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ARTICLE

COMMENTS

CASENOTES

RECENT DEVELOPMENTS

In Celebration of Twenty-Five Years

Associate Professor Hazel Glenn Beh
William S. Richardson School of Law
University of Hawai'i at Manoa

The Honorable Roger Traynor wryly noted, "It is more fun to dedicate law reviews than to edit them."[1] Now having done both, I wholeheartedly agree. Like Traynor, I am an undying fan of law reviews.[2] Law reviews are remarkable institutions; that the editing, writing and publication of so much legal scholarship has been entrusted to students is one of the most unique aspects of the law.[3] Indeed, many scholars roundly criticize student-edited law reviews,[4] with one critic commenting:

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[1] Roger J. Traynor, *To the Right Honorable Law Reviews*, 10 UCLA L. REV. 3 (1962-63) (writing on the occasion of UCLA Law Review's tenth anniversary).

[2] "There is in no other profession and in no other country anything equal to the student-edited American law review, nurtured without commercial objective in university law schools alive to the imperfections of the law, and alert to make space for worthy commentary of an unknown student as well as for the worthy solicited or unsolicited manuscript of renowned authority . . . . Time is with the law reviews. An age that churns up problems more rapidly than we can solve them needs such fiercely independent problem-solvers with long range solutions." Traynor, *supra* note 1, at 8-10 (quoted in Richard S. Harnsberger, *Reflections About Law Reviews and American Legal Scholarship*, 76 NEB. L. REV. 681 (1997)).

[3] According to critics, "Far and away, the most noted facet of student-run law reviews — and the one that allegedly causes all their other quirks – is the fact that students run them. Students select articles written by professors, judges, practitioners – their experiential and – hell! — moral superiors. Students then edit and criticize . . . often without reservation and often without the benefit of any experience." James W. Harper, *Why Student-Run Law Reviews?*, 82 MINN. L. REV. 1261, 1270 (1998). However, Harper refutes complaints that students are not qualified to select and edit by noting "[l]aw is not like other academic pursuits or the sciences, where reification and new levels of abstraction are . . . improvements . . . . "[L]aw should be understandable. Let lawyers talk to each other in their own language from time to time, but law is not served by relying to excess on legal jargon, veering into abstract theory, or rendering legal principles less clear." *Id.* at 1280. He approves that students "select articles they can grasp, then edit them to maximize their own understanding." *Id.* at 1279.

[4] For a sample of the vast body of literature criticizing student-edited law reviews as the main source of legal scholarship, *see e.g.*, Fred Rodell, *Goodbye to Law Reviews*, 23 VA. L. REV. 38 (1936-37) ("The average law review writer is peculiarly able to say nothing with an air of great importance."); Fred Rodell, *Goodbye to Law Reviews – Revisited*, 48 VA. L. REV. 279 (1962) (offering an irreverent, humorous rant against the student-run law reviews); Bernard J. Hibbitts, *Last Writes? Reassessing the Law Review in the Age of Cyberspace*, 71 N.Y.U. L. REV. 615, 628-54 (1996); Bernard J. Hibbitts, *Yesterday Once More: Skeptics, Scribes and the Demise of Law Reviews*, 30 AKRON L. REV. 267 (advocating self publishing online); Richard A. Posner, *The Future of the Student-Edited Law Review*, 47 STAN. L. REV. 1131, 1133 (1995); Roger Crampton, *The Most Remarkable Institution: The American Law Review*, 36 J. LEGAL EDUC. 1 (1986) (opining that students do not have the background to select or edit submissions and questioning the future of the traditional law review). John Kester concludes that as student-edited law reviews fade (replaced by professional journals), "we will no longer enjoy the myth

> In the classic description, students without law degrees set the standards for publication in the scholarly journals of American law – one of the few reported cases of the inmates truly running the asylum. The baffled outsider is expected to marvel at how the legal profession, unlike any other, can rely so exclusively for scholarly discourse on journals edited by students.[5]

Despite the naysayers, law reviews, and particularly the University of Hawai'i Law Review, have successfully assumed an important role in legal education and in promoting scholarly discourse in the legal community.[6] Writing student notes or comments and reading, selecting and editing the works of noted scholars obviously provides a substantial learning opportunity to students.[7] In addition, working with and motivating authors and critiquing the work of seasoned law professors are unparalleled learning experiences.[8] Law review is not just a teaching tool. We also know that law review membership is a mark of distinction that earns members more post-law school

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that students set the intellectual standards for the legal profession. But that is all right. They never should have. And they never really did." John G. Kester, *Faculty Participation in the Student-Edited Law Review*, 36 J. LEGAL EDUC. 14, 17 (1986).

[5] Kester, *supra* note 4, at 14.

[6] *See e.g.*, Harper *supra* note 3. Additionally, Harper approves that students "select articles they can grasp, then edit them to maximize their own understanding." *Id.* at 1279.

[7] *See id.* (commenting that "the teaching function is an important purpose of the student-run law review" and writing a note or comment benefits the writer and the student editor); *see also* Traynor, *supra* note 1, at 4-5 ("law reviews that enable some students, and ideally should enable all students, to refine and also broaden their education, render consequential service to the legal profession").

[8] The value of the "people skills" and "thick skin" developed to manage outside authors should not be underestimated. The Chicago Kent Law Review wrote candidly about the arrogance of some authors:

> An editor sent a manuscript back to an author with a relatively long list of suggestions she thought would improve the article. The author responded with a scathing letter that rejected virtually all the changes and claimed that "it is virtually impossible for you to suggest an alternative construction of a sentence that I have not already considered and rejected. I've been doing this for a long time and I know what I'm doing." The Law Review responded with a letter explaining our policy of deferring to the author, but encouraging the author to at least consider our changes. His response included the following passage, which addressed the Law Review's argument that no article is beyond improvement and that given the disparity in quality of manuscripts submitted to us we have an obligation to try and improve each of them: "Now it is certainly the case that some law professors cannot write their way out of a paper bag: as the year goes along you will see a huge quantity of miserable writing, all by people older and more experienced than you are . . . . You will also see some things (one anyway) that are very well written, so well written that they are very hard to improve (so far as the writing is concerned). My article is like that."

Executive Board of the Chicago Kent Law Review, *The Symposium Format as a Solution to the Problems Inherent in Student-Edited Law Journals: A View From the Inside*, 70 CHI.-KENT L. REV. 141, 149-50 n.29 (1994).

opportunities than the rest of a law school's student body.[9] However, membership does not grant a student a free ride, it is the experience, not the status, of law review membership that makes law review members desirable to employers.[10] Villanova's Professor John Gotanda (Editor-in-Chief 1987) confirms that law review is an excellent training ground:

> I found working on the Law Review both challenging and exciting. It vastly improved my ability to perform in-depth legal research and to think critically about legal issues, and refined my writing and editing skills. It also taught me how to work as part of a highly qualified team. These skills have served me well in my professional life.

Each school benefits from the student's efforts as well; a well-run law review brings prestige to the law school, and the school continues to benefit from the achievements of law review graduates.[11] These students often begin their legal career with prized judicial clerkships. Besides distinguished careers in private practice, government, and industry, some remain in or return to academia[12] or become jurists.[13]

Law reviews promote legal discourse that benefits the entire legal community. Earl Warren once commented, "If it were not for [law reviews'] critical examination, we would have a great void in the legal world. Courts would have few guidelines for appraising the thinking of scholars and students

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[9] "Another purpose of student-run law reviews, complimentary and subsidiary to the teaching function, is distinguishing among students for legal employers . . . . Knowing who is on law review helps law firms and judges decide who to interview and hire as associates and clerks." Harper, *supra* note 3, at 1274. More cynically put, "The point of law review from the beginning has been to separate the best from the merely good for the benefit of fancy employers—first corporate, then corporate and judicial. Employers liked this separation because it lowered their costs first by limiting the number of students who might plausibly have merited an interview and second by teaching each student something useful for his new job - how to endure intense boredom for the corporate types, how to write a judicial opinion for the aspiring clerks." John Henry Schlegel, *An Endangered Species?*, 36 J. LEGAL EDUC. 18 (1986).

[10] Law review members are attractive employees not merely because they sit at the top of their class. They bring skills to the workplace that distinguishes them from other students. "[T]he best help of all to employers is the certification 'law review student.' This guarantees that the 'school within the school' has trained the student to perform many of the tasks judges and lawyers want employees to do. It is this ultimate law review credential that truly saves employers tremendous amounts of time, money, and energy." Harnsberger, *supra* note 2, at 686.

[11] *See* Harper, *supra* note 3, at 1276-78.

[12] Those pursuing careers in academia include: Lawrence Foster (University of Hawaii), John Y. Gotanda (Villanova), Danielle Hart (Southwestern), Hazel Beh (University of Hawaii), Mari Matsuda (Georgetown), S.Y. Tan (University of Hawaii John A. Burns School of Medicine), Laurie Tochiki (University of Hawaii), Judith Weightman (University of Hawaii), and Susan Marie Connor (John Marshall).

[13] Distinguished jurists include Sabrina McKenna, Elizabeth Hifo (Bambi Weil), and Karen Ahn.

or of the bar itself. It is largely through them that we are able to see ourselves as others see us."[14] As evidence of their impact, student works in Hawai'i's law review have been widely read and cited in legal scholarship[15]

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[14] Earl Warren, *Upon the Tenth Anniversary of the UCLA Law Review*, 10 UCLA L. REV. 1 (1962-63).

[15] *See e.g.*, Suzianne D. Painter-Thorne, Comment, *Contested Objects, Contested Meanings: Native American Grave Protection Laws and the Interpretation of Culture*, 35 U.C. DAVIS L. REV. 1261 (citing Isaac Moriwake, Comment, *Critical Excavations: Law, Narrative, and the Debate on Native American and Hawaiian "Cultural Property" Repatriation*, 20 U. HAW. L. REV. 261, 242 (1998)); Tracy Schacter Zwick, *Over Privileged? A Guide To Illinois Attorney Privilege to Defame*, 86 ILL. B.J. 378 (1998) (citing M. Linda Dragas, *Curing a Bad Reputation: Reforming Defamation Law*, 17 U. HAW. L. REV. 113, 115 (Summer 1995)); David Tomlin, *Sui Generis Database Protection: Cold Comfort for Hot News*, 19 SPRING COMMUNICATIONS L. 15 (2001) (citing Rex Y. Fujichaku, *The Misappropriation Doctrine in Cyberspace: Protecting the Commercial Value of "Hot News" Information*, 20 U. HAW. L. REV. 421, 446 (1998)); R.A. Conrad, *Searching for Privacy in All the Wrong Places: Using Government Computers to Surf the Internet*, 48 NAVAL L. REV. 1 (2001) (citing Jared D. Beeson, *Cyberprivacy on the Corporate Intranet: Does the Law Allow Private-Sector Employers to Read Their Employees' E-mail?*, 20 U. HAW. L. REV. 165 (1998)); Patrick Boyd, Note, *Tipping the Balance of Power: Employer Intrusion on Employee Privacy through Technological Innovation*, 14 ST. JOHN'S J. L. COMM. 181 (1999) (citing Jared D. Beeson, *Cyberprivacy on the Corporate Intranet: Does the Law Allow Private-Sector Employers to Read Their Employees' E-mail?*, 20 U. HAW. L. REV. 165 (1998)); Sherry Talton, *Mapping the Information Super Highway: Electronic Mail and the Inadvertent Disclosure of Confidential Information*, 20 REV. LITIG. 271 (2000) (citing R. Scott Simon, Recent Development, *Searching for Confidentiality in Cyberspace: Responsible Use of E-Mail for Attorney-Client Communications*, 20 U. HAW. L. REV. 527 (1998); Shelly Ross Saxer, *Planning Gain, Exactions, and Impact Fees: A Comparative Study of Planning Law in England, Wales and the United States*, 32 URBAN LAWYER 21 (2000) (citing Michael B. Dowling & A. Joseph Fadrowsky III, Casenote, Dolan v. City of Tigard: *Individual Property Rights v. Land Management Systems*, 17 U. HAW. L. REV. 193, 209 (1995)); Yuval Merin, *The Case Against Official Monlingualism: The Idiosyncracies of Minority Language Rights in Israel and the United States*, 6 ILSA J. INT'L & COMP. L. 1 (1999) (citing Susan Kiyomi Serrano, *Rethinking Race for Strict Scrutiny Purposes: Yniguez and the Racialization of English Only*, 19 U. HAW. L. REV. 221 (1997); Carol J. King, *Burdening Access to Justice: The Cost of Divorce Mediation on the Cheap*, 73 ST. JOHN'S L. REV. 375 (1999) (citing Renee M. Yoshimura, Recent Development, *Empowering Battered Women: Changes in Domestic Violence Laws in Hawai'i*, 17 U. HAW. L. REV. 575, 576 (1995)); Stephan Wilske, Teresa Schiller, *Jurisdiction Over Persons Abducted in Violation of International Law in the Aftermath of* United States v. Alvarez-Machain, 5 U. CHI. L. SCH. ROUNDTABLE 205, 241 (citing Elizabeth Chien, Note, 15 U. HAW. L. REV. 179 (1993)); Barbara Glesner Fines, *Joinder of Tort Claims in Divorce Actions*, 12 J. AM. ACAD. MATRIMONIAL LAW 285, 302 (1994) (citing Lori L. Yamauchi, Note, Gussin v. Gussin: *Appellate Courts Powerless to Mandate Uniform Starting Points in Divorce Proceedings*, 15 U. HAW. L. REV. 423, 450 (1993)); Kirsten K. Davis, *Ohio's New Administrative License Suspension for Drunk Driving: Essential Statutes Has Unconstitutional Effect*, 55 OHIO ST. L.J. 697, 697 (1994) (citing Michael A. Medeiros, Comment, *Hawai'i's New Administrative Driver's License Revocation Law: A Preliminary Due Process Inquiry*, 14 U. HAW. L. REV. 853 (1992)); Greg Guidry & Gerald Huffman, *Legal and Practical Aspects of Alternative Dispute Resolution in Non-Union Companies*, 6 LAB. LAW. 1, 39 (1990) (citing Lynette T. Oka, *Disarray in the Circuits after* Alexander v. Gardner-Denver Company,

and in judicial opinions in Hawai'i[16] and elsewhere.[17]

