF 1996

The problems created by child pornography on the Internet are complex. Consequently, no single solution provides a complete remedy. One problem is that the Internet, and the child pornography it carries, crosses state jurisdictions and international boundaries.[75] A second issue concerns the victims who are often unable to defend themselves and usually do not know where and how to report the abuse. For these reasons, society needs an arsenal of strategies to protect victimized children. Solutions include everything from criminal prosecutions and public awareness campaigns to international treaties. Unfortunately, with the passage of § 230 of the Communications Decency Act ("CDA"), Congress, with the help of the courts, has removed what could have potentially been a potent force in the arsenal—tort liability for ISPs.

Section 230 gives ISPs immunity for any content on websites provided by anyone other than the ISPs themselves.[76] The immunity stands, regardless of the amount of notice the ISP has of the offending material on its sites or the nature of the ISP's relationship with the third party.[77] To date, § 230 has been used primarily to dismiss defamation claims on summary judgment.[78] In at least one case, however, § 230 has been used to prevent a civil suit by the

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[71] Nordland & Bartholet, *supra* note 37, at 44 ("Arrests for possessing and distributing child pornography have been climbing steadily . . . .").

[72] *See id.*

[73] *Id.*

[74] *Id.* ("In . . . 1998, the FBI opened up roughly 700 cases dealing with online pedophilia, most of them for posting child pornography . . . [b]y 2000 that figure had quadrupled to 2,856 cases.").

[75] Scharbach, *supra* note 40, at 64 ("When Internet users can post messages, transmit pictures and send mail to one another with just a few keystrokes, child pornography slips easily across borders.").

[76] Robert Cannon, *How the Communications Decency Act Helps Good Samaritans, at* http://www.boardwatch.com/src/Telecom_project.htm (last visited Feb. 22, 2001) [hereinafter Cannon, *Communications Decency Act*].

[77] *Id.*

[78] *See* Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998); Zeran v. America Online, Inc., 958 F. Supp. 1124 (E.D. Va. 1997); Doe v. America Online, Inc., 718 So. 2d 385 (Fla. Dist. Ct. App. 1998).

mother of a molested child seeking an examination of America Online's culpability in a child pornography case.[79]

A. The Political Context Behind the Enactment of the Communications Decency Act

In the mid 1990s, the availability of pornography on the Internet was a hot topic. A study published in the *Georgetown Law Review* in 1989 painted the Internet as literally infested with pornography.[80] It argued that as much as 83.5 percent of the images available on the Usenet were pornographic.[81] The media paid a great deal of attention to the study, including a cover story in *Time* magazine.[82] Although the media eventually discredited the study,[83] the debate over child pornography on the Internet continues.

In this heated environment, Senator James Exon of Nebraska introduced the Communications Decency Act, a bill that penalized any person who sent obscene materials to a child via the Internet.[84] Specifically, the CDA prohibited anyone from using the Internet to transmit material that would be offensive under a community standard to anyone younger than eighteen.[85] The CDA also provided for certain affirmative defenses, such as age verification via a credit card or a good faith effort to restrict access by minors.[86] The CDA stimulated a national debate between those who felt that children needed

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[79] *See Doe*, 718 So. 2d at 385.

[80] *See* Marty Rimm, *Marketing Pornography on the Information Superhighway: A Survey of 917,410 Images, Descriptions, Short Stories, and Animations Downloaded 8.5 Million Times by Consumers in over 2000 Cities in Forty Provinces and Territories*, 83 GEO. L.J. 1849 (1995).

[81] Robert Cannon, *The Legislative History of Senator Exon's Communications Decency Act: Regulating Barbarians on the Information Superhighway*, 49 FED. COMM. L.J. 51, 54 (1996) [hereinafter Cannon, *Legislative History*].

[82] Philip Elmer-Dewitt, *On a Screen Near You: It's Popular, Pervasive and Surprisingly Perverse, According to the First Survey of Online Erotica*, TIME, July 3, 1995, at 38.

[83] Cannon, *Legislative History*, *supra* note 81, at 54-55.

> The problems of the Rimm study were numerous. The Rimm Study was apparently not subjected to peer review. Professors Donna L. Hoffman and Thomas P. Novak criticized the study, concluding that Rimm's work was methodologically flawed. The ethics of Mr. Rimm's research procedures were questioned. He was accused of plagiarism. Finally, it was discovered that he was working both sides of this issue; Mr. Rimm was also the author of The Pornographer's Handbook: How to Exploit Women, Dupe Men & Make Lots of Money.

Id.

[84] *Id.* at 57. "Senator Exon, believing that God was on his side, set forth to battle the pornographers by introducing the most important piece of legislation that the Senator ever believed that he had worked on. 'The fundamental purpose of the Communications Decency Act is to provide much needed protection for children.'" *Id.*

[85] Reno v. ACLU, 521 U.S. 844, 859 (1997).

[86] *Id.* at 860.

government protection and those who felt that First Amendment concerns should be paramount.[87]

While those championing free speech lost the battle over passage of the CDA, they ultimately won the war. In 1997, the United States Supreme Court in *Reno v. ACLU*[88] held that the vast majority of the CDA did not meet constitutional requirements because it infringed on the free speech right of adults by limiting their access to constitutionally protected information.[89]

Most of the country was not aware that § 230 of the CDA survived the *Reno* decision.[90] Known as the "Good Samaritan" provision, § 230 effectively stopped debate on some of the most important questions regarding the growth of the Internet.[91] These important questions include: (1) what responsibilities do ISPs have for content created by third parties?; (2) what recourse is available for individuals who are harmed by content posted on the Internet?; and (3) what role do states have in protecting their citizens from torts committed via the Internet? As a small part of the CDA, § 230 passed with little notice and little debate. Subsequently, the courts have used § 230 as an opportunity to set public policy in the area of ISP liability for third-party content.[92]

B. The Impetus for § 230: Stratton Oakmont, Inc v. Prodigy

Congress enacted § 230 of the CDA in direct response to the holding in *Stratton Oakmont, Inc. v. Prodigy*.[93] The *Stratton* court held that when an ISP

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[87] *See* Eileen Meier, *Child Pornography, the Internet, and Congressional Activity*, 25 PEDIATRIC NURSING 661 (1999).

[88] 521 U.S. 844 (1997).

[89] *Id.* at 874.

> We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.

Id.

[90] Kane, *supra* note 18, at 488.

[91] *See generally id.*

[92] *Id.* at 483 ("[T]he courts dramatically dismissed all traditional defamation principles in expanding the law's immunity provisions farther than necessary.").

[93] No. 31063/94, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 26, 1995); *see* Kane, *supra* note 18, at 487-88.

> The *Stratton Oakmont* decision was heavily criticized by commentators. Many argued that such limitations would drive ISPs to forego all editorial control to avoid tort liability. Fearing that this would add to the looming specter of an Internet chocked with indecent

exercises editorial control over content provided by third parties, the ISP will be subject to publisher liability.[94]

Even prior to *Stratton* and the enactment of § 230, however, the court had dealt with the issue of ISP liability for content provided by third parties.[95] The issue arose in the context of suits against ISPs for defamatory statements posted on websites by third parties.[96] In 1991, a district court addressed the issue in *Cubby, Inc. v. CompuServe, Inc.*, and held that ISPs should be treated as distributors for libel claims made against them for content provided by a third party.[97] In *Cubby*, the court found that

> CompuServe's CIS [CompuServe Information Service] product is in essence an electronic, for-profit library that carries a vast number of publications and collects usage and membership fees from its subscribers in return for access to the publications . . . . CompuServe has no more editorial control over such a publication than does a public library, book store, or newsstand, and it would be no more feasible for CompuServe to examine every publication it carries for potentially defamatory statements than it would be for any other distributor to do so.[98]

The controversy gained momentum four years after *Cubby* with the decision in *Stratton Oakmont, Inc. v. Prodigy*.[99] Prodigy, an ISP, maintained a bulletin board called "Money Talk" where members posted statements regarding

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> speech, Congress enacted, as a part of the [CDA], a "Good Samaritan" immunity for online service providers.

Id.

[94] *Stratton*, No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at *12-13. "Computer bulletin boards should generally be regarded in the same context as bookstores, libraries and network affiliates. . . . It is PRODIGY's own policies, technology and staffing decisions which have altered the scenario and mandated the finding that it is a publisher." *Id.; see also* Jonathan A. Friedman & Francis M. Buono, *Limiting Tort Liability for Online Third-party Content Under Section 230 of the Communications Act*, 52 FED. COMM. L.J. 647, 652 (2000).

[95] *See* Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991).

[96] Friedman & Buono, *supra* note 94, at 650.

> At common law, one who repeats or otherwise republishes defamatory matter is just as responsible for the defamatory content as the original speaker. Courts, however, have generally recognized three standards . . . of liability for republication of defamatory material: publisher liability, distributor liability, and common carrier liability. First, an entity that exercises some degree of editorial control over the dissemination of defamatory material will be generally liable for its publication (i.e., publisher liability). . . . Second, an entity that distributes but does not exercise editorial control over defamatory material may only be liable if such entity knew or had reason to know of the defamation (i.e., distributor liability).

Id.

[97] *Cubby*, 776 F. Supp. at 140.

[98] *Id.*

[99] No. 31063/94, 1995 N.Y. Misc. LEXIS 229 (N.Y. Sup. Ct. May 26, 1995).

financial issues.[100] An unknown user posted defamatory statements on the board about the plaintiff's company, accusing the plaintiff of fraud in an initial public offering of stock.[101]

The *Stratton* court found that because Prodigy exercised editorial control over its service and compared itself to a newspaper in terms of the editorial functions it performed, Prodigy would be considered a "publisher" for liability purposes.[102] As a result, Prodigy was liable for defamatory statements posted on its sites regardless of the amount of notice it had regarding the defamatory material. The *Stratton* court held Prodigy to a much higher standard than the one used by the court in *Cubby*.[103] *Stratton*, however, specifically noted that it agreed with the holding in *Cubby*, yet felt the facts of its case justified a higher standard of duty.[104]

Critics widely disapproved of the *Stratton* decision.[105] First, although Prodigy advertised that it controlled content on "Money Talk," Prodigy was only concerned with obscene material and not potentially defamatory material. Second, and more importantly, critics argued that the *Stratton* opinion provided a disincentive for ISPs to monitor their content for fear of being held to a higher standard of liability.[106]

Members of Congress on both sides of the aisle believed that the *Stratton* decision was incorrect.[107] In addition, ISPs began lobbying Congress to overturn the ruling since it forced them to choose between creating a safer Internet and facing increased liability.[108] As a result, Representatives Christopher Cox and Ron Wyden introduced an amendment on the House

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[100] *Id.* at *3.

[101] *Id.* at *1-2.

[102] *See supra* note 93.

[103] Friedman & Buono, *supra* note 94, at 652.

[104] *Stratton*, 1995 N.Y. Misc. LEXIS 229, at *12 ("Let it be clear that this Court is in full agreement with *Cubby* . . . .").

[105] Friedman & Buono, *supra* note 94, at 653.

[106] *Id.*

> The online community and Capitol Hill roundly criticized the Stratton Oakmont decision at a time when Congress was considering telecommunications reform legislation as well as the Communications Decency Act. Lawmakers of all political stripes found common cause in opposing the decision, which they believed would discourage [service providers] from monitoring their sites for objectionable content.

Id.

[107] Cannon, *Legislative History*, *supra* note 81, at 62.

[108] *Id.* ("Representatives of the on-line industry argued that laws like *Stratton* create a 'Hobson's choice' between creating 'child safe' areas that expose the ISP to liability as an editor, monitor, or publisher, and doing nothing in order to protect the ISP from liability.").

floor that gave ISPs protection when they monitored their sites for obscene content.[109] The amendment became § 230 of the CDA.[110]

The amendment states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[111] It further states:

> No provider or user of an interactive computer service shall be held liable on account of–
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or
>
> (B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[112]

The committee report specifically stated that the purpose of the amendment was to overturn the holding in *Stratton*.[113]

C. *Immunity for ISPs for Content Provided by Third Parties: The Application of § 230 by the Courts*

Congress intended § 230 to give ISPs a greater ability to regulate their sites for offensive content.[114] It is ironic that § 230 actually gives ISPs a license to completely ignore the problem of offensive content on their websites.[115]

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[109] Friedman & Buono, *supra* note 94, at 653.

[110] *Id.*

[111] 47 U.S.C. § 230(c)(1) (1996).

[112] *Id.* § 230(c)(2)(A)-(B).

[113] H.R. CONF. REP. NO. 104-458, at 194 (1996).

> One of the specific purposes of this section is to overrule Stratton Oakmont v. Prodigy and any other similar decisions which have treated such providers and users as publishers or speakers of content that is not their own because they have restricted access to objectionable material. The conferees believe that such decisions create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services.

Id.

[114] *Id.*

[115] *See* Kane, *supra* note 18, at 501.

> While Congress and the court certainly acted admirably in attempting to encourage the development of the Internet, both erred in excusing [ISPs] from [their] duty under the common law to guard against the damage to others' reputations. A more cautious approach to regulation on the Internet, and more restraint in interpreting such regulations, would allow the Internet to develop as a forum of free speech while continuing to offer legal protection to those who may be damaged by careless citizens of cyberspace.

Id.

1. Zeran v. America Online, Inc.

Zeran v. America Online, Inc.[116] was the first case to test the scope of § 230. Plaintiff, Kenneth Zeran, fell victim to a malicious Internet hoax when an unknown person posted a message on an America Online ("AOL") bulletin board that a "Ken ZZ03." was selling tee shirts with vulgar and incendiary slogans regarding the Oklahoma City bombing.[117] The advertised slogans included: "Visit Oklahoma ... It's a BLAST!!!"; "Forget the rescue, let the maggots take over—Oklahoma 1995"; and "Finally a day care center that keeps kids quiet—Oklahoma 1995."[118] The message also included Zeran's home phone number.[119] Zeran neither knew about, nor gave his permission for, the hoax advertisements.[120] Moreover, Zeran was not even an AOL customer.[121] Once he became aware of the remarks, Zeran contacted AOL, which removed the listing and terminated the user's account.[122]

After the removal, messages regarding the hoax continued to post on AOL bulletin boards for approximately one week.[123] In addition, outraged individuals inundated Zeran with phone calls at his home listing.[124] He received a call approximately every two minutes.[125] The situation worsened when a radio station disc jockey in Oklahoma received the messages and suggested that his listeners call Zeran and voice their anger and disgust.[126] The phone calls were so threatening that local police placed Zeran's home under protective surveillance.[127] The harassing phone calls did not abate until two weeks later, when they decreased to about fifteen a day.[128]

After the incident, Zeran sued AOL claiming that "AOL was negligent in failing to respond adequately to the bogus notices on its bulletin board after being made aware of their malicious and fraudulent nature."[129] AOL moved for summary judgment, arguing that § 230 preempted the state negligence action by prohibiting liability for ISPs as "publishers."[130] Zeran countered that, while § 230 prevented ISPs from being treated as "publishers," it did not

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[116] 958 F. Supp. 1124 (E.D. Va. 1997).
[117] *Id.* at 1127.
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] Zeran v. America Online, Inc., 958 F. Supp. 1124, 1127 (E.D. Va. 1997).
[123] *Id.* at 1128.
[124] *Id.* at 1127.
[125] *Id.* at 1128.
[126] *Id.*
[127] *Id.*
[128] Zeran v. America Online, Inc., 958 F. Supp. 1124, 1128 (E.D. Va. 1997).
[129] *Id.*
[130] *Id.* at 1128-29.

prevent them from being treated as "distributors," as they were in *Cubby*.[131] The court held that the CDA contained no explicit or implied language that indicated Congress's intent to preempt all state negligence laws.[132]

The court, however, concluded that Zeran's interpretation conflicted with the clear objective of § 230 which "was to encourage the development of technologies, procedures and techniques by which objectionable material could be blocked or deleted"[133] by ISPs. The court felt that distributor liability would discourage ISPs from screening their sites because it would create "actual knowledge."[134] The court did not go so far as to state that the CDA preempted all state claims against ISPs, but it did block Zeran's claim.[135]

2. *Blumenthal v. Drudge*

Blumenthal v. Drudge[136] demonstrates a broad application of § 230 immunity. In *Blumenthal*, Matt Drudge posted on his website, the Drudge Report,[137] an article claiming that Sidney Blumenthal, then assistant to the President, had a history of spousal abuse against his wife.[138] Blumenthal sued Drudge and AOL for defamation.[139] Once again, the court ruled that the ISP could not be held liable for content provided by a third party.[140]

While this result may not seem surprising given the holding in *Zeran*, the holding is startling considering AOL's vastly different role in *Blumenthal*. In *Blumenthal*, AOL and Drudge entered into a written licensing agreement for one year.[141] During that time, all AOL members had access to the Drudge Report.[142] Drudge received a monthly royalty payment of $3,000 from AOL.[143] The AOL contract was Drudge's only source of income during 1997.[144] Under the terms of the licensing agreement, AOL reserved the right

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[131] *Id.* at 1133 ("At the heart of Zeran's argument is the premise that distributor liability is a common law tort concept different from, and unrelated to, publisher liability.").

[132] *Id.* at 1131 ("[T]he CDA reflects no congressional intent, express or implied, to preempt all state law causes of action concerning interactive computer service.").

[133] *Id.* at 1134.

[134] Zeran v. America Online, Inc., 958 F. Supp. 1124, 1134 (E.D. Va. 1997).

[135] *Id.* at 1135. "In sum, although the CDA does not preempt all state law causes of action concerning interactive computer services, it does preempt Zeran's claim. This is so because his 'negligence' cause of action conflicts with both the express language and the purposes of the CDA." *Id.*

[136] 992 F. Supp. 44 (D.D.C. 1998).

[137] *See* Drudge Report, *at* http//:www.drudgereport.com.

[138] *Blumenthal*, 992 F. Supp. at 46.

[139] *Id.*

[140] *Id.* at 53 ("AOL is immune from suit, and the Court therefore must grant its motion for summary judgment.").

[141] *Id.* at 47.

[142] *Id.*

[143] *Id.*

[144] Blumenthal v. Drudge, 992 F. Supp. 44, 47 (D.D.C. 1997).

"to remove, or direct Drudge to remove, any content which, as reasonably determined by AOL . . . violates AOL's then-standard Terms of Service . . . ."[145] Furthermore, AOL could "require reasonable changes to . . . [the] content, to the extent such content would, in AOL's good faith judgment, adversely affect operations of the AOL network."[146]

In *Blumenthal*, AOL was fully aware of the controversial nature of Drudge's column and even promoted the report as such,[147] as evidenced when AOL issued a press release proclaiming "AOL Hires Runaway Gossip Success Matt Drudge."[148] Even given the fact that: (1) AOL paid Drudge under a licensing agreement, (2) AOL promoted its relationship with Drudge, (3) AOL was aware that Drudge's column was a "gossip and rumor"[149] column, and (4) AOL reserved large editorial discretion over Drudge's column, the court held that this case was not outside the parameters of § 230.[150] Begrudgingly, the court concluded, "AOL is immune from suit" and granted summary judgment.[151]

3. Doe v. America Online, Inc.

Courts have not limited § 230's reach to defamation actions. *Doe v. America Online, Inc.*[152] demonstrates the impact of § 230 in the area of child pornography. Jane Doe brought the suit on behalf of her minor son.[153] When her son was eleven years old, Richard Lee Russell, a popular schoolteacher, lured the boy to Russell's home.[154] Russell molested the boy and videotaped the assault.[155] Doe's complaint alleged that Russell discussed the attack on an AOL chatroom and made arrangements to sell the videotape to a man in

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[145] *Id.* at 51.

[146] *Id.*

[147] *Id.*

> [S]hortly after it entered into the licensing agreement with Drudge, AOL issued a press release making clear the kind of material Drudge would provide to AOL subscribers—gossip and rumor—and urged potential subscribers to sign onto AOL in order to get the benefit of the Drudge Report. The press release . . . stated: "Giving the Drudge Report a home on America Online . . . opens up the floodgates to an audience ripe for Drudge's brand of reporting . . . AOL has made Matt Drudge instantly accessible to members who crave instant gossip and newsbreaks."

Id.

[148] Blumenthal v. Drudge, 992 F. Supp. 44, 51 (D.D.C. 1997).

[149] *Id.*

[150] *See id.*

[151] *Id.* at 53.

[152] Doe v. America Online, Inc., 718 So. 2d 385 (Fla. Dist. Ct. App. 1998).

[153] *Id.* at 386.

[154] *Id.*

[155] *Id.*

Arizona.[156] Doe sued both Russell and AOL.[157] Doe claimed that AOL was negligent because

> AOL knew, or should have known, that Russell and others like him used the service to market and distribute child pornographic materials, that it should have used reasonable care in its operation, that it breached its duty, and that the damages were reasonably foreseeable as a result of AOL's breach.[158]

The court cited to § 230 of the CDA and dismissed Doe's suit before a jury had a chance to hear the merits of the case.[159] The court held that Doe's suit attempted to create liability for AOL where none existed because AOL did not edit or withdraw the posting.[160] As in *Zeran* and *Blumenthal*, the ISP again escaped liability.

Cases like *Doe* are especially tragic because child pornography is precisely the type of content that Congress intended § 230 to regulate.[161] Section 230, instead, allows suits against ISPs to be dismissed on summary judgment and prevents parents and children from presenting their case to a jury.

4. Congress did not anticipate the broad scope of § 230

Judicial interpretation of § 230 in *Zeran, Blumenthal*, and *Doe* has given ISPs virtually complete immunity from suits under state law for content provided on their websites by a third party.[162] However, the legislative history of § 230 does not justify such immunity.[163] The history includes very little, if any, debate on the issue.[164] Representatives Cox and Wyden introduced § 230 as a floor amendment,[165] and the section occupies only a paragraph in the committee report.[166] The only objective revealed by the legislators was to

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[156] *Id.*

[157] *Id.*

[158] Doe v. America Online, Inc., 718 So. 2d 385, 386 (Fla. Dist. Ct. App. 1998).

[159] *Id.*

[160] *Id.* at 389.

[161] Cannon, *Legislative History*, *supra* note 81, at 57 ("The fundamental purpose of the CDA is to provide much needed protection for children." (quoting Senator Exon)).

[162] *See* Blumenthal v. Drudge, 992 F. Supp. 44, 49 (D.D.C. 1998) ("Whether wisely or not, [section 230] made the legislative judgment to effectively immunize providers of interactive computer services from civil liability in tort with respect to material disseminated by them but created by others.").

[163] Friedman & Buono, *supra* note 94, at 660 ("[C]ritics point to the plain language and legislative history of section 230 to support the view that Congress enacted section 230 to immunize [ISPs] only from publisher, not distributor, liability.").

[164] *See* Kane, *supra* note 18, at 498.

[165] Friedman & Buono, *supra* note 94, at 653.

[166] *See* H.R. CONF. REP. NO. 104-458, at 194 (1996).

reverse what many felt to be a preposterous result in *Stratton*.[167] The legislative history does not support the courts' action of ending the debate on ISP liability for third party content.[168]

Thus, in *Zeran*, *Blumenthal*, and *Doe*, the courts have gone beyond the protection Congress intended to grant to ISPs.[169] In doing so, the judiciary is severely hampering the states' ability to protect their citizens.

IV. PREEMPTION ANALYSIS: SECTION 230 SEVERELY HANDICAPS A STATE'S ABILITY TO PROTECT ITS CITIZENS FROM CHILD PORNOGRAPHY

One of the primary tools that states use to protect their citizens is tort laws, which provide recovery for those injured by the acts of another. Although the federal government has the power to preempt state tort law, the courts should only apply the doctrine when Congress's intent to preempt is clear.[170] In their application of § 230, the courts have ignored this fundamental principle. It is evident from the legislative history of § 230 that Congress did not intend for the amendment to preempt state tort law.[171] Yet, unfortunately, the courts have interpreted § 230 as pre-emptive in *Zeran*,[172] *Blumenthal*,[173] and *Doe*.[174] As a result of the courts' misapplication of preemption, several plaintiffs were denied recourse before the law for the injuries they endured.[175]

A. Federalism and the Preemption Debate

Our federal system contemplates that states have the obligation and power to protect their citizens through the use of the state's police powers.[176] The

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[167] Friedman & Buono, *supra* note 94, at 660.

[168] *See* Kane, *supra* note 18, at 498.

[169] *See generally id.*

[170] Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559, 568 (1997) ("Sensitive to the need to protect the sovereignty of the states, courts have chosen to check the vast federal power inherent in the Supremacy Clause in various ways, most importantly through a presumption against preemption and an accompanying rule requiring a 'clear statement' of congressional intent to preempt.").

[171] Kane, *supra* note 18, at 498 ("Both the text of the CDA and its meager legislative history support the conclusion that when Congress said 'publisher,' it meant 'publisher' and not 'distributor.'").

[172] Zeran v. America Online, Inc., 958 F. Supp. 1124, 1137 (E.D. Va. 1997).

[173] Blumenthal v. Drudge, 992 F. Supp. 44, 53 (D.D.C. 1998).

[174] Doe v. America Online, Inc., 718 So. 2d 385, 389 (Fla. Dist. Ct. App. 1998).

[175] *See generally* Kane, *supra* note 18, at 562 ("Whether to allow this preemption defense is of critical importance to accident victims, because, if the defense is upheld, they may be left without recourse to a damage remedy.").

[176] 16A AM. JUR. 2D *Constitutional Law* § 315 (1998).

police powers have been called the most important of governmental powers—the principal pillar of government.[177]

One way states traditionally exercise their police power is by providing methods of redress for victims of tortious acts.[178] Indeed, the tort system is effective in addressing the damage caused by the tortious acts of others because tort law is court-created common law and because tort law is local law.[179] While tort law lacks the predictability created by a statute's bright-line rule, it has the marvelous ability to focus on the specific facts of each case to determine what justice requires in that particular situation.[180] Furthermore, because tort laws are local laws, members of the community have the opportunity to determine their application. Tort law thus reflects the "conscience of the community."[181]

A competing concept in the federal system is the supremacy of federal law.[182] The supremacy of federal law can negate actions of the state, even when the state's actions are clearly based upon its police powers.[183] However, the supremacy of federal law is a powerful concept that, when used too freely, can threaten the very concept of federalism.[184] In the past, courts have sparingly used supremacy to preempt state laws, especially when federal laws provide no alternative form of recourse.[185]

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[177] *Id.*

[178] Ronald W. Eades, *Attempts to Federalize and Codify Tort Law*, 36 TORT & INS. L.J. 1 (2000) ("Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens." (quoting Medronic, Inc. v. Lohr, 518 U.S. 470, 475 (1996)).

[179] *Id.* ("The ability of tort law to grow and change with the times arose by virtue of two important factors: tort law is court-created common law, and tort law is local law.").

[180] *Id.* "Although court-made and jury-applied common law threatened a lack of uniformity and predictability, it assured justice. Each case could be decided upon its own facts, and, where necessary, rules changed to meet changing needs. That law as formed and applied, therefore, was just." *Id.*

[181] *See id.*

[182] *See* Grey, *supra* note 170, at 567.

[183] 81A C.J.S. *States* § 24 (1977).

> The supremacy of the exercise of congressional power regarding a given subject matter effectively negatives the reserved power of the state with respect thereto, and state law even if based on the acknowledged police power of the state must always yield in case of conflict with the exercise by the federal government of any power it possesses under the law and Constitution or with any right that instrument gives or secures.

Id.

[184] William T. Waren, *Federal Preemption*, *in* 25 ST. LEGISLATURES 8 (1999). "Federalism respects the geographic, economic, social and political diversity of America. Local diversity is ignored when state laws are preempted and replaced with 'one-size-fits-all' national policies . . . ." *Id.*

[185] *See* Grey, *supra* note 170, at 571.

The Supreme Court has made it clear that preemption should only occur when Congress's intent is clear.[186] Congress can demonstrate its intent in three ways: (1) through express statements, (2) by enacting federal laws in direct conflict with state laws, or (3) when "federal law occupies a legislative field so thoroughly that it is reasonable to infer that Congress left no room for supplementation by the States."[187] Furthermore, courts have been directed to interpret statutes with a presumption against preemption.[188]

In recent years, however, courts have shown a noticeable inconsistency and vacillation when it comes to determining when a federal law will preempt a state cause of action.[189] Corporations and business interests have seized the opportunity to argue that federal regulations preempt state tort claims.[190] When defendants can successfully argue preemption as an affirmative defense, plaintiffs are often left with no other avenue of recovery.[191]

B. Section 230 Should Not Preempt State Tort Claims

In the *Zeran* case, the court went to great lengths to make the argument for preemption despite the fact that neither the statute nor the legislative history suggested that Congress intended to preempt. In *Zeran*, the court found no congressional intent to preempt, either expressed or implied.[192] Indeed,

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[186] Eades, *supra* note 178 (citing Cipollone v. Ligget Group, Inc., 505 U.S. 504, 516 (1992) (quoting U.S. CONST. art. VI)).

[187] *Id.*

[188] Zeran v. America Online, Inc., 958 F. Supp. 1124, 1129 (E.D. Va. 1997).

[189] Grey, *supra* note 170, at 559-60.

[190] *Id.* at 561 ("With increasing frequency, corporations have attempted to turn these statutes from regulatory swords into private shields, contending that the federal statutes preempt the recovery of damages under state tort law.").

[191] Eades, *supra* note 178.

> A dissent to a recent U.S. Supreme Court decision on this subject points out the shortcoming of the federal legislation at issue here and in many other examples of federal preemption. The upshot of the Court's decision is that state negligence law is displaced with no substantive federal standard of conduct to fill the void. That outcome defies common sense and sound policy.

Id. at 1.

[192] *Zeran*, 958 F. Supp. at 1131.

> The purpose and objectives of the CDA support the conclusion that Congress did not intend to occupy the field of liability for providers of online interactive computer services to the exclusion of state law. *Section 230's language and legislative history of [sic] reflect that Congress' purpose in enacting that section was not to preclude any state regulation of the Internet, but rather to eliminate obstacles to the private development of blocking and filtering technologies capable of restricting inappropriate online content.* This purpose belies any congressional intent to bring about, through the CDA, exclusive federal regulation of the Internet. Accordingly, the CDA reflects no congressional intent,

§ 230(e)(3) expressly states: "Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."[193] Nonetheless, despite citing the Supreme Court's observation that "preemption fundamentally is a question of congressional intent,"[194] the court found justification for preemption.

The court did not find persuasive Zeran's argument that AOL should be treated as a distributor rather than a publisher.[195] The court relied on the Restatement (Second) of Torts section 577(2)[196] to support its contention that a publisher is anyone "who fails to take reasonable steps to remove defamatory statements from property under her control."[197] Basing their decision on the Restatement, the court held that Zeran's argument was contrary to § 230(c)(1) and was thus preempted.[198]

In order for the *Zeran* court's reasoning to make sense, one must ignore the legislative history behind § 230. The committee report specifically states that the purpose of the section was to "overrule *Stratton-Oakmont v. Prodigy* and any other similar decisions which have treated such providers and users as *publishers* or *speakers*" of objectionable content.[199] If Congress intended the *Zeran* interpretation, the most obvious case to cite would have been the *Cubby* decision, which deals with distributor liability.[200] The *Stratton* opinion made clear that it was following the holding in *Cubby* and extending it to a different set of circumstances.[201]

Tellingly, the committee report did not mention *Cubby* but referred only to *Stratton*.[202] The reference suggests that Congress's intent with § 230 was to overturn *Stratton*'s extension of a higher degree of liability, and not remove the distributor liability applied in *Cubby*. The floor discussion of the amendment also supported this interpretation. Representative Cox disapproved of the *Stratton* decision and compared it negatively with the court's

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express or implied, to preempt all state law causes of action concerning interactive computer services.

Id. (emphasis added).

[193] 47 U.S.C. § 230(e)(3) (1996).

[194] *Zeran*, 958 F. Supp. at 1130 (quoting English v. Gen. Elec. Co., 496 U.S 72, 78-79 (1990)).

[195] *Id.* at 1133.

[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] H.R. CONF. REP. NO. 104-458 (1996) (emphasis added).

[200] Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 140-41 (S.D.N.Y. 1991).

[201] Stratton Oakmont, Inc. v. Prodigy, No. 31063/94, 1995 N.Y. Misc. LEXIS 229, at *12 (N.Y. Sup. Ct. May 26, 1995).

[202] *See* H.R. CONF. REP. NO. 104-458 (1996).

treatment in *Cubby*.[203] What appalled Cox was that Prodigy could be liable even though it had made a good faith effort—not merely that Prodigy had to face some level of liability.[204]

C. Section 230 Preemption Effects on the Victims of Child Pornography

The victims of tortious acts committed by ISPs are left without recourse regardless of how negligent an ISP's actions are. In each case cited above, § 230 was used as a tool for the defendant to win on summary judgment before the plaintiff could present the merits of the case to a jury.[205] Not only were plaintiffs denied recovery, they were denied their day in court.[206]

Because of the anonymity afforded by the Internet, a plaintiff's best chance of recovery is often against the ISPs. ISPs should be liable since, as seen in *Zeran*, a plaintiff can have a difficult time tracking down the author or original source of tortious information.[207] Anonymity on the Internet is a policy decision—the Internet is anonymous only because society allows it to be.[208] Indeed, this anonymity is precisely what makes the Internet such an attractive place for those wishing to deal in child pornography.[209]

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[203] 141 CONG. REC. H8460, 8469 (1995).