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9 U. HAW. L. REV. 506 (1987)); John J. Ross, The Employment Law Year in Review (1991-1992), PLI September-October, 1992 (citing Michael Nauyokas, *Two Growing Procedural Defenses in Common Law Wrongful Discharge Cases—Preemption and Res Judicata*, 11 U. HAW. L. REV. 143 (1989); Richard L. Barnes, *Delusions by Analysis: The Surrogate Mother Problem*, 34 S.D. L. REV. 1, 1989 (citing Comment, *Who's Minding the Nursery: An Analysis of Surrogate Parenting Contracts in Hawaii*, 9 U. HAW. L. REV. 567 (1987)); Fred Bosselman, *Land Use Planning Requirements of Selected Federal Statutes*, ALI-ABA Course Study, (August 19, 1992) (citing Note, "Stop H-3 Association v. Dole: *Congressional Exemption From National Laws Does Not Violate Equal Protection*" 12 U. HAW. L. REV. 405 (1990)); Jerome B. Kauff & David Block, *Recent Developments in the Law of Unjust Dismissal* – 1986, PLI, January 1, 1987 (citing Note, *Promissory Estoppel and the Employment At-Will Doctrine:* Ravelo v. County of Hawaii, 658 P.2d 883 (Haw. 1983), 8 U. HAW. L. REV. 163-190 (Spring 1986); Robert N. Leavell, *Corporate Social Reform, The Business Judgment Rule and Other Considerations*, 20 GA. L. REV. 565 (1986) (citing Comment, *Disclosure of Socially Oriented Information Under The Securities Acts*, 2 U. HAW. L. REV. 557 (1980-81)); Herbert Hovenkam & John A. MacKerron, *Municipal Regulation and Federal Antitrust Policy*, 32 UCLA L. REV. 719 (1985) (citing Marjorie Au & Gregory Turnbull, Note, Community Communications Co. v. City of Boulder: *Antitrust Liability of Home Rule Municipalities and the Parameters of Home Rule Authority*, 5 U. HAW. L. REV. 327 (1983)).

[16] *See e.g.*, Ka Pa'akai O Ka'aina v. Land Use Commission, 7 P.3d 1068 (Hawai'i 2000) (citing D. Kapua Sproat, *The Backlash Against PASH: Legislative Attempts to Restrict Native Hawaiian Rights*, 20 U. HAW. L. REV. 321 (1998)); State v. Castro, 5 P.3d 444 (Haw. App. 2000) (citing Edmund Haitsuka, *Hawai'i Appellate Standards of Review Revisited*, 18 U. HAW. L. REV. 645 (1996)); State v. Pantoja, 974 P.2d 1082, 1093 (Hawai'i 1999) (Acoba, J., concurring) (citing Shirley Cheung, Note, State v. Sinagoga: *The Collateral Use of Uncounseled Misdemeanor Convictions in Hawai'i*, 19 U. HAW. L. REV. 813 (1997)); State v. Mallan, 950 P.2d 178 (Hawai'i 1998) (citing Nancy Neuffer & Gaye Y. Tatsuno, Note, State v. Kam: *The Constitutional Status of Obscenity in Hawaii*, 11 U. HAW. L. REV. 253 (1989)); State v. Tuipuapua, 925 P.2d 311 (Hawai'i 1996) (citing R. Nakatsuji, State v. Lessary: *The Hawaii Supreme Court's Contribution to Double Jeopardy Law*, 17 U. HAW. L. REV. 269 (1995)); Enos v. Pacific Transfer & Warehouse, Inc., 903 P.2d 1273, 1280 (Hawai'i 1995) (citing Professor Eric Yamamoto and Student Danielle Hart, *Rule 11 and State Courts: Panacea or Pandora's Box?*, 13 U. HAW. L. REV. 57 (1991)); Ditto v. McCurdy, 947 P.2d 952 (Hawai'i 1997) (citing Linda S. Martell, Leyson v. Steuermann: *Is There Plain Error in Hawaii's Doctrine of Informed Consent?*, 8 U. HAW. L. REV. 569 (1986)); Bernard v. Char, 903 P.2d 676 (Hawai'i 1995) (citing Linda S. Martell, Leyson v. Steuermann: *Is There Plain Error in Hawaii's Doctrine of Informed Consent?*, 8 U. HAW. L. REV. 569 (1986)); Keomaka v. Zakaib, 811 P.2d 478 (Haw. App. 1991) (citing Linda S. Martell, Leyson v. Steuermann: *Is There Plain Error in Hawaii's Doctrine of Informed Consent?*, 8 U. HAW. L. REV. 569 (1986)); Mroczkowski v. Straub Clinic & Hospital, Inc., 732 P.2d 1255, 1259 (1987) (citing Linda S. Martell, Leyson v. Steuermann: *Is There Plain Error in Hawaii's Doctrine of Informed Consent?*, 8 U. HAW. L. REV. 569 (1986)); Housing Finance and Development Corp. v. Castle, 898 P.2d 576 (Hawai'i 1995) (citing Eric Young & Kerry Kamita, *Extending Land Reform to Leasehold Condominiums in Hawaii*, 14 U. HAW. L. REV. 681 (1992); Doe v. Grosvenor Properties, 829 P.2d 512 (Hawai'i 1992) (citing Virginia Chock & Les Kondo, Knodle v. Waikiki Gateway Hotel, Inc.: *Imposing a Duty to Protect Against Third Party Criminal Conduct on the Premises*, 11 U. HAW. L. REV. 231 (1989)); State v. Kam, 748 P.2d 372 (Haw. 1988) (citing Trudy L. Tongg, Criminal Law—State v. Kam: *Do Community Standards on Pornography Exist?*, 9 U. HAW. L. REV. 727 (1987)); Crawford v. Crawford, 745 P.2d 285, 288

Foremost among the many rewards of law review is sharing work and goals that forge lasting friendships. Joyce McCarty (Editor-in-Chief 1986) sums up it up: "working with folks who are still some of my best friends in Hawaii and getting to know them much better than we would have otherwise." She observes, "In the end most things come down to people and relationships-law review was certainly no different."

Each year, we demand that a self-governed student group publish a high quality scholarly journal without paid staff or significant budget.[18]

(Haw. 1987) (citing Michael P. Healy & Chuck T. Narikiyo, Rana v. Bishop Insurance of Hawai'i, Inc.: *The Death of Basic No-Fault Stacking in Hawaii* (1987) and Daniel T. Kim & Ward F.N. Fujimoto, In re Maldonado: *The Stacking of No-Fault Benefits on Workers' Compensation Benefits for the Same Loss*, 8 U. HAW. L. REV. 619 (1986)); Bertelmann v. Taas Associates, 735 P.2d 930, 933 (Haw. 1987) (citing Bradford F.K. Bliss & Susan D. Sugimoto, Ono v. Applegate: *Common Law Dram Shop Liability*, 3 U. HAW. L. REV. 149 (1981); Hawaii Housing Authority v. Lyman, 704 P.2d 888, 895 (citing Tom Grande & Craig S. Harrison, Midkiff v. Tom: *The Constitutionality of Hawaii's Land Reform Act*, 6 U. HAW. L. REV. (1984)); Chow v. Alston, 634 P.2d 430 (Haw. App. 1981) (citing Comment, *Defamation: A Study in Hawaiian Law*, 1 U. HAW. L. REV. 84 (1979); Pai Ohana v. United States, 875 F. Supp. 680, 688 (D. Hawaii 1995) (citing Gina M. Watumull, Pele Defense Fund v. Paty: *Exacerbating the Inherent Conflicts between Hawaiian Native Tenant Access and Gathering Rights and Western Property Rights*, 16 U. HAW. L. REV. 208 (1994)); Nelsen v. Research Corporation of the University of Hawaii, 805 F. Supp. 837, 849 (D. Hawaii 1992) (citing Linda M. Paul, Masaki v. General Motors Corp.: *Negligent Infliction of Emotional Distress and Loss of Filial Consortium*, 12 U. HAW. L. REV. 215 (1990)).

[17] *See e.g.*, State v. Hendricks, 787 A.2d 1270, 1278 (Vt. 2001) (Dooley, J., concurring) (citing Sarah Lee, Comment, *The Search for the Truth: Admitting Evidence of Prior Abuse in Cases of Domestic Violence*, 20 U. HAW. L. REV. 221 (1998)); VLT Corporation v. Unitrode Corporation, 194 F.R.D. 8 (2000) (citing Glenn Theodore Melchinger, *Collective Benefit: Why Japan's New Strict Product Liability Law is 'Strictly Business,'* 19 U. HAW. L. REV. 879 (1997); Doe v. Doe, 712 A.2d 132 (Md. App. 1998), rev'd 747 A.2d 617 (Md. 2000) (citing Recent Development, *Interspousal Torts: A Procedural Framework for Hawai'i*, 19 U. HAW. L. REV. 377 (1997)); Cammack v. GTE California Incorporated, 55 Cal. Rptr. 2d 837 (Cal. App. 1996) (citing Michael Nauyokas, *Two Growing Procedural Defenses in Common Law Wrongful Discharge Cases – Preemption and Res Judicata*, 11 U. HAW. L. REV. 143 (1989)); Saldana v. Wyoming, 846 P.2d 604, 639 (Wyo. 1993) (citing Karen L. Stanitz, State v. Rothman: *Expanding the Individual's Right to Privacy Under the Hawaii Constitution*, 13 U. HAW. L. REV. 619 (1991); Guiney v. Police Commission of Boston, 582 N.E.2d 523, 528 (Mass. 1991) (citing Susan Haberberger, *Reasonable Searches Absent Individualized Suspicion: Is There a Drug-Testing Exception to the Fourth Amendment Warrant Requirement After* Skinner v. Railway Labor Executive Association?, 12 U. HAW. L. REV. 345 (1990)); Engberg v. Meyer, 820 P.2d 70, 112 (Wyo. 1991) (citing Steven Kim, State v. Smith: *The Standard of Effectiveness of Counsel in Hawaii Following* Strickland v. Washington, 9 U. HAW. L. REV. 371 (1987)); Amin v. Wyoming, 774 P.2d 597, 619 (Wyo. 1989) (citing Steven Kim, State v. Smith: *The Standard of Effectiveness of Counsel in Hawaii Following* Strickland v. Washington, 9 U. HAW. L. REV. 371 (1987)).

[18] As an advisor to Law Review, each year I fear that this year may be the one in which members live out William Golding's novel, *Lord of the Flies*. Shortly after selection, new members are civilized, keenly intelligent men and women. In those dark days of tech-editing

Remarkably, year after year, the law review staff comes through. On the occasion of the University of Hawai'i Law Review's twenty-fifth anniversary, we celebrate this remarkable institution and twenty-five years of student leadership, accomplishment and grit.

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thousands of footnotes, as deadlines are abandoned, the workload grows insurmountably, mishaps of production stalk the review, I marvel that members are not transformed from civilized students into a lawless savage band haunting the library. Instead, they pull together, and each year, a wonderful, thoughtful, fresh journal appears.

Evolution-Creationism Debate: Evaluating the Constitutionality of Teaching Intelligent Design in Public School Classrooms

I. INTRODUCTION

In July 2001, the Hawai'i Board of Education proposed introducing the Biblical story of creationism into public school science classes.[1] Board member Denise Matsumoto proposed the teaching of creationism as an alternative theory to evolution.[2] Ms. Matsumoto "suggested" that she did not believe that evolution, which she defined as the "changing from one species such as ape to man," was possible.[3] Ultimately, after more than fifty people testified in a debate on whether to permit the teaching of creationism, the Hawai'i Board of Education unanimously voted to keep the original science standards.[4] This is not an isolated incident, but part of a long history of controversy between evolution and creationism. This controversy continues across the nation today.

Evolution has generated great controversy between science and religion.[5] Evolution and creationism both propose to explain the origin of life. Their similarities, however, end there. The religious perspective of creationism proposes that God is the creator and that God created the Earth and its life forms.[6] Charles Darwin's theory of evolution, in contrast, explains the origin

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[1] Crystal Kua, *Bible Gains Ground at BOE: A Committee Instigates Changes to Standards That Now Require Students to Know About "Multiple Theories" of Origin, Not Just Evolution*, HONOLULU STAR-BULLETIN, July 27, 2001, *available at* http://starbulletin.com/2001/07/27/news/story1.html [hereinafter *Bible Gains Ground at BOE*].