[204] *Id.* at 8470.

[205] *See* Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998); Zeran v. America Online, Inc., 958 F. Supp. 1124 (E.D. Va. 1997); Doe v. America Online, Inc. 718 So. 2d 385 (Fla. Dist. Ct. App. 1998).

[206] *See* Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 1973 DUKE L.J. 1153, 1172-77 (1973).

> [T]here are generally accepted *reasons* for making litigation possible. I think we take little risk of serious distortion if we try to frame those reasons in terms of the values (ends, interests, purposes) that are supposed to be furthered by allowing persons to litigate.
>
> I have been able to identify four discrete, though interrelated, types of such values which may be called dignity values, participation values, deterrence values, and . . . effectuation values. *Dignity values* reflect concern for the humiliation or loss of self-respect which a person might suffer if denied an opportunity to litigate. *Participation values* reflect an appreciation of litigation as one of the modes in which persons exert influence, or have their will "counted," in societal decisions they care about. *Deterrence values* recognize the instrumentality of litigation as a mechanism for influencing or constraining individual behavior in ways thought socially desirable. *Effectuation values* see litigation as an important means through which persons are enabled to get, or are given assurance of having, whatever we are pleased to regard as rightfully theirs.

Id.

[207] *Zeran*, 958 F. Supp. at 1126.

[208] Taylor, *supra* note 23, at 4.

[209] Guttman, *supra* note 39, at 43 ("Anonymity and convenience have revealed an extraordinary level of sexual interest in children.").

The enormous powerlessness of children is exacerbated by their lack of access to the courts. Children are not in a position to keep pornographic images from circulating on the Internet. Unfortunately, § 230 prevents children and their parents from holding accountable those who are in a position to control child pornography on the Internet, the ISPs.

V. SECTION 230 IS BAD PUBLIC POLICY FOR CHILDREN AND FOR THE FUTURE GROWTH OF THE INTERNET

The controversy over § 230 illustrates a larger debate currently being addressed by society: to what extent is society willing to trust corporations, like AOL, to protect those who are preyed upon through the use of their services? The choices made by Congress and the courts in enacting and applying § 230 will have a negative impact on efforts to stop the spread of child pornography on the Internet as well as on the growth of the Internet in general.

A. The Courts' Interpretation of § 230 Contradicts the Very Public Policy Concerns Behind the Bill

Perhaps the most compelling argument against the courts' interpretation of § 230 is that it defeats the basic underlying intention of encouraging ISPs to self-regulate.[210] The committee report provides, "[t]he conferees believe that such decisions [as *Stratton*] create serious obstacles to the important federal policy of empowering parents to determine the content of communications their children receive through interactive computer services."[211] Congress wanted to remove the disincentive for self-regulation that *Stratton* created.[212] However, by also eliminating the liability imposed by *Cubby*, courts have removed a powerful incentive to regulate—state tort liability.

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[210] Friedman & Buono, *supra* note 94, at 661 ("Finally, critics contend that *Zeran* does not serve the central public policy goal of section 230—namely that OSPs should be encouraged to police their sites for offensive content.").

[211] H.R. CONF. REP. NO. 104-458 (1996).

[212] Cannon, *Legislative History*, *supra* note 81, at 61.

> [I]ndividuals who make good faith efforts to implement a defense under the CDA shall be protected from other criminal or civil liability. This defense was in response to what Senator Exon felt was an absurd situation. If an Internet Service Provider (ISP) exerted no editorial control over the transmissions on its computers, it was free from liability according to the few cases that had been decided. If, however, an ISP exerts editorial control but is nevertheless unable to prevent all harmful transmissions from passing over its computers, then the ISP could be liable for the resulting harm. *Stratton Oakmont v. Prodigy* was the war cry of this absurdity.

Id.

Even the *Blumenthal* court, which expanded the holding in *Zeran*, expressed a sense of frustration with the outcome.[213] The court commented, "it appears to this court that AOL in this case has taken advantage of all the benefits conferred by Congress in the Communications Decency Act, and then some, without accepting any of the burdens that Congress intended . . . ."[214] The *Blumenthal* court went so far as to announce plainly that it agreed with the plaintiff's arguments and felt that AOL should assume some degree of responsibility.[215]

The public is in the most unfortunate of situations. The courts, without the benefit of jury input, made critical decisions about public policy without a vigorous debate in the public arena or in Congress. In *Zeran* and its progeny, the courts decided that ISPs have no responsibility for content that a third party authors, regardless of their knowledge and regardless of their relationship with that third party.[216] Courts, however, should not be allowed to make a decision of such magnitude unilaterally.[217] Moreover, courts do not even agree with the policy decision articulated in these cases.[218]

B. Tort Liability Provides an Incentive for Companies to Invest in Tools to Limit the Distribution of Child Pornography on the Internet

Supporters of the *Zeran* decision argue that it supports one of the stated policy goals of enacting § 230, namely, "[preservation of] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[219] The supporters overlook the fact that the policy goal they quote is just one of

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[213] Blumenthal v. Drudge, 992 F. Supp. 44, 51 (D.D.C. 1998).

[214] *Id.* at 52-53.

[215] *Id.* at 51.

> If it were writing on a clean slate, this Court would agree with plaintiffs. AOL has certain editorial rights with respect to the content provided by Drudge and disseminated by AOL, including the right to require changes in content and to remove it; and it has affirmatively promoted Drudge as a new source of unverified instant gossip on AOL. Yet it takes no responsibility for any damage he may cause. AOL is not a passive conduit like the telephone company, a common carrier with no control and therefore no responsibility for what is said over the telephone wires.

Id.

[216] Zeran v. America Online, Inc., 958 F. Supp. 1124 (E.D. Va. 1997).

[217] *See* Kane, *supra* note 18, at 495 ("[T]rial courts should examine the [Internet] in small steps, before the Supreme Court takes the big, and almost irreversible, step of applying constitutional analysis to cyberspace and its laws.").

[218] *See Blumenthal*, 992 F. Supp. at 51.

[219] 47 U.S.C. § 230(b)(2) (1996).

five policy objectives outlined in the bill.[220] Equally important is the policy of protecting children from Internet abuses.[221] By eliminating all liability, the courts ignore these other policy considerations.

Some degree of ISP regulation would lend support to all of the policy considerations articulated by Congress. The Internet is an extremely competitive market place. Currently, no legal incentives encourage investment of valuable resources in developing the type of programs and technological advances that would allow ISPs to keep child pornography off their infrastructure. Requiring all ISPs to be responsible for making an effort to keep child pornography off their sites would increase the market for such a product, giving companies a greater incentive to invest in its development.[222] Indeed, one need only look at the area of copyright law, where ISPs are faced with tort liability. Such liability creates a demand for products that screen copyrighted material. One such product has even been modified to allow ISPs to find previously documented images of child pornography.[223] While it is often claimed that § 230 will give ISPs the liberty to take additional protective measures,[224] the *Blumenthal* court felt that this policy was unsuccessful:

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[220] *Id.* § 230(b). It is the policy of the United States:

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

Id.

[221] *See id.*

[222] One software company, BayTSP.com has developed software to allow content providers and webmasters the ability to comply with the record-keeping requirements of 18 U.S.C. § 2237. This is a case where a software company was motivated to create software in order to meet the needs created by legislation. *See BayTSP.com, Inc. Announces Innovative Way to Track Down Child Pornography and Clean Up the Internet*, PR NEWSWIRE, June 2, 2000.

[223] *See id.*

BayTSP.com, a cutting-edge creator of Internet security applications for online content, announced today its intention to assist law enforcement in the identification of child pornography on the Internet while offering content providers and webmasters an electronic solution to comply with existing federal record keeping laws governing the sexual exploitation and abuse of children.

Id.

[224] *See* Patrick J. Carome & Samir Jain, *Immunity from Tort Liability for Online Services: Why the Decision in* Zeran v. America Online *is Good Public Policy*, 2 CYBERSPACE LAW. 13

> Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role, in making available content prepared by others. In some sort of tacit *quid pro quo* arrangement with the service provider community, Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, *even where the self-policing is unsuccessful or not even attempted.*[225]

The Internet is still in its infancy.[226] Often, critics of regulation portray regulating measures as something that will necessarily stifle the growth of the Internet and retard its development.[227] These critics treat the Internet as if it was a fragile medium, yet they have been unable to demonstrate how the *Cubby* or *Stratton* decisions have had a "chilling effect" on the Internet.[228] The truth remains that society simply does not know how regulation will affect the Internet.[229] Indeed, regulation at this early stage of growth of the Internet may provide a unique opportunity to shape such growth in a positive direction.[230]

(1998). "By enacting Section 230, Congress struck a sophisticated balance of competing policy considerations and created a legal regime that simultaneously preserves the vibrancy of discourse over the Internet and online services, while *freeing* those services to deal responsibly with truly harmful content." *Id.* (emphasis added).

[225] Blumenthal v. Drudge, 992 F. Supp. 44, 52 (D.D.C. 1998) (emphasis added).

[226] *See* Zeran v. America Online, Inc., 958 F. Supp. 1124, 1135 n.24 (1997) ("[T]he Internet is a rapidly developing technology—today's problems may soon be obsolete while tomorrow's challenges are, as yet, unknowable.").

[227] *See* Patrick Carome et al., *Don't Sue the Messenger, in* INTELL. PROP. MAG., Sept. 1997 ("The expanded immunity exemplified in *Zeran* and *Doe* represents a big change in the law of cyberspace—and a change that was essential to the continued growth and development of a medium of communication that is still in its infancy.").

[228] *See* John Carr, *It's Time to Tackle Cyberporn*, NEW STATESMAN, Feb. 20, 1998, at 24. "[T]his debate is not about whether some sacred principle of non-regulation or freedom from censorship should be breached: that point was passed some time ago. Now we are discussing practical questions of degree: the ways in which intervention or regulation might occur . . . ." *Id.*

[229] Thomas B. Nachbar, *Paradox and Structure: Relying on Government Regulation to Preserve the Internet's Unregulated Character*, 85 MINN. L. REV. 215, 215-16 (2000) ("Because we don't yet know what the Internet's full potential is, and because the Internet is too young to have reached any kind of regulatory equilibrium, it could very well be that the lack of uniform and readily understood rules is keeping the Internet from reaching its true potential.").

[230] *See* Kane, *supra* note 18, at 496 ("If Congress had not been so incautious, the outcome described above, with ISPs liable as distributors for content they know or have reason to know to be defamatory, would have fully served the policy recognized here: to protect individuals from libel on the Internet, while encouraging the growth of the Internet and simultaneously encouraging ISPs to monitor their content.").

C. Section 230 Removes an Effective Way to Control Child Pornography on the Internet that Does Not Raise First Amendment Concerns

One of the policy considerations cited by the *Zeran* court was concern over the First Amendment.[231] Fans of the *Zeran* decision claim that it prevents the "knee-jerk censorship" ISPs would feel pressured to apply if liability was imposed without notice.[232] Yet, in the context of child pornography, "knee-jerk censorship" might not be such a bad reaction.

Child pornography does not have the same First Amendment protections as other forms of speech. In fact, in *New York v. Ferber*,[233] the United States Supreme Court held that child pornography had so little free speech value that it was "a category of material outside the protection of the First Amendment."[234] The primary reason is that the states have a compelling interest in the protection of children.[235] In *Osborne v. Ohio*[236] the Supreme Court held that, unlike other forms of obscenity, mere possession of child pornography can be illegal.[237] The Court found that the state could rationally conclude that children would be protected by criminalizing possession of child pornography.[238]

While society might not find it desirable to have ISPs actively policing their sites for other types of speech, in the case of child pornography, active

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[231] *See* Carome & Jain, *supra* note 224. "Indeed, given the staggering volume of content that traverses the Internet and online services each day and the inevitable stream of complaints that some particular content was tortious, service providers would have little choice but to censor on demand or face potential liability. Thus, the Fourth Circuit rightfully concluded, 'liability upon notice has a chilling effect on the freedom of Internet speech.'" *Id.*

[232] *See id.* ("At the same time that immunizing interactive service providers from liability for third-party content promotes vigorous discourse and removes a disincentive to knee-jerk censorship, the immunity provided by Section 230 also frees providers to self-monitor and self-regulate content on their networks in a responsible manner, without fear that their actions might create legal liability.").

[233] 458 U.S. 747 (1982).

[234] *Id.* at 763; *see also* Benjamin J. Vernia, *Validity, Construction, and Application of State Statutes or Ordinances Regulating Sexual Performance by Child*, 42 A.L.R. 5th 291, § 2[a] (2000).

[235] *See* Vernia, *supra* note 234, § 2[a].

[236] 495 U.S. 103 (1990).

[237] *Id.* at 111 ("Given the gravity of the State's interests in this context, we find that Ohio may constitutionally proscribe the possession and viewing of child pornography.").

[238] *Id.* at 110-11.

> Given the importance of the State's interest in protecting the victims of child pornography, we cannot fault Ohio for attempting to stamp out this vice at all levels of the distribution chain. According to the State . . . it is now difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution. Indeed, 19 States have found it necessary to proscribe the possession of the material.

Id.

policing is nothing but desirable. As the United States Supreme Court stated, the First Amendment value of child pornography is de minimis.[239] Thus, any concerns over ISPs removing constitutionally protected speech are also de minimis. Furthermore, unlike in the defamation context, screening for child pornography does not require one to do an investigation in order to identify whether or not the material is objectionable.[240] Once an image is identified as child pornography, no further analysis need take place.[241]

D. By Preventing Tort Actions, § 230 Severely Limits the Courts' Ability to Respond to the Rapidly Changing Internet

The Internet is a rapidly evolving medium.[242] It is thus fortuitous that one of the strengths of tort law has been its flexibility and adaptability.[243] Unlike statute-based laws, tort laws have the ability and freedom to look to the particular circumstances and facts of each case to "make decisions based upon concepts of justice."[244] For example, the duty of care required by a particular defendant is determined by the specific facts relating to that defendant. The court is therefore not confined to a one-size-fits-all standard of care.

Because of this flexibility, tort law has the ability to adapt to the growth of the Internet. As new technologies become available, the standard of care for

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[239] *Id.* at 108 ("[T]he value of permitting child pornography has been characterized as exceedingly modest, if not de minimis." (citing New York v. Ferber, 458 U.S. 747, 762 (1982)).

[240] Vernia, *supra* note 234, at 3.

> The [*Ferber*] court also stated that the trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that the sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole.

Id.

[241] *Id.*

> The [*Ferber*] court held that the First Amendment does not protect child pornography from regulation, provided the regulation falls within limits set by the court, as follows: the offense as defined by the regulation must be limited to works which visually depict sexual conduct by children below a specified age; the category of sexual conduct must be suitably described; and there must be an element of scienter.

Id.

[242] Zeran v. America Online, Inc., 958 F. Supp. 1124, 1135 n.24 (E.D. Va. 1997) ("But the Internet is a rapidly developing technology—today's problems may soon be obsolete while tomorrow's challenges are, as yet, unknowable.").

[243] *See* Eades, *supra* note 178, at 1.

[244] *See id.* "As a matter of common law, tort law was not bound by lengthy, complex, unbending legislation. Courts could review cases and make decisions based upon concepts of justice." *Id.*

ISPs can evolve.[245] While a uniform sense of consistency may not be realistic, each case will be determined on its own merits as opposed to being determined by a rigid standard imposed by Congress.[246]

Tort law also allows for flexibility in its forms of recovery. Therefore, not only are money damages available, but if the circumstances warrant it, injunctive relief may also be awarded.[247] Thus, not only can the standard of care adjust with each case, but so too can the method of recovery.[248]

E. Section 230 Prevents Recovery for Those Who Have Been Victimized

Finally, society cannot ignore the fact that imposing tort liability will allow recovery for those who have suffered damages as a result of an ISP's negligent conduct. The Internet revolutionized the way information is disseminated.[249] The Internet makes it possible to communicate information to more locations, faster and cheaper than ever before contemplated.[250] When the Internet is used to distribute obscene and illegal material, however, the injury to the victim is greater than it has ever been.

With all the talk in case law of striking balances between policy decisions, one cannot lose sight of the fact that plaintiffs are real people who believe they have suffered real injuries because of an ISP's actions. Not only did the eleven-year-old boy in *Doe* have to endure the betrayal of trust by being molested by his teacher, discussion of the molestation in AOL chatrooms compounded his suffering.[251] What did AOL know about the activity in those chat rooms? What could it have done to prevent those discussions? These questions are currently unanswered because Doe's case was dismissed on summary judgment.[252] Judicial interpretation of § 230 prevents an examination of the validity of these plaintiffs' claims against AOL and other ISPs.

Courts and Congress have effectively barred these lawsuits from ever coming before a jury. Instead, they have accepted the ISP's arguments against liability without scrutiny. The case law demonstrates that immunity for ISPs

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[245] *See id.* at 3. "Although court-made and jury-applied common law threatened a lack of uniformity and predictability, it assured justice. Each case could be decided upon its own facts, and, where necessary, rules changed to meet changing needs. The law as formed and applied, therefore, was just." *Id.*

[246] *See id.*

[247] *See* 42 AM. JUR. 2D *Injunctions* § 287 (1998).

[248] *See* Trosky v. Civil Serv. Comm'n, 652 A.2d 813 (Pa. 1995) (holding in the law of torts, remedies attempt primarily to put an injured person as nearly as possible to the equivalent to his position prior to the tort).

[249] *See* Nachbar, *supra* note 229, at 215.

[250] *See id.*

[251] Doe v. America Online, Inc., 718 So. 2d 385 (Fla. Dist. Ct. App. 1998).

[252] *Id.*

has only become broader since *Zeran*, and there does not appear to be any flood of self-regulation on the part of ISPs to fill the void. Into this black hole of non-accountability, plaintiffs are left with no opportunity to be heard before the courts. Section 230 cannot be described as a "balancing" of competing interests when the scales seem to be tipped in the ISPs' favor and victims are left with no recourse.

VI. CONCLUSION

Recent experiences with tobacco, HIV,[253] and product liability lawsuits indicate that tort law can be a powerful tool for changing society in a positive way.[254] While there has been a strong call for tort reform in recent years, tort suits remain a primary method to compensate those who have been injured by the tortious actions of others; contrary to criticisms, tort law is not some sort of lawsuit lottery. Standing alone, tort liability could not possibly solve the problem of child pornography, but tort liability for ISPs could prove to be a powerful tool in the arsenal available to combat it.

Child pornography is fundamentally a child protection issue.[255] Society must determine what armor it will allow children and their families to wield, in order to protect themselves from the horrors of child pornography. The history of § 230 amply demonstrates that leaving the protection of children to the good intentions of private companies is a thin armor indeed.

Devon Ishii Peterson[256]

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[253] Wendy E. Parmet, *Tobacco, HIV, and the Courtroom: The Role of Affirmative Litigation in the Formation of Public Health Policy*, 36 HOUS. L. REV. 1663, 1664 (1999).

> Litigation of public health issues is not new. In the past, however, courts generally played a reactive role. They usually became involved in public health issues either when they were asked to review public health regulations or enforcement actions, or when they were asked to provide compensation for individuals injured by the actions of others. But in the cases of tobacco and HIV, advocates have often gone to court hoping to develop new policies that might promote public health. *The courts, in other words, have become central sites of movements to affect the shape of public health policy.*

Id. (emphasis added).

[254] *See generally* Lynn Mather, *Theorizing About Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 LAW & SOC. INQUIRY 897 (1998) (arguing that recent tobacco litigation contributed to "agenda setting, new ways of defining the problem of tobacco and the policy alternatives, political mobilization, new legal norms, and new political and legal resources for the opponents of tobacco").

[255] *See* Guttman, *supra* note 39, at 43.

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Still Wondering After All These Years: *Ferguson v. City of Charleston* and the Supreme Court's Lack of Guidance over Drug Testing and the Special Needs Doctrine

I. INTRODUCTION

In *Ferguson v. City of Charleston*,[1] the United States Supreme Court ruled that a state-run hospital violated the Fourth Amendment of the Constitution when it conducted warrantless, nonconsensual drug tests on pregnant women for the purpose of seeking criminal prosecution.[2] This note argues that although the Court reached the correct result in restricting hospitals from testing pregnant women for drugs and disseminating test results to law enforcement, based on the inconsistencies among previous drug testing cases, the Court could have reached an equally correct, but opposite, result had alternative reasoning been applied. The Court's reasoning in reaching its conclusion demonstrates the unpredictable nature of the Supreme Court when dealing with challenges to drug testing programs. Section II provides relevant background, including the Fourth Amendment, the special needs exception, and the Supreme Court's earlier drug testing cases. Section III examines the *Ferguson* case as decided by the lower courts and ultimately by the United States Supreme Court. Section IV examines the inconsistencies between the Supreme Court's earlier drug testing cases and *Ferguson*, analyzing why this case could have resulted in the upholding of the drug testing policy. Additionally, Section IV will argue that fluctuations in the media attention given the generally distinct issues of reproductive rights and the war on drugs had an influence in the Court's analysis of the search and seizure in *Ferguson*.

II. BACKGROUND

A. The Fourth Amendment and Special Needs

When a governmental entity undertakes a search[3] or a seizure, the Fourth

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[1] 532 U.S. 67 (2001).

[2] *Id.* at 86.

[3] A search is said to have occurred when the police have physically intruded into a constitutionally protected area. *See* Silverman v. United States, 365 U.S. 505, 511-12 (1961). The Court has likewise held that civil authorities may be the party making the intrusion that may constitute a search. *See, e.g.*, Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995) (school administrators' ability to enforce mandatory drug testing for student athletes); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989) (railroad authorities mandatory drug testing of

Amendment is applicable. Generally, the Fourth Amendment protects citizens from unreasonable searches and seizures conducted by state officials.[4] The term unreasonable is not clearly defined, but has been noted as being "judged by balancing [the] intrusion on the individual's Fourth Amendment interests against [the] promotion of legitimate governmental interests."[5] A paramount consideration in this balancing analysis is the privacy of the individual.[6]

Usually, if a search that could result in criminal prosecution is deemed reasonable, a warrant is required.[7] However, the Supreme Court has held that absent a warrant and probable cause, a search may still be deemed constitutional "[when] special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[8] Where special needs exceptions are raised, "courts must . . . [closely] examin[e] . . . the competing private and public interests advanced by the parties" and balance these interests to determine whether the search constitutes a special needs exception.[9] Once it has been determined that a special need exists, a standard of reasonableness is used to judge the search.[10] To determine reasonableness, the Court must first look at whether the action was justified at its inception and whether the search as conducted was reasonably related to the special need.[11]

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employees involved in accidents); New Jersey v. T.L.O., 469 U.S. 325 (1985) (school administrators' ability to search student's purse); Camara v. Mun. Court of San Francisco, 387 U.S. 523 (1967) (municipal building inspectors); Frank v. Maryland, 359 U.S. 360 (1959) (health commissioners).

[4] The Fourth Amendment to the United States Constitution applies to the states via the Fourteenth Amendment. The Fourth Amendment prohibits unreasonable searches and seizures and provides:

> 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.

U.S. CONST. amend. IV.

[5] *Skinner*, 489 U.S. at 619.

[6] *Id.* at 621, 616.

[7] *Id.*

[8] *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring). The special needs exception was first adopted by the Court in *O'Connor v. Ortega*, 480 U.S. 709 (1997). There, the Court held that public employers had a special interest in ensuring that their agencies run efficiently and effectively and therefore the requirement of probable cause for searches would burden public employers. *Id.* at 723-24.

[9] Chandler v. Miller, 520 U.S. 305, 314 (1997).

[10] *O'Connor*, 480 U.S. at 725-26.

[11] *Id.* (citing Terry v. Ohio, 392 U.S. 1, 20 (1968) and *T.L.O.*, 469 U.S. at 341).

B. Previous Special Needs Drug Testing Cases

The special needs exception to the Fourth Amendment has been the basis of the Supreme Court's past decisions concerning drug testing.[12] The first drug testing case the Supreme Court decided was *Skinner v. Railway Labor Executives' Ass'n*.[13] In *Skinner*, railway workers brought suit against the Federal Railroad Administration ("FRA") to challenge the constitutionality of the FRA's regulations that required drug testing of employees following railway accidents or incidents.[14] The FRA was concerned with alcohol and drug abuse by railway employees and the increasing number of accidents where alcohol and drug use were deemed probable causes of or contributing factors to the accidents.[15] The FRA implemented a program that required employees to give a blood or urine sample for drug and alcohol testing following any major train accident that resulted in a fatality or damage over $50,000.[16] The Administration cited that between 1972 and 1983, twenty-five fatalities and sixty-one injuries were the result of errors of employees who were under the influence of drugs or alcohol at the time of the incidents.[17]

The majority opinion in *Skinner*, written by Justice Kennedy,[18] first established that the taking and the testing of the samples were considered a search and therefore subject to the Fourth Amendment.[19] The Court then noted that, although there was no warrant or probable cause, the drug testing would

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[12] *See Chandler*, 520 U.S. at 305; Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 653 (1989).

[13] 489 U.S. 602 (1989).

[14] *Id.* at 612.

[15] *Id.* at 607.

[16] *Id.* at 609. After the occurrence of any major railway accident resulting in fatality or damage over $50,000, the railroad was to transport all employee personnel to an independent medical facility for the taking of the urine or blood sample. The samples were to be analyzed at this same medical facility. The FRA was then required to notify the employee of the results of the test. If positive, the employee could respond in writing before the FRA began an investigative report. Employees who refused to be tested were not allowed to work for nine months, although they were entitled to a hearing concerning their refusal to be tested. *Id.* at 609-11.

[17] *Id.* at 607.

[18] Justices Rehnquist, White, Blackmun, O'Connor, and Scalia joined the majority opinion. Justice Stevens concurred with the majority, but took exception to the majority's reasoning that the policy would deter drug use among railway workers. *Skinner*, 489 U.S. at 602, 634.

[19] *Id.* at 617. The Court examined previous cases involving searches, including *Winston v. Lee*, 470 U.S. 1 (1982); *Terry v. Ohio*, 392 U.S. 1 (1968) (noting that where a physical intrusion infringes upon a reasonable expectation of privacy that society is ready to accept, it is subject to the Fourth Amendment); and *Schmerber v. California*, 384 U.S. 757 (1966).

be allowed if a special need was found.[20] The Court held that the program fit within the special needs doctrine and was therefore constitutional.[21] The Court reasoned that the regulations were not an "undue infringement on the justifiable expectations of privacy of covered employees, [and] the Government's compelling interests outweigh[ed] privacy concerns."[22]

The dissent, lead by Justice Marshall, criticized the majority for "join[ing] those shortsighted courts which have allowed basic constitutional rights to fall prey to momentary emergencies."[23] Marshall stated that the majority's decision was a huge step in removing the probable cause requirement from the Fourth Amendment.[24] This case was clearly the beginning of what Justice Marshall called the "malleable 'special needs' balancing approach [that] can [only] be justified on the basis of the policy results it allows the majority to reach."[25]

In that same session, the Supreme Court similarly held in favor of drug testing in *National Treasury Employees Union v. Von Raab*.[26] In that case, the United States Customs Service introduced a policy that required drug testing for all employees who were up for promotion, were involved in drug interdiction, handled firearms, or dealt with classified materials.[27] Employees who tested positive for drug use were subject to dismissal, but test results were not to be used for law enforcement purposes, or turned over to any other agency.[28] The Court held that the requirements did not violate the Fourth Amendment, reasoning that the program did not "serve the ordinary means of law enforcement" and "test results may not be used in criminal prosecution."[29] Furthermore, the Court found that the substantial interest of deterring drug use and preventing the promotion of drug users, as well as the interest of protecting the United States' borders, "present[ed] a special need that justif[ed]

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[20] *Skinner*, 489 U.S. at 619.

[21] *Id.* at 633.

[22] *Id.*

[23] *Id.* at 635 (Marshall, J., dissenting). Justice Brennan joined Justice Marshall's dissent.

[24] *Id.* at 636.

[25] *Id.* at 641. Justice Marshall argued that the proper way to evaluate the FRA's policy was to analyze it in the traditional Fourth Amendment framework prior to the special needs exception. According to Marshall, the Court should inquire: (1) whether a search has taken place; (2) whether the search was based on a valid warrant or a recognized exception to a warrant; (3) whether the search was based on any probable cause or lesser cause because of minimal intrusion; and (4) whether the search was conducted in a reasonable manner. *Skinner*, 489 U.S. at 641-42; *see, e.g.*, Welsh v. Wisconsin, 466 U.S. 740 (1984); Katz v. United States, 389 U.S. 347 (1967).

[26] 489 U.S. 656 (1989).

[27] *Id.* at 660-61.

[28] *Id.* at 662.

[29] *Id.* at 666.

departure from the ordinary warrant and probable-cause requirements."[30] The only part of the policy the Court struck down was the drug testing of employees who handled classified materials.[31]

It is interesting to note that Justice Scalia, who joined the majority in *Skinner*,[32] dissented in this case.[33] Scalia argued that although *Skinner* recognized that there existed a drug and alcohol problem among railway workers,[34] in *Von Raab* there was no evidence that there was a frequency or likelihood of drug use among Customs workers.[35] In Scalia's view, the reason the policy was implemented was to "set an important example in our country's struggle with this most serious threat to our national health and security."[36]

Six years later, the Supreme Court expanded the special needs doctrine to uphold an Oregon school district's policy of suspicionless drug testing of student athletes in *Vernonia School District v. Acton*.[37] In *Vernonia*, the Vernonia, Oregon School District noted an increase in drug use among its student athletes.[38] In response to this perceived drug epidemic, the School District implemented a student athlete drug policy, which required that all students who wished to play sports submit to a drug test at the beginning of the season and again randomly throughout the season.[39] Wayne Acton, then a seventh grader, was denied acceptance to play football when he and his parents refused to sign consent forms for the drug testing.[40] The Actons filed suit against the School District seeking a declaratory judgment and injunctive relief.[41] The United States District Court for the District of Oregon denied the

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[30] *Id.*

[31] The majority did not see the reasonableness of drug testing those who handled classified materials. *Id.* at 678. The Court found this portion of the policy to be overbroad and remanded on this issue. *Id.*

[32] Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 605 (1989).

[33] Justice Stevens, who concurred in the *Skinner* decision, joined Scalia's dissent. *Von Raab*, 489 U.S. at 680 (Scalia, J., dissenting).

[34] *Id.*

[35] *Id.* at 681.

[36] *Id.* at 686. Scalia quoted from the Commissioner's memorandum to Customs Service employees explaining the program. *Id.*

[37] 515 U.S. 646 (1995).

[38] *Id.* at 648-49. The School District found that students were discussing the draw of the drug culture, of which student athletes were considered the "ring leaders." *Id.* The school also noted an increase in disciplinary problems, which they attributed to drug use. *Id.*

[39] *Id.* at 650. Students, accompanied by a monitor of the same sex, produced their urine sample in an empty locker room. *Id.* Males collected their samples at a urinal with their backs to the monitor. *Id.* Females collected their samples within a stall. *Id.* A monitor checked the sample for tampering. *Id.*

[40] *Vernonia*, 515 U.S. at 651.

[41] *Id.*

claims.[42] The United States Court of Appeals for the Ninth Circuit reversed and held that the policy was a violation of the Fourth and Fourteenth Amendments.[43]

Justice Scalia, who authored the Supreme Court's majority opinion, stated that the key to a governmental search was reasonableness.[44] He noted, however, that a warrant or probable cause was not always necessary where a special need existed that would make the warrant and probable cause requirement impracticable.[45] The majority reasoned that the special needs doctrine clearly applied to public schools[46] because school children are committed to the temporary custody of the state as schoolmaster.[47] The Court further reasoned that Fourth Amendment rights are less protected in public schools than elsewhere, and furthermore, student athletes are voluntary participants in athletics programs.[48] Scalia and the majority found the state's interest in deterring drug use among students to be highly compelling and shared the state's concern over the "role model" effect of drug use by athletes.[49]

The dissent in *Vernonia*, led by Justice O'Connor, criticized the Court's decision, arguing that it would lead to blanket drug testing of all student athletes regardless of whether or not they had given officials a reason to suspect them of drug use.[50] According to the dissent, exceptions to the Fourth Amendment should be based on individualized suspicion, which was not the case in *Vernonia*.[51]

While it seemed to be on the path of expanding the special needs doctrine for drug testing, the Supreme Court took a surprising turn in 1997 and declined to allow the doctrine to cover drug testing of public office candidates in *Chandler v. Miller*.[52] In 1990, the Georgia legislature enacted a statute that required candidates for certain state offices to certify that they had taken a

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[42] *Id.* at 652.

[43] *Id.*

[44] *Id.*

[45] *Id.* at 653 (quoting Griffen v. Wisconsin, 482 U.S. 868, 873 (1987)).

[46] *Vernonia*, 515 U.S. at 653; *see also* New Jersey v. T.L.O., 469 U.S. 325, 340-41 (1985) (finding that a warrant would undercut a school administration's ability to conduct swift and informal disciplinary actions against students).