[2] *Id.* Matsumoto stated, "In other states that have dealt with this . . . some districts say we're just not going to talk about origins because it's not pertinent. Others have said we're going to teach both." *Id.* Matsumoto further stated, "The other theory is creationism. They're both theories. They both have scientific data that go with them." *Id.*

[3] *Id.* Matsumoto stated, "Adaptation is a change within a species to adapt to their survival rather than evolution, which is changing from one species to another species such as ape to man." *Id.* Matsumoto further suggested that such changes between species were not possible. *Id.*

[4] Crystal Kua, *Ed Board Rejects Bible as Science: The BOE Votes Unanimously Against Teaching Multiple Theories of Origin*, HONOLULU STAR-BULLETIN, August 3, 2001, *available at* http://starbulletin.com/2001/08/03/news/story1.html [hereinafter *Ed Board Rejects Bible as Science*].

[5] Peter J. Bowler, *Evolution*, *in* THE HISTORY OF SCIENCE AND RELIGION IN THE WESTERN TRADITION: AN ENCYCLOPEDIA 458 (Gary B. Ferngren ed., 2000).

[6] NATIONAL ACADEMY OF SCIENCES, SCIENCE AND CREATIONISM: A VIEW FROM THE NATIONAL ACADEMY OF SCIENCES 7 (2d ed. 1999) [hereinafter SCIENCE AND CREATIONISM]. Views on creationism may vary from a strict interpretation of the Bible, whereby God created

of life without divine intervention. Darwin's "greatest accomplishment" was to explain the origin of living things "as the result of a natural process, natural selection, without any need to resort to a Creator or other external agent."[7] Based on these stark differences, science and religion are immediately in conflict with one another in a unique intersection of science and religion that takes place in school classrooms.[8] This conflict is further complicated by the Establishment Clause of the First Amendment,[9] which erects a "wall of separation between church and state."[10] While the Establishment Clause raises barriers to the teaching of creationism because of its religious nature, evolution is routinely taught in public schools.

For proponents of creationism, the U.S. Supreme Court has foreclosed the most obvious strategies for teaching creationism in the classroom. The Court has been especially vigilant in guarding against religion in the classroom[11] and has expressly forbidden allowing religion into the classroom through teaching creationism[12] or prohibiting the teaching of evolution.[13] In *Epperson v. Arkansas*,[14] the Supreme Court held that prohibiting the teaching of evolution in schools is a violation of the Establishment Clause.[15] In *Edwards v. Aguillard*,[16] the Court further prohibited "balanced treatment" legislation that requires the teaching of creationism whenever evolution is taught.[17] Advocates

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all life forms less than 10,000 years ago, or a progressive interpretation in which the "Mosaic" days are construed to be long periods of time. Ronald L. Numbers, *Creationism Since 1859*, *in* THE HISTORY OF SCIENCE AND RELIGION IN THE WESTERN TRADITION: AN ENCYCLOPEDIA 313 (Gary B. Ferngren ed., 2000).

[7] Stephen C. Meyer, *The Demarcation of Science and Religion*, *in* THE HISTORY OF SCIENCE AND RELIGION IN THE WESTERN TRADITION: AN ENCYCLOPEDIA 18 (Gary B. Ferngren ed., 2000) (quoting FRANCISCO AYALA, CREATIVE EVOLUTION 4-5 (1994)).

Darwin's theory of evolution involves five theories: (1) evolution as such--characteristics of organisms and lineages change over time; (2) common descent--species diverge from common ancestors, and all of life can be portrayed as one great family tree; (3) gradualness--differences between organisms evolve by innumerable small steps through intermediate forms; (4) population speciation--evolution occurs by changes in the proportions of individuals within a population that differ in one or more hereditary characteristics; and (5) natural selection--the "struggle for life" could result in the evolution of adaptations. DOUGLAS J. FUTUYMA, EVOLUTIONARY BIOLOGY 21-22 (3rd ed. 1998).

[8] *See* Meyer, *supra*, note 7, at 18-19.

[9] U.S. CONST. amend. I. The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion." *Id.*

[10] Reynolds v. United States, 98 U.S. 145, 164 (1878) (citations omitted).

[11] *See infra* section II.D.

[12] Edwards v. Aguillard, 482 U.S. 578, 596-97 (1987).

[13] Epperson v. Arkansas, 393 U.S. 97, 98-99, 109 (1968).

[14] 393 U.S. 97 (1968).

[15] *Id.* at 109.

[16] 482 U.S. 578 (1987).

[17] *Id.* at 581, 596-97.

of creationism are therefore forced to find other means of prohibiting the teaching of evolution or introducing creationism into public schools.

The most recent strategies for advancing creationist views in the classroom have been slightly more subtle than the anti-evolution and balanced treatment laws addressed in *Epperson* and *Edwards*. In August 1999, the Kansas State Board of Education voted to remove from the school curriculum certain evolutionary concepts that are in direct conflict with creationist views.[18] The concept of evolution of species from common ancestors,[19] for example, opposes the creationist view that God created the Earth's life forms[20] and was removed from the Kansas curriculum.[21] The concept of evolution by adaptation within species,[22] however, does not oppose creationist views and

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[18] *See* Eric P. Martin, Note, *The Evolutionary Threat of Creationism: The Kansas School Board of Education's Omission of Evolution From Public School Criteria*, 27 J. LEGIS. 167, 170 (2001). Beginning in the 2000-2001 school year, the Kansas state science tests would not ask questions about the theory that "multiple species have evolved from a common ancestor" or the theory that "the universe originated in an explosion, or Big Bang." *Id.* (quoting Jacques Steinberg, *Evolution Struggle Shifts to Kansas School Districts*, N.Y. TIMES, Aug. 25, 1999, at A1). *See also* Marjorie George, Comment, *And Then God Created Kansas? The Evolution/Creationism Debate in America's Public Schools*, 149 U. PA. L. REV. 843, 866 (2001). In addition to omitting macroevolution, the change from one species to another, and the Big Bang theory, the revised standards no longer listed evolution as one of science's unifying concepts. *Id.* (quoting Kate Beem, *Woman's Creationism Crusade Shakes Up Public Education*, KAN. CITY STAR, Nov. 27, 1999, at A1). *See generally* Coleen M. McGrath, Note, *Redefining Science to Accommodate Religious Beliefs: The Constitutionality of the 1999 Kansas Science Education Standards*, 45 N.Y.L. SCH. L. REV. 297, 309-20 (2000) (describing the content and adoption of the 1999 Kansas Science Education Standards).

[19] "Macroevolution" is defined as "[e]volutionary changes occurring over long time spans and usually involving changes in many traits." *See* WILLIAM K. PURVES ET AL., LIFE: THE SCIENCE OF BIOLOGY G18 (4th ed. 1995). Macroevolution deals with the concept of the formation of species. *Id.* at 448. "Speciation" is the process by which a single species splits into two or more species, which thereafter evolve as distinct lineages. *Id.* The daughter species are characterized as having evolved from a common ancestor, the original single species. *Id.* From a much broader perspective, the theory of evolution postulates that "all living things are descended from a common ancestor." *Id.* at 426-27; *see also* FUTUYMA, *supra* note 7, at 21. This common ancestor, from which "all living things are descended," is believed to have given rise to the 1.5 million or more species that exist today. PURVES, *supra*, at 426-27, 446.

[20] *See* SCIENCE AND CREATIONISM, *supra* note 6, at 7; Numbers, *supra* note 6, at 313; *see also supra* note 6 and accompanying text.

[21] *See* Martin, *supra* note 18, at 169-70. The Kansas Board of Education defined macroevolution as "evolution between species" and removed macroevolution from the science standards. *Id. See also* McGrath, *supra* note 18, at 317 ("Indicators one, two, four and five, which focused on the origins of life and the earth and processes that may give rise to new species ('macroevolution'), were eliminated.").

[22] Adaptation *within* species is "microevolution." PURVES ET AL., *supra* note 19, at G19. Microevolution is the short-term changes within a species that usually involve a small number of traits and minor genetic changes. *Id.* at 442, G19. Microevolution does not explain the formation of species. *Id.*

was not removed from the curriculum.[23] Another approach to advancing creationist views in the classroom is the requirement that a disclaimer disavowing endorsement of evolution be read prior to a teaching of evolution.[24] The Tangipahoa Parish Board of Education in Louisiana, for example, adopted a resolution disclaiming endorsement of evolution after it failed to introduce religion into the curriculum.[25] A third strategy to advance creationist views is to erode the validity of evolution by requiring the teaching of the evidence against evolution.[26]

The newest approach to introducing creationist views into the classroom is the teaching of the theory of "intelligent design."[27] Under this theory, the complexity of life forms can be explained not by undirected natural causes but by intelligent causes.[28] Advocates of intelligent design do not specifically identify the nature or the identity of the intelligent cause and claim to have no "prior religious commitments,"[29] thereby preserving characterization of the theory as non-religious and potentially scientific.

At the present time, the Supreme Court is divided as to the proper test that should be applied in analyzing whether a law has violated the Establishment Clause.[30] The Supreme Court has used three primary tests to evaluate whether a government action violates the Establishment Clause. The three-part *Lemon* test requires that a law: (1) have a secular purpose, (2) have a primary effect

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[23] *See* Martin, *supra* note 18, at 169 (stating that the Kansas Board of Education distinguished macroevolution from microevolution and omitted macroevolution from the science standards); McGrath, *supra* note 18, at 317 ("Indicator three, which refers to the changes within a species, or 'microevolution,' was retained in the Subcommittee's standards.").

[24] *See, e.g.*, Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 341 (5th Cir. 1999).

[25] *Id.*

[26] *See* Lisa D. Kirkpatrick, Note, *Forgetting the Lessons of History: The Evolution of Creationism and Current Trends to Restrict the Teaching of Evolution in Public Schools*, 49 DRAKE L. REV. 125, 138 (2000). Teaching the evidence against evolution is not simply the teaching of creationism. The purpose of teaching such evidence is to discredit evolution as a valid scientific theory. *See infra* notes 381-389 and accompanying text.

[27] *See* H. Wayne House, *Darwinism and the Law: Can Non-Naturalistic Scientific Theories Survive Constitutional Challenge?*, 13 REGENT U. L. REV. 355, 397 (2001); Deborah A. Reule, Note, *The New Face of Creationism: The Establishment Clause and the Latest Efforts to Suppress Evolution in Public Schools*, 54 VAND L. REV. 2555, 2587 (2001).

[28] William A. Dembski, *Introduction: Mere Creation*, *in* MERE CREATION: SCIENCE, FAITH & INTELLIGENT DESIGN 17 (William A. Dembski ed., 1998) [hereinafter Mere Creation].

[29] WILLIAM A. DEMBSKI, INTELLIGENT DESIGN: THE BRIDGE BETWEEN SCIENCE & TECHNOLOGY 247 (1999) [hereinafter INTELLIGENT DESIGN]; *see also* MERE CREATION, *supra* note 28, at 17 ("[I]ntelligent design presupposes neither a creator nor miracles. Intelligent design is theologically minimalist. It detects intelligence without speculating about the nature of the intelligence.").

[30] *Freiler*, 185 F.3d at 343 ("[W]e have evaluated state action challenged on Establishment Clause grounds under each of 'three complementary (and occasionally overlapping) tests' established by the Supreme Court.").

that does not advance or inhibit religion, and (3) does not involve excessive government entanglement.[31] Justice O'Connor prefers the endorsement test, which gauges constitutionality by whether a law communicates government endorsement or approval of religion.[32] Justice Kennedy, in contrast, advocates the coercion test, which requires that a government action force objectors to participate in the activity in order to violate the Establishment Clause.[33] Applications of the different tests may result in different outcomes. This creates confusion and uncertainty in determining what government actions would be permissible under the Establishment Clause.

This paper argues that a law requiring the teaching of intelligent design would violate the Establishment Clause under all three tests. Part II of this paper begins with a background of the antagonistic history between evolution and creationism. This section then examines the Establishment Clause jurisprudence, focusing on the formation and application of the tests currently used to determine Establishment Clause violations and the cases resolving issues within the evolution-creationism arena. Part II continues with a review of other Establishment Clause cases that take place in school settings in order to demonstrate the higher standard of scrutiny that is applied in school settings. Finally, Part II discusses the recent strategies employed by creationists to erode the teaching of evolution in public schools and to introduce creationism into the classroom, culminating in the most recent strategy of intelligent design. Part III analyzes the constitutionality of a law requiring the teaching of intelligent design in the public schools and compares such an analysis to the analyses of other creationist strategies. It begins with an assessment of whether intelligent design is, on its merits and not within the context of the evolution-creationism controversy, a religious or a scientific theory. This examination reveals that intelligent design is a religious theory, not a scientific theory. This section then analyzes the constitutionality of the intelligent design theory under the *Lemon* test, the endorsement test, and the coercion test, and concludes that a law requiring the teaching of intelligent design is in violation of the Establishment Clause under each of these tests. Part III then examines other creationist strategies to introduce creationism into the classroom under the same tests, similarly concluding that these creationist strategies are also impermissible under the Establishment Clause. From this analysis of other creationist strategies and the analysis of a law requiring intelligent design, Part III then articulates factors that are common to creationist strategies examined in this paper that render any current or potential creationist strategy a violation of the Establishment Clause. Finally, Part IV

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[31] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

[32] Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring).