[47] *Vernonia*, 515 U.S. at 654.

[48] *Id.* at 657.

[49] *Id.* at 663. The School District argued that sports were important to the school community and high school athletes were seen as role models by their peers. *Id.* at 648.

[50] *Id.* at 667 (O'Connor, J., dissenting).

[51] *Id.*; *see also* Illinois v. Krull, 480 U.S. 340, 365 (1987) (O'Connor, J., dissenting) (arguing that blanket searches without individualized suspicion pose a greater threat to liberty); Carroll v. United States, 267 U.S. 132, 153 (1925) (viewing blanket searches as "intolerable and unreasonable").

[52] 520 U.S. 305 (1997).

drug test and that the results were negative.[53] Nominees from the Libertarian Party challenged the policy, requesting declaratory and injunctive relief.[54] The United States District Court for the Northern District of Georgia denied the injunction and entered a final judgment for the State.[55] The United States Court of Appeals for the Eleventh Circuit upheld the District Court's decision, citing the two previous Supreme Court decisions of *Von Raab* and *Skinner*.[56]

On certiorari, the majority of the Supreme Court[57] found that the "requirement that candidates for state office pass a drug test . . . does not fit within the closely guarded category of permissible suspicionless searches."[58] Citing *Von Raab* and *Skinner*, the Court stated that if Georgia could establish that the need for drug testing was "substantial [or] important enough to override the individual's acknowledged privacy interest," then the policy would be justified as a special need.[59] However, Georgia failed to show that there was a history of drug abuse by state officials, which, although not entirely necessary, would have clarified the state's special need.[60] The Court found that Georgia's attempt to display "its commitment to the struggle against drug abuse" and the special need the state asserted was "symbolic, not 'special.'"[61] Thus, no special need was found.[62]

Chief Justice Rehnquist was the only Justice to dissent from the majority's conclusion that the Georgia law was unconstitutional.[63] Rehnquist found the majority's opinion that there was no evidence of a special need because lack

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[53] *Id.* at 308. Candidates for the offices of Governor, Lieutenant Governor, Secretary of State, Attorney General, State School Superintendent, Commissioners of Insurance, Agriculture, and Labor, Justices of the Supreme Court, Judges of the Court of Appeals, judges of superior courts, district attorneys, members of the General Assembly, and members of the Public Service Commission were required to be tested. *Id.* at 309-10. The drug tests were to be administered by an accepted laboratory or a personal physician. *Id.* An approved laboratory then certified the results of the tests. *Id.* at 310.

[54] *Id.* The plaintiffs were running for the offices of Lieutenant Governor, Commissioner of Agriculture and member of the General Assembly. *Id.*

[55] *Chandler*, 520 U.S. at 311. Between the denial of the injunction and the final judgment, petitioners took the drug test and received the certified results. *Id.*

[56] *Id.*

[57] *Id.* at 307. Justice Ginsburg authored the *Chandler* opinion, joined by Justices Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, and Breyer. Justice Rehnquist filed a dissenting opinion, arguing that the holding was inconsistent with the Court's holding in *Von Raab*. *Id.* at 324 (Rehnquist, C.J., dissenting).

[58] *Id.* at 309.

[59] *Id.* at 318.

[60] *Id.* at 319.

[61] *Id.* at 321-22.

[62] *Id.*

[63] *Id.* at 323 (Rehnquist, C.J., dissenting).

of proof of drug use among candidates inconsistent with *Von Raab*,[64] which upheld a similar policy when there was likewise no proof of a drug problem among United States Customs workers.[65] The majority countered that because candidates for public office are under strict public scrutiny, drug testing was unnecessary because regular law enforcement means could adequately handle high profile addicted individuals.[66] Rehnquist argued, however, that because such candidates were subject to constant public scrutiny, their expectation of privacy should be considered less important when weighed against the government interest of keeping public office holders free from drug use.[67]

III. *FERGUSON V. CITY OF CHARLESTON*

A. Factual Background

In 1988, concerned with the growing number of cocaine abusing prenatal patients and a perceived epidemic of children being born addicted to crack, the Medical University of South Carolina ("MUSC"), a state hospital, began to drug test patients suspected of using cocaine and turning the patients whose test results were positive over to substance abuse counseling and treatment programs.[68] Although the policy was initiated in response to a perceived rise in drug use by prenatal patients, the policy did not appear to reduce the number of drug addicted patients.[69]

In late 1989, Nurse Shirley Brown heard a radio report that detailed the City of Greenville's arrest of a pregnant drug addict[70] under South Carolina's child abuse statute.[71] Brown discussed the possibility of a similar program at MUSC

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[64] Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

[65] *Chandler*, 520 U.S. at 324.

[66] *Id.* at 320.

[67] *Id.* at 326.

[68] Ferguson v. City of Charleston, 532 U.S. 67, 70-71 (2001).

[69] *Id.*

[70] *Id.* at 70.

[71] S.C. CODE ANN. § 20-7-50 (Law. Co-op. 2000). This statute provided that:

(A) It is unlawful for a person who has charge or custody of a child, or who is the parent of guardian of a child, or who is responsible for the welfare of a child as defined in Section 20-7-490(5) to:

(1) place the child at unreasonable risk of harm affecting the child's life, physical or mental health, or safety;

(2) do or cause to be done unlawfully or maliciously any bodily harm to the child so that the life or health of the child is endangered or likely to be endangered;

(3) willfully abandon the child.

(B) A person who violates subsection (A) is guilty of a felony and for each offense, upon conviction, must be fined with the discretion of the court or imprisoned not more than ten years, or both.

with the hospital administration. MUSC subsequently expressed to Charleston Solicitor General Charles Condon ("Condon") its interest in assisting in the prosecution of mothers giving birth to babies who tested positive for cocaine.[72] Condon developed a plan to "identify/assist pregnant patients suspected of drug abuse."[73] The program would require that women who met one or more criteria from a list of nine would be drug tested through urinalysis,[74] the results of which could be used in criminal prosecutions.[75] The criteria to be used in the identification of patients to be tested included: (1) not seeking prenatal care; (2) seeking late prenatal care; (3) obtaining incomplete prenatal care; (4) experiencing abruptio placentae; (5) experiencing pre-term labor with no obvious cause; (6) experiencing intrauterine fetal death; (7) experiencing inter-uterine growth retardation; (8) having previous known drug or alcohol abuse; and (9) delivering a baby with unexplained congenital anomalies.[76] Groups that contributed to the creation of this program included representatives from MUSC, as well as the police, County Substance Abuse Commission and the Department of Social Services.[77]

Under the program guidelines, positive drug test results were turned over to the police, and the women were either subsequently arrested or given the option of seeking drug abuse treatment.[78] Women who were given the option of treatment but failed to go to counseling were arrested.[79] Of the ten petitioners, four were arrested without being given the opportunity to receive drug treatment, while the other six were arrested either for failing to attend the drug treatment program or testing positive for cocaine abuse a second time after treatment.[80]

Arrested patients were charged either with simple possession (if less than twenty-seven weeks pregnant) or with possession and distribution to a minor.[81] Charges of possession and distribution to a minor were justified under South

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Id.; *see also* Whitner v. State, 492 S.E.2d 777 (S.C. 1997). In *Whitner*, the South Carolina Supreme Court held that a viable fetus is a child under the state's child abuse statutes. *Whitner* was decided after the implementation of the Medical University of South Carolina's prenatal substance abuse policy. At the time of implementation, a fetus had not yet been classified as a child and the South Carolina Legislature had considered and rejected proposals to expand the child abuse statutes to fetuses and pregnant women's drug use. *See* Kimani Paul-Emile, *The Charleston Policy: Substance or Abuse?*, 4 MICH. J. RACE & L. 325, 332 (1999).

[72] *Ferguson*, 532 U.S. at 70.

[73] *Id.* at 71.

[74] *Id.* at 72.

[75] *Id.* The taking of urine is a regular part of prenatal care. *Id.* at 72-73.

[76] *Id.* at 72 n.4.

[77] *Ferguson*, 532 U.S. at 71-72.

[78] *Id.*

[79] *Id.* at 72-73.

[80] *Id.* at 73.

[81] *Id.* at 72.

Carolina law because a viable fetus is considered a child within the meaning of the child abuse and endangerment statute.[82]

The ten women who challenged MUSC's policy were receiving prenatal care and were subsequently arrested after testing positive for cocaine, either during their pregnancy or immediately after giving birth.[83] The women challenged the policy, arguing that the "warrantless and nonconsensual drug tests conducted for criminal investigatory purposes" violated their Fourth Amendment right against unreasonable searches.[84] In its defense to the Fourth Amendment claim, the City of Charleston asserted that the women had consented to the searches.[85] The City of Charleston further argued that, even absent consent, the searches were reasonable because they constituted a special need and served a "non-law-enforcement purpose."[86]

B. Procedural History

In the United States District Court for the District of South Carolina, C. Weston Houck, Chief Judge, allowed the issue of consent to go to the jury with instructions that the taking of the urine samples without a warrant violated the Constitution.[87] Judge Houck instructed that the case be found in

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[82] *See* Whitner v. State, 492 S.E.2d 777 (S.C. 1997). In *Whitner*, the South Carolina Supreme Court held that under the state's Children's Code, the word "child" was intended by the legislature to include a viable fetus. Therefore, the conviction of Whitner for causing her baby to be born with cocaine in its system was upheld as violating South Carolina's child neglect and abuse laws. *Id.* at 778-79.

[83] *Ferguson*, 532 U.S. at 73. One woman spent the last three weeks of her pregnancy in jail, receiving her prenatal care while handcuffed and shackled. Police arrested another woman immediately after giving birth, still bleeding and in her hospital gown. ACLU Supreme Court Preview: 2000 Term, *Ferguson v. City of Charleston*, http://www.aclu.org/court/ferguson_00.html (last visited Apr. 2, 2002).

[84] *Ferguson*, 532 U.S. at 73. At the lower court levels, the patients also raised the argument that the policy violated Title 6 of the Civil Rights Act of 1964 because of its racially disparate impact, that the disclosure of their medical records violated their right to privacy, and that the staff at MUSC had committed a state-law tort of abuse of process in the administration of the policy. *Id.* It is interesting to note that of the thirty women arrested, twenty-nine were African-American. ACLU Supreme Court Preview: 2000 Term, *Ferguson v. City of Charleston*, http://www.aclu.org/court/ferguson_00.html (last visited Apr. 2, 2002). Furthermore, the SEATTLE POST-INTELLIGENCER reported that MUSC was the only hospital in the area that served Medicaid patients. Eric Schnapper, *Washington Fares Only Slightly Better in Treating Drug Users: A Tale of Two States*, SEATTLE POST-INTELLIGENCER, June 10, 2001, at D11.

[85] *Ferguson*, 532 U.S. at 74.

[86] *Id.*

[87] *Id.*

favor of the patients unless it could be found that the patients had consented.[88] The jury found in favor of the City.[89]

The women appealed, arguing that the evidence of consent was inadequate.[90] The Court of Appeals affirmed the lower court's decision, holding that the searches were reasonable based on previous United States Supreme Court decisions, which recognized that special needs can justify searches under certain circumstances.[91] With regard to the issue of consent, the Fourth Circuit Court of Appeals found it was "unnecessary to address the issue" based on the fact that the searches were "reasonable as special needs searches."[92] In its analysis, the court first considered the governmental need.[93] The court found that the perceived increase in prenatal drug use, the medical harm to fetuses from cocaine use, and the economic consequences together constituted a substantial governmental interest in reducing the use of cocaine by pregnant women.[94] Next, the court noted that the testing of prenatal patients was the only effective means of advancing the state's interest.[95] Further, the court found that the level of intrusiveness of the testing was minimal, since the taking of a urine sample was a regular part of medical examinations and services.[96] Thus, the Court of Appeals concluded that the hospital's interest in protecting the health of children whose mothers are drug addicts served a compelling governmental need and "created a special need beyond normal law enforcement goals."[97] The United States Supreme Court granted certiorari.

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[88] *Id.*

[89] *Id.*

[90] Ferguson v. City of Charleston, 186 F.3d 469 (4th Cir. 1997).

[91] *Id.* at 476. The Fourth Circuit applied the balancing tests found in *National Treasury Employees Union v. Von Raab*, 489 U.S. 653 (1989) and *Vernonina School District v. Acton*, 515 U.S. 646 (1995), balancing state interest and individual privacy expectations of the patients.

[92] *Ferguson*, 186 F.3d at 476.

[93] *Id.* at 477.

[94] *Id.* at 478. The court noted that cocaine-related pregnancy complications and resulting harm to infants, on a nationwide scale, may create expenses that can exceed three billion dollars annually over a ten year period, straining public resources. *Id.*

[95] *Id.*

[96] *Id.* at 479.

[97] *Id.* at 476. The majority also upheld the district court's findings against the patients' Title 6 claim, medical records disclosure claim, and the state-tort claim. *Id.* at 482-83.

C. The Supreme Court Opinion

1. The majority opinion

The United States Supreme Court reversed the judgment of the Fourth Circuit Court of Appeals on the issue of special needs and remanded the case on the issue of consent.[98] Writing for the majority, Justice Stevens first established that MUSC's status as a state hospital rendered the urine tests "indisputably searches within the meaning of the Fourth Amendment."[99] The Court then stated that it would not deal with the question of whether there was sufficient evidence to find consent.[100] Instead, the Court "assume[d] for the purposes of [the] decision, as did the Court of Appeals, that the tests were performed without the informed consent of the patients."[101] The Court proceeded to distinguish *Ferguson* from four previous Supreme Court cases in which the Court weighed the issues of personal privacy against the special needs that were the basis for the various programs.[102] The majority found that, in the case at issue, the invasion of privacy was more substantial than were the situations in the previous cases.[103] In the present case, the Court held that the prenatal patients had a reasonable expectation that the results of any tests would not be disseminated to non-medical personnel or used for purposes non-medical in nature.[104] In addition, the Court distinguished the drug testing in the four previous cases as merely disqualifying persons from a particular benefit, without an accompanying threat that the test results would be used in criminal prosecution.[105] Justice Stevens explained that "throughout the development and application of the policy, Charleston prosecutors and police were extensively involved in the day-to-day administration of the policy."[106] Specifically, the Charleston police department determined procedures for

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[98] Ferguson v. City of Charleston, 532 U.S. 67, 86 (2001).

[99] *Id.* The Court previously found urinalysis drug testing to be searches with regards to the taking of urine from student athletes, railway workers after accidents, political candidates, and United States Customs Workers. *See generally* Chandler v. Miller, 520 U.S. 305 (1997);Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 653 (1989); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989).

[100] *Ferguson*, 532 U.S. at 76.

[101] *Id.* at 77.

[102] *Id.*

[103] *Id.* at 78.

[104] *Id.*

[105] *Id.* at 77-78. In the previous cases, negative results were used to disqualify tested persons from benefits such as a promotion, participation in high school athletics, or eligibility for political office. *Id.* at 77.

[106] *Id.* at 81.

screening, decided who would receive reports of positive test results, and determined what type of information would be included in the reports.[107] Additionally, the police had access to the medical files of the women who tested positive.[108] The majority thus determined that the purpose of the searches were "ultimately indistinguishable from the general interest of crime control."[109]

The majority opined that the immediate and primary objective of the drug testing was to produce evidence for law enforcement, and to use the threat of arrest and prosecution to force women into treatment.[110] The Court noted that although state hospital workers may have a duty to report illegal activity when found inadvertently, in the present case state hospital employees were "undertak[ing] to obtain such evidence *for the specific purpose of incriminating those patients*."[111] Therefore, the majority held that the drug testing program put into place by MUSC did not meet the special needs exception to the Fourth Amendment.[112]

2. The concurrence

In his concurrence, Justice Kennedy argued that, although he agreed that the drug testing policy of MUSC violated the Fourth Amendment, the majority's distinction between the immediate policy purpose of collecting evidence and the ultimate purpose of protecting the fetus lacked foundation in the prior drug testing cases.[113] According to Justice Kennedy, if the same distinction had been employed in *Von Raab*, the Court would have recognized the collection of evidence of drug and alcohol use by railway employees as a relevant government interest, not just an interest in railway safety alone.[114]

The concurring opinion also discussed the limitations of the majority's decision.[115] Kennedy noted the importance of the state's interest in protecting both fetal and maternal life.[116] He also stressed that the majority opinion failed to deal with the validity of mandatory child abuse laws, and rested on the assumption that the patients did not consent to the drug testing.[117] Ultimately, however, Kennedy disagreed with the use of the evidence collected in the

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[107] *Id.* at 83.
[108] *Id.* at 82.
[109] *Id.* at 81.
[110] *Id.* at 82-83.
[111] *Id.* at 85.
[112] *Id.* at 86.
[113] *Id.* at 86-87 (Kennedy, J., concurring).
[114] *Id.* at 87.
[115] *Id.* at 89-90.
[116] *Ferguson*, 532 U.S. at 89-90 (Kennedy, J., concurring).
[117] *Id.* at 90.

arrests,[118] and found that there was too much involvement by law enforcement to uphold the policy under the special needs doctrine.[119]

3. The dissent

Justice Scalia dissented, arguing that the searches in this case were consented to.[120] However, Scalia noted that even if there was no consent, the policy would be valid under the Court's Fourth Amendment jurisprudence.[121] Scalia pointed out that "the Fourth Amendment protects only against searches of citizens' 'persons, houses, papers, and effects' and it is highly unrealistic to regard urine as one of the 'effects'" recognized.[122] Scalia went on to reject the majority's reasoning that the goal of the hospital was to obtain evidence of drug use for prosecution.[123] Additionally, Scalia argued that the special needs exception had previously been applied by the Court in instances where there was law enforcement activity.[124] Ultimately, Justice Scalia contended that the manner in which the hospital should deal with the perceived cocaine problem was not a matter for resolution by the Court; instead, the Court should defer to the State to protect its own interests.[125]

IV. ANALYSIS

The Court in *Ferguson* could have upheld the drug testing scheme of MUSC under the special needs exception. As evidenced by *Von Raab, Skinner, Vernonia*, and *Chandler*, the Court's support of the special needs doctrine has changed from its original use[126] to include warrantless searches where individualized suspicion was lacking.[127] Yet, while seemingly expanding the doctrine's breadth of coverage, the Supreme Court surprisingly decided not to

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[118] *Id.*

[119] *Id.* at 88.

[120] *Id.* at 92 (Scalia, J., dissenting).

[121] *Id.* at 93-94.

[122] *Ferguson*, 532 U.S. at 92.

[123] *Id.* at 98. Scalia argued that this reasoning contradicted the district court's finding of fact that the goal of the policy was to protect mother and child. *Id.*

[124] *Id.* at 100. Justice Scalia made reference to *Griffen v. Wisconsin*, 483 U.S. 868 (1987), where the Court held that the warrantless search of the house of the petitioner, who was on probation, did not violate the Fourteenth Amendment. *Ferguson*, 532 U.S. at 100-01.

[125] *Ferguson*, 532 U.S. at 102.

[126] *See* New Jersey v. T.L.O., 469 U.S. 325 (1985) (upholding a single search of a student's purse).

[127] *Compare id.* at 347 (search of single student's purse upheld), *with* Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (randomized drug testing of U.S. Customs workers upheld), and Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995) (suspicionless drug testing of student athletes upheld).

extend the doctrine to allow the required drug testing of political candidates.[128] Furthermore, in its 2001 session, the Court threw Fourth Amendment jurisprudence another curve ball with its reasoning in *Ferguson*.[129] Based upon precedent established in earlier cases, the Court in *Ferguson* could have persuasively upheld the drug testing policy in question. The outcome of this case suggests that the Supreme Court's reasoning was not based upon special needs precedent. Instead, the reproductive rights issues raised by the case and the lessening of political pressures supporting the war on drugs influenced the Court to hold that there was no special need for drug testing in *Ferguson*.

A. Inconsistencies Among Prior Cases

The Supreme Court's prior drug testing cases have failed to provide a clear path when dealing with the special needs exception. The *Chandler* decision is especially interesting because its outcome cannot be reconciled with the holdings of *Von Raab*, *Skinner*, and *Vernonia*. In *Chandler*, the majority did not find a special need because there was no evidence of drug use among Georgia's politicians.[130] The majority in *Chandler* distinguished the facts of the case from from those of *Skinner* and *Vernonia*, because there was general evidence of drug use by rail workers and student athletes, respectively, in those cases.[131] There was no evidence of a drug problem among custom workers in *Von Raab*; however, drug testing was upheld in that case.[132]

Despite the majority's reliance on public safety arguments to uphold the drug testing policy in *Von Raab* and *Skinner*, the *Vernonia* outcome also seems to suggest that the Court has not provided a clear scope of the special needs exception leading up to *Ferguson*.[133] In both *Skinner* and *Von Raab* the nature of employment, rail workers and U.S. Customs workers respectively, strengthened the argument that public safety contributed to the validity of a special need exception.[134] In *Vernonia*, there was no valid public safety argument for upholding the policy to drug test all students wishing to participate in athletics. The majority's immediate concern was merely the disruption and behavioral problems that drugs may cause among students,[135]

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[128] *See* Chandler v. Miller, 520 U.S. 305 (1997).

[129] Ferguson v. City of Charleston, 532 U.S. 67 (2001).

[130] *Chandler*, 520 U.S. at 321-22.

[131] *Id.* at 319.

[132] *See* Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

[133] Ferguson v. City of Charleston, 532 U.S. 67 (2001).

[134] *See* Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 628 (1989) (stating that the employees are subject to such responsibilities for which a lapse in their responsibilities would cause serious public harm); *see also Von Raab*, 489 U.S. at 668 (stating that customs workers are the first line of defense for the borders of the United States).

[135] Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 662-63 (1995).

supported by the fact that students have a lower privacy expectation from intrusion by school officials, who act in loco parentis.[136]

B. The Court's Bending of the Special Needs Doctrine in Ferguson

Like the drug testing cases before it, *Ferguson* does not provide a clear standard for determining what constitutes a governmental interest compelling enough to require a court to invoke the special needs exception to the Fourth Amendment. In *Ferguson*, the majority contorted the special needs doctrine to hold that the drug testing of pregnant women and the use of the results in arrests was unconstitutional.[137]

The majority in *Ferguson* attempted to distinguish the hospital's special need to curb harm to fetuses by concluding that this special need was not "one divorced from the State's general interest in law enforcement."[138] However, this can only be the case if the special need being asserted was the hospital's desire to prosecute addicted mothers.[139] As Justice Kennedy's concurrence points out, the majority should be wary in "its distinction between the ultimate goal of the policy and immediate purpose of the policy."[140] The Supreme Court's earlier drug-testing cases allowed the policies to stand where the ultimate goals were actually similar to the goals of MUSC. In *Von Raab*, the Court upheld the policy because the desire to protect the United States' borders was determined a special need while, in *Skinner*, preventing train accidents was similarly important.[141]

Also, it is remarkable that the majority's decision to analyze the case without a finding on the consent issue creates what Justice Kennedy calls "a strange world for deciding the case."[142] The Justices' decision would likely have been affected by a determination of whether or not the women consented to testing.[143] Yet the majority assumed no consent was given by the patients.[144]

In *Ferguson*, the majority was mainly concerned with the degree of involvement by law enforcement in MUSC's policy.[145] Had the Supreme Court not assumed the tests were non-consensual and identified the search as the taking of urine alone, the search could have been considered a special

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[136] *Id.* at 655.

[137] Ferguson v. City of Charleston, 532 U.S. 67, 86 (2001).

[138] *Id.* at 79.

[139] *Id.* at 87 (Kennedy, J., concurring).

[140] *Id.* at 86.

[141] *See* Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989).

[142] *Ferguson*, 532 U.S. at 91 (Kennedy, J., concurring).

[143] *Id.*

[144] *Id.* at 77.

[145] *Id.* at 83-84.

needs exception to the Fourth Amendment.[146] Undoubtedly, the state does have a special interest in the protection of both mothers and their unborn children.[147] If the Court focused its analysis on the taking of the urine as the search in question, it could have been viewed as being for the medical purpose of identification.[148] The act of taking the urine was a means of identifying which mothers and fetuses were in danger from their cocaine use.[149] The identification of fetuses in danger of being born addicted to cocaine is an essential part of the state's special need in protecting the fetuses.[150] The Supreme Court's earlier cases upheld the taking of a urine sample for purposes of railroad safety and boarder safety.[151] In *Skinner*, the taking of a urine sample was immediately to identify which employees were under the influence of drugs when a particular accident occurred. In *Von Raab*, the taking of the urine was to identify which customs workers were ineligible for certain promotions. Based on its previous drug testing cases, the Court could have viewed the taking of the urine sample as being separate from the rest of MUSC's policy.

Furthermore, if looked at separately, the reporting of the test results was not a search or seizure.[152] Since the majority's concern was the dissemination of the results, it could have upheld the policy if the taking of urine was considered separate from the dissemination of results.[153] Had the Court simply decided to separate the taking of the urine sample from the sharing of information with the police, the Court could have upheld the policy as a special needs exception to the Fourth Amendment.[154]

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[146] *Id.* at 92-94 (Scalia, J., dissenting). Scalia argues that the majority should only focus on the taking of the urine which is not an unreasonable search. However, this analysis depends on the idea that the patients consented to the taking of their urine for medical purposes other than prenatal care. *Id.*

[147] Ferguson v. City of Charleston, 186 F.3d 469, 477-78 (4th Cir. 1997). The majority in the Fourth Circuit noted that the government interest need not be compelling in an absolute sense. In South Carolina there was an increase in the number of mothers abusing cocaine which led to harm to the fetus and the mother, and economic damage from having to care for cocaine addicted babies. *Id.*

[148] *Id.* at 477.

[149] *Id.*

[150] *Id.* at 477-78.

[151] *See* Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989).

[152] Ferguson v. City of Charleston, 532 U.S. 67, 92-93 (2001) (Scalia, J., dissenting).

[153] *Id.* Justice Scalia's dissent pointed out that what the majority and the petitioners objected to was not the urine testing, which should be considered the "search" in question, but rather the reporting of test results to the police, which is not a search under the Fourth Amendment. *Id.* (citing United States v. Calandra, 414 U.S. 338, 354 (1974)). Scalia argued that the dissemination of test results did not deal with a question of Fourth Amendment rights. *Id.*

[154] *Ferguson*, 532 U.S. at 92 (Scalia, J., dissenting).

C. Pregnant Women and Politicians

The examination of the inconsistencies among the drug testing cases seems to point to a trend in the Supreme Court of picking and choosing whose Fourth Amendment rights will be subject to the special needs exception. Justice Marshall was correct in calling the special needs doctrine "malleable," because it allows a "balancing approach [that] can only be justified on the basis of the policy results it allows the majority to reach."[155]

The Supreme Court's decision in *Chandler* has already revealed that the drug testing of candidates for certain public offices is outside the scope of the special needs doctrine.[156] The *Ferguson* case suggests that drug testing of pregnant women is also outside the special needs exception. The Court may have been concerned that if the special needs doctrine had been applied in this case, it would have reduced the legal status of pregnant women.[157] The women in *Ferguson* were not merely student athletes, United States Customs workers, or railroad employees,[158] but pregnant women who some believe enjoy greater privacy rights based on a right to bodily integrity.[159]

The Court has previously affirmed a woman's right to reproductive freedom. In *Roe v. Wade*,[160] the Supreme Court was faced with the issue of whether a Texas statute that made abortion a crime was unconstitutional.[161] Jane Roe,[162] a single pregnant woman who wished to have an abortion, argued that the Texas statute violated her right to privacy.[163] With regard to the privacy rights issue, the Court first noted that, although the Constitution does

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[155] *Skinner*, 489 U.S. at 641 (Marshall, J., dissenting). Marshall argued that the proper way to evaluate the Federal Railway Administration's policy was to analyze it in the traditional Fourth Amendment framework prior to the special needs exception. The Court should inquire: (1) whether a search has taken place; (2) whether the search was based on a valid warrant or a recognized exception to a warrant; (3) whether the search was based on any probable cause or lesser cause because of minimal intrusion; and (4) whether the search was conducted in a reasonable manner. *Id.* at 641-42.

[156] *See* Chandler v. Miller, 520 U.S. 305 (1997).

[157] *See* Brief for Petitioners at 5, Ferguson v. City of Charleston, 532 U.S. 67 (2001)(No. 99-93), http://www.aclu.org/court/ferguson_v_charleston.html.

[158] *See* Byrony J. Gagan, Ferguson v. City of Charleston, South Carolina: *'Fetal Abuse,' Drug Testing and the Fourth Amendment*, 53 STAN. L. REV. 491, 515 (2000).

[159] *Id.*

[160] 410 U.S. 113 (1973).

[161] *Id.* at 117, 120.

[162] *Id.* at 120. Jane Roe's real name is Norma McCorvey. *See* Douglas S. Wood, *Who is 'Jane Roe'?*, *at* http://www.cnn.com/SPECIALS/1998/roe.wade/stories/roe.profile/ (last visited Jan. 21, 2002).

[163] *Roe*, 410 U.S. at 120. Roe argued that her right to privacy was protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. *Id.*

not explicitly speak of a right to privacy, the Court had already acknowledged a right to personal privacy in a number of contexts.[164] The Court held that "this right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy,"[165] and is "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action."[166] The Supreme Court indicated that regardless of a state's interest in protecting life, the state does not have an absolute right to deprive pregnant women of their right to privacy.[167]

Abortion cases following *Roe* have further indicated that pregnant women have a right to privacy with regard to reproduction.[168] For example, in *Planned Parenthood v. Casey*, Justice O'Connor, speaking for the majority, reiterated that pregnant women have a certain right to privacy concerning their reproductive rights.[169] In *Casey*, abortion clinics and physicians challenged the constitutionality of amendments made to Pennsylvania's abortion statute.[170] Among the changes to the statute were a twenty-four-hour informed consent requirement, a requirement that a married woman notify her husband of her intent to seek an abortion, parental consent for minors, and certain reporting requirements of abortion facilities.[171] In analyzing the issues, the majority found it necessary to review the principles that defined women's reproductive

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[164] *Id.* at 152; *see, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("[I]f the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); Skinner v. Oklahoma, 316 U.S. 535 (1942) (acknowledging the fundamental right of procreation).

[165] *Roe*, 410 U.S. at 153.

[166] *Id.* The Fourteenth Amendment states in part:

> No State shall make or enforce any law which shall abridge the privileges and 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.

The majority further held that fetuses are not persons under the Fourteenth Amendment. *Roe*, 410 U.S. at 158.

[167] The majority did hold, however, that the state may impose regulations on abortions to protect and preserve the mother's health after the pregnancy reaches a "compelling point." *Id.* at 163. In *Roe*, the "compelling point" was deemed to be viability, when the fetus had the "capability of meaningful life outside the mother's womb." *Id.*

[168] *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992); Planned Parenthood Ass'n of Kansas City, Inc. v. Ashcroft, 462 U.S. 476 (1983); Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 461 (1983).

[169] *Casey*, 505 U.S. at 844. Although *Casey* is one of the landmark abortion cases, an in-depth analysis of the issues in *Casey* goes beyond the scope of this note.

[170] *Id.*

[171] *Id.* These requirements could be exempt in the event of a medical emergency. *Id.*

rights.[172] The majority began by stating that it reaffirmed *Roe*'s essential holding: (1) a woman has a right to choose an abortion before viability of the fetus; (2) the state has the ability to restrict abortions after viability only if the law contains exceptions for pregnancies that endanger the mother; and (3) the state does have an interest in protecting the health of the woman and the fetus that may become a child.[173] According to the majority, it had already been settled in *Roe* that "the Constitution places limits on a state's right to interfere with a person's most basic decisions about family and parenthood,"[174] and the majority stressed that decisions and choices dealing with "personal dignity and autonomy [were] central to the liberty protected by the Fourteenth Amendment."[175] Thus, *Casey* stated, albeit in dicta, that *Roe* was "a rule of personal autonomy and bodily integrity."[176]

Examining the Court's position on women's right to privacy concerning reproduction and abortion may shed light on why the majority in *Ferguson* chose to analyze MUSC's policy in its entirety, rather than separate the taking of urine, the testing of urine, and the dissemination of test results to authorities.[177] This choice may have to do with the reproductive rights issues that MUSC's policy raises.[178] Perhaps if the Court had ruled to uphold the drug-testing and prosecution policy of MUSC, it would have opened the door to other issues regarding pregnant women's rights, particularly their right to privacy.[179] For example, there are substances other than illegal narcotics that can have damaging effects on a fetus.[180] Alcohol and cigarettes, which are both legal, can have devastating effects on the health of unborn and newborn children.[181] For example, Fetal Alcohol Syndrome leads to permanent

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[172] *Id.* at 845.

[173] *Casey*, 505 U.S. at 846.

[174] *Id.* at 849.

[175] *Id.* at 851.

[176] *Casey*, 505 U.S. at 857. The Court stated that "*Roe* . . . may be seen not only as an exemplar of *Griswold* . . . but as a rule . . . of personal autonomy and bodily integrity . . . ." *Id.* Ultimately, the majority in *Casey* rejected a trimester framework for determining viability and replaced it with the "undue burden" approach. *Id.* at 873, 874. The "undue burden" test invalidates state regulation of pregnancy when "state regulation imposes an undue burden on a woman's ability to make . . . decision[s]" concerning her reproductive health. *Id.* at 874.