[33] Lee v. Weisman, 505 U.S. 577, 593 (1992).

concludes that any effort to erode the teaching of evolution or to introduce creationist views into the public schools should be unconstitutional.

II. BACKGROUND

A review of Establishment Clause jurisprudence is central to any analysis of the constitutionality of a government action under the Establishment Clause. This paper analyzes the constitutionality of a law requiring the teaching of the theory of intelligent design. In order to analyze such a law, however, it is important to place this theory within the historical context of the evolution-creationism controversy and within the larger framework of religious intrusions into the school.

A. History of Evolution-Creationism Debate

The Supreme Court has recognized the "historic and contemporaneous link between the teachings of certain religious denominations and the teaching of evolution."[34] As a result of the evolutionary theories espoused in 1859 by Charles Darwin in *The Origin of Species*,[35] a controversy erupted in the 1920s.[36] William Jennings Bryan led the anti-evolution movement and hoped to "drive Darwinism from our schools."[37] Ordinary people began to see Darwin's theory of evolution as "a symbol of the moral corruption that was undermining traditional values" because "[t]o treat humans as animals . . . was to invite the evils of hedonism and social Darwinism."[38] The battle between religious fundamentalism and scientific theory entered the courtroom in the much publicized "Scopes Monkey Trial" of 1925, in which John Thomas Scopes, prosecuted by William Jennings Bryan himself, was convicted of violating Tennessee's anti-evolution law.[39] By the end of the decade, several states had considered anti-evolution legislation, banned evolution in public schools, prohibited evolution textbooks, or condemned the teaching of Darwinism.[40] Anti-evolution sentiment soon subsided, only to be revived

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[34] Edwards v. Aguillard, 482 U.S. 578, 590 (1987).

[35] CHARLES DARWIN, THE ORIGIN OF SPECIES (Gramercy Books 1979) (1859).

[36] Numbers, *supra* note 6, at 314.

[37] *Id.*

[38] Bowler, *supra* note 5, at 463.

[39] *See* Scopes v. Tennessee, 278 S.W. 57 (Tenn. 1925); Bowler, *supra* note 5, at 463. The Tennessee Anti-Evolution Act provided that "it shall be unlawful for any teacher . . . to teach any theory that denies the story of the divine creation of man as taught in the Bible and to teach instead that man has descended from a lower order of animals." *Scopes*, 278 S.W. at 363. *See infra* note 328 (describing the evolution of humans from other primates)

[40] *See* Numbers, *supra* note 6, at 314.

again in the 1960s.[41] Unlike the efforts in the 1920s to ban evolution entirely, anti-evolutionists in the 1970s focused on giving evolution and creationism balanced treatment in public schools, thereby focusing their efforts on introducing creationism into classrooms.[42]

Although advocates of creationism have attempted to bar evolution from being taught in public schools, evolution has become a prominent and well-established theory among scientists.[43] Evolution has also become a central and underlying concept in school science curricula. The *National Science Education Standards*[44] has recognized evolution as a "unifying concept,"[45] meaning the concepts of evolution unify science disciplines and provide students with powerful ideas that help them to understand the natural world.[46]

B. Establishment Clause Jurisprudence

The First Amendment states that "Congress shall make no law respecting an establishment of religion."[47] The Establishment Clause serves to erect a "wall of separation between church and State."[48] In order to better understand the purpose of the Establishment Clause, it is prudent to examine the environment of the period in which this constitutional provision was drafted.[49]

Many of this country's early settlers fled religious persecution in Europe, where laws forced them to attend particular churches of the government's choosing.[50] To compel loyalty to a favored church, "men and women had been fined, cast in jail, cruelly tortured, and killed."[51] The colonial leaders

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[41] *See* Bowler, *supra* note 5, at 463.

[42] *See* Numbers, *supra* note 6, at 317.

[43] *See* SCIENCE AND CREATIONISM, *supra* note 6, at 1. The fact that evolution has taken place is accepted among scientists. NATIONAL ACADEMY OF SCIENCES, TEACHING ABOUT EVOLUTION AND THE NATURE OF SCIENCE 125 (1998) [hereinafter TEACHING ABOUT EVOLUTION] ("There is no longer a debate among scientists over whether evolution has taken place.").

[44] NATIONAL RESEARCH COUNCIL, NATIONAL SCIENCE EDUCATION STANDARDS (1996) [hereinafter NATIONAL SCIENCE EDUCATION STANDARDS].

[45] *Id.* at 104.

[46] *Id.* Evolution is discussed throughout the *National Science Education Standards* from grade 5 through 12. *See* TEACHING ABOUT EVOLUTION, *supra* note 43, at 48-53 (discussing NATIONAL SCIENCE EDUCATION STANDARDS, *supra* note 44).

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

[48] Reynolds v. United States, 98 U.S. 145, 164 (1878) (citations omitted).

[49] *See generally* Everson v. Bd. of Educ., 330 U.S. 1, 8-13 (1947) (providing a "review [of] the background and environment of the period in which that constitutional language was fashioned and adopted.").

[50] *See id.* at 8.

[51] *See id.* at 9. These punishments fell upon individuals who committed "offenses" such as "speaking disrespectfully of the views of ministers of government-established churches,

perpetuated these practices in the colonies.[52] Religious freedom in the colonies meant "the liberty to practice religion as they saw fit and to penalize anyone who disagreed with them."[53] The Establishment Clause was therefore enacted to provide protection for colonists against the practices of the colonial leaders.[54]

In 1947, the Supreme Court provided interpretation and clarification of the Establishment Clause in *Everson v. Board of Education*.[55] The Court adopted Thomas Jefferson's view that the Establishment Clause was "intended to erect 'a wall of separation between Church and State.'"[56] The Court further stated that the "wall [between church and state] must be kept high and impregnable."[57] Government may not "pass laws which aid one religion, aid all religions, or prefer one religion over another."[58]

In the years following the landmark decision of *Everson*, the Supreme Court has been unable to reach a consensus on a method to determine whether a government program violates the Establishment Clause.[59] The Court has

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nonattendance at those churches, expressions of non-belief in their doctrines, and failure to pay taxes and tithes to support them." *Id.*

[52] *See id.* These practices "became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence." *Id.* at 11. The colonists grew to resent the imposition of taxes to pay for government-established church expenses such as paying salaries of ministers and building and maintaining churches and church property. *See id.*

[53] *See* Jon Veen, Note, *Where Do We Go From Here? The Need For Consistent Establishment Clause Jurisprudence*, 52 RUTGERS L. REV. 1195, 1198 (2000) (citing ISAAC KRAMNICK & R. LAURENCE MOORE, THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS 47 (1996)).

[54] *See Everson*, 330 U.S. at 11; *see also* Veen, *supra* note 53, at 1198.

[55] 330 U.S. 1 (1947).

[56] *Id.* at 16 (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)). The Court further interpreted the Establishment Clause:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever from they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

Id. at 15-16.

[57] *Id.* at 18.

[58] *Id.* at 15.

[59] *See* Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 343 (5th Cir. 1999) (stating that the Establishment Clause jurisprudence is "rife with confusion").

applied different tests to the different facts before it,[60] and its opinions have been plagued with multiple concurrences and dissents. The primary tests applied by the Court are: the *Lemon* test, the endorsement test, and the coercion test. Since the Court has not settled on a single test, an examination of each test is central to a discussion of the constitutionality of any state action that may violate the Establishment Clause.

1. Lemon *Test*

In *Lemon v. Kurtzman*,[61] the Supreme Court established a three-part test to determine whether a particular government action was in compliance with the Establishment Clause: "[1] the statute must have a secular legislative purpose; [2] [the statute's] principal or primary effect must be one that neither advances nor inhibits religion; [and] [3] the statute must not foster 'an excessive government entanglement with religion.'"[62] The first prong of the *Lemon* test, also known as the "purpose prong," does not require a purely secular purpose in order to comply with the Establishment Clause.[63] If the state action is motivated entirely by a purpose to advance religion, however, it is unconstitutional.[64] Also, the Court has determined that a law promoting religion in general, rather than promoting a particular religion, has a purpose to promote religion.[65] The second prong of the *Lemon* test, known as the "effects test," examines the actual effect of the state action.[66] The third prong, excessive

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[60] *See, e.g.*, Mitchell v. Helms, 530 U.S. 793 (2000) (applying a modified *Lemon* test in upholding a school-aid program where the federal government distributes funds to state and local governmental agencies, which in turn lend educational materials and equipment to public and private schools); Lee v. Weisman, 505 U.S. 577, 592-93, 599 (1992) (applying the coercion test in holding that clerical members cannot offer prayer at official high school graduation ceremonies); Allegheny v. ACLU, 492 U.S. 573, 598-602, 616-20 (1989) (applying the endorsement test in examining the constitutionality of holiday displays).

[61] 403 U.S. 602 (1971).

[62] *Id.* at 612-13 (citations omitted).

[63] Wallace v. Jaffree, 472 U.S. 38, 56 (1985) ("For even though a statute that is motivated in part by a religious purpose may satisfy the first criterion, the First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion." (citations omitted)).

[64] *Id.*

[65] *Id.* at 52-53 ("[T]he Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendement embraces the right to select any religious faith or none at all.").

[66] *See, e.g.*, Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 779-80 (1973) ("New York's maintenance and repair provisions violate the Establishment Clause because their effect, inevitably, is to subsidize and advance the religious mission of sectarian schools.").

government entanglement, is a "question of kind and degree"[67] as to the relationship and interaction between the government and religious organizations.[68]

The *Lemon* test was most recently applied in 2000 in *Mitchell v. Helms*.[69] There, the Court upheld a school-aid program in which the federal government distributed funds to state and local governmental agencies that subsequently provided educational materials and equipment to public and private schools.[70] Although the Court has not consistently applied the *Lemon* test,[71] the most recent application of the *Lemon* test in *Mitchell v. Helms* indicates that *Lemon* is still a viable test to apply in Establishment Clause cases.[72]

2. Endorsement Test

The endorsement test first appeared in Justice O'Connor's concurrence in *Lynch v. Donnelly*.[73] A government endorses religion if it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders,

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[67] Lynch v. Donnelly, 465 U.S. 668, 684 (1984).

[68] *See* Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). Entanglement is generally addressed in the context of government aid. Agostini v. Felton, 521 U.S. 203, 232 (1997). The factors that are considered in examining government entanglement are: (1) the character and purposes of the institutions that are benefited; (2) the nature of the aid that the government provides; and (3) the resulting relationship between the government and the religious authority. *Lemon*, 403 U.S. at 615.

[69] 530 U.S. 793 (2000).

[70] *See id.* (applying modified *Lemon* test). The Court modified the second and third prongs of the *Lemon* test in *Agostini v. Felton* in the context of government aid to religious schools. *Agostini*, 521 U.S. at 233, 234. The modified *Lemon* test examines only the purpose and effect tests. Three factors to be considered in determining a statute's effect are whether the statute: (1) results in governmental indoctrination; (2) defines its recipients by reference to religion; or (3) creates an excessive entanglement. *Agostini*, 521 U.S. at 234. The entanglement prong of the *Lemon* test was thus "recast . . . as simply one criterion relevant to determining a statute's effect." *Mitchell*, 530 U.S. at 808. This modified *Lemon* test was applied in *Mitchell*. *See Mitchell*, 530 U.S. 793.

[71] *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 786-91 (1983) (focusing on the history and tradition of paying a chaplain to open the Nebraska legislative session in upholding such practice); Allegheny v. ACLU, 492 U.S. 573, 598-602, 616-20 (1989) (applying the endorsement test in examining the constitutionality of holiday displays); Lee v. Weisman, 505 U.S. 577, 592-93, 599 (1992) (applying the coercion test in holding that clerical members cannot offer prayer at official high school graduation ceremonies).

[72] "Although widely criticized and occasionally ignored, the *Lemon* test continues to govern Establishment Clause cases." Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 344 (5th Cir. 1999).

[73] Lynch v. Donnelly, 465 U.S. 668, 688-94 (1984) (O'Connor, J., concurring).

favored members of the political community."[74] The endorsement test inquires whether the "government practice [has] the effect of communicating a message of government endorsement or disapproval of religion."[75] In determining whether the effect of a statute is to communicate the government's endorsement or disapproval of religion, the dispositive issue is "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement."[76]

In *Allegheny v. ACLU*,[77] the Court applied the endorsement test and evaluated whether two holiday displays violated the Establishment Clause.[78] The Court concluded that a crèche[79] displayed near the Grand Staircase of the county courthouse was a government endorsement of religion,[80] while a display consisting of a menorah, a Christmas tree, and a nonreligious sign[81] was a recognition of Chanukah and Christmas as secular holiday celebrations, rather than an endorsement of the Christian and Jewish faiths.[82] The endorsement test also permeated the Supreme Court's analysis in a recent Establishment Clause case, *Santa Fe Independent School District v. Doe*,[83] involving student-initiated, student-led prayer at football games.[84] The Court determined that the school policy permitting such prayer had the "purpose and perception" of school endorsement and was therefore unconstitutional.[85]

3. Coercion Test

Under the coercion test, a violation of the Establishment Clause occurs when the government's action forces objectors to participate in a religious activity and induces them to conform.[86] This standard therefore requires

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[74] *Id.* at 688.

[75] *Id.* at 692.