[177] The Court in *Casey* stated that with regard to reproductive rights, "the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law." *Id.* at 852.

[178] *See* Heather Flynn Bell, *In Utero Endangerment and Public Health: Prosecution v. Treatment*, 36 TULSA L.J. 649, 671 (2001); Michelle D. Mills, *Fetal Abuse Prosecutions: The Triumph of Reaction over Reason*, 47 DEPAUL L. REV. 989, 1001-02 (1998).

[179] Bell, *supra* note 178, at 671.

[180] *Id.*

[181] Mills, *supra* note 178, at 1001; *see also* Bell, *supra* note 178, at 673. Bell argues that the "perfect womb" can never be provided and prosecution of pregnant drug abusers could open the

disabilities such as cerebral palsy.[182] In addition, women who smoke cigarettes during pregnancy increase the risk that their child will be born underweight, may suffer from mental retardation, or will die from sudden infant death syndrome.[183] Examined in conjunction with these possibilities, the *Ferguson* case begins to look more like a fetal rights issue than simply a Fourth Amendment challenge.[184] Had the Court in *Ferguson* allowed MUSC to continue to turn over drug test results to law enforcement, it conceivably could have led to abuse by hospitals conducting similar "searches" for harmful but legal activities.[185] Commentators have argued that the MUSC policy punishes these particular women not necessarily for having a drug problem, but for having a drug problem *and* choosing to carry their pregnancy to term.[186] Other commentators have argued that these women are being punished merely for having a drug abuse problem.[187]

In addition, states other than South Carolina have attempted to prosecute women for prenatal drug use.[188] However, the only state supreme court to uphold a conviction of a pregnant woman for drug abuse is South Carolina.[189] It is interesting to note that, by denying certiorari of that case, the Supreme Court declined to take up the issue of whether state child abuse statutes should consider fetuses to be "children" protected by those statutes.[190]

D. The War on Drugs

Another reason the Court may have analyzed the policy as a whole is because the "war on drugs" that likely prompted the creation of MUSC's policy is no longer the center of national attention. The earlier cases decided by the Supreme Court in favor of drug testing and the implementation of the

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door to prosecution for other activities undertaken during pregnancy. *Id; see also* Sherrif v. Encoe, 885 P.2d 596 (Nev. 1996). In *Sherrif*, the Nevada Supreme Court reasoned that prosecuting women for ingesting illegal substances while pregnant could "open the floodgates to prosecution of pregnant women who ingest such things as alcohol, nicotine, and a range of miscellaneous, otherwise legal, toxins." *Id.* at 598.

[182] Bell, *supra* note 178, at 672. Bell reports that about 4,800 prenatal deaths occur each year as a result of maternal smoking. *Id.* at 673.

[183] *Id.*

[184] *Id.*

[185] *See id.*

[186] *See* Paul-Emile, *supra* note 71.

[187] Bell, *supra* note 178, at 671.

[188] *See* Johnson v. State, 602 So. 2d 1288 (Fla. 1992); Collins v. State, 890 S.W.2d 893 (Tex. 1994).

[189] Nancy Kubasek & Melissa Hinds, *The Communitarian Case Against Prosecutions for Prenatal Drug Abuse*, 22 WOMEN'S RTS. L. REP. 1, 3 (2000).

[190] Whitner v. South Carolina, 492 S.E.2d 777 (4th Cir. 1997), *cert. denied*, 532 U.S. 1145 (1998).

policy in *Ferguson* both coincide with the Reagan-Bush "war on drugs."[191] This metaphor has been used repeatedly by politicians and the media to characterize attempts to address drug use in the United States.[192] During the 1980s and early 1990s, the media also played a huge role in publicizing drug use as a type of national emergency.[193] Additionally, the battle against, and the fear of, drug abuse in the 1980s was reflected both in Congress's and the states' passage of minimum sentencing laws for drug possession.[194] The earlier Supreme Court cases concerning drug testing may have been more of a reflection of the national fear of drug abuse than a valid special need exception to the Fourth Amendment.

In *Von Raab*, Justice Marshall's dissent called into question the majority's upholding of the drug testing of U.S. Customs agents, arguing that in that case, "neither frequency of [drug] use nor connection to harm is either demonstrated or even likely."[195] He further classified the drug testing policy as "a kind of immolation of privacy and human dignity in symbolic opposition to drug use."[196] Marshall concluded that the only real explanation of the drug testing policy was that "[i]mplementation of the program would set an important example in our county's struggle with this most serious threat to our national health and security."[197] Marshall concluded that the government was attempting to show how serious it was about its "war on drugs" by subjecting United States Customs workers, "employees on the front line of that war," to suspicionless drug testing.[198]

Drug abuse continues to be a problem but it is one that more recently has received less attention than during the Reagan-Bush years.[199] Other issues, such as health care, the economy, and education, have become more important

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[191] Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to* Roe v. Wade, 62 ALB. L. REV. 999, 1017 (1999). Paltrow suggests that law enforcement's inability to control the drug war allowed pregnant women to become targets of anti-drug and anti-choice proponents. *Id.* at 1018-20.

[192] *Id.*

[193] *Id.* at 1016. Paltrow states that in 1986 alone, more than 1,000 stories on crack cocaine were run on the country's largest newspapers, magazines, and television stations. *Id.* Some critics of domestic drug policies have argued that the exploding public interest in the crack epidemic is actually the result of the stereotypes of race and poverty attributable to the Regan/Bush years. *See* Paul-Emile, *supra* note 71, at 326.

[194] *See* Paltrow, *supra* note 191, at 1016.

[195] Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 681 (1989) (Marshall, J., dissenting).

[196] *Id.*

[197] *Id.* at 686.

[198] *Id.*

[199] *See* Robert J. Blendon & John T. Young, *The Public War on Illicit Drugs*, 18 J. AM. MED. ASS'N 827 (1998); *see also* Paltrow, *supra* note 191, at 1016 (citing the widespread media coverage of the Reagan/Bush war on drugs received during the late 1980s).

on the national agenda, and crime has been deemed the nation's most important problem.[200] It is possible that the Court in *Ferguson* would have been more inclined to focus on the ultimate goal of protecting the fetus from damage from drugs if the "war on drugs" continued to captivate the nation.[201] The end of media attention and the aggressive national campaign against drug use may have been another reason the Court in *Ferguson* chose to tailor its opinion to find MUSC's policy outside the boundaries of the special needs exception.

V. CONCLUSION

It is important to note that the result in *Ferguson* does have its limitations.[202] *Ferguson*'s majority decision was based on the assumption that there was no consent by the patients, a determination to be decided on remand.[203] As Justice Kennedy's concurrence pointed out, the majority opinion did not discuss mandatory reporting laws such as child abuse statues requiring teachers to report abuse to authorities.[204] Also, Kennedy's concurrence warned that drug testing may be allowed if prosecuting authorities adopt legitimate procedures to discover which pregnant women are abusing drugs, since the majority's decision only outlaws drug testing without consent or without a warrant.[205]

The limitations of the decision point out the lack of guidance the Supreme Court has provided with its prior special needs drug testing cases. The previous cases have produced a special needs doctrine that, as Justice Marshall puts it, is malleable and able to be bent the way a majority of justices decides it should be bent. *Ferguson* could easily have produced the opposite result. It is fortunate that the majority in this case chose to protect pregnant women from an attack on their reproductive rights. However, the reality demonstrated in *Ferguson* is that the special needs doctrine can be bent in the direction of undermining our Fourth Amendment rights as public policy or national frenzy dictates.

Krislen Nalani Chun[206]

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[200] Blendon, *supra* note 199. Blendon based this conclusion on numerous ABC and Gallup polls. *Id.*

[201] *See, e.g.*, Ferguson v. City of Charleston, 532 U.S. 67, 86-87 (Kennedy, J., concurring) (2001) (distinguishing "what the majority terms a policy's ultimate goal" from its "proximate purpose").

[202] *Id.*

[203] *Id.* at 76.

[204] *Id.* at 90.

[205] *Id.*

[206] J.D. Candidate, May 2003, William S. Richardson School of Law, University of Hawai'i.

State v. Rogan: Racial Discrimination and Limits of the Color-blind Approach

[A]n appeal to racial prejudice threatens our multicultural society and constitutional values. We must therefore recognize that "our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example."[1]

I. INTRODUCTION

In *State v. Rogan*,[2] the Hawai'i Supreme Court recognized the importance of the judiciary's role in admonishing racial prejudice, but it did not take into consideration the difficulties that accompany such a task in Hawai'i's multicultural society.[3] The strategy used by the *Rogan* court[4] to evaluate racial prejudice resulted in the imposition of a broader bar on racial prejudice and the rejection of the United States Supreme Court's standard for determining when retrial is barred under the Double Jeopardy Clause.[5] In *Rogan*, the court held that the prosecutor's racial remark during his closing argument was so egregious that it denied Rogan the right to a fair trial. Prejudicial remarks are barred by the Double Jeopardy Clause because a prosecutor who feels that a case will not result in a conviction may improperly try to gain a second chance to convict the defendant by deliberately invoking a mistrial during the closing remarks of a trial. Despite *Rogan*'s explicit denunciation of the use of racial prejudice, the ability of this holding to stop future racial prejudice is unclear because the court did not provide adequate guidance as to what constituted an egregious racial remark in the context of Hawai'i's multicultural background.

Hawai'i's unique racial make-up requires workable solutions that recognize the State's racial complexity. Hawai'i is far from a multicultural paradise in which all races are equal. When examining racial relations, we cannot assume conceptions of egalitarianism exist, because racial groups are not the same. Viewing races as equal poses a danger of masking real power differentials.[6]

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[1] State v. Rogan, 91 Hawai'i 405, 414-15, 984 P.2d 1231, 1240-41 (1999).

[2] 91 Hawai'i 405, 984 P.2d 1231 (1999).

[3] *Id.* at 414, 984 P.2d at 1240. The court states that "such an appeal to racial prejudice threatens our multicultural society." *Id.*

[4] *Id.* at 415, 984 P.2d at 1241. The opinion was authored by Justice Mario Ramil.

[5] Rather than requiring that a defendant prove the prosecutor specifically intended to cause a mistrial, the court based its holding on the Hawai'i Constitution which affords a defendant greater protections. HAW. CONST. art. I, § 10; *see also infra* discussion Part II.B.

[6] *See infra* Part III.D (explaining that although Hawai'i is touted as a model of multicultural equality, in reality there exists a racial hierarchy); *see generally* Jonathan Y. Okamura, *The Illusion of Paradise: Multiculturalism in Hawai'i*, paper delivered at the "Reconfiguring Minority-Majority Discourse: Problematizing Multiculturalism" Conference at the East-West Center, Honolulu, Hawai'i (Aug. 11-13, 1994) (on file with author).

This note argues that the *Rogan* court, despite recognizing the crucial role the government has in remedying race relations, could have provided more guidance to practitioners by examining the history and current conditions of racial discrimination that require remediation. The *Rogan* court's blanket prohibition on racial remarks implicates a color-blind approach that does not significantly address racial justice and does not account for the differences amongst racial groups. Part II of this note provides a summary of the factual background and opinion of the *Rogan* decision. Part III analyzes the divergence of the Hawai'i court from the Supreme Court standard for deciding when double jeopardy attaches, and critiques the *Rogan* court's egregiousness standard. Further, by focusing on the Filipino population in Hawai'i, Part III suggests that a more appropriate method of evaluating the egregiousness of a racial remark could be achieved by examining the complexity of Hawai'i's multiracial community. Part IV concludes that although the court could have gone farther than simply imposing double jeopardy in the *Rogan* case, the case has opened the door to application of a more liberal double jeopardy standard in cases of racial prosecutorial misconduct. Nevertheless, it remains important to keep in mind that because a liberal standard is difficult to apply, it is imperative that the opinion be coupled with a historical understanding of racial prejudice for its application to be workable.

II. *STATE V. ROGAN*

A. Factual Background

Jerome Rogan was charged with three counts of sexual assault in the first degree, in violation of Hawai'i Revised Statutes ("HRS") section 707-730(1)(b),[7] and five counts of sexual assault in the third degree, in violation of HRS section 707-732(1)(b).[8] These allegations included penile, anal, and digital penetration with all counts based on the allegation that the complainant was less than fourteen years old.[9] Rogan denied all of these allegations.[10]

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[7] Hawai'i Revised Statutes section 707-730(1)(b) provides in relevant part that "a person commits the offense of sexual assault in the first degree if . . . the person knowingly subjects to sexual penetration another person who is less than fourteen years old." HAW. REV. STAT. ANN. § 707-730(1)(b) (Michie 2001).

[8] Hawai'i Revised Statutes section 707-732(1)(b) provides in relevant part that "a person commits the offense of sexual assault in the third degree if . . . the person knowingly subjects to sexual contact another person who is less than fourteen years old or causes such a person to have sexual contact with the person." HAW. REV. STAT. ANN. § 707-732(1)(b) (Michie 2001).

[9] Count I alleged penile penetration of the Complainant's vagina. Count II alleged anal penetration. The grand jury found "no bill" with regard to Count III, thereby refusing to indict Rogan for this count. Count IV alleged digital penetration of the Complainant's vagina. Count V alleged manual contact with the Complainant's vagina. Count VI

The Complainant's testimony was directly at odds with Rogan's.[11] The Complainant, who was twelve at the time of the alleged offenses, testified that she had never met Rogan prior to the evening of the incident, but had talked to him on the phone.[12] On September 13, 1995, after the Complainant's mother left the house, the Complainant invited Rogan to her home and showed him into her sister's bedroom where they listened to music and danced.[13] Complainant testified that Rogan and she then had sexual relations[14] and that Rogan stopped touching her when her mother entered the room,[15] after which he put on his clothes and ran out the door.[16]

The Complainant stated that Rogan told her he was a twenty-one year old black man from Mississippi, in the military, and stationed at Fort Shafter.[17] The Complainant testified that she talked with two friends while Rogan was at her house.[18] She also admitted that she voluntarily gave Rogan a "hickey."[19] Finally, Complainant explained that her parents wanted to see Rogan convicted, but that she did not want to testify against him.[20]

Rogan stated, at trial, that he was a soldier in the United States Army and had arrived in Hawai'i two or three weeks prior to the incident.[21] According to Rogan, the Complainant told him that she was a seventeen-year-old singer, with plans to attend Honolulu Community College, but chose to take a year off to relax.[22] She told Rogan her parents would be gone for the evening and invited him over.[23] Later that night, the Complainant called Rogan, gave him directions, and a specific time to come to her house.[24] Rogan explained that he did not find it unusual that the Complainant waited until her parents were gone to invite him over because the parents of the female he previously dated

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alleged that Rogan caused the Complainant to have manual contact with his penis. Count VII alleged manual contact with the Complainant's breast. Count VIII alleged manual contact with her buttock. Count IX alleged oral contact with her breast. All eight counts were based on the allegation that the complainant was less than fourteen years old.

Rogan, 91 Hawai'i at 409, 984 P.2d at 1235 n.3.

[10] *Id.*

[11] *See id.* at 415, 984 P.2d at 1241.

[12] *Id.* at 409, 984 P.2d at 1235.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at 410, 984 P.2d at 1236.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

objected to their relationship due to the fact that he was African American.[25] Rogan testified that, at the Complainant's suggestion, they went into the bedroom,[26] where they danced and she kissed his neck.[27] She pulled his shirt over his head and continued to kiss him on the neck.[28] Rogan testified that he asked her, "Come on, you want to do it?" Her response was, "No, I'm not having sex with you."[29] Rogan thought that the Complainant was not serious because she was laughing and continued to kiss his neck.[30] He also testified that the Complainant looked like she was seventeen years old at the time and that the girl he previously dated, who was twenty, looked younger than the Complainant.[31]

At the close of defense's case, the prosecutor and public defender delivered their closing arguments.[32] During the prosecution's rebuttal argument, the Deputy Prosecutor stated, in relevant part, that finding "some black, military guy on top of your daughter [is] every mother's nightmare."[33] Defense counsel objected on the ground that the comment constituted an appeal to racism. The objection was overruled.[34] While the jury was excused for deliberations, defense counsel moved for mistrial based on the prosecution's appeal to racial prejudice but the motion was denied.[35]

Rogan was found guilty on four counts of sexual assault in the third degree.[36] He was sentenced to five years of probation, and fifty days of incarceration with credit for time already served,[37] and was ordered to pay a

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[25] *Id.* The use of the term African American is complicated. In this article, African American refers not only to those of African descent who are also American citizens, but also includes those who are identified as being of African descent because of their skin color.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] *Id.* at 411, 984 P.2d at 1237.

[32] *Id.*

[33] *Id.* (internal quotations omitted). Deputy Prosecutor Victor Bakke stated that "the comments were legally proper, but apologized out of court for any appearance of impropriety. He also apologized to Rogan outside [the presence] of the jury." Linda Hosek & Susan Kreifels, *Defendant Says Racist Remark Hurt Chance of Fair Trial*, HONOLULU STAR-BULLETIN, Aug. 27, 1998, http://starbulletin.com/98/08/97/news/story2.html. Bakke explained that the comment "just came right out of my mouth. It wasn't said with any malice of forethought [sic]." *Id.*

[34] *Rogan*, 91 Hawai'i at 411, 984 P.2d at 1237.

[35] *Id.*

[36] *Id.* The jury found Rogan not guilty of Count II, guilty as to Counts V and VIII, guilty of lesser included offenses as to Counts I and IV, and could not reach a verdict as to Counts VI, VII, and IX. *Id.*

[37] Circuit Court Judge Dexter D. Del Rosario denied the State's request for a five-year jail term. Hosek, *supra* note 33.

fee of $400 to the Criminal Injuries Compensation Commission, and to attend sex offender treatment.[38] Rogan appealed.[39]

B. The Opinion

Writing for a unanimous Hawai'i Supreme Court, Justice Ramil held that the circuit court erred in failing to grant Defendant's motion for mistrial based on prosecutorial misconduct.[40] The court found that the remark made by the prosecutor was an appeal to racism and improperly incited the jury to sympathize with the mother of the Complainant.[41] Thus, Rogan's conviction was reversed.[42] In addition, the court determined that the prosecutor's remark was so egregious, from an objective standpoint, that the remark clearly denied Rogan the right to a fair trial.[43] Under the Double Jeopardy Clause of Article I, Section 10 of the Hawai'i Constitution,[44] once the prosecution has had the opportunity to try its case against the defendant, it is impermissible for the prosecutor to make a deliberate racial remark with the intent of invoking a mistrial to gain a second chance at prosecuting the defendant. Accordingly, the court barred the reprosecution of Rogan.

1. Prosecutorial misconduct

The Hawai'i Supreme Court examined the prosecutorial misconduct to decide whether the trial court had abused its discretion and whether the misconduct would warrant a reversal.[45] As explained in the opinion, "[a]llegations of prosecutorial misconduct are reviewed under the harmless beyond a reasonable doubt standard, which requires an examination of the record and a determination of 'whether there is a reasonable possibility that the error complained of might have contributed to the conviction.'"[46] In

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[38] *Rogan*, 91 Hawai'i at 411, 984 P.2d at 1237.

[39] *Id.*

[40] *Id.* at 408, 984 P.2d at 1234.

[41] *Id.* at 414, 984 P.2d at 1240.

[42] *Id.* at 424, 984 P.2d at 1250.

[43] *Id.*

[44] *Id.* The court quoted article I of the Hawai'i Constitution, which states, "nor shall any person be subject for the same offense to be twice put in jeopardy." HAW. CONST. art. I, § 10. The court reasoned that because of the "inadequacy of the specific intent standard adopted by the United States Supreme Court in [*Oregon v. Kennedy*, 456 U.S 667 (1982)] . . . [they chose to] give broader protection under the Hawai'i Constitution than that given by the federal constitution." *Rogan*, 91 Hawai'i at 423; 984 P.2d at 1249 (internal quotations omitted).

[45] *Rogan*, 91 Hawai'i at 411, 984 P.2d at 1237.

[46] *Id.* (quoting State v. Holbron, 80 Hawai'i 27, 32, 904 P.2d 912, 917, *recons. denied*, 80 Hawai'i 187, 907 P.2d 773 (1995)).

determining whether prosecutorial misconduct has occurred, the court traditionally weighs three factors: (1) the nature of the alleged misconduct; (2) the promptness of the curative instruction; and (3) the strength/weakness of the evidence to make this determination.[47] Under the Hawai'i Supreme Court's standards, the balancing of these three factors is critical to the determination of whether there is a "reasonable possibility that the error complained of might have contributed to the conviction."[48] After weighing the three factors, the *Rogan* court could not conclude that the comment was harmless beyond a reasonable doubt.[49] Accordingly, the prosecutor's comment was deemed to be prosecutorial misconduct, harmful enough to deny Rogan his right to a fair trial.[50]

2. Double jeopardy

In addition to reversing the conviction, the court imposed an even stiffer penalty on the state by barring Rogan's retrial based on the Double Jeopardy Clause.[51] This was unusual because courts are generally reluctant to apply the Double Jeopardy Clause unless faced with truly exceptional circumstances. The standard for determining whether double jeopardy barred retrial is much higher than that used to determine whether a defendant is entitled to a new trial.[52] More specifically, the double jeopardy bar can only be invoked where the court determines that there is highly prejudicial error affecting the defendant's right to a fair trial.[53]

In determining that the double jeopardy exception applied to Rogan, the Hawai'i Supreme Court departed from the United States Supreme Court's specific intent standard for double jeopardy,[54] which requires a showing that the prosecutor had the specific intent of causing a mistrial.[55] Instead, the *Rogan* court chose to follow another line of cases that balanced the interests of the criminal defendant against the interest of society.[56] In explaining its divergence from the Supreme Court's specific intent standard, the *Rogan* court stated that the United States Supreme Court approach was inadequate to protect defendants from prosecutorial misconduct because the proof required

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[47] *Id.* at 412, 984 P.2d at 1238 (citing State v. Samuel, 74 Haw. 141, 148, 838 P.2d 1374, 1378 (1992)).

[48] *Id.* (quoting State v. Balisbisana, 83 Hawai'i 109, 114, 924 P.2d 1215, 1220 (1996)).

[49] *Id.* at 415-16, 984 P.2d at 1241-42.

[50] *Id.* at 416, 984 P.2d at 1242.

[51] *Id.* at 424, 984 P.2d at 1250.

[52] *Id.* at 423, 984 P.2d at 1249 n.11.

[53] *Id.*

[54] *Id.* at 424, 984 P.2d at 1250.

[55] Oregon v. Kennedy, 456 U.S. 667 (1982).

[56] *Rogan*, 91 Hawai'i at 416, 984 P.2d at 1242.

is almost impossible to meet.[57] Specifically, the *Rogan* court focused on the Supreme Court case of *Oregon v. Kennedy*.[58]

In *Oregon v. Kennedy* the Supreme Court established a specific intent standard that requires the defendant to prove the prosecutor intended to "goad" the defendant into requesting a mistrial.[59] In other words, the *Kennedy* standard requires the defendant to prove that the purpose of the prosecutor's conduct was to obtain a second chance to convict the defendant.[60]

In *Kennedy*, the trial court granted the defendant's motion for mistrial because the prosecutor unfairly prejudiced the defendant by characterizing him as a "crook."[61] The defendant moved to dismiss the charges based on the Double Jeopardy Clause, which was granted.[62] The court of appeals upheld the trial court's ruling and found that the prosecutorial misconduct amounted to "overreaching."[63] Upon appeal to the United States Supreme Court, the Court struggled with two conceptions of the intent-based standard. The first standard relies on whether the government intended to provoke a request for a mistrial by the defendant.[64] The second concept was based on bad faith, viewing the government's conduct as harassing the accused into successive prosecutions.[65] The *Kennedy* Court found that the more general, "bad faith" standard would be too broad, unmanageable and difficult to apply.[66] The majority reasoned that a prosecutor is always attempting to prejudice the defendant by arguing for the defendant's guilt, therefore determinations of bad faith or harassment into moving for a mistrial are difficult to determine.[67]

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[57] *Id.* at 422, 984 P.2d at 1248. The *Rogan* court concluded that a heavy burden on the prosecutor arises because society is owed a full and fair opportunity to try a person. *Id.* at 417, 984 P.2d at 1243. In addition, defendants require protection because severe complications accompany multiple trials. The Hawai'i Supreme Court listed several hardships that would occur if multiple trials were allowed: (1) disruption of defendant's personal life during trial, (2) potential for government harassment of defendant, (3) increased financial burden, and (4) prolonged period of stigmatization. *Id.* at 416, 984 P.2d at 1242. As the likelihood of conviction increases with each subsequent trial, the Double Jeopardy Clause serves to limit prosecutorial power. *Id.*

[58] 456 U.S. 667 (1982).

[59] *Rogan*, 91 Hawai'i at 419; 984 P.2d at 1245 (citing *Kennedy* at 676).

[60] *Id. But cf.* United States v. Dinitz, 424 U.S. 600, 607 (1976) ("[W]here circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error.").

[61] *Kennedy*, 456 U.S. at 669.

[62] *Id.*

[63] *Id.* at 668.

[64] *See id.* at 674.

[65] *See id.*

[66] *See id.* at 674-75.

[67] *Id.* at 675.

Furthermore, assessment of bad faith is fact intensive and provides little guidance to the federal and state courts that must apply the decision.[68] The majority opted for the narrower standard requiring the defendant to prove that the government intended to provoke a request for mistrial, in effect limiting the circumstances under which a defendant may invoke the double jeopardy bar.[69]

The Hawai'i Supreme Court criticized the *Kennedy* standard, stating it is "nearly impossible for a defendant to prove that the prosecutor intended by deliberate misconduct to provoke a mistrial and not merely to prejudice the defendant."[70] Specifically, the court found that "[t]he *Kennedy* test . . . misdirects the focus of the double jeopardy protections on the harboring of bad intentions as opposed to the prevention of unacceptable behavior by the prosecution."[71] Accordingly, Justice Ramil chose not to adopt the specific intent standard set forth in *Kennedy*, and instead adopted the bad faith standard applied in the Texas case of *Bauder v. State*[72] and the New Mexico case of

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[68] *Id.* at 675 n.5.

[69] *Id.* at 679. Justice Stevens concurred in the judgment, but was critical of the standard upon which the majority based its opinion. *Id.* at 681-92 (Stevens, J., concurring). He argued for a general standard allowing courts to invoke the double jeopardy bar on retrial if incidents of prosecutorial misconduct render the defendant's choice to continue or abort the proceedings meaningless. *Id.* at 689.

[70] State v. Rogan, 91 Hawai'i 405, 419, 984 P.2d 1231, 1245 (1999). The court went on to state:

> [T]here are other situations in which the defendant's double jeopardy interests outweigh society's interest in obtaining a judgment on the merits even though the defendant has moved for a mistrial. For example, a prosecutor may be interested in putting the defendant through the embarrassment, expense, and ordeal of criminal proceedings even if he cannot obtain a conviction. In such a case, with the purpose of harassing the defendant the prosecutor may commit repeated prejudicial errors and be indifferent between a mistrial or mistrials and an unsustainable conviction or convictions. Another example is when the prosecutor seeks to inject enough unfair prejudice into the trial to ensure a conviction but not so much as to cause a reversal of that conviction. This kind of overreaching would not be covered by the Court's standard because, by hypothesis, the prosecutor's intent is to obtain a conviction, not to provoke a mistrial. Yet the defendant's choice—to continue the tainted proceeding or to abort it and begin anew—can be just as "hollow" in this situation as when the prosecutor intends to provoke a mistrial.
>
> To invoke the exception for overreaching, a court need not divine the exact motivation for the prosecutorial error. It is sufficient that the court is persuaded that egregious prosecutorial misconduct has rendered unmeaningful the defendant's choice to continue or to abort the proceedings.

Id.

[71] *Id.* at 423; 984 P.2d at 1249.

[72] 921 S.W.2d 696 (Tex. Crim. App. 1996) (en banc) [hereinafter *Bauder II*], rev'g 880 S.W.2d 502 (Tex. Ct. App. 1994) [hereinafter *Bauder I*].

State v. Breit.[73] In both cases retrial was barred, not because the prosecutor intended to cause a mistrial, but because the prosecutor *willfully disregarded the consequences* of his or her actions.[74]

In *Bauder*, the defendant was charged with driving while intoxicated.[75] During trial the prosecutor elicited testimony from the arresting officer that the defendant had been receiving oral sex when the officer approached the defendant's parked car.[76] The trial court held that the prosecutor had elicited the testimony to inject prejudice into the trial, but that he had not elicited the testimony to goad the defendant into obtaining a mistrial.[77] The Texas Court of Appeals in *Bauder I* affirmed the trial court's holding that the defendant's retrial was barred by double jeopardy.[78]

Similarly, in *Breit*, the prosecutor engaged in improper arguments with witnesses, solicited irrelevant comments, directed belligerent remarks at defense counsel, and displayed "sarcasm, sneering, rolling of eyes and exaggerated expressions."[79] The Supreme Court of New Mexico affirmed the trial court's holding that although the prosecutor did not want a mistrial, his conduct nevertheless denied the defendant the right to a fair trial, and therefore barred retrial.[80]

III. ANALYSIS

A. Expansion of the Double Jeopardy Exception

Although the United States Supreme Court attempted to create a more workable standard in *Kennedy*, in effect, the heavy burden placed on the defendant rendered the standard virtually impossible to meet. In his dissent, Justice Stevens reasoned that "[i]t is almost inconceivable that a defendant could prove that the prosecutor's deliberate misconduct was motivated by an intent to provoke a mistrial instead of an intent simply to prejudice the

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[73] 930 P.2d 792 (N.M. 1996).

[74] *See Rogan*, 91 Hawai'i at 421-22, 984 P.2d at 1247-48.

[75] *Bauder II*, 921 S.W.2d at 696.

[76] *Bauder I*, 880 S.W.2d at 503.

[77] *Id.*

[78] *Id.* In *Bauder II*, the Texas Court of Criminal Appeals, upon grant of discretionary review, reversed and remanded *Bauder I* due to its misapplication of the Texas Constitution. *Bauder II*, 921 S.W.2d at 700. *Bauder II* held that the "specific intent standard" in *Kennedy* was not binding under the Texas Constitution. *Id.* at 699. *Bauder II* did nothing to change the defendant's bar on retrial; it only clarified that the holding should be construed under the Texas Constitution and not the U.S. Constitution. *Id.* at 700.

[79] State v. Breit, 930 P.2d 792, 805 (N.M. 1996).

[80] *Id.* at 804.

defendant."[81] Thus, according to the reasoning of Justice Stevens, by placing strident limits on the situations in which the double jeopardy bar on retrial could be invoked, *Kennedy* made its standard practically inapplicable.[82] Significantly, in the sixteen years following the *Kennedy* decision, only two reported cases have afforded a remedy under the specific intent standard for even the most egregious of prosecutorial conduct.[83]

One of the most difficult problems with the *Kennedy* standard is that it is extremely challenging to deal "with a 'cold record' at the appellate stage that often fails to provide detail, not to mention context, regarding the circumstances of the claim."[84] This problem is illustrated by the cases of *State v. Laster*[85] and *Beck v. State*.[86]

In *Laster*, the defendant was charged with the sale of cocaine to a minor.[87] Although there was little proof that the substance in the minor's blood was cocaine,[88] throughout the trial the prosecutor repeatedly attempted to shift the focus from the charge to the defendant's supposed status as a "black pimp."[89] As a result, the district court granted defendant's motion for a mistrial.[90] Based on the *Kennedy* standard, the district court reasoned that "[f]rom these objective facts and circumstances, the [c]ourt must determine whether the prosecutor intended to provoke the final motion for a mistrial to afford the State a more favorable opportunity to convict this defendant."[91] In barring retrial, the district court held that the prosecutor used overreaching questions to shift the focus to the defendant's status as a "black pimp"[92] because the prosecutor had little evidence of the offense charged.[93] A reversal of the lower court's ruling would have required the Supreme Court of Montana to show that the error was clear, convincing, and practically free from doubt.[94] Under

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[81] Oregon v. Kennedy, 456 U.S. 667, 688 (1982).

[82] *See id.* at 687.

[83] State v. Rogan, 91 Hawai'i 405, 422, 984 P.2d 1231, 1248 n.9 (1999) (citing Kenneth Rosenthal, *Prosecutor Misconduct, Conviction, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 910 (1998)). The two cases were *Beck v. State*, 412 S.E.2d 530 (Ga. 1992) and *State v. Laster*, 724 P.2d 721 (Mont. 1986).

[84] Andrea D. Lyon, *Setting the Record Straight: A Proposal for Handling Prosecutorial Appeals to Racial, Ethnic or Gender Prejudice During Trial*, 6 MICH. J. RACE & L. 319, 327 (2001).

[85] 724 P.2d 721 (Mont. 1986).

[86] 412 S.E.2d 530 (Ga. 1992).

[87] *Laster*, 724 P.3d at 722-23.

[88] *Id.* at 723.

[89] *Id.* at 725.