[76] Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

[77] 492 U.S. 573 (1989).

[78] *Allegheny* may be the Court's "most significant reliance on the endorsement test." Robert Vaught, Comment, *The Debate Over Evolution: A Constitutional Analysis of the Kansas State Board of Education*, 48 U. Kan. L. Rev. 1013, 1031 (2000).

[79] A "crèche" is a "representation of the Nativity scene." THE AMERICAN HERITAGE DICTIONARY 338 (2d ed. 1991).

[80] *Allegheny*, 492 U.S. at 601-02.

[81] *Id.* at 581-82. The sign included the mayor's name and was entitled "Salute to Liberty." *Id.*

[82] *Id.* at 616, 620.

[83] 530 U.S. 290 (2000).

[84] *Id.* at 294.

[85] *Id.* at 316.

[86] Lee v. Weisman, 505 U.S. 577, 599 (1992). "Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting." *Id.* at 593. "The sole question presented is whether a religious exercise may be

greater advancement of religion by the government to trigger a violation of the Establishment Clause. In *Lee v. Weisman*,[87] the Supreme Court held that the Establishment Clause forbids the offering of prayers by members of the clergy at public middle school and high school graduation ceremonies.[88] When making its decision, the Court evaluated the coercion involved in holding a prayer at a formal high school ceremony.[89] It found that the coercion was heightened by the school setting of the prayer.[90] At first glance, a prayer at a graduation ceremony may be viewed by most believers as a reasonable request that nonbelievers accommodate their beliefs.[91] After exploring the actual effect of such a policy in detail, however, the Court found it coercive.[92] The Court focused on the experience of objectors, stating that the circumstances forced them either to participate or to protest.[93] The circumstances effectively required participation in the religious exercise.[94]

The Court incorporated the coercion test in its analysis of student-initiated prayer at football games in *Santa Fe Independent School District v. Doe*.[95] The Court noted that pre-game prayer coerced those present to participate in the religious exercise.[96] The Court therefore appears to currently favor the coercion analysis in school settings where a religious activity is directly thrust upon students.[97]

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conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform." *Id.* at 599. The Fifth Circuit Court of Appeals distilled the coercion test into a three-part test: "(1) the government directs (2) a formal religious activity (3) in such a way as to oblige the participation of objectors." Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 343 (5th Cir. 1999).

[87] 505 U.S. 577 (1992).

[88] *Id.* at 599.

[89] *Id.* at 593.

[90] *Id.* ("The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction.").

[91] *Id.* at 592.

[92] *Id.* at 593.

[93] *Id.*

[94] *Id.* at 594.

[95] 530 U.S. 290 (2000).

[96] *Id.* at 312 ("Even if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pre[-]game prayer has the improper effect of coercing those present to participate in an act of religious worship.").

[97] In *Lee*, the religious activity was a prayer by clergy at graduation ceremonies. *Lee*, 505 U.S. at 580. In *Santa Fe*, the religious activity was a student-initiated prayer at football games. *Santa Fe*, 530 U.S. at 294.

C. Judicial Decisions on the Evolution-Creationism Conflict

The evolution-creationism precedent has demonstrated little tolerance for infringement on the teaching of evolution. The Supreme Court has considered only two cases directly affecting the evolution-creationism debate: *Epperson v. Arkansas*[98] and *Edwards v. Aguillard*.[99] The Fifth Circuit Court of Appeals has produced the most recent case addressing this controversy, *Freiler v. Tangipahoa Parish Board of Education*.[100]

In the 1968 case of *Epperson v. Arkansas*,[101] the Supreme Court addressed a state statute that prohibited the teaching of evolution at any state-supported school or university.[102] The Court determined that the purpose of the statute was to prevent the teaching of evolution because it conflicted with the account of human origins according to the Book of Genesis.[103] The Court characterized the statute as an adaptation of Tennessee's Anti-Evolution Act of 1925.[104] The First Amendment forbids both the preference of a religious theory and the prohibition of a contrary theory.[105] The Court therefore struck down the Arkansas statute, concluding that it was unconstitutional.[106]

The Supreme Court's next clarification came in 1987 with *Edwards v. Aguillard*.[107] The Court considered the constitutionality of Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction" Act[108] ("Creationism Act"), which prohibited the teaching of evolution in public schools unless it was accompanied by instruction in "creation science."[109] The Court applied the *Lemon* test and struck down the Creationism Act because the purpose of the Act was to advance "the religious

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[98] 393 U.S. 97 (1968).

[99] 482 U.S. 578 (1987).

[100] 185 F.3d 337 (5th Cir. 1999).

[101] 393 U.S. 97 (1968).

[102] *Id.* at 98-99. The Arkansas statute "ma[de] it unlawful for a teacher in any state-supported school or university 'to teach the theory or doctrine that mankind ascended or descended from a lower order of animals.'" *Id.*

[103] *Id.* at 107. The statute existed solely to further "fundamentalist sectarian conviction." *Id.* at 108. In the campaign to secure adoption of the statute, advertisements read: "THE BIBLE OR ATHEISM, WHICH?" "All atheists favor evolution. If you agree with atheism vote against Act No. 1. If you agree with the Bible vote for Act No. 1." *Id.* at 108 n.16.

[104] *Id.* at 98.

[105] *Id.* at 106-07.

[106] *Id.* at 109.

[107] 482 U.S. 578 (1987).

[108] LA. REV. STAT. ANN. §§ 17:286.1 to 17:286.7 (West 1982).

[109] *See Edwards*, 482 U.S. at 581. Under the "Creationism Act," public schools were not required to teach either evolution or creation science, but if one theory was taught, then the other must be taught. *Id.*

viewpoint that a supernatural being created humankind."[110] Despite the state's assertions that the Creationism Act was enacted with the secular purpose of protecting academic freedom,[111] the Court determined that, in fact, there was a "preeminent religious purpose" behind the statute.[112]

In determining that the Creationism Act had a religious purpose rather than a secular purpose, the Court looked to the "historic and contemporaneous" link between the teachings of evolution and certain religious groups.[113] The Court reviewed the *Epperson* Court's comparison of Arkansas's anti-evolution statute to Tennessee's Anti-Evolution Act of 1925[114] and its recognition of the "fundamentalist religious fervor" driving the statute.[115] The *Edwards* Court determined that "[t]hese same historic and contemporaneous antagonisms between the teachings of certain religious denominations and the teaching of evolution [were] present."[116] The Court found that the Creationism Act was designed either to promote the theory of creation science, which embodied a particular religious tenet, or to prohibit the teaching of evolution, which was disfavored by certain religious sects.[117] The Establishment Clause forbids each of these goals.[118] The Creationism Act was therefore struck down because it had a religious purpose.[119]

The Supreme Court has not made any subsequent rulings on evolution-creationism issues. The Fifth Circuit Court of Appeals, however, has ruled on the constitutionality of a requirement that a disclaimer be read immediately prior to the teaching of evolution in public schools in *Freiler v. Tangipahoa Parish Board of Education*.[120] The required disclaimer, mandated by the Tangipahoa Parish Board of Education, stated that the teaching of evolution was designed to educate students and was not intended to "influence or dissuade the Biblical version of Creation."[121] The disclaimer further stated that

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[110] *Id.* at 591.

[111] *Id.* at 586.

[112] *Id.* at 590 ("[W]e need not be blind in this case to the legislature's preeminent religious purpose in enacting this statute.").

[113] *Id.* at 591.

[114] *Id.* at 590 (citing Epperson v. Arkansas, 393 U.S. 97, 109 (1968)).

[115] *Id.* (quoting *Epperson*, 393 U.S. at 98).

[116] *Id.* at 591. The Court in *Edwards* also noted that the legislative history evidenced religious intent. *Id.* at 592-93. The senator sponsoring the statute had explained in legislative hearings that "his disdain for the theory of evolution resulted from the support that evolution supplied to views contrary to his own religious beliefs." *Id.* at 592.

[117] *Id.* at 593.

[118] *Id.* (citing *Epperson*, 393 U.S. at 106-07).

[119] *Id.* at 596-97.

[120] Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 341, 348 (5th Cir. 1999).

[121] *Id.* at 341. The disclaimer was required to be recited immediately before any unit of study on evolution in elementary or high school classes. *Id.* The disclaimer reads:

It is hereby recognized by the Tangipahoa Board of Education, that the lesson to be

students were encouraged to examine each alternative before forming an opinion.[122] The court in *Freiler* applied the *Lemon* test to determine the constitutionality of the disclaimer.[123]

The disclaimer passed the purpose prong of the *Lemon* test. The court found that the school board's claimed secular purposes, "disclaim[ing] any orthodoxy of belief that could be inferred from the exclusive placement of evolution in the curriculum" and "reduc[ing] offense to the sensibilities and sensitivities of any student or parent caused by the teaching of evolution,"[124] were sincere and legitimate.[125] The court's application of the *Lemon* test's effect prong, however, proved fatal for the disclaimer.[126] The court evaluated the effect of the disclaimer by focusing on the message received by the students and

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presented, regarding the origin of life and matter, is known as the Scientific Theory of Evolution and should be presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept. It is further recognized by the Board of Education that it is the basic right and privilege of each student to form his/her own opinion and maintain beliefs taught by parents on this very important matter of the origin of life and matter. Students are urged to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion.

Id.

[122] *Id.*

[123] *Id.* at 344. The *Freiler* court primarily applied the *Lemon* test to determine the constitutionality of the disclaimer. *Id.* at 344-48. In examining the second prong of the *Lemon* test, however, the court stated that an analysis under the second prong of the *Lemon* test was similar to an analysis pursuant to the endorsement test. *Id.* at 346. Ultimately, the court determined that the disclaimer violated both the second prong of the *Lemon* test and the endorsement test. *Id.* at 348. This holding, however, seems primarily based on a *Lemon* test analysis. *Id.* at 344-48.

[124] *Id.* at 344. The court determined that the disclaimer did not serve the school board's stated secular purpose to "encourage informed freedom of belief" and that this purpose was a "sham." *Id.* at 344-45. The court stated that school children hearing the disclaimer heard the message that the teaching of evolution did not need to affect what they already knew. *Id.* at 345. This message received by the students did not encourage critical thinking. *Id.*

[125] *Id.* The court evaluated whether disclaiming orthodoxy of belief and reducing student/parent offense that were religious in nature were permissible purposes. The court determined stated that "a purpose is no less secular simply because it is infused with a religious element" and determined that the purposes were not religious purposes. *Id.*

[126] *Id.* at 348. The court stated that the inquiry under the second prong of the *Lemon* test was whether "the practice under review in fact conveys a message of endorsement or disapproval." *Id.* at 346 (quoting Doe v. Santa Fe Indep. Sch. Dist., 168 F.3d 806, 817 (5th Cir. 1999)). The court therefore likened this part of the *Lemon* test to the endorsement test. *Compare id.* at 346 (articulating the second prong of the *Lemon* test as a question of whether "the practice . . . in fact conveys a message of endorsement or disapproval."), *with* Lynch v. Donnelly, 465 U.S. 668, 692 (O'Connor, J., concurring) (articulating the endorsement test as a question of whether the "government practice [has] the effect of communicating a message of government endorsement or disapproval").

concluded that the primary effect of the disclaimer was to "protect and maintain a particular religious viewpoint, namely belief in the Biblical version of creation."[127] Rather than merely disclaiming an endorsement of religion, the disclaimer encouraged students to "read and meditate upon religion in general and the 'Biblical version of Creation' in particular."[128] The Fifth Circuit noted that it is permissible for schools to introduce religion and religious concepts in an appropriate study of "history, civilization, ethics, comparative religion, or the like,"[129] but it is not permissible to urge students "to think about religious theories of 'the origin of life and matter' as an *alternative* to evolution, the State-mandated curriculum."[130]

D. Schools Create a Particularly Coercive Environment

Much of the Establishment Clause jurisprudence has involved religious advancement in public schools.[131] The Supreme Court has recognized that there are "heightened concerns with protecting freedom of conscience from subtle coercive pressure" in the public elementary and secondary schools.[132] Public school children are young and impressionable, and the government's activities in the education of such children can have a "magnified impact" on them.[133] In the school setting, children may not only emulate their teachers as role models but may be particularly susceptible to peer pressure.[134] The government therefore "exerts great authority and coercive power" by compelling children to attend school.[135] The Court noted that in the unique and special circumstances of school, it may be difficult to distinguish between voluntary participation and coerced participation.[136] Prior to 1947, when the

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[127] *Freiler*, 185 F.3d at 346. The factors critical to the court's consideration were: (1) the juxtaposition of the disavowal of the endorsement of evolution with the urging that students explore other theories on the origin of life; (2) the reminder that students may adhere to the beliefs taught by their parents regarding the origin of life; and (3) the fact that the Biblical version of the origin of life was the only alternative that was explicitly referenced in the disclaimer. *Id.*

[128] *Id.*

[129] *Id.* at 347.

[130] *Id.*

[131] *See* Joanne Yasus, Note, *What's In a Name? Nothing Good if it's Friday: The Seventh Circuit Invalidates Good Friday Public School Holiday*, 29 J. MARSHALL L. REV. 1031, 1038 n.46 (1996).

[132] Lee v. Weisman, 505 U.S. 577, 592 (1992).