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.* at 726.

this strict standard, the trial court's ruling stood, and the Supreme Court of Montana did not examine the record in close detail.[95]

Similarly, in *Beck*[96] the defendant was tried on charges of child molestation.[97] During the trial, the prosecutor violated a court order that excluded evidence of similar misconduct.[98] The trial judge found that the prosecutor had "a deliberate intent to goad [defense counsel] into a mistrial, . . . and that it [constituted] prosecutorial misconduct."[99] On appeal, in a one-page opinion, the Supreme Court of Georgia held that the trial court did not err in granting the plea of double jeopardy.[100] There was no discussion as to how the court arrived at its conclusion that the prosecutor intended to *goad* the defendant into moving for a mistrial. Instead, the court merely stated: "[W]hen the trial court's oral and written rulings are considered as a whole, the court's findings in support of its grant of the plea of double jeopardy meet the test of *Oregon v. Kennedy*."[101] Therefore in both *Laster* and *Beck*, trial judges, not the appellate court, determined the prosecutor's intent to goad the defendant into requesting a mistrial, thus illustrating the practical difficulty in applying the *Kennedy* approach.

It can be reasoned from the limited application of the *Kennedy* standard that it is difficult for an appellate court to infer whether the prosecutor did or did not intend to cause a mistrial. Thus, the specific intent standard is virtually inapplicable in any situation where the trial court denies a motion for double jeopardy or where the conduct at issue is not determined to be misconduct. On the other hand, the broader standard applied by the *Rogan* court affords the defendant recourse in situations where prosecutorial misconduct and double jeopardy are denied by the trial court.

B. Egregiousness Standard

The Court in *Kennedy* attempted to create a more workable standard[102] that requires the defendant to prove the prosecutor specifically intended to cause a mistrial.[103] The unworkable application of this standard is further illustrated by *Rogan*.[104] Instead of the rule set forth in *Kennedy*, the *Rogan* court crafted

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[95] *Id.*
[96] 412 S.E.2d 530 (Ga. 1992).
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.* at 531.
[101] *Id.*
[102] *See* Oregon v. Kennedy, 456 U.S. 667, 675 (1982).
[103] *Id.* at 679.
[104] State v. Rogan, 91 Hawai'i 405, 422-24, 984 P.2d 1231, 1248-50 (1999).

a broader rule requiring that the misconduct rise to the level of egregiousness for retrial to be barred.[105]

Although the broader standard employed by the *Rogan* court is useful in developing principled standards that will not inhibit legitimate prosecution practices, it still fails to provide clear guidance.[106] By failing to adequately define the egregiousness standard that it adopted, the *Rogan* court made it difficult for future courts to interpret and apply the standard.

Although admirable, Justice Ramil's description of the racial remark in *Rogan* is not sufficiently instructive. He explained that "[a]rguments that rely on racial . . . prejudices of the jurors introduce into the trial elements of irrelevance and irrationality that cannot be tolerated."[107] He also explained: "[W]here the jury's predisposition against some particular segment of society is exploited to stigmatize the accused or the accused['s] witnesses, such argument clearly trespasses the bounds of reasonable inference of fair comment on the evidence."[108] While these comments clearly denounce the use of racial remarks, they provide no insight as to how a court is supposed to make a finding of egregiousness. Arguably, some guidance regarding the egregiousness of a remark can be found in the social context and history of the racial references in other reported cases.[109] However, the court's reliance on other cases is limited to racial references directed at the racial classification of African Americans.[110] This limited assessment of racial prejudice leads to the

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[105] *Id.* at 423, 984 P.2d at 1249.

[106] *See Kennedy*, 456 U.S. at 687 n.22 (Stevens J., dissenting). Justice Stevens reasoned that generality, the broader standard, is a virtue which will afford courts the ability to balance the competing interests and determine fairness on a case-by-case basis. *Id.* Although Justice Stevens supported the use of a broader standard, he provided only limited guidance as to determinations of egregiousness. *Id.* at 690 n.29. He stated that "deliberate misconduct generally must be inferred from the objective evidence. The *more egregious the prosecutorial error*, and the harsher its impact on the defendant, the more readily the inference could be drawn." *Id.* (emphasis added).

[107] *Rogan*, 91 Hawai'i at 413, 984 P.2d at 1239.

[108] *Id.*

[109] *See infra* note 110.

[110] *Rogan*, 91 Hawai'i at 413, 984 P.2d at 1239. Specifically, the court noted the following cases:

> United States v. Cannon, 88 F.3d 1495, 1503 (8th Cir. 1996) (reversing conviction where prosecutor twice called African American defendant "bad people" and drew attention to the fact that they were not from the locality); Withers v. United States, 602 F.2d 124, 124-25 (6th Cir. 1979) (holding improper prosecutor's statement that "not one white witness has been produced in this case that contradicts [the victim's] position in this case" where the black defendant was charged with interstate kidnapping); Kelly v. Stone, 514 F.2d 18, 19 (9th Cir. 1975) (reversing rape conviction of black defendant because during closing argument the prosecutor told the jury to "think about the consequences of letting a guilty man . . . go free . . . because the next time it won't be a little black girl from the other side of the tracks"); Miller v. North Carolina, 583 F.2d 701, 708 (4th Cir. 1978) (finding error

question of whether *all* racial remarks will be determined to be as egregious as those referring to African Americans. Based upon the court's holding that *references to race* are prohibited,[111] it would seem that the court did not intend to restrict egregious racial remarks to the benefit of only one race.

The inadequacy of the egregiousness standard is evidenced by subsequent lower court decisions requiring further interpretation of the level of egregiousness required in order for double jeopardy to be imposed.[112] To date, the Hawai'i Supreme Court has revisited the *Rogan* egregiousness standard in only one case, *State v. Pachecho*,[113] but found that the prosecutorial misconduct did not rise to a level comparable to the misconduct in *Rogan*.[114] The *Pachecho* court specifically stated that it limited the application of the rule to the most "exceptional circumstances" and that the prosecutor's misconduct did not rise to the level found in *Rogan*, which was based on racial prejudice.[115]

On the other hand, in *State v. Ganal*[116] the Hawai'i Supreme Court, comprised of the same members as in *Rogan*,[117] held that prejudicial comments made by the prosecutor did not deprive the defendant of a fair trial although the prosecutor made blatant racial remarks during closing argument.[118] This holding seems inconsistent with *Rogan* in light of the prohibition the court places on the use of racial remarks.[119]

In *Ganal*, the defendant was accused of murdering his wife's parents and her boyfriend's family in a fit of jealous rage.[120] In addition, the defendant

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in the prosecution's "blatant appeal to racial prejudice in the assertion that no white woman would consent to sexual intercourse with a black man").

Id.

[111] *Id.* at 415, 984 P.2d 1241.

[112] Several cases have raised the issue of *Rogan*'s double jeopardy standard but because those cases did not find prosecutorial misconduct they did not reach the issue of double jeopardy. *See* State v. Klinge, 92 Hawai'i 577, 994 P.3d 509 (2001); State v. Wilmer, 96 Hawai'i 336, 31 P.3d 193 (2001).

[113] State v. Pacheco, 96 Hawai'i 83, 98, 26 P.3d 572, 587 (2001) (holding that the prosecutor's repeated reference to the defendant as an "asshole" was not egregious prosecutorial misconduct).

[114] *Id.*

[115] *Id.*

[116] 81 Hawai'i 358, 377, 917 P.2d 370, 389 (1996).

[117] Although *Ganal* was decided three years prior to *Rogan*, the court was composed of the same members (Chief Justice Moon, Justices Klein, Levinson, Nakayama, and Ramil).

[118] *Ganal*, 81 Hawai'i at 377, 917 P.2d at 389.

[119] Although other reasons influenced the court's decision that the prosecutor's racial comment did not constitute misconduct, the *Ganal* case is an illustration of where the historical and cultural inquiry of racial prejudice could have been implemented. *See generally Ganal*, 81 Hawai'i at 358; 917 P.2d at 370. If the court had explicitly evaluated the racial discrimination, such an examination would have lent greater credibility to the court's eventual holding.

[120] *Id.* at 362, 917 P.2d at 374-75.

was charged with the attempted murder of his wife.[121] During the summation of the case, the prosecutor argued against Ganal's defense of extreme emotional disturbance.[122] The prosecutor stated that Ganal's driving in his underwear in the early morning was not unusual because of his race.

> It's so odd that he would be driving in his truck early in the morning only with his BVDs. What's so odd about that? It's the [F]ilipino bathing suit, that's nothing unusual . . . . You want to talk about stereotypes? You know, why go in the water, you don't have to buy [sic] bathing suit, wear your BVDs, big deal.[123]

The court noted that the comments by the prosecutor "[l]acked the professionalism and decorum required of attorneys who practice before the bar," however, in denying Ganal's motion for a new trial, the court concluded that the strength of the case against Ganal prevented the court from finding an abuse of discretion.[124]

The *Rogan* court distinguished *Ganal* by citing to the overwhelming evidence against *Ganal*, such as the number of witnesses who testified against him, as well as the abundance of forensic evidence.[125] The court did not impose the same condemnation on racial remarks about Filipinos as it had in *Rogan* when the remarks were made about African Americans. In fact, the opinion simply stated "that the prosecutor's indecorous comments during closing argument . . . were inappropriate."[126]

In light of *Ganal*, it can be concluded that the Hawai'i Supreme Court has not ruled consistently when faced with determining the egregiousness of racial remarks. This inconsistency demonstrates the difficulty of applying the egregiousness standard to different races and the disparate results that can occur from the lack of guidance provided by the court. In order to provide adequate guidance for future court decisions, determinations of egregiousness should be explained with particular regard to the societal context and history of racial references.

C. Color-blind Approach

The *Rogan* court's denunciation of irrelevant racial remarks[127] implicates a

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[121] *Id.* at 361, 917 P.2d at 373.

[122] *Id.* at 374, 917 P.2d at 386.

[123] *Id.* at 375, 917 P.2d at 388.

[124] *Id.* at 377, 917 P.2d at 390.

[125] State v. Rogan, 91 Hawai'i 405, 415, 984 P.2d 1231, 1241 (1999).

[126] *Ganal*, 81 Hawai'i at 376, 984 P.2d at 388.

[127] *See Rogan*, 91 Hawai'i at 413, 984 P.2d at 1239. The court made a distinction between racial remarks that are legitimate and those that are illegitimate. A legitimate racial remark is, for example, a reference to race because identity was in question. An illegitimate racial remark is one which draws attention to the defendant's race to improperly appeal to jurors' prejudices. *Id.*

color-blind approach[128] to remedying racial prejudice. The color-blind approach advocates that courts be neutral and objective, avoiding any consideration of race so that everyone is treated equally, without references to context, situation, history, or culture. [129] However, many scholars have criticized the color-blind approach because it reinforces existing racial stratification.[130] Professor Neil Gotanda explains that the adoption of a color-blind vision of racial justice is problematic: "[C]olor blindness is often described as a race-neutral process. However, 'racial nonrecognition,' the technique at the heart of our understanding of color blindness, is by its nature not a 'neutral' process, since certain characteristics . . . [are always] recognized, calculated, and then discounted."[131]

Although color-blindness seeks to remedy dissonant race relations in the United States, law professor and race theorist Charles Lawrence asserts that the color-blind approach cannot be a cure for the disease of racism because it is a denial of racism's existence.[132] Thus, the approach of refusing to say race "out loud" is an inadequate method to eradicate race consciousness.[133] Specifically, Lawrence states:

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[128] Under the Equal Protection Clause, race has primarily been made identifiable only through skin color. *See generally* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991) [hereinafter Gotanda, *A Critique of Our Constitution*]. Beginning with Justice Harlan's dissent in *Plessy v. Ferguson*, 163 U.S. 537 (1896), the concept of "color-blindness" was advocated as a remedy to dissonant race relations in the United States. Justice Harlan stated, "Our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Id.* at 559 (Harlan, J., dissenting).

[129] *See* Jen-L A. Wong, Note, Adarand Constructors, Inc. v. Pena*: A Colorblind Remedy Eliminating Racial Preferences*, 18 U. HAW. L. REV. 939, 969 (1996) (citing John A. Powell, *An Agenda for the Post-Civil Rights Era*, 29 U.S.F. L. REV. 889, 892 (1995)). Color-blind constitutionalism is often equated with the Supreme Court's use of the strict scrutiny standard under the Fourteenth Amendment's Equal Protection Clause. Neil Gotanda, *Failure of the Color-Blind Vision: Race, Ethnicity, and the California Civil Rights Initiative*, 23 HASTINGS CONST. L.Q. 1135, 1138-39 (1996) [hereinafter Gotanda, *Failure of the Color-Blind Vision*].

[130] *See, e.g.*, Neil Gotanda, *A Critique of Our Constitution*, *supra* note 128 (arguing that the metaphor of "Our Constitution is Color-Blind" fosters racial domination); Jerome McCristal Culp, Jr., *Colorblind Remedies and the Intersectionality of Oppression: Policy Arguments Masquerading as Moral Claims*, 69 N.Y.U. L. REV. 162 (1994) (arguing that color-blindness is a myth which we construct in order to deal with the moral dilemma of a racially stratified society); Chris K. Iijima, *Swimming from the Island of the ColorBlind: Deserting an Ill-Conceived Constitutional Metaphor*, 17 LOY. L.A. ENT. L. REV. 583 (1997) (stating that the metaphor of color-blind constitutionalism will not eradicate racism as long as it ignores the larger social context because race is socially constructed).

[131] Gotanda, *Failure of the Color-Blind Vision*, *supra* note 129, at 1140.

[132] Charles R. Lawrence III, *Race, Multiculturalism, and Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 837 (1995).

[133] *Id.*

> This approach treats the demeaning social construction of race as if it were a bad habit that one could break by not using express racial categories . . . . The admitted injury imposed by the still-virulent and demeaning social construction of race continues while we wait for the "just-don't-say-it" approach to work. But this cost includes more than what can be measured by a reckoning of those cases where racial discrimination is real in fact but not in law. The narrow doctrinal view of what counts as racism helps spread the epidemic of denial.[134]

In other words, Lawrence asserts that accepting the color-blind approach and eradicating racial references does not change the material reality of racism in our communities.

Based upon Lawrence's theory, courts need to look beyond just the recognition of skin color in determining the egregiousness of a racial remark; social context and history of the racial reference also need to be factored into a court's assessment.

The *Rogan* court's blanket prohibition of illegitimate racial remarks did not fully account for the fact that conceptions of race are not uniform. According to Angela Harris,[135]

> [U]nder a post-structural account . . . "race" is neither a natural fact, simply there in "reality," nor a wrong idea, eradicable by an act of will. "Race" is real, and pervasive: our very perceptions of the world . . . are filtered through a screen of "race." And because the meaning of "race" is neither unitary or fixed, while some groups use notions of "race" to further the subordination of people of color, other groups use "race" as a tool of resistance.[136]

Therefore, race, as indicated by skin color rather than historical context, does not fully explain racial discrimination. By equating race only to skin color, the social construction of racial identification and its inconsistencies are left unexamined.

The *Rogan* court's unitary treatment of racial prejudice limits the extension of its applicability to the "multicultural society" it seeks to protect from appeals to racial prejudice.[137] Implicit in *Rogan*'s unitary conception of race is the fundamental black/white paradigm.[138] This paradigm limits the effectiveness of the remedies issued by courts.[139] For example, numerous

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[134] *Id.*

[135] Professor of Law, University of California, Berkeley, Boalt Hall School of Law.

[136] Lawrence, *supra* note 132, at 839 (citing Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 774 (1994)).

[137] State v. Rogan, 91 Hawai'i 405, 414, 984 P.2d 1231, 1240 (1999).

[138] *See* Michael Omi, *Rethinking the Language of Race and Racism*, 8 ASIAN L.J. 161, 165-66 (2001).

[139] *See* Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 845 (1997).

courts have interpreted anti-discrimination laws within the last fifteen years, and like the *Rogan* court, have narrowly defined racial discrimination as unequal treatment based on "skin color," resulting in the failure to look at racial discrimination as a historical problem.[140] When racial discrimination is examined severed from its historical roots, racial harms are easily viewed as individual acts at specific moments rather than acts affecting entire groups.[141]

Since many judges operate under the misconception of racial color-blindness, the treatment of race varies. Until courts can sort out how to define, and then eliminate, illegitimate racial references, courts will be unable to give meaningful future guidance as to how to identify racial discrimination.

Professor Neil Gotanda's work on race in American jurisprudence provides guidance to courts, such as *Rogan*, in dealing with conceptions of race in a multicultural society. Gotanda explains that there are four conceptions of race:[142] status-race,[143] formal-race,[144] historical-race, and culture-race.[145] Of particular relevance are historical-race and culture-race. Historical-race assigns substance to racial categories and embodies past and continuing racial subordination.[146] This is the meaning of race the United States Supreme Court contemplates when it applies "strict scrutiny" to racially prejudicial government conduct.[147]

Culture-race, on the other hand, is informed by the culture, community, and consciousness of a racial group.[148] Historical-race and culture-race are best explained through the Supreme Court's decision in *Palmore v. Sidoti*,[149] wherein the Court refused to deny a mother custody of her child because she had married an African American man.[150] The Court reasoned that it was not within its purview to consider private biases such as social pressures and discrimination that the child may suffer living with a stepparent of a different race.[151] Gotanda criticizes the Court's inability to see that the child may actually benefit from living with a stepparent of another race since the child

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[140] *Id.* at 845-46.

[141] *Id.*

[142] Gotanda, *A Critique of Our Constitution*, *supra* note 128, at 1, 4.

[143] Status-race is the traditional notion of race as an indication of social status. *Id.* at 4. It implies that certain races are "naturally" inferior. *Id.*

[144] Formal-race refers to socially constructed categories which view race as apolitical and only reflecting skin color or country of ancestral origin. *Id.*

[145] *Id.* at 4.

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] 466 U.S. 429 (1984).

[150] *Id.*

[151] Gotanda, *A Critique of Our Constitution*, *supra* note 128, at 58 (citing *Palmore*, 466 U.S at 433).

will be able to experience the stepparent's culture in a way the child would not if living with her biological father.[152]

Understanding the prejudices outside the home is connected to historical-race, whereas understanding the benefits of the stepparent's culture is connected to culture-race.[153] Historical-race and culture-race are important conceptual bases for guiding the future application of the *Rogan* court's standard of egregiousness as applied to race. The *Rogan* court does not explicitly define the concept of race that it adopts, but it does state, "[t]he factor of racial prejudice has been formally and officially squelched in our society after long and arduous struggles. Where it remains informally, it cannot be condoned."[154] By failing to address the perceived inferiority of a race, the court ignores the status-race view, and instead, only recognizes the existence of racial discrimination and a need to rectify that harm.

Similarly, if the court had simply adopted the formal-race conception, then it would seek to erase mention of race from the law. It appears, however, that the court conceives of race as something more substantive than skin color. The imposition of double jeopardy necessitated that the racial remark was egregious; it required that the prosecutor knew the remark would cause a mistrial.[155] The presumption that the prosecutor knew of the racial harm is derived from the history of group racial discrimination and current conditions of discrimination. Thus, while the court sought to address the historical and cultural conceptions of race, by failing to accompany the prohibition of racial remarks with the history and current conditions which reflect the social realities of the group, the court amputates the remedy to racial prejudice from its social reality.

In a multicultural setting, however, identifying racial discrimination is often more difficult. The preconception that Hawai'i is a multiracial paradise further complicates the process of identifying racial harm because there is, in fact, no tradition of tolerance or peaceful co-existence.[156] Ethnic antagonisms occur

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[152] *Id.*

[153] *Id.*

[154] State v. Rogan, 91 Hawai'i 405, 424, 984 P.2d 1231, 1250 n.12 (1999) (citing Kornegay v. State, 329 S.E.2d 601, 605 (Ga. Ct. App. 1985)).

[155] *See id.* at 424, 984 P.2d at 1250.

[156] Okamura, *supra* note 6 (critiquing the proponents of Hawai'i's multicultural model and complicating the ethnic relationships in Hawai'i). Harmonious social relations are another characteristic of Hawai'i's multicultural paradise. Relatively high rates of marriages outside of a racial group have been cited as an indication of racial equality. *Id.* at 5. However, it was Hawai'i's demographics that had more to do with "outmarriage" than harmonious social relations. *Id.* The demographics of interracial marriages are due to the historic immigrant population in Hawai'i with its relative lack of women among Chinese and Filipinos and the small population of Puerto Ricans and Koreans. *Id.* Okamura also explains that there has been a tendency to overemphasize the significance of outmarriage on the overall nature and quality

in everyday life, but it is the "myth" of tolerance that allows us to mask conflicted interethnic, interracial relations.[157] Consequently, although the *Rogan* court prohibited references to African Americans, determining racial prejudice against other racial groups was left unclear. Hawai'i is an apt illustration of the need for historical analysis of racial discrimination because of its multiethnic population.

D. Hawai'i and the Myth of Multiculturalism

The multicultural model can be particularly insidious and deceiving because it dismisses, through its appeals to historical egalitarianism and equal opportunity, these points of ethnic and racial discord. For these reasons, it is imperative that the courts begin to address the historical conditions that bring about racial discrimination.

Applying a social and historical context to racial oppression of other minorities in Hawai'i is particularly instructive for understanding the type of inquiry the court could have adopted in *Rogan*. For example, the outcome of the *Ganal* case cannot be reconciled to mean that racial discrimination against African Americans is more "egregious" than discrimination against Filipinos. If the court had looked at the history of oppression evidenced by legislation, judicial action, and social discrimination in Hawai'i, it would have seen a history of discrimination and a present condition of discrimination which might have changed their appreciation of the racial remark.

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of ethnic relations in Hawai'i. *Id.* Although outmarriages may indicate an ethnically tolerant community, it cannot be equated with a harmonious or egalitarian society. *Id.* at 6. If there is a feeling of tolerance it may be short-lived. *Id.*

Equality of opportunity is another characteristic of the Hawai'i multicultural model. *Id.* at 6-7. The idea that through the passage of time all immigrants can achieve economic success is not necessarily true as Hawai'i does not provide immigrants with equal economic mobility. *Id.* at 7. Hawai'i does not afford upward mobility to all groups such as Native Hawaiians, Filipinos, and Samoans, as they continue to be underrepresented in the upper levels of the occupational scale as professionals, executives, and technical laborers. These groups are simultaneously overrepresented in lower level positions such as laborers and service workers. *Id.*

[157] *Id.* at 5. Hawai'i's local culture has been recognized since the 1920s as a prime example of diverse people living in harmony. *Id.* However, Hawai'i has a history of numerous ethnic conflicts, including the overthrow of the Hawaiian monarchy in 1893, the numerous sugar, pineapple, and dock workers' strikes from 1909 through 1958, plantation strikes by Filipino and Japanese workers in 1920 and 1924, the racist efforts to close the Japanese language press and language schools in the 1940s, the emergence of the anti-Japanese backlash in the mid-1970s, and especially harsh negative stereotyping and prejudice against Filipinos which continues today. *Id.* at 9.

For Filipinos in Hawai'i, racial oppression has deep historical roots.[158] In 1909, the Territorial Legislature passed its first law establishing citizenship requirements for public employees, thus barring many Filipino immigrants from the work force.[159] In the 1940s, these adverse conditions had not changed much as illustrated by the fact that both the Chinese and Japanese median incomes were well above that of the Filipinos.[160] The 1970-80s census data noted that Chinese, Whites, Japanese, and Koreans ranked well above Filipinos, Hawaiians, and Samoans in occupational and educational status.[161] Even today, Filipinos are still underrepresented in tenured or tenure-track positions in the Hawai'i Department of Education.[162]

Despite this long history of social discrimination and exclusion from equal opportunity, the holding in *Ganal* could be interpreted to mean that the court believes that racial remarks about Filipinos carry lesser badges of oppression than remarks about African Americans.

Instead, the *Ganal* court's seemingly cursory view of racism against Filipinos may also be a reflection of the difficulty in identifying racial discrimination in a multicultural society.[163] If the Hawai'i Supreme Court

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[158] *See* Jeff Chang, *Lessons of Tolerance: Americanism and the Filipino Affirmative Action Movement in Hawaii*, 37 SOC. PROCESS IN HAW. 112 (1996).

[159] *See id.* at 114. Colonial administrators were threatened by the potential influence of the Japanese community who made up forty percent of Hawai'i's population. Therefore, the Territorial Legislature passed its first law establishing citizenship requirements. *Id.* The Japanese were not the only group harmed by this legislation, as many other immigrant communities were also shut out of government employment. *See id.* The impact on the Filipino community is significant because of the eventual fragmentation of the immigrant coalition and establishment of new hierarchies. *See id.* at 116.

[160] *Id.*

[161] *Id.*

[162] *Id.* at 131. In the 1970s, the Japanese held nearly sixty percent of all teaching positions and over sixty-seven percent of all educational officer positions in the Hawai'i Department of Education. *Id.* at 116. Less than three percent of teachers and three percent of educational officers were Filipino. *Id.* Three-quarters of new teacher hires were of Japanese or White ancestry, while less than five percent were Filipino. *Id.*

Prevalent violence between students has also been attributed to the dearth of Filipino educators on campuses. The problem was so severe in the 1970s that the State created a State task force to petition the United States Department of Health, Education, and Welfare to equalize employment opportunities. *Id.* at 119. The petition was signed by 750 people and outlined seven civil rights violations from the denial of employment to the lack of equal access to quality education. *Id.* In addition, the task force found that Filipinos were ethnically segregated, more likely to be exposed to school violence, were not receiving adequate college preparation, and were less likely to graduate. *Id.*

[163] Filipina poet Darlene Rodrigues attests that speaking and writing about racism in Hawai'i is difficult. She explains that it was difficult to criticize racial depictions of characters in Hawai'i-born Japanese American author Lois-Ann Yamanaka's book *Blu's Hanging*, stating:

The sadness of injustice, the sadness of my forefathers and foremothers, all the pain and

sincerely aims to remedy what they refer to as a threat to "our multicultural" society, the court needs to extend their analysis of racial prejudice beyond the mere references to race and request that attorneys brief judges on the historical realities of racial groups. Another alternative is to provide a hearing at the moment the comment is introduced to assist courts in identifying prejudice.[164] A hearing would also be beneficial in preserving a record to assist appellate courts in considering the substance of the remarks in order to provide further checks on prejudice.[165]

IV. CONCLUSION

By adopting the egregiousness test for invoking the Double Jeopardy Clause, the *Rogan* court created a broader standard under which defendants can seek protection from egregious prosecutorial misconduct. This standard offers a foundation to guide Hawai'i courts, however, it does not provide enough instruction as to how courts should treat racial remarks in light of their social and historical context. Because racial identifications exist in reality, racial categories are one of the predominant ways in which our world is conceptualized. It would be ideal if race was not a factor, but individuals are defined by race. When conceptions of race are intertwined with history, race becomes an individual's history. It is not possible to separate the two without ignoring the reality of social stratification, racial dominance, and oppression. Until communities develop a new language in which to talk about themselves and their relationships with others, communities cannot understand race

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> suffering they had to go through, that's what I feel in my throat. I don't know if I'm overwhelmed by everything that I'm trying to say, or if I'm afraid of what it is I have to say about racism in Hawai'i. When I'm bravest, I just think of being true to what it is I have to say, and sometimes that is the hardest thing to do because I was force-fed the illusion that race doesn't matter among Asians in Hawai'i. I want to say these things to break down that illusion. The angry part of me is there, and it's raring to go, but my body shuts down. I am made to feel like a little girl who must not say anything; I must not draw attention to myself. *Just be quiet.* I am made to muffle my anger about the racism that Filipinos live with each day.

Darlene Rodrigues, *Imagining Ourselves: Reflections on the Controversy over Lois-Ann Yamanaka's* Blu's Hanging, 26 AMERASIA J. 195, 202 (2000).

[164] Lyon, *supra* note 84, at 336. See Lyon for a thorough methodology of handling prosecutorial appeals to racism. Lyon advocates analyzing suspect comments at the time they are made, which enables counsel to provide context and perspective, especially if they are unaware of the implications of their statement on the jury. *Id.* Employing immediate review of the comment will enable the court to "articulate what would otherwise remain latent prejudice." *Id.*

[165] *Id.* at 337.

beyond its historical underpinnings.[166] Thus, it is crucial that courts begin to examine racial prejudice beyond references to race. If racial justice is the goal, then the court as the "omnipresent teacher" should examine the real consequences of racial discrimination, rather than simply and blindly barring all references to race.

Liann Ebesugawa[167]

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[166] *See generally*, Omi, *supra* note 138. Omi proposes that the category of "race" no longer works as a way of describing racial theories and practices. *Id.* at 161. He asserts that "race" is a conception that is laden with contradictions and therefore can no longer help in the discourse over effective anti-racist strategies. *Id.* at 163. Finally, he proposes that:

> [W]e need to frame a new language—a new way to talk about race—that explicitly confronts the nature of racialized power in our society, and articulates and advances new principles of social justice. Such a language needs to emphasize the continuing importance of social concepts of race, and expansive definitions of what is racist, and the necessity of confronting conflicts between communities of color.

Id. at 167.

[167] Class of 2003, The University of Hawai'i, William S. Richardson School of Law. Many thanks to Professor Eric Yamamoto, Professor John Van Dyke, Professor Chris Iijima, Professor Candace Fujikane, Professor John Zuern, Chris Kempner, Ian Hlawati, Stanton Oishi, Michelle Oishi, Norman Cheng, Jamie Tanabe, and the 2001 University of Hawai'i Law Review Editorial Board.

New York Times Co. v. Tasini: Can Electronic Publications Ever Be Considered Revisions of Printed Media?

I. INTRODUCTION

As Congress predicted long ago, advancement in technology and innovative devices to store information have changed our lives today.[1] Many people use electronic mail to communicate,[2] digital cameras to take photographs,[3] and word processing software to express their ideas.[4] Typewriters have declined in popularity,[5] and the photography industry has seen a decrease in film sales.[6] Technology has indeed changed rapidly, and the legislature and courts are faced with many unresolved questions as they integrate new forms of electronic media into the current legal system.[7] One such question is whether the law should treat electronic media the same as traditional media, such as paper and film.[8]

In *New York Times Co. v. Tasini*, the United States Supreme Court faced such an issue in deciding how courts should deal with electronic databases in the realm of copyright law.[9] The issue arose when magazine and newspaper publishers allowed their publications to be reproduced in electronic databases.[10] Freelance writers who contributed their articles to the original

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[1] H.R. REP. NO. 94-1476, at 47 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5660 ("During the past half century a wide range of new techniques for capturing and communicating printed matter, visual images, and recorded sounds have come into use, and the increasing use of information storage and retrieval devices . . . promises even greater changes in the near future.").

[2] *See* Ann Shields, *Reach Out and Fax Someone*, L.A. TIMES, June 7, 1995, at E3.

[3] *See* Mike Musgrove, *Eliminate the Negative? As Non-Techies Embrace Digital Photography, It's Still Not Clear Whether Film Will Fade*, WASH. POST, Dec. 16, 2001, at H1.

[4] *See* Mike Pramik, *PC Has Turned World on Its Ear in 20 Years*, COLUMBUS DISPATCH, Aug. 12, 2001, at 1D.

[5] *See* Glenn Collins, *Literary Set's Liquid Paper Conspiracy: Demise of Typewriter Shop Saddens Authors Who Nurse Their Machines*, N.Y. TIMES, Feb. 20, 2001, at B1.

[6] Musgrove, *supra* note 3, at H6.

[7] John D. Shuff & Geoffrey T. Holtz, *Copyright Tensions in a Digital Age*, 34 AKRON L. REV. 555, 555 (2001).

[8] *See generally* Christopher Stern, *Freelancers Win Fight Over Reuse of Works: Justices Say Databases Require Permission*, WASH. POST, June 26, 2001, at E1 ("The dispute is just one of several battles now being waged as traditional copyright law—written in an age of ink and paper—is applied to the possibilities created by the information age.").

[9] N.Y. Times Co. v. Tasini, 533 U.S. 483, 512 (2001).

[10] *Id.* at 509-10.

publications filed suit, seeking compensation for the electronic publications.[11] The publishers asserted the defense that they had a right to create "revisions" of the publications under 17 U.S.C. § 201(c).[12] The Supreme Court held that this assembly of articles could not constitute a "revision" of the original publication and ruled in favor of the writers.[13] The Court concluded that electronic databases are distinct from printed publications and will not be recognized as revisions of traditional media for copyright law purposes.[14] This casenote argues that, although *Tasini* was consistent with settled rules of statutory interpretation, the decision left unanswered the question of whether an electronic version of print media can ever be considered a "revision" under 17 U.S.C. § 201(c). Despite the Court's efforts to properly interpret the copyright law, the ambiguity in its reasoning may stifle the benefits of technological advancement and free expression that Congress originally sought to attain.[15]

Part II will provide a brief history of copyright law and the relevant provisions of the copyright statute. Part III will detail the facts and procedural history of *Tasini*, as well as the Court's analysis, holding, and dissenting opinion. Part IV argues that while the holding was correct, it provided little guidance as to whether an electronic version of print media can ever constitute a "revision" under 17 U.S.C. § 201(c).

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[11] *Id.* at 511.