[133] Sch. Dist. v. Ball, 473 U.S. 373, 383 (1985); *see* Edwards v. Aguillard, 482 U.S. 578, 584 (1987); Sch. Dist. v. Schempp, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring).

[134] *See Edwards*, 482 U.S. at 584.

[135] *See id.*; *Schempp*, 374 U.S. at 307 (Goldberg, J., concurring).

[136] Bd. of Educ. v. Mergens, 496 U.S. 226, 261-62 (1990) (Kennedy, J., concurring in part and concurring in the judgment).

Court decided the landmark case of *Everson v. Board of Education*,[137] public schools regularly conducted religious exercises,[138] and these exercises continued after the decision of *Everson*.[139]

The Supreme Court has demonstrated its commitment to protecting public school children from direct government action that violates the Establishment Clause.[140] In *Santa Fe Independent School District v. Doe*,[141] the Court determined that a school district's policy to permit, but not require, a student-initiated, student-led prayer at high school football games was a violation of the Establishment Clause.[142] At first glance, such a policy may appear to incur minimal government advancement because it is the students who initiate and lead the prayer. However, the Court determined that the pre-game prayers had "the imprint of the State and thus put school-age children who objected in an untenable position."[143] Also, the student was still required to deliver a

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[137] 330 U.S. 1 (1947).

[138] *See* Allan Gordus, Note, *The Establishment Clause and Prayers in Public High School Graduations:* Jones v. Clear Creek Independent School District, 47 ARK. L. REV. 653, 659 (1994).

[139] *Id.* Allan Gordus posits that there is a conflict within the public school board, which derives its authority from the state but is elected by the community. *Id.* The school board may therefore be asked by the community it serves to enact policies that violate the Establishment Clause. *Id.*

[140] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 599 (1992) (holding that clerical members cannot offer prayer at official high school graduation ceremonies); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 316 (2000) (striking down a school district's policy of permitting student-initiated, student led prayers before football games); *Schempp*, 374 U.S. at 225 (holding that state may not require that schools begin each day with readings from the Bible); Wallace v. Jaffree, 472 U.S. 38, 61 (1985) (holding that a state law authorizing a minute of silence for prayer or meditation was unconstitutional).

[141] 530 U.S. 290 (2000).

[142] *Id.* at 316. The policy stated in pertinent part:

> The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.
>
> Upon advice and direction of the high school principal . . . the high school student council shall conduct an election . . . to determine whether such a statement or invocation will be a party of the pre-game ceremonies and if so, shall elect a student . . . to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.

Id. at 298 n.6.

[143] *Id.* at 305 (citing *Lee*, 505 U.S. at 590). The policy required that an election be held to determine whether a statement or invocation would be part of the pre-game ceremonies and, if so, which student shall deliver such a statement. *Id.* at 298 n.6. Despite the school district's "hands-off" approach, the Court observed that the elections were required to be held upon the

"statement or invocation" that would "solemnize the event."[144] These requirements served to channel the student's statement toward a religious message that appealed for divine assistance.[145] Consequently, although the policy facially appeared to deliver control to the student, the Court determined the policy to involve "both perceived and actual endorsement of religion."[146]

In *Lee v. Weisman*,[147] the Court similarly protected the students' freedom to attend their high school graduation ceremony without forced participation in a religious exercise.[148] The Court recognized high school graduation as "one of life's most significant occasions," a time for family and friends to celebrate the student's success and to express mutual gratitude and respect.[149] The Court refused to permit the State to "exact religious conformity as the price of attending [the student's] own high school graduation."[150] The Court thus remained committed to ensuring that public school students are protected from religious infringements.

The Supreme Court has remained vigilant in maintaining an impregnable "wall of separation between church and state"[151] in public schools where the students readily perceive and experience direct government action.[152] The

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advice and direction of the school's principal and that the elections only took place because the school board *chose* to permit students to deliver pre-game statements. *Id.* at 306.

[144] *Id.*; *see id.* at 298 n.6 (providing language of policy).

[145] *Id.* at 306-07. The *Santa Fe* Court stated:

> [T]he policy, by its terms, invites and encourages religious messages. The policy itself states that the purpose of the message is "to solemnize the event." A religious message is the most obvious method of solemnizing an event. . . . [T]he only type of message that is expressly endorsed in the text [of the policy] is an "invocation"--a term that primarily describes an appeal for divine assistance.

Id.

[146] *Id.* at 305.

[147] 505 U.S. 577 (1992).

[148] *Id.* at 599.

[149] *Id.* at 595.

[150] *Id.* at 596.

[151] Reynolds v. United States, 98 U.S. 145, 164 (1878).

[152] In other school situations not resulting in the direct and readily perceived government action, the Supreme Court has not demonstrated such commitment to keeping church and state entirely separate. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 234-35 (1997) (holding that "a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present" in this case); Mitchell v. Helms, 530 U.S. 793, 835 (2000) (upholding a school-aid program in which the federal government provided funds to state and local government agencies that subsequently used such funds for both public and private schools, even though many of the private schools receiving the funds were religiously-affiliated); Zorach v. Clauson, 343 U.S. 306, 314-15 (1952) (upholding a released-time program where public schools released students during the school day so that they may leave school to

prayer before football games in *Santa Fe Independent School District v. Doe* and the high school graduation prayer in *Lee v. Weisman* were both readily and vividly experienced by the students.[153] Similarly, the effects of Tennessee's Anti-Evolution Act of 1925 in *Epperson v. Arkansas* and Louisiana's Creationism Act in *Edwards v. Aguillard* were experienced first-hand by the students in the content of the instruction that they were provided or deprived of.[154] The Court has further exhibited its vigilance in this arena by striking down as unconstitutional laws requiring that public school students recite a non-denominational prayer each day,[155] laws requiring that "at least ten verses from the Holy Bible" be read "without comment" at every public school each morning,[156] laws requiring the posting of the Ten Commandments in public school classrooms,[157] and laws authorizing a one-minute period of silence in public schools for "meditation or voluntary prayer."[158]

E. Recent Attempts to Introduce Creationist Concepts Into Schools

In *Epperson v. Arkansas*[159] and *Edwards v. Aguillard*,[160] the Supreme Court considered two anti-evolution statutes, one prohibiting the teaching of evolution[161] and the other requiring the balanced treatment of evolution and creationism.[162] In striking down both statutes, the Court demonstrated that it is unwilling to allow religion into the public schools through anti-evolution legislation.[163] Despite the Supreme Court's clear precedent, creationists

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go to religious centers for religious exercise or devotional exercises).

[153] *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311-12 (2000); *Lee*, 505 U.S. at 593-94.

[154] Epperson v. Arkansas, 393 U.S. 97, 98-99 (1968); Edwards v. Aguillard, 482 U.S. 578, 581 (1987); *see also supra* notes 101-119 and accompanying text.

[155] Engel v. Vitale, 370 U.S. 421, 433 (1962). The prayer to be recited stated: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422.

[156] Sch. Dist. v. Schempp, 374 U.S. 203, 205, 225 (1963). A child could be excused from such a Bible reading only upon the written request of a parent or guardian. *Id.* at 205.

[157] Stone v. Graham, 449 U.S. 39, 42-43 (1980).

[158] Wallace v. Jaffree, 472 U.S. 38, 41, 61 (1985). In examining whether there was a religious purpose to the statute, the Court in *Wallace v. Jaffree* stated that the record provided an "unambiguous affirmative answer." *Id.* at 56. Senator Donald Holmes, the sponsor of the bill, stated that the legislation was "an 'effort to return voluntary prayer' to the public schools." *Id.* at 56-57.

[159] 393 U.S. 97 (1968).

[160] 482 U.S. 578 (1987).

[161] *Epperson*, 393 U.S. at 98-99.

[162] *Edwards*, 482 U.S. at 581.

[163] *Epperson*, 393 U.S. at 109; *Edwards*, 482 U.S. at 596-97.

remain committed either to removing evolution from school curricula or introducing creationist ideas into the classrooms.[164]

Creationist tactics to further their goals have included a variety of different approaches. One approach, which bears some resemblance to the anti-evolution statute in *Epperson*,[165] removes macroevolution from state curricula.[166] Although there is no law enacted to prohibit the teaching of evolution, school boards have discretion as to its teaching.[167] Disclaimers are also used to further creationist goals.[168] Disclaimers seek to limit the influence of evolutionary teachings by disclaiming endorsement of evolution, mentioning a possible creationist theory of the origin of life, or reminding students that evolution is theory rather than fact.[169] Another tactic employed by creationists is teaching evidence against evolution.[170]

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[164] *See generally* Kirkpatrick, *supra* note 26, at 135-40; Reule, *supra* note 27, at 2580-88.

[165] *Epperson*, 393 U.S. at 98-99.

[166] *See, e.g.*, Martin, *supra* note 18, at 170; George, *supra* note 18, at 866; *see also supra* notes 18-23 and accompanying text.

[167] *See* Reule, *supra* note 27, at 2581.

[168] *See* Kirkpatrick, *supra* note 26, at 137; Reule, *supra* note 27, at 2585.

[169] *See* Kirkpatrick, *supra* note 26, at 137-38; Reule, *supra* note 27, at 2585.

[170] *See* Kirkpatrick, *supra* note 26, at 138. Commentators disagree as to, practically speaking, how much evidence there is to teach against evolution. David K. DeWolf et al. provides grounds upon which "scientists writing in technical journals across the subdisciplines of biology have questioned neo-Darwinism theory" along with sources for such assertions. David K. DeWolf et al., *Teaching the Origins Controversy: Science, or Religion, or Speech?*, 2000 UTAH L. REV. 39, 50-55 (2000). It has also been asserted, however, that there is "no credible evidence disproving the evolutionary process." *See* Kirkpatrick, *supra* note 26, at 138 (citing CNN, *In the Beginning* (CNN television broadcast, Mar. 12, 2000) [hereinafter CNN]). According to the late Stephen Jay Gould, one of the world's leading and most influential paleontologists and former professor at Harvard University:

> There are things we don't understand about the mechanisms of evolution, so if . . . the creationist folks are saying there are holes, there are certain holes in our explanatory mechanisms, but if the holes are supposed to be substantial doubt that the process happened at all, then there are no such holes.

Kirkpatrick, *supra* note 26, at 138 (quoting CNN, *supra*).

Commentators with creationist agendas may not accurately represent the scientists' views. The National Academy of Sciences has noted that "[t]hose opposed to the teaching of evolution sometimes use quotations from prominent scientists out of context to claim that scientists do not support evolution." TEACHING ABOUT EVOLUTION, *supra* note 43, at 56. For example, Professor Gould wrote that "the extreme rarity of transitional forms in the fossil record persists as the trade secret of paleontology." *Id.* In writing this statement, however, Gould was discussing how evolution took place in terms of punctuated equilibrium. *Id.* Gould has commented that the quotation, taken by itself, is "dishonest in leaving out the following explanatory material showing [his] true purpose--to discuss rates of evolutionary change, not to deny the fact of evolution itself." *Id.* In *Teaching the Origins Controversy*, one of the reasons for questioning neo-Darwinian theory is "missing transitional forms," which the authors supported with the above quote from Gould: "[T]he extreme rarity of transitional forms in the

The theory of intelligent design has arisen as the newest challenger of evolution.[171] This theory proposes that "intelligent causes rather than undirected natural causes best explain many features of living systems."[172] Intelligent design "assumes the work is too complex to be anything but the plan of an intelligent agent."[173] This theory differs from the classical creationism version of the origin of life.[174] First, intelligent design accepts the belief in an "old" earth,[175] while creationism adopts the Biblical narrative of the earth's creation by "God."[176] Intelligent design is also more "theologically diverse" than creationism, a belief held primarily by Fundamentalist and Evangelical Christians.[177] Furthermore, intelligent design advocates describe the theory as "a new program for scientific research,"[178] while creationism lacks a research program.[179] Despite these differences between intelligent design and creationism, however, intelligent design still differs notably from

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fossil record persists as the trade secret of paleontology." DeWolf et al., *supra*, at 52, 52 n.45 (citing Stephen Jay Gould, *Evolution's Erratic Pace*, NAT. HIST., May 1977, at 12, 14).

[171] *See* House, *supra* note 27, at 397 ("A new movement has now arisen to challenge naturalistic evolution."); Reule, *supra* note 27, at 2587 ("[A] third strategy, known as Intelligent Design, has taken shape in recent years.").

The theory of intelligent design has been further developed in recently published works: WILLIAM A. DEMBSKI, THE DESIGN INFERENCE: ELIMINATING CHANGE THROUGH SMALL PROBABILITIES (1998); WILLIAM A. DEMBSKI, INTELLIGENT DESIGN: THE BRIDGE BETWEEN SCIENCE & THEOLOGY (1999); MERE CREATION: SCIENCE, FAITH & INTELLIGENT DESIGN (William A. Dembski, ed., 1998).

[172] DeWolf et al., *supra* note 170, at 59; *see* MERE CREATION, *supra* note 28, at 17 ("From observable features of the natural world, intelligent design infers to an intelligence responsible for those features. The world contains events, objects and structures that exhaust the explanatory resources of undirected natural causes and that can be adequately explained only by recourse to intelligent causes.").

[173] *See* Kirkpatrick, *supra* note 26, at 139 (citing John Gibeaut, *Evolution of a Controversy: Almost 75 Years After the Scopes Trial, a New Species of the Old Darwin vs. Creation Debate Has Come to Life in a Suburban Seattle Community*, A.B.A. J. Nov. 1999, at 50, 52); MERE CREATION, *supra* note 28, at 17.

David K. DeWolf et al. propose the following example to demonstrate the notion that the world is too complex to have been created by natural causes: "Imagine a computer 'mutating' at random the text of the play *Hamlet* by duplicating, inverting, recombining and changing various sections. Would such a computer simulation have a realistic chance of generating Stephen Hawking's best-seller, *A Brief History of Time*, even granting multiple millions of undirected iterations?" DeWolf et al., *supra* note 170, at 50 n.40.

[174] *See* House, *supra* note 27, at 402-03.

[175] *See id.* at 402. "Old" earth refers to the current scientific estimate of approximately 4.6 billion years old. *Id.*

[176] *See* Numbers, *supra* note 6, at 313; *see also supra* note 6 and accompanying text.

[177] *See* House, *supra* note 27, at 402-03.

[178] MERE CREATION, *supra* note 28, at 16.

[179] *See* House, *supra* note 27, at 403.

the theory of evolution, which attributes the complexity and diversity in the world to *natural* causes, not to the design of an intelligent agent.[180]

Creationists have tried to introduce intelligent design into the school curriculum. The textbook *Of Pandas and People: The Central Question of Biological Origins*[181] incorporated the intelligent design theory and caused controversy as communities debated whether it should be adopted in the curriculum.[182] In 2002, the Ohio Board of Education considered a proposal to introduce intelligent design into the science curriculum, sparking controversy in Ohio.[183] The quasi-religious,[184] quasi-scientific[185] nature of intelligent design makes it a greater threat as an infringement on the teaching of evolution since it is not facially a religious-based theory. It is therefore important and relevant to determine the constitutionality of the theory under the Establishment Clause.

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[180] *See* Meyer, *supra* note 7, at 18.

[181] PERCIVAL DAVIS & DEAN H. KENYON, OF PANDAS AND PEOPLE: THE CENTRAL QUESTION OF BIOLOGICAL ORIGINS (2d ed. 1993), *cited in* Jay D. Wexler, Note, *Of Pandas, People, and the First Amendment: The Constitutionality of Teaching Intelligent Design in the Public Schools*, 49 STAN. L. REV. 439, 440 n.2 (1997).

[182] *See* George, *supra* note 18, at 862.

[183] In January 2002, Ohio became the "latest battleground in the national debate over what high school biology students should know about evolution" when conservative groups, including some groups that had tried and failed to introduce the Biblical story of creationism into the classroom, pushed for the teaching of intelligent design in public school classrooms. Associated Press, *Evolution to be Part of State Science Curriculum*, THE MARION STAR, Oct. 16, 2002, *available at* http://www.marionstar.com/news/stories/20021016/localnews/303463.html. *See also* Francis X. Clines, *Ohio Board Hears Debate on an Alternative to Darwinism*, N.Y. TIMES, Feb. 13, 2002, at A16 ("The latest challenge to evolution's primacy in the nation's classrooms--the theory of intelligent design . . . --will get a full-scale hearing next month before Ohio Board of Education members, who are in a heated debate over whether established science censors other views about the origins of life."); Amanda Onion, *Design vs. Darwin: Ohio Science Standards Under Fire by Supporters of Alternative Theory*, ABCNEWS.com, Apr. 1, 2002, *at* http://more.abcnews.go.com/sections/scitech/dailynews/evolution020401.html (last visited January 24, 2003) ("[A] theory known as Intelligent Design is clamoring for recognition in Ohio. Supporters of the theory are arguing that Ohio's science education standards should include language saying that Darwin's theory remains unproven and is challenged by other theories, including Intelligent Design.").

On October 15, 2002, the Ohio Board of Education unanimously voted to adopt standards that emphasized both evolution and critical analysis of the theory but did not mention intelligent design. Associated Press, *supra*.

[184] One commentator has suggested that intelligent design theorists do not identify a specific "intelligent designer," thus precluding characterization of this theory as a religious theory. *See* Kirkpatrick, *supra* note 26, at 139.

[185] Intelligent design advocates describe the theory as "a new program for scientific research." MERE CREATION, *supra* note 28, at 16.

III. ANALYSIS

Whether one applies the *Lemon* test, the endorsement test, or the coercion test to a state law requiring the teaching of intelligent design in public schools, it becomes evident that such a law would violate the Establishment Clause. The theory of intelligent design, examined on its merits and not within the context of the larger evolution-creationism debate, is religious and not scientific.

A. Intelligent Design is Religion

The theory of intelligent design is not a scientific theory but a religious belief. The nonscientific, religious nature of this theory can be demonstrated on the theory's merits alone, apart from its placement in the evolution-creationism debate and its advocacy by creationists.[186] First, intelligent design does not meet the definition of science, but it does meet the definition of religion. Second, it is similar to nontheistic beliefs that have been characterized by courts as religions. Finally, proponents of intelligent design, or "designists," look outside the natural world to explain the origin of life, an approach that is inherently religious.

Intelligent design is not science. Science is "a particular way of knowing about the world [in which] explanations are limited to those based on observations and experiments that can be substantiated by other scientists."[187] Scientific interpretations of natural phenomena, therefore, must also be testable by observations and experiments.[188] The court in *McLean v. Arkansas Board of Education*[189] echoed this belief when it provided the essential characteristics of science: (1) it is guided by natural law; (2) it is explanatory by reference to natural law; (3) it is testable against the empirical world; (4) its conclusions are tentative, i.e., are not necessarily the final word; and (5) it is falsifiable.[190]

Intelligent design is not science because it is not testable by observations and experiments, requirements of the scientific method.[191] Instead, the presence of intelligent design is *inferred* where there is "complexity" and

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[186] *See id.* at 13-14. William A. Dembski, advocate for intelligent design, proposes "a theory of creation" that will gain support among Christians in "defeat[ing] the common enemy of creation, to wit, naturalism." *Id.* The characterization of intelligent design as a religious belief will further be analyzed in its full context within the framework of current Establishment Clause jurisprudence in section III.B.

[187] SCIENCE AND CREATIONISM, *supra* note 6, at 1.

[188] *Id.* at 25.

[189] 529 F. Supp. 1255 (E.D. Ark. 1982).

[190] *Id.* at 1267.

[191] *Id.*

"specification."[192] Complexity means the event is highly improbable;[193] specification means that "the object exhibits the type of pattern characteristic of intelligence."[194] Although designists have a "rigorous criterion for distinguishing intelligently caused objects from unintelligently caused ones,"[195] this is not the scientific method. When designists determine that a particular event is both complex and specified, they trigger the conclusion that the event was guided by design;[196] this conclusion cannot be tested or refuted by observations and experiments. It is impossible to refute the conclusion that the event was guided by design because it "depends upon a supernatural intervention which is not guided by natural law."[197] Intelligent design is not

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[192] *See* DeWolf et al., *supra* note 170, at 60 n.73 (explaining "complexity" and "specification"); INTELLIGENT DESIGN, *supra* note 29, at 128 (providing that complexity "ensures that the object is not so simple that it can readily be explained by chance" and that specification "ensures that the object exhibits the type of pattern characteristic of intelligence").

The inference of design can be explained by an "explanatory filter" flowchart. *See id.* at 133; WILLIAM A. DEMBSKI, THE DESIGN INFERENCE: ELIMINATING CHANCE THROUGH SMALL PROBABILITIES 36 (1998) [hereinafter DESIGN INFERENCE]. "Whenever explaining an event, we must choose from three competing modes of explanation. These are *regularity*, *chance*, and *design*." DESIGN INFERENCE, *supra*, at 36. Regularity and chance are used to describe events that are not complex and not specified. If an event has a high probability, it is caused by regularity. *Id.* at 38. Highly probable events include a bullet firing when a gun's trigger is pulled and getting at least one head when a coin is tossed 100 times. *Id.* If an event has an intermediate probability, it is caused by chance. *Id.* at 39. The one in thirty-six chance of a pair of dice landing with each die displaying a one is an example of intermediate probability. *Id.* An event that has a small probability, or a complex event, may also be caused by chance. *Id.* at 40. However, if this complex event is also specified, chance is eliminated, and the event is a result of design. *Id. See generally* INTELLIGENT DESIGN, *supra* note 29, at 128-34; DESIGN INFERENCE, *supra*, at 36-66.

Take, for example, the following three sequences:

1) ABABABABABABABABABABABABAB;

2) inetehnskysk)idfawqnz,mfdifhsnmcpew,ms.s/a;

3) Time and tide waits for no man.

See DeWolf et al., *supra* note 170, at 60 n.73. The first sequence is highly probable; it is not complex. *Id.* The second sequence is highly improbable but is disordered; it is complex but lacks specification. *Id.* The third sequence, however, is both complex and specified and infers an intelligent design. *Id.*

[193] INTELLIGENT DESIGN, *supra* note 29, at 128, 130.

[194] *Id.* at 128.

[195] *Id.* at 127.

[196] *See generally* INTELLIGENT DESIGN, *supra* note 29, at 128-34; DESIGN INFERENCE, *supra* note 192, at 36-66; *supra* note 192.

[197] McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255, 1267 (E.D. Ark. 1982); *see also* SCIENCE AND CREATIONISM, *supra* note 6, at 25 ("Creationism, intelligent design, and other claims of supernatural intervention in the origin of life or of species are not science because they are not testable by the methods of science."). The *McLean* court concluded that creation science, which embodied the concept of creation from nothing, was not science because it "depend[ed] upon a supernatural intervention which [was] not guided by natural law." *McLean*, 529 F. Supp. at 1267.

guided by natural law, explanatory by reference to natural law, or testable,[198] and it therefore fails to meet the essential characteristics set forth by the *McLean* court.[199] The theory of intelligent design is not a scientific theory.

Rather, the theory of intelligent design is a religious view. Although the *McLean* court was able to define science,[200] courts have struggled with establishing a definition of religion.[201] The Supreme Court defined religion as "a given belief that is sincere and meaningful [and] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God."[202] The *McLean* court recognized that the power of "creation from nothing" is an inherently religious belief.[203] The theory of intelligent design postulates that an intelligent designer directed the formation of complex life forms.[204] Although advocates for intelligent design claim that "intelligent design presupposes neither a creator nor miracles" and that it "detects intelligence without speculating about the nature of the intelligence,"[205] the theory nevertheless attributes the creation of the earth to some divine intelligent presence. Intelligent design proposes the presence of a divine intelligence and

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[198] The characteristics of being guided by natural law, explanatory by reference to natural law, and testable are characteristics of science as provided by *McLean*. *McLean*, 529 F. Supp. at 1267.

[199] *Id.*

[200] *Id.*

[201] *See* Jonathan C. Lipson, *On Balance: Religious Liberty and Third-Party Harms*, 84 MINN. L. REV. 589, 597 (2000) ("Although the Supreme Court has been reluctant to define religion, it has circled around the issue for over one hundred years."); Jane Rutherford, *Religion, Rationality, and Special Treatment*, 9 WM. & MARY BILL RTS. J. 303, 320 (2001) ("This question [of how religion should be defined] is extremely difficult, and one that the Court has frequently avoided."). The definition of religion is more often an issue in Free Exercise cases than it is in Establishment Clause cases. *See* Craig A. Mason, Comment, *"Secular Humanism" and the Definition of Religion: Extending a Modified "Ultimate Concern" Test to* Mozert v. Hawkins County Public Schools *and* Smith v. Board of School Commissioners, 63 WASH. L. REV. 445, 448 (1988). However, even in Free Exercise jurisprudence, the courts are reluctant to define religion for fear of implicitly establishing those beliefs through Free Exercise protections. *Id.*

[202] United States v. Seeger, 380 U.S. 163, 166 (1965).

[203] *McLean*, 529 F. Supp. at 1266. The *McLean* court addressed the religious nature of "creation out of nothing": "'[C]reation out of nothing' is a concept unique to Western religions. In traditional Western religious thought, the conception of a creator of the world is a conception of God. Indeed, creation of the world 'out of nothing' is the ultimate religious statement because God is the only actor." *Id.* at 1265. The *McLean* court's discussion of "creation out of nothing" differs from the present discussion in that advocates of intelligent design do not advocate "sudden creation from nothing." *Id. See* House, *supra* note 27, at 402 (providing that intelligent design accepts the belief in an "old" earth). The idea of attributing the power to create or to guide creation, however, is the same.

[204] *See* MERE CREATION, *supra* note 28, at 17.

[205] *Id.*

conveys to this divine being the power of creation, a power that is inherently religious.[206] Intelligent design bears a strong resemblance to an "orthodox belief in God"[207] and is therefore religious in nature.

Intelligent design can be characterized as a religion even if the advocates of this view do not identify the intelligent designer.[208] Intelligent design, by its nature of giving deference to an intelligence that is inherent in the design of life forms, is a religion. A religion does not require that the believer actually hold an "orthodox belief in God," but rather that the belief "occupies a place in the life of its possessor parallel to [such an orthodox belief]."[209] Intelligent design may therefore be characterized as a religion without describing the intelligent designer.