[12] *Id.* at 508-09. According to 17 U.S.C. § 201(c) (1994), the creator of a collective work reserves the privilege to create revisions of the work without having to secure permission from the contributors to the collective work. Contributors, on the other hand, still retain the copyright in their individual contributions and have the exclusive power to authorize the sale of the contribution as a single unit or as part of a different collective work. *See* H.R. REP. NO. 94-1476, at 122-23 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5738.

[13] *Tasini*, 533 U.S. at 520.

[14] *Id.* at 509.

[15] Under the Constitution, Congress has the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art. I, § 8. Technological development and electronic media provide publishers the ability to quickly distribute ideas amongst people. *See* Barbara Love, *Opportunities, Questions Abound as Digital Magazines Become a Reality*, CIRCULATION MGMT., July 1, 2001, at 14. Publishers, however, are reluctant to invest in technology and the means of distributing information through electronic media because of the uncertainty as to what protections copyright law would offer. *Id.*

II. BACKGROUND

A. *The Copyright Act of 1976*

The purpose of copyright law is to provide an incentive for people to express their ideas by affording their works protection from improper duplication and allowing the authors to profit from their creative efforts.[16] Under the Copyright Act of 1976, copyright protection is granted to "original works of authorship fixed in any tangible medium of expression."[17] The term "any tangible medium of expression" does not limit copyright protection to traditional media, such as paper or film, but rather affords protection to any medium of expression in current existence or developed in the future.[18]

From a historical perspective, the Copyright Act of 1976 provides a panoply of protection to individual authors.[19] Before the changes made by the Act, copyrights were considered indivisible rights.[20] Therefore, an author who published her article in a newspaper, magazine, or other print medium always ran the risk of relinquishing her copyright to the public domain if the publication failed to indicate her name as the author of the article.[21] The Copyright Act of 1976 eliminated this risk.[22] The Act recognized a copyright as a divisible bundle of rights,[23] such that authors could transfer part of their

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[16] *See* Mazer v. Stein, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant . . . copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'").

[17] 17 U.S.C. § 102(a) (1994).

[18] *Id.*; *see also* H.R. REP. NO. 94-1476, at 51 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5664 ("The [Copyright Act of 1976] bill does not intend . . . to freeze the scope of copyrightable subject matter at the present stage of communications technology . . . .").

[19] *See Tasini*, 533 U.S. at 513.

[20] *See* 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.01[A], at 10-5 (2001). Under the doctrine of indivisibility, an author can transfer a copyright only as a whole and not in parts. Goldwyn Pictures Corp. v. Howells Sales Co., 282 F. 9, 11 (2d Cir. 1922) (holding that the plaintiff did not have standing to sue because the plaintiff had only a partial assignment of the copyright, and only the owner, who kept all the rights, could sue for infringement).

[21] *See* Copyright Act of 1909, § 18, 35 Stat. 1075, 1079 (amended 1976).

[22] H.R. REP. NO. 94-1476, at 146, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5762.

[23] 17 U.S.C. § 106 (1994 & Supp. IV 1999); *see also* H.R. REP. NO. 94-1476, at 61, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5674 ("These exclusive rights . . . comprise the so-called 'bundle of rights' that is a copyright . . . ."). The bundle of rights the author now possesses includes the right: to reproduce copyrighted works, to prepare derivative works based upon the copyrighted works, to distribute copies of the copyrighted works to the public, to perform the copyrighted work publicly, to display the copyrighted work publicly, and to perform the copyrighted work publicly by means of a digital audio transmission. 17 U.S.C. § 106.

copyright to the publisher without the risk of losing it to the public domain[24] or implicitly transferring it entirely to the publisher.[25]

B. Publications and Copyrights

Under the Copyright Act of 1976, a periodical publication falls under the definition of a "collective work," which is comprised of separate and independent works that are assembled into a collective whole.[26] Significantly, the independent articles that make up a collective work are themselves copyrightable.[27] Thus, under 17 U.S.C. § 201, there are two copyrights vested in such publications.[28] The first copyright exists in the individual articles themselves and usually vests in the original author of the work.[29] The second copyright exists in the publication as a whole and protects the publisher's original expression in selecting, coordinating, or arranging such articles to create the collective work.[30]

To avoid any overlap between the two distinct copyrights, 17 U.S.C. § 201(c) recognizes that the publisher is presumed to have acquired only the "privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series."[31] While there is very little case law defining the scope of these privileges,[32] the legislative history of the statute

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[24] 17 U.S.C. § 201(d) (1994); *see also* H.R. REP. NO. 94-1476, at 61, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5674 ("Each of the five enumerated rights may be subdivided indefinitely . . . [and] each subdivision of an exclusive right may be owned and enforced separately.").

[25] N.Y. Times Co. v. Tasini, 533 U.S. 483, 513 (2001) ("[A]bsent a specific contract, a court might find that an author had tacitly transferred the entire copyright to a publisher, in turn deemed to hold the copyright in 'trust' for the author's benefit.").

[26] 17 U.S.C. § 101 (1994 & Supp. IV 1999).

[27] 17 U.S.C. § 201(c) (1994); *see also* 1 NIMMER, *supra* note 20, § 2.04[B], at 2-46.

[28] 17 U.S.C. § 201(c).

[29] *Id.* Under an exception, the copyright in the article can vest in the publisher if the author is an employee of the publisher or both parties sign a written agreement stating that the article is a work made for hire. 17 U.S.C. § 201(b) (1994).

[30] 17 U.S.C. § 201(c). A collective work is a type of "compilation," which is defined as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101. Legislative history of the Copyright Act of 1976 indicates the same level of analysis is used to determine the existence of originality for copyright protection in both collective works and compilations. H.R. REP. NO. 94-1476, at 122 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5737 ("[A] collective work is a species of 'compilation' and, by its nature, must involve the selection, assembly, and arrangement of 'a number of contributions.'").

[31] 17 U.S.C. § 201(c).

[32] Ryan v. Carl Corp., 23 F. Supp. 2d 1146, 1150 (N.D. Cal. 1998) (holding that the defendant infringed on the individual authors' copyrights when it copied and delivered

provides some guidance.[33] Congress stated that a publisher could "reprint a contribution from one issue in a later issue of its magazine, and could reprint an article from a 1980 edition of an encyclopedia in a 1990 revision of it" but could not "revise the contribution itself or include it in a new anthology or an entirely different magazine or other collective work."[34]

Accordingly, both publishers and individual authors have a copyright claim in a single publication and, therefore, a dilemma arises when a publisher authorizes the reproduction of the entire publication in electronic form without asking for the individual authors' permission.[35] On one hand, individual authors retain the copyrights in their articles and own the exclusive right to create reproductions of their works.[36] On the other, publishers own a copyright in the publication as a whole, and the copyright law grants publishers the right to profit from this work.[37] The *Tasini* decision resolves this issue.

III. *NEW YORK TIMES CO. V. TASINI*

A. Factual Background

Jonathan Tasini and five other freelance writers contributed articles to the New York Times and Newsday newspapers, as well as to the Sports Illustrated magazine.[38] The writers registered the copyrights in their individual articles.[39] The publishers, New York Times Company, Inc.; Newsday, Inc.; and Time, Inc. ("Print Defendants"), registered the copyrights in each periodical.[40] Without asking the writers for permission or providing compensation, the Print Defendants licensed the right to reproduce their periodicals in electronic databases owned by Mead Corporation, now called LEXIS/NEXIS ("LEXIS"), and University Microfilms, Inc., now called UMI Company ("UMI").[41]

LEXIS owned the NEXIS database, which contained hundreds of different publications.[42] UMI owned two databases called the New York Times OnDisc

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individual articles to users with only the permission from the publishers).

[33] *See generally* Tasini v. N.Y. Times Co., 206 F.3d 161, 167 (2d Cir. 2000).

[34] H.R. REP. NO. 94-1476, at 122-23, *reprinted in* 1976 U.S.C.C.A.N. 5659, 5738.

[35] Tasini v. N.Y. Times Co., 972 F. Supp. 804, 806 (S.D.N.Y. 1997).

[36] Brief for Respondents Tasini, Blakely, Mifflin & Whitford at 15, 27, N.Y. Times Co. v. Tasini, 533 U.S. 483 (2001) (No. 00-201).

[37] Brief for Petitioners at 15, 17, 39, N.Y. Times Co. v. Tasini, 533 U.S. 483 (2001) (No. 00-201).

[38] *Tasini*, 972 F. Supp. at 806-07.

[39] Tasini v. N.Y. Times Co., 206 F.3d 161, 163 (2d Cir. 2000).

[40] N.Y. Times Co. v. Tasini, 533 U.S. 483, 509 (2001).

[41] *Tasini*, 972 F. Supp. at 807-08.

[42] *Tasini*, 206 F.3d at 164.

("NYTO") and the General Periodicals OnDisc ("GPO") database.[43] To create the NEXIS and the NYTO databases, LEXIS and UMI removed all advertisements and pictures from the articles, saved each article as an individual electronic file, and preserved only the text portion of the articles while adding citations to the original periodicals.[44] For the GPO database, UMI replicated the articles by using a scanner and had the computer software display the articles on the screen exactly as they were shown in the original periodicals.[45] The NYTO database contained only articles from the New York Times while the GPO database contained articles from numerous other publications, in addition to the Times' Sunday Book Review and Magazine.[46]

B. Procedural History

Tasini and the other writers sued the Print Defendants, LEXIS, and UMI for copyright infringement of their individual articles.[47] The Print Defendants asserted two defenses. First, they claimed that the plaintiffs' copyrights were transferred to them by contract.[48] Second, they argued that the publication in electronic form was valid under the Print Defendants' right to create "revisions" of their publications under 17 U.S.C. § 201(c).[49] The district court rejected the Print Defendants' first defense based upon contract law[50] but

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[43] *Tasini*, 972 F. Supp. at 806.

[44] *Id.* at 808.

[45] *Id.*

[46] *Id.* at 806, 808.

[47] *Id.* at 806.

[48] *Id.* at 810-11. Despite the lack of a formal contract, Newsday, Inc. did print a statement on the back of the payment checks reserving the electronic rights to the articles. *Id.* at 807. All but Tasini, who crossed the provisions out, cashed the checks with this clause. *Id.* Time, Inc. had a formal contract with one of the freelance writers and argued that the author transferred the electronic rights to Time, Inc. through a first publication clause in the contract. *Id.* at 811-12. New York Times Company, Inc. did not assert any defense based on contract law. *Id.* at 809.

[49] *Id.* at 812.

[50] *Id.* at 811-12. The district court denied Newsday's defense because not all checks with the written statements on the back were cashed before the articles were sent to LEXIS and UMI, and these vague clauses could have referred to the right to store the articles in an electronic database owned by Newsday, Inc. for archival purposes. *Id.* at 810-11. The court concluded that there was no express transfer as required by 17 U.S.C. § 201(d). *Id.* at 810. The court rejected Time's argument because Time, Inc. already enjoyed its first publication right through the printing of its periodical and had no argument that a later publication in an electronic database could still be considered a first publication. *Id.* at 812.

accepted their second defense that the electronic databases were simply "revisions" allowed under 17 U.S.C. § 201(c).[51]

The court of appeals reversed the lower court's decision and granted summary judgment in favor of the plaintiffs.[52] The appeals court agreed with the lower court that the defendants' defense based on contract law did not hold weight.[53] However, the court reversed the lower court on the second defense based on the statutory construction of 17 U.S.C. § 201(c).[54]

C. The Majority Opinion

In a seven-to-two majority,[55] the Supreme Court affirmed the court of appeals decision.[56] The opinion, written by Justice Ginsburg, held that "the databases reproduce and distribute articles standing alone and not in context, not 'as part of that particular collective work' to which the author contributed, 'as part of . . . any revision' thereof, or 'as part of . . . any later collective work in the same series.'"[57]

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[51] *Id.* at 826. Since this issue was one of first impression, the court had to create a test to determine the standards for a revision under § 201(c). *Id.* at 812, 821. The district court granted summary judgment for the defendants under a two-pronged test of, first, identifying the original aspects of the collective work and, second, determining whether or not the electronic periodical preserved these original aspects. *Id.* at 823. The originality involved in the publication was the editor's selection process, and the database kept this aspect of originality. *Id.* The court also found this revision privilege to be transferable because there appeared to be no reason given in the legislative history of 17 U.S.C. § 201(d) for barring such acts. *Id.* at 815-16. The plaintiffs moved for reconsideration, but the district court denied the motion. Tasini v. N.Y. Times Co., 981 F. Supp. 841, 851 (S.D.N.Y. 1997).

[52] Tasini v. N.Y. Times Co., 206 F.3d 161, 172 (2d Cir. 2000).

[53] *Id.* at 171.

[54] *Id.* at 168. The court of appeals found that the electronic publication of articles in the NEXIS and NYTO databases could not be considered revisions because the originality of the publications had been lost by the process of stripping these articles of their graphics and formatting. *Id.* at 168-69. The NEXIS and NYTO databases also failed to contain revisions because, regardless of the embedded citations the articles contained, the databases still presented the articles individually rather than as an assembled whole. *Id.* at 169. The GPO failed as a revision despite retaining the original formatting because the database contained different publications and was at best a new anthology outside of the 17 U.S.C. § 201(c) revision privilege. *Id.* at 170. The court did not find it necessary to address the issue of transferability of revision privileges. *See id.* at 165.

[55] N.Y. Times Co. v. Tasini, 533 U.S. 483, 507 (2001). The majority was comprised of Chief Justice Rehnquist and Justices Ginsburg, O'Connor, Scalia, Kennedy, Souter, and Thomas. *Id.*

[56] *Id.* at 520.

[57] *Id.* at 509.

The Court reasoned that the plaintiffs' articles were no longer assembled and arranged as they were in the original publication.[58] The databases stored articles from thousands of different publications, and users accessed the plaintiffs' works from a vast collection of articles including those from other publications.[59] In the NEXIS and NYTO databases, LEXIS and UMI removed all formatting, graphics, and other articles that may have appeared with the plaintiffs' articles in the original publication.[60] The GPO database preserved this original formatting of the articles but did not allow users to access other articles originally published before or after the one selected.[61]

The Court expressed doubt as to whether the databases could ever be considered "revisions" under 17 U.S.C. § 201(c) because of the ability of databases to hold thousands of different publications[62] and instead determined that "[t]he massive whole of the [d]atabase is not recognizable as a new version of its every small part."[63] Consequently, the Court concluded that the databases involved did not present articles as part of any recognizable collective work, despite the fact that each article provided citations to the original publication.[64] According to the Court's reasoning, the "crucial fact [was] that the [d]atabases, like [a] hypothetical library, store and retrieve articles separately within a vast domain of diverse texts."[65] Therefore, the databases could not constitute "revisions" of the original publication.[66]

Having determined that the databases were not "revisions," the Court addressed other arguments brought by the Print Defendants[67] and raised again by the dissent.[68] The Court rejected the Print Defendants' assertion that databases were comparable to microfilm and microfiche, which are recognized as "revisions" under 17 U.S.C. § 201(c).[69] According to the Court, microfilm

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[58] *Id.* at 516.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *Id.* at 518.

[66] *Id.* at 509.

[67] *Id.* at 516-18. The Court found unpersuasive the Print Defendants' argument that the user could assemble the electronic articles to re-create the original publication because the plaintiffs were claiming infringement of their works by the existence of the databases rather than through the users' activity of accessing their articles. *Id.*

[68] *Id.* at 516-19. The Court dismissed the dissent's argument, asserting that the widespread electronic publication enhanced the plaintiffs' reputation and caused no injury to the plaintiffs. *Id.* at 514. The Court found evidence to the contrary and, regardless of any harm proven, still recognized that the plaintiffs were properly exercising their right of protection under copyright law. *Id.* at 514 n.6.

[69] *Id.* at 516-17.

and microfiche presented articles in context by enabling users to flip the page to view other articles next to the one originally selected.[70] The Court was also unconvinced by the Print Defendants' policy argument that ruling in favor of the plaintiffs would injure the public by forcing database companies to purge part of their records to avoid additional lawsuits.[71] The majority simply stated that the issue was not a concern because they were ordering monetary damages to be paid rather than an injunction, and the problem could be dealt with through contract negotiations, dealings with collective writers' associations, and proper compensation to writers.[72] Concluding that the electronic publication was not a "revision" and rejecting these other claims, the Court remanded the case to the lower court to determine the damages owed to the plaintiffs for the Print Defendants' infringement.[73]

D. The Dissenting Opinion

Justice Stevens[74] argued that, under the concept of media neutrality encompassed by the Copyright Act of 1976, the articles in the electronic databases should be recognized as "revisions" of the printed publications.[75] The dissent claimed that all changes to the original collective work were attributable to the conversion of the medium of expression,[76] and disagreed with the majority that storing the articles individually on disc was relevant to determining whether the article was placed in context.[77] The dissent reasoned

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[70] *Id.* at 517.

[71] *Id.* at 519.

[72] *Id.* As a result of the Supreme Court's decision, publishers have started to purge their databases for fear of future lawsuits. *See* Tony Mauro, *Free-lance Authors' Rights to Digital Copies Affirmed*, RECORDER (San Francisco), June 26, 2001, at 3. Publishers have also started to require freelance writers to transfer their electronic rights in their contracts as well. *See* Cynthia Cotts, *Freelancers Asked to Surrender Their Rights—Again*, VILLAGE VOICE, July 17, 2001, at 32.

[73] *Tasini*, 533 U.S. at 519.

[74] Justice Stevens filed a dissenting opinion, in which Justice Breyer joined. *Id.* at 520.

[75] *Id.* The concept of media neutrality stems from the idea that copyright law should provide the same amount of protection to original expression of ideas regardless of the media used to convey this expression. H.R. REP. NO. 94-1476, at 53 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5666.

[76] *Tasini*, 533 U.S. at 524.

[77] *Id.* at 526. The dissenting opinion pointed out that this situation simply involved articles in printed media being converted to electronic media, so the concept of media neutrality under the Copyright Law of 1976 would recognize the publication to be the same regardless of the media used to convey the articles. *Id.* Rejecting this argument, the majority ruled that LEXIS and UMI removed the graphics and saved the articles as individual files to allow for more convenient access to the database articles by the users. *Id.* at 517 n.11. LEXIS and UMI were not forced to make these changes by any inherent limitations of the medium used to store the articles. *Id.*

that, just as a newspaper is divided into sections for ease of use, the electronic articles should also be allowed to be stored separately for utility.[78] The dissent also concluded that mixing publications should be irrelevant to the determination of a revision because a single electronic publication, recognizable as a "revision," should not suddenly cease to be one when mixed with other publications if this practice is allowed for microfilm.[79]

IV. ANALYSIS

A. Applying a Statutory Analysis of 17 U.S.C. § 201(c) to New York Times Co. v. Tasini

Tasini is consistent with Congress's statutory construction of 17 U.S.C. § 201(c). The publications at issue in *Tasini*, reproduced in electronic form, could not be considered "revisions" of the original because the articles were no longer assembled into a collective whole.[80] All assembly had been lost in the final product, and the only originality left was the individual articles themselves, which were copyrighted to the plaintiffs.[81]

1. Determining whether the electronic publications in the databases are collective works

To determine whether the Print Defendants had a right to list their publications in the databases as a "revision," the threshold question is whether the electronic publications within the databases are still perceived by users as collective works.[82] A collective work is "a work . . . in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole."[83] In this situation, however, the databases preserve the Print Defendants' copyrightable expression only in the selection of the articles used to create the original publication.[84]

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[78] *Id.* at 524. Also, as a practical matter, the GPO, with its scanned images, would become unwieldy as a single file because computers cannot handle large files as quickly as small ones. *See id.* at 524 n.9.

[79] *Id.* at 527.

[80] *Id.* at 517.

[81] *Id.*

[82] *See* 17 U.S.C. § 102 (1994) (stating that copyright protection is available to original works on media from which they can be "perceived, reproduced, or otherwise communicated").

[83] 17 U.S.C. § 101 (1994 & Supp. IV 1999).

[84] *See* 1 NIMMER, *supra* note 20, § 2.04[B], at 2-46, 2-47 ("Note that requisite originality may inhere in selection . . . alone . . . ."); *see also* Eckes v. Card Prices Update, 736 F.2d 859, 862-63 (2d Cir. 1984) (holding that a baseball card price guide was entitled to copyright protection because it involved selection amongst 18,000 cards to determine which were the

Copyright protection for collective works is granted because the preexisting materials are assembled into a collective whole.[85] Having multiple works does not automatically qualify a work for copyright unless there is an original assembly of those works.[86] In this respect, the electronic publications in *Tasini* fail to meet the requirements of a collective work. When reading one article, users of the databases are given no means of accessing other articles in the same publication.[87] Therefore, from the user's perspective, the plaintiffs' articles are no more assembled with ones from the same publication than they are with articles from other publications. Having no perceptible assembly, the plaintiffs' articles are accessed by users as individual works and not as part of any collective work.

2. *Analyzing whether the electronic publications are "revisions" of the original periodicals*

Having determined the databases are not collective works, the next issue is whether the publishers have a right under 17 U.S.C. § 201(c) to authorize the republication of the individual articles in the databases. A publisher is given only the "privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series."[88]

The first privilege in the statute appears to allow publishers to reproduce articles, provided that the articles are kept in the context of the original collective work agreed upon by the parties.[89] This provision could be interpreted to allow publishers only the right to produce copies of original publications, such as the printed New York Times, Newsday, and Sports Illustrated periodicals, for sale to the public.[90] Since *Tasini* involved the new

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premium cards). The standard of originality is satisfied so long as the creator used independent efforts to create the work using some "minimum degree of creativity." Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991).

[85] 17 U.S.C. § 101.

[86] *See* Sem-Torq, Inc. v. K Mart Corp., 936 F.2d 851, 855 (6th Cir. 1991) (holding that a set of five signs was not a copyrightable compilation because the plaintiff neither selected nor arranged the signs to create an independent work).

[87] N.Y. Times Co. v. Tasini, 533 U.S. 483, 517 (2001).

[88] 17 U.S.C. § 201(c) (1994).

[89] *See* Ryan v. Carl Corp., 23 F. Supp. 2d 1146, 1149 (N.D. Cal. 1998) (holding that photocopying individual articles of publications for sale is not permissible under the publisher's privilege of reproducing the contribution as part of that particular work).

[90] Tasini v. N.Y. Times Co., 206 F.3d 161, 167 (2d Cir. 2000). Under an alternative interpretation, one could argue that this privilege allows a publisher to produce copies of the original expression, regardless of the media in which it is stored. Brief of Amicus Curiae National Geographic Society at 7-8, N.Y. Times Co. v. Tasini, 533 U.S. 483 (2001) (No. 00-201). Since the Copyright Act of 1976 embraces the concept of media neutrality, publishers

electronic version of the publications and not the originals, this provision would be irrelevant to the case.[91]

The second privilege allows publishers to create revisions of their work.[92] The Copyright Act of 1976 does not provide any definition for the word "revision." Therefore, an analysis of the surrounding provisions of the statute is helpful at least to determine what is not a "revision." Every word must be given significance when interpreting a statute,[93] and the meaning of one term can be determined by other terms in the statute.[94]

The second privilege provides that the contribution can be used for "any revision of that collective work."[95] The use of the word "that" in this section references "that particular work" as stated in the first privilege.[96] Consequently, the focus of the second privilege is on the original collective work.[97] The term "revision" suggests that some alteration has been made to this original work.[98] To define the scope of this alteration, the second privilege focuses on changes to the collective work itself and not on the individual contribution.[99] In addition, the legislative history indicates that the alterations must not be so drastic as to make it a new anthology or an entirely different

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could argue that the privilege applies to print and electronic publications so long as they constitute the original expression agreed upon by the parties. *Id.* at 8. Even under this interpretation, this privilege still does not help the Print Defendants because the availability of all the articles does not justify a publisher providing users with articles separate from the publication. *See Tasini*, 206 F.3d at 168 ("Section 201(c) would not permit a Publisher to sell a hard copy of an Author's article directly to the public even if the Publisher also offered for individual sale all of the other articles from the particular edition."). *See generally Ryan*, 23 F. Supp. 2d at 1149.

[91] *See Tasini*, 206 F.3d at 167 ("In this context, 'that particular work' means a specific edition or issue of a periodical.").

[92] 17 U.S.C. § 201(c).

[93] *See* Regions Hosp. v. Shalala, 522 U.S. 448, 467 (1998) (Scalia, J., dissenting) ("It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word.") (quoting Market Co. v. Hoffman, 101 U.S. 112, 115 (1879)).

[94] *See* Gen. Elec. Co. v. Occupational Safety & Health Review Comm'n, 583 F.2d 61, 65 (2d Cir. 1978) ("The meaning of one term may be determined by reference to the terms it is associated with . . . ."); *see also* Sec. & Exch. Comm'n v. Nat'l Sec., Inc., 393 U.S. 453, 466 (1969) ("The meaning of particular phrases must be determined in context . . . .").

[95] 17 U.S.C. § 201(c).

[96] *Id.*

[97] *See id.*

[98] *See* N.Y. Times Co. v. Tasini, 533 U.S. 483, 516 (2001) ("'Revision' denotes a new 'version,' and a version is, in this setting, a 'distinct form of something regarded by its creators or others as one work.'") (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1944 (1976)).

[99] *See* Tasini v. N.Y. Times Co., 972 F. Supp. 804, 819-20 (S.D.N.Y. 1997).

magazine or other collective work.[100] Since the electronic publications in this case are no longer collective works, the change is already too drastic for the publications to qualify as revisions of the original publication.

The third privilege initially appears to give publishers the right to use the articles in a different collective work because it expressly states that the publisher may reproduce and distribute "any later" collective work.[101] This too is of no assistance to the *Tasini* defendants because, again, the collection of articles in electronic form is not a collective work.[102] Therefore, the failure to preserve the publication as a collective work precluded the publishers from using their right to create revisions as a defense in this case.[103] The question left unresolved is whether the publishers could have successfully asserted this right had the electronic version of the publication been a collective work.

B. Analysis of Whether an Electronic Publication Can Ever Constitute a Revision Under 17 U.S.C. § 201(c)

Tasini did not answer the question of whether an electronic version of print media can ever be considered a revision under 17 U.S.C. § 201(c). The decision was based upon a narrow set of facts that essentially defined what qualifies as a copyright-protected collective work and not upon the determination of whether an electronic publication could qualify as a revision. A closer look at the GPO database provides some insight into this ambiguity.

Considering the importance of the user's view of the work,[104] the GPO database appears to satisfy the requirements of what the Court might consider a revision of the original work. The articles on screen retain the surrounding text, pictures, and advertisements as in the printed form[105] to preserve the selection and arrangement of the articles necessary for the copyright in the original publication.[106]

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[100] H.R. REP. NO. 94-1476, at 122-23 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5738. Given this narrow scope and limited degree of alteration involved, one court has suggested that the publisher might be able to use the second privilege as a defense so long as the only alteration made is the medium of expression and the changes are made without originality. Greenberg v. Nat'l Geographic Soc'y, 244 F.3d 1267, 1274 n.14 (11th Cir. 2001), *cert. denied*, 122 S. Ct. 347 (2001).

[101] 17 U.S.C. § 201(c).

[102] *Tasini*, 533 U.S. at 518.

[103] *Id.*

[104] *See* 17 U.S.C. § 102 (1994) (stating that copyright protection is available to original works on media from which they can be "perceived, reproduced, or otherwise communicated").

[105] *Tasini*, 972 F. Supp. at 808-09.

[106] *See generally* 17 U.S.C. § 201(c). A collective work is a type of "compilation," which is defined as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole

The GPO database, however, fails as a revision because of two concerns raised by the *Tasini* Court. First, there is no assembly of the publications in the databases because users viewing one article cannot turn the page to view other articles in the same publication.[107] To resolve this problem, one could propose to provide hyperlinks[108] that tie electronic articles to others in the same publication. Essentially, if a database contained scanned images that retain the appearance of articles and provided links to "flip the page" to put the articles in context, these works may qualify as revisions similar to microfilm and microfiche according to the Court's analysis.[109] However, some ambiguity remains because the Court also stated that the databases could not qualify as "revisions" due to the fact that the articles were stored and retrieved as separate files.[110] Copyright law protects original works that are fixed in any tangible medium from which the expression "can be perceived, reproduced, or otherwise communicated,"[111] so there remains a question of why the physical storage, which is not perceptible to the user, of plaintiffs' articles is relevant at all to this analysis.

The second concern of the *Tasini* Court was that an electronic publication should not be considered a "revision" if it is added to a database containing multiple publications.[112] The Court stated that the "database no more constitutes a revision of each constituent edition than a 400-page novel quoting a sonnet in passing would represent a revision of that poem . . . . The massive whole of the database is not recognizable as a new version of its every small part."[113] The Court recognized that microfilm and microfiche can contain multiple publications because they still retain the articles in context.[114]

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constitutes an original work of authorship." 17 U.S.C. § 101 (1994 & Supp. 1999). The legislative history of the Copyright Act of 1976 indicates the same level of analysis is used to determine the existence of originality for copyright protection in both collective works and compilations. H.R. REP. NO. 94-1476, at 122 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5737 ("[A] collective work is a species of 'compilation' and, by its nature, must involve the selection, assembly, and arrangement of 'a number of contributions.'"). The "requisite originality may inhere in selection . . . alone . . . ." 1 NIMMER, *supra* note 20, § 2.04[B], at 2-46, 2-47. The standard of originality is satisfied so long as the creator used independent efforts to create the work using some "minimum degree of creativity." Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 348 (1991).

[107] *Tasini*, 533 U.S. at 517.

[108] A hyperlink is a "word, symbol, image, or other element in a . . . document that links to another such element in the same document or in another . . . document." ENCARTA WORLD ENGLISH DICTIONARY 886 (1999).

[109] *Tasini*, 533 U.S. at 517.

[110] *Id.* at 518.

[111] 17 U.S.C. § 102 (1994).

[112] *Tasini*, 533 U.S. at 516.

[113] *Id.*

[114] *Id.* at 516-17.

Providing hyperlinks between articles should remove this distinction, but apparently there is something inherently different between electronic databases and microfilm that the Court did not specify. By the definition of a "collective work," it appears possible to have collective works exist within a larger collective work,[115] so multiple publications should not pose a problem.

In conclusion, the Court reached the proper holding in the *Tasini* case but left some ambiguity as to whether electronic publications can ever be considered revisions under 17 U.S.C. § 201(c).[116] Assuming that the articles could be assembled using hyperlinks, the Court fails to elaborate why publications in databases are no longer collective works once they are put into a pool of other publications, when the same practice is allowed for microfilm,[117] and the articles are physically stored as separate files.

V. CONCLUSION

New developments in technology and the tremendous growth of electronic communication constantly challenge the legal landscape of copyright protection.[118] With this growth, a lucrative market for electronic media has followed, giving rise to conflicts as people begin to take advantage of this opportunity.[119] *Tasini* is the first case to draw the line between the rights of publishers and freelance writers in collective works. Under the Court's analysis, if a database destroys the aspect of originality that created a collective work, what remains is the copyright in the individual contributions.[120] The databases in *Tasini* merely acted as a library for individually copyrighted

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[115] 17 U.S.C. § 101 (1994 & Supp. IV 1999) ("A 'collective work' is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole."); *see also* Brief of Amicus Curiae National Geographic Society at 9, N.Y. Times Co. v. Tasini, 533 U.S. 483 (2001) (No. 00-201). For example, a newspaper containing various articles would constitute a collective work, and microfilm containing various newspapers would constitute a collective work made up of collective works.

[116] Edward T. Colbert, "Tasini" *Leaves Issues Pending: For Example, Would a CD-ROM Containing an Entire Work Be OK?*, NAT'L L.J., July 23, 2001, at C1 ("This focus on the limitation of the reproduction, however, leaves open a number of questions not fully answered by the court.").

[117] *See Tasini*, 533 U.S. at 527 (Stevens, J., dissenting) ("A microfilm of the New York Times for October 31, 2000, does not cease to be a revision of that individual collective work simply because it is stored on the same roll of film as other editions of the Times . . . .").

[118] Mary Maureen Brown, Robert M. Bryan, & John Conley, *Database Protection in a Digital World*, 6 RICH. J.L. & TECH. 2, 2 (1999).

[119] Dale M. Cendali & Ramon E. Reyes, Jr., *Freelancers Reeling in Fight Over Online Rights*, NAT'L L.J., Oct. 20, 1997, at C2.

[120] *Tasini*, 533 U.S. at 516.

articles,[121] and the Court ruled that this collection of articles could not constitute a "revision" of the original publication.[122]

The Court's ruling was correct. The focus of the publishers' privileges is always on the comparison between the new work and the original publication.[123] A party may only assert a copyright in a work to the extent of the original elements contributed by that party,[124] and the underlying originality contributed by a publisher is the assembly of the publication and the selection, arrangement, or coordination of the pre-existing material.[125] Despite preserving the publishers' selection of the individual articles, the databases failed to preserve the assembly aspect of the original collective work.[126]

Tasini, however, leaves some uncertainty as to whether an electronic publication can ever be considered a "revision" of the original. The Court left open the questions of how electronic publications within databases could be designed to properly meet the assembly requirement of a copyright in a collective work and what distinguishes them from microfilm to be held under a different standard for protection. Until this issue is resolved, electronic media will not be fully integrated into the legal system, and technology may never reach its potential in distributing ideas freely for the benefit of society.

James T. Ota[127]

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[121] *Id.*

[122] *Id.* at 520.

[123] 17 U.S.C. § 201(c) (1994) ("[T]he owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of *that particular* collective work, any revision of *that* collective work, and any later collective work *in the same series*.") (emphasis added).

[124] 1 NIMMER, *supra* note 20, § 3.04[A], at 3-19.

[125] *See* 17 U.S.C. § 201(c). A collective work is a type of "compilation," which is defined as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101 (1994 & Supp. IV 1999). Legislative history of the Copyright Act of 1976 indicates the same level of analysis is used to determine the existence of originality for copyright protection in both collective works and compilations. H.R. REP. NO. 94-1476, at 122 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5737 ("[A] collective work is a species of 'compilation' and, by its nature, must involve the selection, assembly, and arrangement of 'a number of contributions.'").

[126] *Tasini*, 533 U.S. at 517.

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A Piece of Mind for Peace of Mind: Federal Discoverability of Opinion Work Product Provided to Expert Witnesses and Its Implications in Hawai'i

I. INTRODUCTION

In the context of modern civil trials, attorneys face the difficult task of balancing dual roles: as zealous advocate representing the client's best interests, and as officer of the court, bound to work for the advancement of justice.[1] These interests clash when an attorney considers providing an expert witness with case information.

Nearly every civil trial features testimony of several expert witnesses.[2] Litigants pay experts to form opinions about relevant issues in the case.[3] Consequently, a litigant will want to ensure that its expert is adequately informed about those issues.[4]

An attorney can inform an expert in two ways.[5] One way is to provide an expert with all relevant discovery and pleadings and have the expert independently review the information.[6] This approach is both time-consuming and expensive.[7] An alternative method is to provide an expert with background materials, such as legal memoranda and summaries, organized and selected by counsel.[8] In effect, an attorney can inform the expert quickly of the relevant facts and issues, which facilitates prompt formation of an expert's

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[1] *See* Hickman v. Taylor, 329 U.S. 495, 510 (1947). "Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients." *Id.*

[2] *See* Lee Mickus, *Discovery of Work Product Disclosed to a Testifying Expert Under the 1993 Amendments to the Federal Rules of Civil Procedure*, 27 CREIGHTON L. REV. 773, 773 (1994) (proposing that a discovery-oriented expert discovery rule would better serve the integrity of the litigation system); Michael E. Plunkett, *Discoverability of Attorney Work Product Reviewed by Expert Witnesses: Have the 1993 Revisions to the Federal Rules of Civil Procedure Changed Anything?*, 69 TEMP. L. REV. 451, 451 (1996) (arguing that the amendments to Federal Rule of Civil Procedure 26, when read in light of the work product doctrine, allow the discovery of all work product materials given to an expert witness).

[3] *See* Mickus, *supra* note 2, at 773; Plunkett, *supra* note 2, at 451.

[4] *See* Mickus, *supra* note 2, at 773; Plunkett, *supra* note 2, at 451.

[5] *See* Plunkett, *supra* note 2, at 451.

[6] *Id.*

[7] *Id.*

[8] *See* Mickus, *supra* note 2, at 773; Plunkett, *supra* note 2, at 451.

opinion.[9] While this approach carries the benefit of efficiency, it may also lead to discovery of such information by the opponent.[10]

Pursuant to the United States Supreme Court's historic decision, *Hickman v. Taylor*,[11] and the later codified Federal Rule of Civil Procedure 26(b)(3), an attorney's "mental impressions, conclusions, opinions, or legal theories"[12] are afforded strong protection under what is known as the "work product" doctrine.[13] Information selected and compiled by an attorney in anticipation of litigation constitutes work product.[14] Protecting these mental impressions is crucial to serving the best interests of the client.[15]

At the same time, the Federal Rules of Civil Procedure provide for broad discovery of information regarding a testifying expert witness.[16] Because expert witnesses "occupy a central role in modern civil litigation,"[17] the need for discovery regarding their testimony is crucial to the interests of justice. Rule 26(b)(4) thus allows for discovery of materials provided to experts.[18] Following the 1993 amendments to the Federal Rules of Civil Procedure, Rule 26(a)(2) further requires that an attorney provide opposing counsel with information a testifying expert witness has considered in forming his or her opinion.[19] As a result, when an attorney shares work product materials with a testifying expert, the issue arises as to whether these materials become discoverable.

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[9] *See* Mickus, *supra* note 2, at 773.

[10] *See* Plunkett, *supra* note 2, at 451.

[11] 329 U.S. 495 (1947); *see also infra* Part II.A (discussing the Supreme Court's decision in *Hickman*).

[12] FED. R. CIV. P. 26(b)(3).

[13] *See Hickman*, 329 U.S. at 510. "Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney." *Id.*

[14] *Id.* at 511.

[15] *Id.* "Proper preparation of a client's case demands that [an attorney] assemble information, sift what he considers to be relevant from irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *Id.*

[16] *See* FED. R. CIV. P. 26(a)(2), *infra* note 74; FED. R. CIV. P. 26(b)(4), *infra* note 87.

[17] Lamonds v. Gen. Motors Corp., 180 F.R.D. 302, 305 (W.D. Va. 1998).

[18] Rule 26(b)(4)(A) provides: "A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided." FED. R. CIV. P. 26(b)(4)(A).

[19] *See* FED. R. CIV. P. 26(a)(2); *see also infra* Part III.A.

A split of authority currently exists among the federal districts.[20] The Ninth Circuit and the Federal District Court of Hawai'i have not ruled conclusively on the issue as well.[21] To add to the uncertainty, districts were allowed to opt out of the mandatory disclosure requirements imposed by the 1993 amendments.[22] Because the 2000 amendments have eliminated the opt-out provision,[23] attorneys in all districts, including Hawai'i, will be faced with a difficult judgment call: provide an expert with work product materials and reap the benefits, risking discovery by the opponent, or withhold work product from the expert and waste valuable time and resources, but be certain that a court will not order disclosure.[24]

This article argues that courts in all jurisdictions should adopt a "bright-line" rule for disclosure—that all information provided to a testifying expert witness is discoverable in light of the 2000 amendments to the Federal Rules of Civil Procedure. Part II examines application of expert discovery rules prior to the 1993 amendments. Subpart II.A focuses on the history of the work product doctrine, identifying problems courts faced as to expert discovery, while subpart II.B discusses various court approaches to the issue. Next, Part III argues that the text of post-amendment Rule 26, as well as convincing policy reasons, prescribe application of a bright-line rule to expert discovery. Subpart III.A focuses on the 1993 amendments themselves; subpart III.B discusses cases decided subsequent to the amendments, and subpart III.C explains policy reasons supporting a bright-line rule. Finally, Part IV.A argues that the Federal District Court of Hawai'i should apply the bright-line rule to expert discovery, while subpart IV.B focuses on the Hawai'i Supreme Court. This article concludes by arguing that, like the Federal District Court of Hawai'i, the Hawai'i Supreme Court should also adopt the bright-line rule.

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[20] *Compare* Karn v. Ingersoll-Rand, 168 F.R.D. 633, 637 (N.D. Ind. 1996) (holding that Rule 26(a)(2) is a bright-line rule that mandates full disclosure of all materials provided to an expert witness regardless of whether they constitute opinion work product), *with* Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289, 295 (W.D. Mich. 1995) (holding that Rule 26 only requires the disclosure of factual information considered by an expert and not opinion work product); *see also infra* Part III.B.

[21] *See infra* Part IV.A.

[22] *See* Eric K. Yamamoto & Joseph L. Dwight IV, *Procedural Politics and Federal Rule 26: Opting-out of "Mandatory" Disclosure*, 16 U. HAW. L. REV. 167, 169 (1994) (discussing implications of the 1993 amendments to Federal Rule of Civil Procedure 26).

[23] *See* Morgan Cloud, *The 2000 Amendments to the Federal Discovery Rules and the Future of Adversarial Pretrial Litigation*, 74 TEMP. L. REV. 27, 45 (2001). "The 2000 amendments eliminate the 'opt out' provisions adopted in 1993 . . . . As a result, for the first time all districts are subject to the mandatory disclosure rules." *Id.*

[24] *See* Mickus, *supra* note 2, at 774-75; Plunkett, *supra* note 2, at 452; Christina L. Klopfenstein, Note, *Discoverability of Opinion Work Product Materials Provided to Testifying Experts*, 32 IND. L. REV. 481, 482 (1999) (arguing that work product materials provided to testifying experts should not be discoverable under Rule 26).

II. History and Case Law of the Work Product Doctrine Before the 1993 Amendments

A. Historical Context of the Work Product Doctrine

The United States Supreme Court first articulated the work product doctrine in *Hickman v. Taylor*[25] to protect attorney theories and mental impressions from discovery.[26] In *Hickman*, the estate of a crewmember who had drowned in the accidental sinking of a tugboat sued the tugboat owners.[27] The defendant's attorney privately interviewed several survivors and took statements from them with an eye toward anticipated litigation.[28] The plaintiff requested production of these written statements, in addition to a detailed account of any oral statements taken by defendant's counsel.[29] The Court denied the request, holding that without proper justification or showing of necessity, most "written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties" are not discoverable.[30]

The Court recognized the difficulty of balancing the competing interests involved.[31] An attorney is an officer of the court, working for the advancement of justice, but at the same time, a zealous advocate, representing the best interests of his or her client.[32] The Court agreed that on the one hand, "the deposition-discovery rules are to be accorded a broad and liberal treatment . . . [and that] . . . mutual knowledge of all the relevant facts gathered by both parties are essential to proper litigation."[33] Yet, for the adversarial system to function properly, "it is essential that a lawyer work with a certain degree of privacy"[34] to "promote justice and to protect their client's interests."[35]

Although the Court in *Hickman* dictated the important policy of protecting an attorney's work product, it allowed discovery of certain materials in some

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[25] 329 U.S. 495 (1947).

[26] *Id.* at 510.

[27] *Id.* at 498.

[28] *Id.*

[29] *Id.* at 499.

[30] *Id.* at 510.

[31] *Id.* at 497. "It is not without reason that various safeguards have been established to preclude unwarranted excursions into the privacy of a man's work. At the same time, public policy supports reasonable and necessary inquiries. Properly to balance these competing interests is a delicate and difficult task." *Id.*

[32] *See supra* note 1 and accompanying text.

[33] *Hickman*, 329 U.S. at 507.

[34] *Id.* at 510.

[35] *Id.* at 511.

situations. Thus, written materials prepared by an attorney with an eye toward litigation may be discoverable where "facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case."[36] Similarly, the court may order discovery where the written statements "might be useful for purposes of impeachment or corroboration," or "where the witnesses are no longer available."[37] The plaintiff in *Hickman* did not demonstrate such a need, merely requesting the materials "to make sure that he [had] overlooked nothing."[38]

The work product doctrine established in *Hickman* was codified in 1970 in the Federal Rules of Civil Procedure, Rule 26(b)(3).[39] The rule divides work product into two types, "fact" work product and "opinion" work product, and provides for different levels of immunity based on these distinctions.[40]

Fact work product materials, also referred to as "ordinary" work product,[41] are documents and tangible things prepared in anticipation of litigation that include facts, but not an attorney's mental impressions.[42] The first sentence of Rule 26 (b)(3) provides fact work product with a qualified immunity, which

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[36] *Id.*

[37] *Id.*

[38] *Id.* at 513.

[39] *See* Upjohn Co. v. United States, 449 U.S. 383, 398 (1981) (stating that the work product doctrine set forth in *Hickman v. Taylor*, 329 U.S. 495 (1947), is substantially incorporated in Federal Rule of Civil Procedure 26(b)(3)). Federal Rule of Civil Procedure 26(b)(3) provides in pertinent part:

> (3) Trial Preparation: Materials. Subject to the provision of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety indemnitor, insurer, or agent) only upon showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without due hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Fed. R. Civ. P. 26(b)(3).

[40] *See* Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co., 967 F.2d 980, 984 (4th Cir. 1992). "[T]he jurisprudence of Rule 26(b)(3), which is a codification of the holding of *Hickman* and its progeny, divides work product into two parts, one of which is 'absolutely' immune from discovery and the other only qualifiedly immune." *Id.* at 983-84 (citation omitted).

[41] *See* Magee v. Paul Revere Life Ins. Co., 172 F.R.D. 627, 643 (E.D.N.Y. 1997) (referring to fact work product as "ordinary" work product).

[42] *See* Klopfenstein, *supra* note 24, at 485.

a party seeking discovery can overcome by demonstrating a substantial need for the materials.[43]

Opinion work product materials, also known as "core" work product,[44] are materials prepared in anticipation of litigation, which include an attorney's thoughts.[45] Opinion work product receives a higher level of protection against disclosure than fact work product.[46] The second sentence of Rule 26(b)(3) affords opinion work product near absolute immunity because courts must "protect against disclosure . . . the mental impressions, conclusions, opinions, or legal theories of an attorney."[47]

Prior to the 1993 amendments, most courts recognized that fact work product became discoverable when provided to a testifying expert witness.[48] However, courts were split on the discoverability of opinion work product provided to a testifying expert witness.[49]

The confusion stemmed from interpretation of Rule 26(b)(3), first sentence, which provides that work product immunity "is [s]ubject to the provisions of subdivision (b)(4) of this rule."[50] Pre-1993 amendment Rule 26(b)(4) specifically provided for the discovery of expert information.[51]

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[43] Specifically, Rule 26(b)(3) states:

> [A] party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation . . . only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means . . . .

Fed. R. Civ. P. 26(b)(3).

[44] *See* Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289, 297 (W.D. Mich. 1995) (referring to opinion work product as "core" work product).

[45] FED. R. CIV. P. 26(b)(3); *see also* Stephen D. Easton, *Ammunition for the Shoot-out with the Hired Gun's Hired Gun: A Proposal for Full Expert Witness Disclosure*, 32 ARIZ. ST. L.J. 465, 532 (2000) (advocating discovery of all communications between the hiring attorney and her expert witness through an amendment to existing disclosure and discovery rules); Klopfenstein, *supra* note 24, at 485-87.

[46] *See* Easton, *supra* note 45, at 532; Klopfenstein, *supra* note 24, at 485-87.

[47] FED. R. CIV. P. 26(b)(3). The second sentence of Rule 26(b)(3) provides: "In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *Id.*

[48] *See, e.g.*, B.C.F. Oil Ref., Inc. v. Consol. Edison Co., 171 F.R.D. 57, 62-63 (S.D.N.Y. 1997); *Haworth*, 162 F.R.D. at 294-99.

[49] *See infra* Part II.B.

[50] FED. R. CIV. P. 26(b)(3).

[51] Pre-1993 Rule 26(b)(4) provided:

> (4) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:
>
> (A)(i) A party may through interrogatories require any other party to identify each

Under the rule, a party could obtain, through interrogatories or "by other means" through a court order, "the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion."[52] In some situations, the grounds for an expert's opinion included an attorney's impressions, opinions, and theories, divulged to an expert by the attorney, that were nevertheless discoverable.[53]

Thus, courts faced the question of whether the phrase "subject to the provision of subdivision (b)(4)"[54] applied to only fact work product provided in the first sentence of the rule,[55] or also to opinion work product as stated in the second sentence.[56] If the drafters intended the phrase to apply to the first sentence only, then opinion work product given to testifying experts is not discoverable through Rule 26(b)(4).[57] Alternatively, if the phrase applied to both sentences, then the expert discovery rule of 26(b)(4)[58] trumps opinion work product immunity and, thus, opinion work product given to a testifying expert witness is discoverable.[59]

B. Pre-1993 Amendment Case Law

Due to this confusion, courts were split on the discoverability of opinion work product materials provided to testifying experts.[60] Decisions dealing with the issue were either protection-oriented or discovery-oriented.[61]

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person whom the other person expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

28 U.S.C.A. FED. R. CIV. P. 26(b)(4) (1992) (amended 1993).

[52] *Id.*

[53] *See* Boring v. Keller, 97 F.R.D. 404, 407 (D. Colo. 1983); Easton, *supra* note 45, at 533.

[54] FED. R. CIV. P. 26(b)(3).

[55] *Id.*

[56] *Id.*

[57] *See* Klopfenstein, *supra* note 24, at 488; Easton, *supra* note 45, at 533-35.

[58] 28 U.S.C.A. FED. R. CIV. P. 26 (b)(4) (1992) (amended 1993).

[59] *See* Klopfenstein, *supra* note 24, at 488; Easton, *supra* note 45, at 533-35.

[60] *Compare* Bogosian v. Gulf Oil Corp., 738 F.2d 587, 594-95 (3d Cir. 1984) (holding that opinion work product provided to testifying experts is protected from discovery), *with* Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384, 397 (N.D. Cal. 1991) (holding that all communications from counsel to a testifying expert, even opinion work product, are discoverable).

[61] *See* Klopfenstein, *supra* note 24, at 489; Easton, *supra* note 45, at 533-34; Mickus, *supra* note 2, at 776; Plunkett, *supra* note 2, at 455-67.

The strongly protection-oriented approach was expressed by the Third Circuit in *Bogosian v. Gulf Oil Corp.*[62] In holding that opinion work product materials provided to testifying expert witnesses are not discoverable, the *Bogosian* court reasoned that the first sentence of Rule 26(b)(3) "does not limit the second sentence of Rule 26(b)(3) restricting disclosure of work product containing 'mental impressions' and 'legal theories.'"[63]

Conversely, the court in *Intermedics, Inc. v. Ventritex, Inc.*[64] took the opposite approach. It rejected the reasoning in *Bogosian*, arguing that the opinion "did not clearly say why it concluded that the [subject to subdivision (b)(4)] proviso applied only to the first sentence in . . . [the] paragraph [i.e., fact work product]."[65] This discovery-oriented court held that "written and oral communications from a lawyer to an expert that are related to matters about which the expert will offer testimony are discoverable, even when those communications otherwise would be deemed opinion work product."[66]

Other courts adopted various intermediate approaches,[67] allowing discovery of some but not all work product materials provided to a testifying expert.[68]

III. The Issue Revisited Subsequent to the 1993 Amendments

A. 1993 Amendments

The courts' differing interpretations of the work product rule, and corresponding inconsistent results, demonstrated the need for a clear standard

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[62] 738 F.2d 587 (3d Cir. 1984). *Bogosian* was a class action antitrust suit brought by plaintiffs who alleged several major oil companies acted concertedly with their dealers to eliminate or lessen price competition with respect to sales of gasoline. Plaintiffs relied primarily on expert witness testimony to prove their claims. *Id.* at 588-89. Defendants sought to compel production of plaintiffs' memoranda and documents concerning expert witnesses while plaintiffs claimed work product protection. *Id.*

[63] *Id.* at 594.

[64] 139 F.R.D. 384 (N.D. Cal. 1991). In *Intermedics*, plaintiff alleged patent infringement and misappropriation of trade secrets concerning the parties' development of a new medical device. *Id.* at 385. Defendants requested copies of documents prepared by plaintiff's counsel shown to plaintiff's expert witness, which may have contributed to formation of the expert's opinion. *Id.*

[65] *Id.* at 388.

[66] *Id.* at 387.

[67] *See* Mickus, *supra* note 2, at 796-98; Plunkett, *supra* note 2, at 455-67.

[68] *See* Rail Intermodal Specialists, Inc. v. Gen. Elec. Capital Corp., 154 F.R.D. 218, 221-22 (N.D. Iowa 1994) (holding that a balancing test in which interests of the work product doctrine are weighed against the interest of discovery is the most appropriate method); Klopfenstein, *supra* note 24, at 491-92 (discussing various intermediate approaches); Easton, *supra* note 45, at 536 (discussing several courts' intermediate positions).

that would allow attorneys to predict what materials were and were not discoverable.[69]

On December 1, 1993, Congress ratified the 1993 amendments to the Federal Rules of Civil Procedure to redress former discrepancies and resultant inconsistent court interpretations.[70] One motivation of the Federal Rule of Civil Procedure Advisory Committee[71] was to increase the reliability of testifying expert witnesses.[72] Accordingly, the amendments called for sweeping changes to Rule 26 dealing with initial disclosure of information between litigants.[73]

In particular, the 1993 amendments required mandatory disclosure of information as to a testifying expert witness, through the addition of Rule 26(a)(2).[74] As a result, a party retaining an expert witness must make these initial disclosures even without a discovery request from the opposing party.[75] One mandatory disclosure is a report, prepared and signed by any person "specifically employed to provide expert testimony in the case."[76] The report must contain "a complete statement of all opinions to be expressed and the basis and reasons therefor," and "data or other information considered by the

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[69] *See* Mickus, *supra* note 2, at 774-79; Plunkett, *supra* note 2, at 468.

[70] *See* Plunkett, *supra* note 2, at 468.

[71] *Id.* at 468 n.146. The Advisory Committee is a twelve member division of the Judicial Conference of the United States, responsible for drafting the 1993 Amendments. *Id.*

[72] *See* FED. R. CIV. P. 26(a)(2) advisory committee notes; Plunkett, *supra* note 2, at 468 n.149.

[73] *See* Plunkett, *supra* note 2, at 469 n.152; Easton, *supra* note 44, at 537.

[74] Rule 26(a)(2), entitled "Disclosure of Expert Testimony," provides:

> (A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.
>
> (B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

FED. R. CIV. P. 26(a)(2)(A), 26(a)(2)(B).

[75] *See* FED. R. CIV. P. 26(a)(2)(C). Rule 26(a)(2)(C) provides in pertinent part: "In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial . . . ." *Id.*

[76] FED. R. CIV. P. 26(a)(2)(B).

witness in forming the opinions."[77] If the expert considers additional information after submitting the report, the party must supplement the report with such information.[78] In addition, an evasive or incomplete disclosure constitutes failure to disclose,[79] which may trigger a variety of court sanctions under Rule 37(c).[80]

Besides adding mandatory disclosure requirements, the 1993 amendments broadened the scope of discoverable information in two ways.[81] First, under Rule 26, an expert's report must disclose information "considered" by experts,[82] whereas under pre-amendment Rule 26(b)(4),[83] expert information was discoverable only if "known"[84] by an expert and relied upon. As one court noted, "'[c]onsidered' . . . simply means 'to take into account,' [and] clearly invokes a broader spectrum of thought than the phrase 'relied upon,' which requires dependence on the information."[85] In effect, a party can no longer argue that information its expert reviewed, but did not rely on, is protected from discovery.[86]

Second, amended Rule 26(b)(4) allows the opposing party to depose a testifying expert,[87] whereas former Rule 26(b)(4) required use of interrogatories to obtain information from an expert witness.[88] Given Rule 26(a)(2)(B)'s clear language, and the significantly broader scope of the amended rules, work product materials disclosed to a testifying expert should be discoverable.

Moreover, the Advisory Committee Notes to the 1993 amendments to Rule 26 reinforce the concept that information given to a testifying expert must be disclosed. The Advisory Committee stated:

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[77] *Id.*

[78] *See id.* at 26(a)(2)(C), 26(e)(1).

[79] *See id.* at 37(a)(3). Rule 37(a)(3), titled "Evasive or Incomplete Disclosure, Answer, or Response" provides: "For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond." *Id.*

[80] Rule 37(c) can preclude a party from using undisclosed information, and can require the non-disclosing party to pay attorney's fees caused by the failure to disclose. *Id.* at 37 (c); *see also* Klopfenstein, *supra* note 24, at 493 n.94.

[81] *See* Easton, *supra* note 45, at 537-38; Klopfenstein, *supra* note 24, at 493-94.

[82] FED. R. CIV. P. 26(a)(2)(B).

[83] 28 U.S.C.A. FED. R. CIV. P. 26(b)(4) (1992) (amended 1993); *see supra* note 51.

[84] 28 U.S.C.A. Fed. R. Civ. P. 26(b)(4) (1992) (amended 1993); *see supra* note 51.

[85] *See* Karn v. Rand, 168 F.R.D. 633, 635 (N.D. Ind. 1996) (citing WEBSTER'S NEW RIVERSIDE UNIVERSITY DICTIONARY at 301, 993 (1984)); Klopfenstein, *supra* note 24, at 493 n.98 (citing *Karn*, 168 F.R.D. at 635); Easton, *supra* note 45, at 538 n.226.

[86] *See* Klopfenstein, *supra* note 24, at 493.

[87] Rule 26(b)(4)(A) provides: "A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided." FED. R. CIV. P. 26(b)(4)(A).

[88] 28 U.S.C.A. FED. R. CIV. P. 26(b)(4) (1992) (amended 1993); *see supra* note 51.

> The [expert] report is to disclose the data and other information considered by the expert . . . . Given this obligation of disclosure, litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged or otherwise protected from disclosure when such persons are testifying or being deposed.[89]

A growing majority of courts have construed this language to create a bright-line rule—that all materials, even opinion work product, provided to an expert are discoverable.[90] Other courts, however, have refused to require the disclosure of opinion work product, despite the 1993 amendments.[91]

B. Post-1993 Amendment Decisions

Cases decided subsequent to the 1993 amendments can still be characterized as either protection-oriented or discovery-oriented.[92]

The only federal appellate decision to date to consider the issue since the 1993 amendments is *In re Pioneer Hi-Bred International, Inc.*[93] In ordering disclosure of documents defendants claimed were protected by work product immunity, the court held, "the 1993 amendments to Rule 26 . . . make clear that documents and information disclosed to a testifying expert in connection with his testimony are discoverable by the opposing party, whether or not the expert relies on the documents and information in preparing his report."[94]

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[89] FED. R. CIV. P. 26(a) 1993 advisory committee notes.

[90] *See Karn*, 168 F.R.D. at 635; Lamonds v. Gen. Motors Corp., 180 F.R.D. 302, 304 (W.D. Va. 1998) (holding that documents provided to testifying experts are discoverable and not privileged under the work product doctrine); Musselman v. Phillips, 176 F.R.D. 194, 199 (D. Md. 1997); B.C.F. Oil Ref., Inc. v. Consol. Edison Co., 171 F.R.D. 57, 66 (S.D.N.Y. 1997); Barna v. United States, No. 95-C6552, 1997 U.S. Dist. LEXIS 10853, at *5 (N.D. Ill. July 18, 1997) (holding that any information considered by a testifying expert in forming his opinion on an issue, even if that information contains attorney work product, is discoverable); Furniture World, Inc. v. D.A.V. Thrift Stores, Inc., 168 F.R.D. 61, 62 (D.N.M. 1996) (finding that all documents provided to a party expert witness must be produced on request); United States v. City of Torrance, 163 F.R.D. 590, 593-94 (C.D. Cal. 1995).

[91] *See* Magee v. Paul Revere Life Ins. Co., 172 F.R.D. 627, 642-43 (E.D.N.Y. 1997); Haworth, Inc. v. Herman Miller, Inc., 162 F.R.D. 289, 295 (W.D. Mich. 1995); All West Pet Supply Co. v. Hill's Pet Prods. Div., 152 F.R.D. 634, 638 (D.C. Kan. 1993).

[92] *See* Klopfenstein, *supra* note 24, at 494-95; Mickus, *supra* note 2, at 778.

[93] 238 F.3d 1370 (Fed. Cir. 2001). The plaintiff in *Pioneer* sued for breach of contract, patent infringement, and misappropriation of trade secrets concerning a patent licensing agreement for genetic technology. Plaintiff asserted that the licensing agreements did not survive a merger involving defendant and sought information regarding the merger. Defendants invoked work product protection. *Id.* at 1372.

[94] *Id.* at 1375.

The court reasoned that "because any disclosure to a testifying expert in connection with his testimony assumes that privileged material or protected material will be made public" the disclosure constitutes a waiver of any claimed protection "to the same extent as any other disclosure."[95] Furthermore, it found that Rule 26 "proceeds on the assumption that fundamental fairness requires disclosure of all information supplied to a testifying expert in connection with his testimony."[96] For these reasons, the court was "unable to perceive what interests would be served by permitting counsel to provide core work product to a testifying expert and then deny discovery of such material to the opposing party."[97] The recent discovery-oriented lead taken by the Court of Appeals for the Federal Circuit seems to indicate that the correct interpretation of Rule 26 is to mandate discovery of work product information provided to an expert witness.

The leading post-amendment case espousing a discovery-oriented approach at the district court level is *Karn v. Ingersoll-Rand*.[98] The court in *Karn* reviewed the historical context of the work product doctrine and compared the divergent views of *Bogosian* and *Intermedics*.[99] In addition, the court considered the Advisory Committee Notes to Rule 26(a)(2) to be particularly significant in holding that "subdivision (a)(2) and the supporting commentary unambiguously provide a 'bright-line' rule."[100] In the court's view, the new Rule 26 resolved the pre-amendment conflict between rules 26(b)(3) and 26(b)(4) because "the requirements of [Rule 26] (a)(2) 'trump' any assertion of work product or privilege."[101] Accordingly, the *Karn* court properly concluded that "[a]gainst this historical backdrop, it becomes plainly evident that the text of the new Rule, and its supporting commentary, was designed to mandate full disclosure of those materials reviewed by an expert witness, regardless of whether they constitute opinion work product."[102]

The court in *Karn* also justified its bright-line approach on several policy[103] grounds: "effective cross examination of expert witnesses will be enhanced; the policies underlying the work product doctrine will not be violated; and,

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[95] *Id.* at 1375-76.

[96] *Id.* at 1375.

[97] *Id.*

[98] 168 F.R.D. 633 (N.D. Ind. 1996). In *Karn*, the defendant sought production of a medical chronology concerning plaintiff's injuries prepared by plaintiff's counsel and provided to plaintiff's vocational expert. Defendant also requested production of a letter from plaintiff's counsel to plaintiff's liability expert. *Id.* at 634.

[99] *Id.* at 636-38.

[100] *Id.* at 638.

[101] *Id.* at 639.

[102] *Id.* at 637.

[103] *See infra* Part III.C.

finally, litigation certainty will be achieved—counsel will know exactly what documents will be subject to disclosure and can react accordingly."[104]

In *B.C.F. Oil Refining, Inc. v. Consolidated Edison Co.*,[105] the U.S. District Court for the Southern District of New York agreed with the *Karn* court's holding and policy justifications. The court also noted an additional reason opinion work product should be discoverable, namely, the idea that Rule 26(a)(2) "trumps" the work product doctrine set forth in Rule 26(b)(3) is "consistent with the intent of the drafters of the 1993 Amendment," which was "to require parties to produce attorney opinions given to the expert and considered by the expert in forming his or her opinion."[106]

In *Musselman v. Phillips*,[107] the U.S. District Court for the District of Maryland also found the "*Karn* opinion and its progeny persuasive."[108] In ordering production of work product materials held by the plaintiff, the court held that "when an attorney communicates otherwise protected work product to an expert witness retained for the purposes of providing opinion testimony at trial—whether factual in nature or containing the attorney's opinions or impressions—that information is discoverable if considered by the expert."[109]

In favoring the bright-line approach, the *Musselman* court provided two reasons to substantiate its holding:

> [B]ecause the providing of work product to the retained, testifying expert constitutes one of the "very rare and extraordinary circumstances," when opinion work product is not absolute, and there is a concomitant substantial need for the opposing party to have this information; or, alternatively, because the disclosure of the work product to the expert constitutes a waiver of privilege as to that information.[110]

In addition, the court explained that the bright-line rule was necessary "because of the influential role which expert witnesses play in trial, and the importance of promoting effective cross examination of expert witnesses."[111]

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[104] *Karn*, 168 F.R.D. at 639.

[105] 171 F.R.D. 57, 66 (S.D.N.Y. 1997). In *B.C.F. Oil Refining, Inc.*, plaintiff, an oil refining company, alleged that defendant distributed contaminated oil to plaintiff. A discovery dispute ensued when defendants sought to compel production of documents concerning communication between plaintiff and plaintiff's expert. Plaintiff refused to produce the documents on work product grounds. *Id.* at 60.

[106] *Id.* at 66.

[107] 176 F.R.D. 194 (D. Md. 1997).

[108] *Id.* at 199.

[109] *Id.*

[110] *Id.* (quoting Better Gov't Bureau, Inc. v. McGraw, 106 F.3d 582, 606 (4th Cir. 1997)).

[111] *Id.* at 199.

Likewise, in *Simon Property Group L.P. v. mySimon, Inc.*,[112] the court agreed with the *Karn* holding and reasoning, stating, "an attorney should not be permitted to give a testifying expert witness a detailed 'road map' for the desired testimony without also giving the opposing party an opportunity to discover that 'map' and to cross-examine the expert about its effect on the expert's opinion in the case."[113]

The court in *W.R. Grace & Co.-Connecticut v. Zotos International, Inc.*,[114] similarly held that Rule 26(a)(2) requires "disclosure of all 'information considered by the expert'" and "does not exempt so-called 'core' work product."[115] The court looked to the language of the 1993 amendments, specifically to the provision stating that "litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions—whether or not ultimately relied upon by the expert—are privileged *or otherwise protected from disclosure*."[116] The court reasoned that "it is illogical that such broad language, explicitly directed to privileges and other sources of protection against disclosure, was intended to exclude any form of attorney work product."[117]

In yet another recent decision, the U.S. District Court for the District of Massachusetts in *Suskind v. Home Depot Corp.*,[118] agreed with *Karn*'s bright-line approach to expert discovery under Rule 26(a)(2), giving an additional basis for the adoption of the bright-line rule.[119] The court looked at the historical interplay between Rules 26(b)(3) and 26(b)(4)[120] to determine whether the "subject to the subdivision (b)(4)" clause in Rule 26(b)(3) applied to both fact and work product.[121] The court noted that prior to 1993, although the intent of the drafters was unclear as to whether Rule 26(b)(4) trumped 26(b)(3), "there can be no doubt that by 1993, the authors of the rules and the Notes were aware of the issue."[122] Furthermore, by including the language, "litigants should no longer be able to argue that materials furnished to their experts to be used in forming their opinions . . . are privileged or otherwise

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[112] 194 F.R.D. 644 (S.D. Ind. 2000); *accord* Amway Co. v. Procter & Gamble Co., No. 1:98cv726, 2001 U.S. Dist. LEXIS 5317, at *3 (W.D. Mich. Apr. 17, 2001) (finding that Rule 26(a)(2) requires disclosure of any document considered by a testifying expert whether or not the document is otherwise protected).

[113] *Simon Property*, 194 F.R.D. at 647.

[114] No. 98-CV-838S(F), 2000 LEXIS 18096, at *10-11 (W.D.N.Y. Nov. 2, 2000).

[115] *Id.* at *10 (quoting FED. R. CIV. P. 26(a)(2)(B).

[116] FED. R. CIV. P. 26(a) 1993 advisory committee notes (emphasis added).

[117] *W.R. Grace*, 2000 U.S. Dist. LEXIS 18096, at *11.

[118] No. 99-10575-NG, 2001 U.S. Dist. LEXIS 1349, at *1 (D. Mass. Jan. 2, 2001).

[119] *Id.* at *16.

[120] *See supra* Part II.A.

[121] *Suskind*, 2001 U.S. Dist. LEXIS 1349, at *6-10.

[122] *Id.* at *9-10.

protected from disclosure when such persons are testifying or being deposed,"[123] in the Advisory Committee Notes, the drafters "rejected the interpretation of Rule 26(b)(3) set forth in *Bogosian* that discovery pursuant to Rule 26(b)(4) is subject to the limitations of the second sentence of Rule 26(b)(3) concerning core attorney work product."[124]

The court next considered whether the drafters of the 1993 amendments intended mandatory expert disclosure pursuant to Rule 26(a)(2)(B) to be subject to work product protection. In so doing, it looked to the explicit language of Rule 26(a)(1)(C).[125] That subsection, also added in 1993, mandates production of "documents or other evidentiary material, *not privileged or protected from disclosure*," on which computations of damages are based.[126] In granting defendant's motion to compel, the *Suskind* court reasoned that "if the authors of the 1993 Amendments to Rule 26 intended . . . [Rule 26(a)(2)] to be subject to either attorney-client privilege and/or work product protection, they could have said so as they did with the required disclosure under Rule 26(a)(1)(C)."[127]

Appropriately, the magistrate in *Suskind* noted, "to the extent that one can discern trends in caselaw, it appears to me that the present weight of the caselaw tends to be in favor of allowing discovery of core attorney work product materials which have been considered by an expert."[128] Yet, in spite of the growing case law supporting a bright-line rule as illustrated by the preceding cases, several courts have refused to order disclosure of opinion work product provided to testifying experts.[129]

One of the first decisions favoring a protection-oriented approach after the 1993 amendments is *All West Pet Supply Co. v. Hill's Pet Products Division*.[130] In refusing to grant defendant's motion to compel disclosure of

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[123] FED. R. CIV. P. 26 1993 advisory committee notes.

[124] *Suskind*, 2001 U.S. Dist. LEXIS 1349, at *10.

[125] Rule 26(a)(1) provides, in pertinent part:

(1) Initial Disclosures. Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

. . . .

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered . . . .

Fed. R. Civ. P. 26(a)(1).

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

[127] *Suskind*, 2001 U.S. Dist. LEXIS 1349, at *11.

[128] *Id.* at *15-16.

[129] *See, e.g.*, *supra* note 91.

[130] 152 F.R.D. 634 (D. Kan. 1993). *All West* involved a discovery dispute where plaintiff alleged that misappropriation of information supplied by plaintiff to defendant resulted in lost

documents and information related to plaintiff's expert witness, the court held that sharing the documents in question did not cause the plaintiff to "waive the protection afforded by Rule 26(b)(3) for attorney work product."[131] The court interpreted revised Rule 26 and its comment "to mean only that the data or information, i.e., the facts, considered by the expert must be disclosed."[132] Thus, the rule did not "compel the production of the documents that . . . contain protected work product other than data or information."[133] In reaching its conclusion, however, the court in *All West* relied on cases decided prior to the 1993 amendments;[134] it ruled on the issue almost immediately after Rule 26(a)(2) was amended, and before there was commentary on the issue.[135] The reasoning of *All West* is therefore in doubt.[136] Moreover, in *Johnson v. Gmeinder*,[137] a recent case decided in the same jurisdiction, the court rejected the holding of *All West*, finding that in light of the plain language of Rule 26(a)(2)(B) and the Advisory Committee Notes, "any type of privileged material[s], including materials or documents prepared by a non-testifying expert, lose their privileged status when disclosed to, and considered by, a testifying expert."[138]

Nevertheless, the leading post-amendment protection-oriented decision, *Haworth, Inc. v. Herman Miller, Inc.*,[139] adopted the holding of *All West*.[140] The *Haworth* court construed Rule 26 and the Advisory Committee Notes to mean "only . . . all factual information considered by the expert must be

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profits. *Id.* at 635. Defendant filed a motion to compel documents and information related to opinion testimony of plaintiff's expert witness who testified at trial regarding plaintiff's lost profits. *Id.*

[131] *Id.* at 638.

[132] *Id.* at 639 n.9 (emphasis omitted).

[133] *Id.* (emphasis omitted).

[134] *All West* cites *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 594 (3d Cir. 1984) and *Hamel v. General Motors Corp.*, 128 F.R.D. 281, 284 (D. Kan. 1989) before holding that attorney work product is not waived when shared with an expert witness. *All West*, 152 F.R.D. at 638.

[135] *See* Johnson v. Gmeinder, 191 F.R.D. 638, 646 (D. Kan. 2000).

> The Court notes . . . that *All West* was decided almost immediately after Rule 26(a)(2) was amended and before there was [any] commentary on the issue. The Court also notes that *All West* did not address the Advisory Committee Note which makes it clear that all materials "regardless of their privileged or other protected status" are discoverable if disclosed to and considered by the expert.

Id.

[136] *Id.*

[137] 191 F.R.D. 638 (D. Kan. 2000).

[138] *Id.* at 647.

[139] 162 F.R.D. 289 (W.D. Mich. 1995). *Haworth* involved a patent infringement action where defendant requested that plaintiff's expert witness testify regarding materials plaintiff's counsel provided to the expert. *Id.* at 291. Plaintiff's counsel objected on the grounds of attorney work product. *Id.*

[140] *Id.* at 295.

disclosed in the report."[141] The court believed the only changes Rule 26 effectuated were that attorneys "are obligated to disclose all factual information on their own in a report rather than on motion of opposing counsel," and that "the new procedure simply eliminates the need to have a judge order the redaction of core work product from materials that contain discoverable facts and data."[142]

The *Haworth* decision, however, is flawed in many respects. The court based most of its arguments on pre-1993 cases, with the exception of *All West*.[143] The fact that the decision did not recognize the significance of the 1993 amendments undercuts the court's reasoning. The work product doctrine has never protected discovery of facts, as opposed to the documents on which an attorney has recorded those facts.[144] Because the work product doctrine never protected factual information, the *Haworth* court does not read anything new into the 1993 amendments to Rule 26 and, as the *Suskind* court stated, "this distinction renders the 1993 Amendments meaningless."[145] Other recent decisions have adopted the *Haworth* court's protective stance, despite its flawed reasoning.[146]

Other protectionist courts have based their holdings on the work product doctrine of Rule 26(b), rather than on post-amendment Rule 26(a). For example, in *Krisa v. Equitable Life Assurance Society*,[147] the court held that "[a]n interpretation of Rule 26 [holding] that a party must produce documents

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[141] *Id.*

[142] *Id.* (citations omitted).

[143] *Haworth* cites *All West* for its holding, as well as *Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 594 (3d Cir. 1984), and *Hamel v. General Motors Corp.*, 128 F.R.D. 281, 284 (D. Kan. 1989), for its reasoning. *See Haworth*, 165 F.R.D. at 295-96.

[144] *See* Suskind v. Home Depot Corp., No. 99-10575-NG, 2001 U.S. Dist. LEXIS 1349, at *13 (D. Mass. Jan. 2, 2001).

[145] *Id.*; *see also* Barna v. United States, No. 95-C-6552, 1997 U.S. Dist. LEXIS 10853, at *6 (N.D. Ill. July 18, 1997) (stating that "[t]he *Haworth* court's interpretation of the Advisory Committee Notes renders the 1993 amendments to Rule 26(a)(2) superfluous").

[146] *See* Nexxus Prods. Co. v. CVS New York, Inc., 188 F.R.D. 7, 10 (D. Mass. 1999) (stating that "[t]he most reasonable reading of the 1993 Advisory Committee Note is that the drafters intended to put to rest any dispute concerning expert disclosures and to clarify that disclosure of factual materials was required under the rule but not core attorney work product"); Ladd Furniture, Inc. v. Ernst & Young, No. 2:95CV0043, 1998 U.S. Dist. LEXIS 17345, at *43 (M.D.N.C. 1998) (finding that "opinion work product is protected even when it was considered by an expert in forming his opinions"); Magee v. Paul Revere Life Ins. Co., 172 F.R.D. 627, 642 (E.D.N.Y. 1997) (stating that "Rule 26(a)(2)(B) extends only to factual materials, and not to core attorney work product considered by an expert").

[147] 196 F.R.D. 254 (M.D. Pa. 2000). In *Krisa*, plaintiff demanded defendant produce drafts of reports prepared by defendant's expert witnesses, as well as correspondence between defendant's counsel and its expert witnesses. *Id.* at 254. Defendant claimed the documents were protected under the work product doctrine and were outside the scope of permissible discovery. *Id.*

containing work product . . . disclosed to its expert ignores the language of [Federal Rule of Civil Procedure] 26(b)(3)."[148] Because Rule 26(b)(3) requires production of documents containing work product only when the requesting party shows substantial necessity and undue hardship to obtain the substantial equivalent of such documents by other means,[149] the court found that interpreting Rule 26 to mandate production of opinion work product disclosed to an expert "would render the language in Rule 26(b)(3) superfluous."[150]

Similarly, in *Estate of Chopper v. R.J. Reynolds Tobacco Co.*,[151] and *Estate of Moore v. R.J. Reynolds Tobacco Co.*,[152] two cases decided on the same day by the same judge, the court relied heavily on the importance the Eighth Circuit affords the opinion work product doctrine.[153] In denying the defendant's motion to compel production of documents containing opinion work product, the court held that "opinion work product has near absolute immunity from discovery, and such work product can be discovered only in very rare and extraordinary circumstances."[154]

Courts, like *Chopper* and *Moore*, that have relied on the work product doctrine language in 26(b)(3) in adopting a protection-oriented approach fail to consider the significance of Rule 26(a)(2). Rule 26(a)(2) is clearly applicable because it deals precisely with disclosure of information considered by a testifying expert.[155] In reaching their conclusions, these courts again rely on cases decided prior to the 1993 amendments.[156] As such, the courts' refusal to recognize the significance of the 1993 amendments undermines their reasoning.

As in the pre-1993 era, one court has attempted to strike a balance between the discovery-oriented and protection-oriented approaches. In *Kennedy v. Baptist Memorial Hospital*,[157] the defendant's expert witness wrote defendant's counsel a letter stating his opinion of the case.[158] Within a twenty-four hour period, the expert forwarded a second letter to defendant's counsel

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[148] *Id.* at 260.

[149] FED. R. CIV. P. 26(b)(3).

[150] *Krisa*, 196 F.R.D. at 260.

[151] 195 F.R.D. 648 (N.D. Iowa 2000).

[152] 194 F.R.D. 659 (S.D. Iowa 2000).

[153] *See Estate of Chopper*, 195 F.R.D. at 651; *Estate of Moore*, 194 F.R.D. at 663.

[154] *Estate of Chopper*, 195 F.R.D. at 651; *Estate of Moore*, 194 F.R.D. at 663-34.

[155] *See* FED. R. CIV. P. 26(a)(2).

[156] *See Krisa*, 196 F.R.D. at 260 (protecting core work product is consistent with the analysis set forth in *Bogosian*); *Estate of Chopper*, 195 F.R.D. at 651; *Estate of Moore*, 194 F.R.D. at 663 (finding that *In re Murphy*, 560 F.2d 326 (8th Cir. 1977) is controlling on the issue facing the court and provides the rule that opinion work product has near absolute immunity).

[157] 179 F.R.D. 520 (N.D. Miss. 1998).

[158] *Id.* at 521.

reflecting "several substantive changes of opinion and deletions" from the previous letter.[159] Plaintiffs sought discovery of information regarding any communication between the expert and attorney that occurred between the first and second letters.[160] The court ultimately ordered discovery of the information but held that communications between an attorney and an expert witness are not discoverable unless there are egregious facts dictating disclosure.[161]

The *Kennedy* court's moderate approach ignores the plain language of Rule 26(a)(2) and loses many benefits of a bright-line approach. Specifically, under the *Kennedy* approach, courts must examine every factual situation to determine whether discovery should occur, whereas under the bright-line approach, both courts and attorneys can easily predict the discoverability of work product materials.[162] Furthermore, without access to information considered by an expert, an attorney may have difficulty determining if an egregious situation exists, and thus is unable to raise the issue with the court.

To date, no other court has followed the intermediate *Kennedy* approach. In fact, a later decision from the same jurisdiction as *Kennedy*, *TV-3, Inc. v. Royal Insurance Co.*,[163] acknowledged the moderate *Kennedy* approach but disregarded it in favor of the bright-line rule.[164]

Despite the clear language of Rule 26(a)(2), the Advisory Committee Notes, and growing case law supporting the bright-line rule,[165] courts confronting the issue of the discoverability of opinion work product provided to a testifying expert cannot turn to a uniform federal rule. These courts should, however, consider the convincing policy arguments in support of the bright-line rule.[166]

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[159] *Id.*

[160] *Id.*

[161] *Id.* at 522.

[162] *See* Karn v. Ingersoll-Rand, 168 F.R.D. 633, 641 (N.D. Ind. 1996). "[T]he 'bright-line' view actually preserves opinion work product protection in that there is no lingering uncertainty as to what documents will be disclosed. Counsel can easily protect genuine work product by simply not divulging it to the expert." *Id.*

[163] 194 F.R.D. 585 (S.D. Miss. 2000). In *TV-3*, plaintiffs subpoenaed certain documents from defendant's expert witnesses, including correspondence between defendant and its experts. *Id.* at 586. Defendant sought a protective order contending that the correspondence was protected attorney work product. *Id.*

[164] *Id.* at 588-89 (favoring the bright-line rule from *Karn* over the *Kennedy* court's "hybrid approach").

[165] *See supra* notes 127-28 and accompanying text.

[166] *See infra* Part III.C.

C. Policy for Full Disclosure

As the Karn court articulated, there are three basic policy grounds supporting mandatory disclosure of all materials provided to an expert witness, including opinion work product.[167] This section discusses these rather persuasive policy considerations.

1. *Full effective cross-examination is critical to the truth-finding process*

The importance of expert witness testimony cannot be overstated, because experts "testify regarding subjects outside the common knowledge of the finder of fact, so the jury cannot rely on the experience and common sense of its members to ferret out distorted evidence."[168] In addition, unlike other witnesses, expert witnesses may base their opinions on facts not admissible as evidence, if of a nature reasonably relied on by others in the field.[169] Moreover, an expert witness may testify as to his or her opinion without first having to testify about underlying facts or data supporting that opinion, unless the court so orders.[170]

Despite the importance of expert witnesses and the influence they have over a jury, many attorneys "can all too easily color the expert's opinion by simply controlling the expert's access to information,"[171] thereby subjecting the expert to improper influences. Misleading expert testimony destroys the truth-finding process and calls judicial integrity into question.[172] Even the Supreme Court has recognized that "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it."[173] Without pre-trial access to information an expert has received from the attorney, opposing counsel may be unable to effectively reveal the influence counsel has imposed upon the expert's testimony.[174] Thus, as one court stated:

> Without this form of discovery, expert testimony may become another way in which counsel places his view of the case or the evidence in front of the jury. The real danger is that this view, when espoused by an expert, is presented to the

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[167] *See Karn*, 168 F.R.D. at 639-41 (finding three policy reasons in support of a bright-line rule: "effective cross-examination of expert witnesses will be enhanced; the policies underlying the work product doctrine will not be violated; and, finally, litigation certainty will be achieved—counsel will know exactly what documents will be subject to disclosure and can react accordingly").

[168] Mickus, *supra* note 2, at 788.

[169] *See* FED. R. EVID. 703, 704.

[170] *See* FED. R. EVID. 705.

[171] *Karn*, 168 F.R.D. at 639; *see also* Mickus, *supra* note 2, at 787-91.

[172] Easton, *supra* note 45, at 516-17.

[173] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 595 (1993) (citation omitted).

[174] *See Karn*, 168 F.R.D. at 639.

> jury with an air of authority and a stamp of scientific validity, and opposing counsel might be left without a solid basis for cross-examination.[175]

A bright-line rule of discovery advances effective cross-examination and consequently preserves the integrity of the truth-finding process. Full and effective cross-examination "can only be accomplished by gaining access to all of the information that shaped or potentially influenced the expert witness's opinion."[176] Moreover, one commentator has suggested the crucial importance of discovery of expert-attorney information in allowing the jury to come to a fair conclusion.[177] Thus,

> [d]isplaying for the jury that counsel has directed the expert to reach a specific conclusion, when coupled with a showing that the expert made his findings on the basis of insufficient data; or incomplete information provided by counsel; reached a conclusion without reviewing applicable and relevant scientific research; reported an opinion that flatly contradicts a large body of scientific work, or failed to apply any of the analytic techniques of analysis standard to his particular field in forming his opinion goes far in establishing in the minds of the jury that the expert is "little more than a mouthpiece or amplifier through which . . . counsel addressed the argument to the trier of fact."[178]

The bright-line rule is, therefore, critically necessary for full and effective cross-examination, supporting the policy of judicial integrity.

2. The bright-line rule of discovery does not violate the precepts of the work product doctrine

The work product doctrine "is intended to allow counsel unfettered latitude to develop new legal theories or to conduct a factual investigation, but without knowing beforehand if the results will be favorable to the client's case."[179] Most attorneys, however, do not use their testifying experts to develop new legal theories.[180] Instead, they generally limit such interchanges to their non-testifying experts.[181] Thus, relating work product to a testifying expert serves only two purposes: "to inform the expert regarding factual aspects of litigation that might affect the expert's opinion, or to influence or prompt the expert to adhere to an opinion that favors counsel's legal theory."[182]

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[175] Barna v. United States, No. 96-C-6552, 1997 U.S. Dist. LEXIS 10853, at *8 (N.D. Ill. July 18, 1997).

[176] *See Karn*, 168 F.R.D. at 639.

[177] *See* Mickus, *supra* note 2, at 792-93.

[178] *Id.* (quoting Deltak Inc. v. Advanced Sys., Inc., 574 F. Supp. 400, 405 (N.D. Ill. 1983).

[179] *Karn*, 168 F.R.D. at 640 (citations omitted).

[180] *See id.*

[181] *Id.*

[182] Mickus, *supra* note 2, at 785.

These two purposes, however, do not further the policies of the work product doctrine. Providing work product to an expert witness "does not result in counsel developing new legal theories or in enhancing the conducting of a factual investigation."[183] Requiring disclosure of an attorney's communications to an expert, therefore, "does not impinge on the goals served by the opinion work product doctrine."[184]

3. The bright-line rule preserves opinion work product by establishing a clear rule of law which eliminates uncertainty as to what documents will be disclosed

"[T]he bright-line rule, because of its clarity and ease of application, allows"[185] an attorney to know exactly what materials will be discoverable or should be reported in advance of trial.[186] The rule effectively reduces confusion that may exist regarding the discoverability of such information. As the *Karn* court noted, "the 'bright-line' view actually preserves opinion work product protection in that there is no lingering uncertainty as to what documents will be disclosed. Counsel can easily protect genuine work product by simply not divulging it to the expert."[187]

Therefore, the three policy considerations articulated by the *Karn* court support the justification of a bright-line rule, as most likely intended by the Rule's drafters.

IV. APPLICATION TO HAWAI'I

A. Federal District Court of Hawai'i

The 1993 amendments to Rule 26 (effective December 1 of that year) began with the clause "[e]xcept to the extent otherwise stipulated or directed by order or local rule."[188] This language allowed districts to opt out of certain amendments to the rule.[189] By a temporary court order, the Federal District Court of Hawai'i opted out of Rule 26(a)(2)'s provision that governed the mandatory disclosure of information given by an attorney to a testifying expert witness.[190]

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[183] *Karn*, 168 F.R.D. at 640.
[184] *Id.*
[185] Johnson v. Gmeinder, 191 F.R.D. 638, 646 (D. Kan. 2000).
[186] *Id.*
[187] *Karn*, 168 F.R.D. at 641; *see also* Plunkett, *supra* note 2, at 483.
[188] 28 U.S.C.A. FED. R. CIV. P. 26 (1999) (amended 2000).
[189] *See* Yamamoto, *supra* note 22, at 168-69, 175 n.27.
[190] *Id.* at 173 n.25.

One of the most significant changes included in the 2000 amendments to the Federal Rules of Civil Procedure,[191] however, was the elimination of the opt-out provision adopted in 1993 by deleting the phrase "local rule" from Rule 26(a)(1).[192] As a result, "for the first time all districts are subject to the mandatory disclosure rules."[193] Rule 26(a)(2) was not changed by the 2000 amendments.[194]

The District Court of Hawai'i has not ruled as to whether opinion work product provided to an expert witness becomes discoverable, pursuant to Rule 26(a)(2). Moreover, the court cannot look to the Ninth Circuit for guidance because the Ninth Circuit also has not conclusively ruled on the issue.[195] Four district court decisions in California, however, seem to indicate that the Ninth Circuit would favor the bright-line rule of disclosure.[196]

For example, although decided prior to the 1993 amendments, the District Court for the Northern District of California, in *Intermedics*, held that "written and oral communications from a lawyer to an expert that are related to matters about which the expert will offer testimony are discoverable, even when those communications otherwise would be deemed opinion work product."[197]

In a case decided after the 1993 amendments, the District Court for the Central District of California, in *United States v. City of Torrance*,[198] held that compelling the production of opinion work product provided to a testifying expert is "most consistent with the purpose of the Federal Rules of Civil Procedure."[199] The court further noted that when an attorney forwards documents to a testifying expert, "[a]ny protection the document may have had, no longer applies."[200]

Furthermore, two district court decisions have held that when an attorney for a party serves as an expert witness, that party forfeits all attorney-client

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[191] *See* Cloud, *supra* note 23, at 45.

[192] *Id.*

[193] *Id.*

[194] *See* FED. R. CIV. P. 26 (amended 2000).

[195] Until *In re Pioneer Hi-Bred International, Inc.*, 238 F.3d 1370 (Fed. Cir. 2001), *Bogosian v. Gulf Oil*, 738 F.2d 587 (3d Cir. 1984), was the only circuit court decision regarding the discoverability of opinion work product provided to experts. *See* Easton, *supra* note 45, at 535; Klopfenstein, *supra* note 24, at 482.

[196] *See* United States v. City of Torrance, 163 F.R.D. 590 (C.D. Cal. 1995); Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384 (N.D. Cal. 1991); *see also* cases cited *infra* note 201.

[197] *Intermedics*, 139 F.R.D. at 387.

[198] 163 F.R.D. 590 (C.D. Cal. 1995). In *City of Torrance*, plaintiffs alleged that defendants, in the hiring of police officers and firefighters, pursued policies that racially discriminated against minorities. Defendants demanded production of documents used by plaintiffs' statistical expert in forming his opinions. Plaintiffs argued that the documents were protected by the work product doctrine. *Id.* at 591-92.

[199] *Id.* at 593.

[200] *Id.*

privilege and/or work product protection with respect to documents in the attorney's possession.[201] Although these cases relied on outdated pre-1993 Rule 26, amended Rule 26 states more clearly that providing opinion work product to a testifying expert witness waives any protection the material may have had.[202]

Given the direction these district courts have taken, and the growing majority[203] of other jurisdictions' decisions favoring the discovery-oriented approach, it is likely that the Ninth Circuit would lean towards the bright-line rule of disclosure for information provided to a testifying expert witness.

Accordingly, because the Federal District Court of Hawai'i is now bound by Rule 26(a)(2) after the 2000 amendments, it should look to the better-reasoned decisions in other jurisdictions, the likelihood that the Ninth Circuit will apply the bright-line rule favoring disclosure, and the convincing policy reasons stated in *Karn*, in adopting the bright-line rule.

B. The Hawai'i Supreme Court Should Apply the Bright-line Rule

The Supreme Court of Hawai'i has adopted and promulgated its own set of rules: the Hawai'i Rules of Civil Procedure.[204] The Hawai'i Rules of Civil Procedure have not incorporated the mandatory disclosures of post-1993 Federal Rules of Civil Procedure, Rule 26(a).[205] Work product protection, however, is governed by Hawai'i Rules of Civil Procedure, Rule 26(b)(3), which is identical to the Federal Rule 26(b)(3).[206]

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[201] *See* Bio-Rad Labs., Inc. v. Pharmacia, Inc., 130 F.R.D. 116, 122 (N.D. Cal. 1990) (finding that "an attorney's opinion work product is discoverable where such information is directly at issue and the need for production is compelling") (quoting Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 933 (N.D. Cal. 1976)); Handgards, Inc. v. Johnson & Johnson, 413 F. Supp. 926, 931 (N.D. Cal. 1976) (holding that Rule 26(b)(3) does not create an absolute immunity from discovery for opinion work product).

[202] *See, e.g.*, Karn v. Ingersoll-Rand, 168 F.R.D. 633, 639 (N.D. Ind. 1996). "[T]he text of the new Rule [26(a)(2)] itself, combined with its supporting commentary, mandate disclosure of all materials reviewed by an expert witness." *Id.*

[203] *See supra* note 90; *see also* notes 127-28 and accompanying text.

[204] *See* HAW. REV. STAT. ANN. § 602-11 (Michie 1995). The section states: "The supreme court shall have the power to promulgate rules in all civil and criminal cases for all courts relating to process, practices, procedure and appeals, which shall have the force and effect of law." *Id.; see also* HAW. R. CIV. P. (adopted and promulgated by the Supreme Court of Hawai'i). Specifically, Rule 1, titled "Scope of rules" provides: "These rules govern the procedure in the circuit courts of the State in all suits of a civil nature whether cognizable as cases at law or in equity . . . ." HAW. R. CIV. P. 1.

[205] *Compare* HAW. R. CIV. P. 26(a), *with* FED. R. CIV. P. 26(a).

[206] *See* HAW. R. CIV. P. 26(b)(3); Lee v. Elbaum, 77 Haw. App. 446, 453, 887 P.2d 656, 663 (1993) (stating, "the [Hawai'i Rules of Civil Procedure] . . . are patterned after the Federal Rules of Civil Procedure.").

As to the discoverability of information provided to a testifying expert witness, the same problem exists under the Hawai'i rules as under the Federal Rules prior to the 1993 amendments. Namely, Rule 26(b)(3) begins with the clause "[s]ubject to the provisions of subdivision (b)(4) of this rule."[207] In several cases, Hawai'i courts have considered the work product doctrine, seeming to indicate that the Supreme Court of Hawai'i would be willing to apply a bright-line rule for disclosure.[208]

In *Lee v. Elbaum*, plaintiffs argued they had been unfairly surprised and prejudiced by defendant's expert testimony at the trial court level.[209] The Intermediate Court of Appeals held that the testimony unfairly surprised plaintiffs and that such testimony should have been disallowed by the trial court.[210] The court considered Hawai'i Rule of Civil Procedure 26(b)(4), noting that its federal counterpart allows for "the very liberal pretrial discovery of an adverse party's experts."[211] Examining the unique role of an expert witness in trial, the court recognized that "[e]ffective cross-examination of an expert witness requires advance preparation. The lawyer even with the help of his own experts frequently cannot anticipate the particular approach his adversary's expert will take on the data on which he will base his judgment on the stand."[212] The court expressed the importance of allowing the discovery of expert testimony, stating:

> The history of FRCP 26, which is highly persuasive in construing HRCP 26, thus makes it abundantly clear that complete and accurate pretrial discovery of expert witnesses is critical to a fair trial, and HRCP 26 is designed to promote the candor and fairness in the pretrial discovery process and to eliminate surprises at trial.[213]

Similarly, in a recent case, the Supreme Court of Hawai'i also expressed the significance of Rule 26 in allowing the discovery of information regarding an expert witness. In *Stender v. Vincent*,[214] the court aptly noted:

> Recognizing the importance of expert testimony to modern trial practice, the Civil Rules provide for extensive pretrial disclosure of expert testimony. *This*

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[207] *See* HAW. R. CIV. P. 26(b)(3).

[208] *See Lee*, 77 Haw. App. at 454, 887 P.2d at 664; Stender v. Vincent, 92 Hawai'i 355, 367, 992 P.2d 50, 62 (2000).

[209] 77 Haw. App. at 453, 887 P.2d at 663. In *Lee*, plaintiff filed a wrongful death suit following the death of her son in a boating accident. Plaintiff argued on appeal that because defendant's expert previously testified during deposition that he had no trial opinions, the expert's adverse trial testimony unduly surprised plaintiff. *Id.* at 451, 887 P.2d at 661.

[210] *Id.*

[211] *Id.*

[212] *Id.* at 454, 887 P.2d at 664.

[213] *Id.* (citation omitted).

[214] 92 Hawai'i 355, 992 P.2d 50 (2000).

> *disclosure is consonant with the federal courts' desire to make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practical extent.* In the arena of expert discovery—a setting which often involves complex factual inquiries—Rule 26 increases the quality of trials by better preparing attorneys for cross-examination, minimizing surprise, and supplying a helpful focus for the court's supervision of the judicial process. In short, Rule 26 promotes fairness both in the discovery process and at trial.[215]

The importance the Hawai'i Supreme Court places on discovery of expert testimony and effective cross-examination seems to indicate the court's willingness to mandate disclosure of any work product materials provided to a testifying expert as well.[216]

In light of *Lee* and *Stender*, both the Hawai'i Supreme Court and the Federal District Court of Hawai'i should take note of the better-reasoned decisions of the discovery-oriented jurisdictions and the convincing policy reasons stated in *Karn*, and adopt the bright-line rule.

V. CONCLUSION

The growing majority of case law supports the bright-line rule for expert disclosure[217]—that when an attorney provides a testifying expert witness with information, such information becomes discoverable, regardless of opinion work product immunity.[218] The bright-line rule is necessary for the full and effective cross-examination of experts; it does not violate precepts of the work product doctrine and it eliminates uncertainty, making it easier for attorneys and courts to apply.[219] As all federal district courts, including the District Court of Hawai'i, are now bound by Rule 26(a)(2),[220] they should follow the lead taken by the growing majority and apply the bright-line rule, which is

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[215] *Id.* at 367, 992 P.2d at 62 (quoting Thibeault v. Square D. Co., 960 F.2d 239, 244 (1st Cir. 1992)) (emphasis added). In *Stender*, plaintiffs filed suit for negligence and products liability. *Id.* at 357, 992 P.2d at 52. Under HRCP 26(e), parties were required to seasonably supplement discovery responses concerning the identity of expert witnesses to be called at trial, the subject matter on which the expert was expected to testify, as well as the substance of the testimony. *Id.* at 366, 992 P.2d at 61. Defendant produced large amounts of information close to the discovery deadline. Plaintiffs made a motion to exclude defendant's supplemental production of documents, arguing the late production prejudiced plaintiffs' rights to both timely discovery and a fair trial. *Id.* at 366-69, 992 P.2d at 61-64.

[216] *See Lee*, 77 Haw. App. 446, 887 P.2d 656; *Stender*, 92 Hawai'i 355, 992 P.2d 50.

[217] *See supra* Part III.B.

[218] *Id.*

[219] *See supra* Part III.C.

[220] *See supra* note 23 and accompanying text.

based on sound policy.[221] Likewise, the Hawai'i Supreme Court should consider its recent decisions,[222] and also adopt the bright-line rule. Doing so will allow attorneys and judges alike to have the "peace of mind" they deserve.

Duke T. Oishi[223]

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[221] *See supra* Part III.C.

[222] *See* Lee v. Elbaum, 77 Haw. App. 446, 887 P.2d 656 (1993); Stender v. Vincent, 92 Hawai'i 355, 992 P.2d 50 (2000).

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