Furthermore, nontheistic beliefs have been recognized as religions. In *Torcaso v. Watkins*,[210] the Supreme Court recognized that religion may include beliefs that do not teach the existence of "God."[211] One of the nontheistic religions acknowledged in a note by the Supreme Court is secular humanism,[212] which is "a nontheistic belief system based on a faith in rationality, human autonomy, and democracy."[213] The Eleventh Circuit Court of Appeals addressed the possible advancement of the religion of secular humanism in *Smith v. Board of School Commissioners*.[214] The court declined to expressly state that secular humanism was a religion[215] but nevertheless assumed that secular humanism was a religion for purposes of its Establish-

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[206] *McLean*, 529 F. Supp. at 1265-66.

[207] *Seeger*, 380 U.S. at 166.

[208] *See* MERE CREATION, *supra* note 28, at 17. "[I]ntelligent design presupposes neither a creator nor miracles. Intelligent design is theologically minimalist. It detects intelligence without speculating about the nature of the intelligence." *Id.* "[I]ntelligent design resists speculating about the nature, moral character or purposes of this intelligence . . . ." *Id.* at 18. Designists assert that "one of the great strengths of intelligent design" is that "it distinguishes design from purpose." *Id.*

[209] *Seeger*, 380 U.S. at 166. The Supreme Court in *Seeger* did not define religion simply as an "orthodox belief in God" but rather as a "belief that is *sincere and meaningful* [and] occupies a place in the life of its possessor *parallel to that* filled by the orthodox belief in God." *Id.* (emphasis added).

[210] 367 U.S. 488 (1961).

[211] *Id.* at 495 n.11 ("Among *religions* in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism and others." (emphasis added)).

[212] *Id.*

[213] Stephen P. Weldon, *Secular Humanism*, *in* THE HISTORY OF SCIENCE AND RELIGION IN THE WESTERN TRADITION: AN ENCYCLOPEDIA 208 (Gary B. Ferngren, ed., 2000).

[214] 827 F.2d 684 (11th Cir. 1987).

[215] At the outset, the *Smith* court stated that "even assuming that secular humanism is a religion for purposes of the [E]stablishment [C]lause," there was no violation of the Establishment Clause. *Id.* at 689.

ment Clause analysis.[216] Also, in *Malnak v. Yogi*,[217] the Third Circuit Court of Appeals examined the religious nature of "Science of Creative Intelligence Transcendental Meditation" ("SCI/TM"), which teaches that "'pure creative intelligence' is the basis of life, and that through the process of Transcendental Meditation students can perceive the full potential of their lives."[218] The Third Circuit held that SCI/TM "was religious in nature."[219]

The commonality of secular humanism, transcendental meditation, and theistic religions is their shared goal of understanding the world through a belief in rationality, autonomy, and democracy (secular humanism),[220] pure creative intelligence (transcendental meditation),[221] or the existence of a deity (theistic religions). Similarly, intelligent design is the belief in an underlying intelligence that is inherent in the formation of complex life forms.[222] Intelligent design can therefore also be characterized as religion under this comparison.

Finally, intelligent design is a religious belief because it looks outside the natural world to explain our existence. The theories of intelligent design and evolution are markedly different in their explanations of how the present level of complexity and diversity in the world came to be. Under intelligent design, deference is given to an intelligent designer, a supernatural being.[223] When faced with a situation that does not appear to be explained by regularity or chance within the natural world,[224] designists look outside the natural world to a supernatural third-party.[225] This belief in a being that has the power of creation is inherently a religious belief.[226] In contrast, under the theory of evolution, and in following with the *McLean* court's requirement that science be guided by natural law,[227] only natural processes are used to explain the events and processes that occurred from the origin of the universe to our

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[216] *See id.* at 689-95.

[217] 592 F.2d 197 (3rd Cir. 1979).

[218] *Id.* at 198.

[219] *Id.* at 199.

[220] Weldon, *supra* note 213, at 208.

[221] *Malnak*, 592 F.2d at 198.

[222] *See* MERE CREATION, *supra* note 28, at 17.

[223] *Id.* (stating that some "events, objects and structures" are explained only by "recourse to intelligent causes"); *see supra* notes 204-206 and accompanying text. The author submits that a supernatural third-party is the source of the intelligence.

[224] *See* DESIGN INFERENCE, *supra* note 192, at 36 (stating that regularity, chance, and design are the only explanations for an event); *see also supra* note 192.

[225] *See* MERE CREATION, *supra* note 28, at 17 ("The world contains events, objects and structures that exhaust the explanatory resources of undirected natural causes and that can be adequately explained only be recourse to intelligence causes."); *see also supra* note 192.

[226] McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255, 1265-66 (E.D. Ark. 1982).

[227] *Id.* at 1267.

present state.[228] The random variations that occur in the survival or reproduction of organisms arise purely by chance;[229] the differential survival or reproduction of organisms based on these random variations is an unguided process.[230] These differences make evolution a scientific theory and intelligent design a religious belief.

The marked differences in the religious belief of intelligent design and the scientific theory of evolution can be illustrated with an explanation of the formation of the vertebrate eye. The eyes of vertebrates are highly complex.[231] A designist would attribute the incredible complexity of the eye to design by an intelligent agent.[232] Such complexity has a very low probability of occurring by pure chance and would therefore be "complex."[233] The extraordinary intricacies of the eye exhibit the "type of pattern characteristic of intelligence";[234] the eye therefore possesses specification. When both complexity and specification are present, design is inferred.[235] The designist would believe that this type of highly complex formation could not have arisen

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[228] Meyer, *supra* note 7, at 18.

> [Evolutionary biologists] Francisco Ayala, Stephen Jay Gould, William Provine, Douglas Futuyma, Richard Dawkins, Richard Lewontin, and the late G. G. Simpson . . . all agree that neo-Darwinism . . . postulates an exclusively naturalistic mechanism of creation, one that allows no role for a directing intelligence. As Simpson put it: "man is the result of a purposeless and natural process that did not have him in mind." . . . From a Darwinian point of view, any appearance of design in biology is illusory, not real. Thus, even if God exists, his existence is not manifest in the products of nature.

Id. (citations omitted). Evolutionary biologist Francisco Ayala recognized that the functional design of organisms seems to argue for the existence of a designer. Darwin's greatest accomplishment, therefore, was explaining the design of these organisms "as the result of a natural process, natural selection, without any need to resort to a Creator or other external agent." *Id.*

[229] *See* FUTUYMA, *supra* note 7, at 4.

[230] *See id.*

[231] PURVES ET AL., *supra* note 19, at 897 ("Vertebrates . . . have evolved eyes with exceptional abilities to form images of the visual world. These eyes operate like cameras . . . ."); *see generally id.* at 897-904 (providing a general description of the vertebrate eye).

[232] *See* MERE CREATION, *supra* note 28, at 17 ("The world contains events, objects and structures that exhaust the explanatory resources of undirected natural causes and that can be adequately explained only by recourse to intelligence causes."); *see also supra* note 192.

[233] *See* INTELLIGENT DESIGN, *supra* note 29, at 130; *see also supra* note 192. Even Charles Darwin acknowledged that it seemed "absurd" that an eye could have been formed by natural selection. DARWIN, *supra* note 35, at 217. "To suppose that the eye, with all its inimitable contrivances for adjusting the focus to different distances, for admitting different amounts of light, and for the correction of spherical and chromatic aberration, could have been formed by natural selection, seems, I freely confess, absurd in the highest possible degree." *Id.*

[234] *See* INTELLIGENT DESIGN, *supra* note 29, at 128.

[235] *See* DESIGN INFERENCE, *supra* note 192, at 36; *supra* note 192 and accompanying text.

by random chance alone but must have been directed by an intelligent designer.[236]

The evolutionist, however, would explain the formation of the vertebrate eye by the natural process of evolution. The evolutionist would assert that the eye developed gradually over time as a result of the natural process of evolution; natural selection acted on random mutations to cause changes in the features of a simple eye over the course of time to form the complex vertebrate eye.[237] Simple multicellular animals, such as flatworms, have the beginnings of an eye.[238] They use photosensitive cells to collect directional information about light.[239] Although flatworms are only able to receive directional information about light,[240] "half an eye," or an eye capable of sensing light but incapable of forming an image, is more beneficial than no eye.[241] Over time, random changes to a simple eye that enabled the organism to receive more information about its environment would prove beneficial, and the organism with an enhanced eye, even if only a small enhancement, would have a better chance of surviving the pressures of natural selection.[242] These changes would

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[236] *See* MERE CREATION, *supra* note 28, at 17.

[237] *See* DARWIN, *supra* note 35, at 217. Charles Darwin commented:

> [I]f numerous gradations from a perfect and complex eye to one very imperfect and simple, each grade being useful to its possessor, can be shown to exist; if further, the eye does vary ever so slightly, and the variations be inherited, which is certainly the case; and if any variation or modification in the organ be ever useful to an animal under changing conditions of life, then the difficulty of believing that a perfect and complex eye could be formed by natural selection, though insuperable by our imagination, can hardly be considered real.

Id.

[238] *See* PURVES ET AL., *supra* note 19, at 897.

[239] *See id.*

[240] *See id.*

[241] FUTUYMA, *supra* note 7, at 761.

[242] An examination of the different levels of complexity in the eyes of unrelated animals can show the adaptive feasibility of each stage. *See generally id.* at 683.

> The simplest grade is a mere aggregation of a few or many photosensitive cells, found in some flatworms, rotifers, annelid worms, vertebrates (lamprey larvae), and others. The next grade is a simple epidermal cup lined with photic cells; this structure, which can provide some information on the direction of a light source through the differential illumination of different parts of the cup, has evolved independently in numerous lineages of flatworms, cnidarians, molluscs, polychaetes, cephalochordates, and others. From this grade, there are numerous transition series to "pinhole eyes" and thence to "closed eyes," in which translucent cells or cell secretions . . . act as a rudimentary lens. Closed eyes, usually with some kind of lenslike structure, have evolved independently in cnidarians, snails, bivalves, polychaete worms, arthropods, and vertebrates. A closed eye with a lens enables the organism to more accurately determine the direction of incident light and to orient by it, to detect movement of objects, and, by the prineiple of the pinhole camera, to form at least elementary images. Image formation reaches its apogee in insects, in which each element . . . of the compoud eye subtends a small angle of the field of view,

culminate in the modern vertebrate eye.[243]

The evolutionist therefore explains the formation of the complex vertebrate eye through the natural process of random change and increased survival based on beneficial changes. The designist, however, attributes the complexity of the vertebrate eye to design. The designist therefore implicitly gives deference to a supernatural being with the power to direct the formation of such a complex feature, which is the inherently religious power of creation.

B. Scrutiny of Intelligent Design Under the Establishment Clause

The Supreme Court has primarily employed the *Lemon* test, the endorsement test, and the coercion test to determine the constitutionality of a law under the Establishment Clause.[244] A law requiring the teaching of intelligent design in public schools would violate the Establishment Clause under any of these primary tests.[245] Such a law would therefore be unconstitutional.

1. Lemon *Test*

The *Lemon* test requires that: (1) the statute have a secular purpose, (2) the statute's principal or primary effect does not advance or inhibit religion, and (3) the statute must not foster an excessive entanglement with religion.[246] If a law fails to meet any of the three prongs of the *Lemon* test, it will violate the Establishment Clause.[247] When applying the *Lemon* test to a law requiring the teaching of intelligent design in public schools, a court must first look to the purpose prong of the *Lemon* test.[248] A law requiring that intelligent design is taught in public schools would have a religious purpose. The *Lemon* test

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enabling the many elements together to provide a detailed mosaic image; and in cephalopods and vertebrates, in which muscles move the lens or alter its shape in order to focus.

Id.

[243] *See supra* note 242.

[244] *See supra* section II.B.

[245] Such a law may simply require the teaching of intelligent design as part of the school curriculum, or it may be similar to the Louisiana Creationism Act and require the teaching of intelligent design alongside evolution. *See* Edwards v. Aguillard, 482 U.S. 578, 581 (1987) ("The [Louisiana] Creationism Act forbids the teaching of the theory of evolution in public schools unless accompanied by instruction in 'creation science.'" (citing LA. REV. STAT. ANN. § 17:286.4A)).

[246] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

[247] *Id.* The *Lemon* test states: "[1] the statute *must* have a secular legislative purpose; [2] [the statute's] principal or primary effect *must* be one that neither advances nor inhibits religion; [and] [3] the statute *must* not foster 'an excessive government entanglement with religion.'" *Id.* (emphasis added) (citations omitted).

[248] *Id.* at 612.

requires that the statute be "sincere and not a sham."[249] In determining the purpose of a statute, a court will evaluate its history.[250] In *Wallace v. Jaffree*,[251] the Supreme Court examined the history behind an Alabama statute authorizing a moment of silence "for meditation or voluntary prayer" in order to determine whether it had a religious or a secular purpose.[252] A prior Alabama statute authorized a period of silence in public schools "for meditation"[253] but did not specify prayer. The Court determined that the purpose of the subsequent statute was to return voluntary prayer to the public schools.[254] Also, in *Edwards v. Aguillard*,[255] the Court recognized the "historic and contemporaneous antagonisms between the teachings of certain religious denominations and the teaching of evolution"[256] when determining that Louisiana's Creationism Act was enacted with a religious purpose.[257] The historic and contemporaneous link between the teachings of evolution and certain religious groups therefore creates a strong presumption that the requirement of teaching intelligent design in public school classrooms is designed to promote a theory that "embodies a particular religious tenet."[258]

In addition, the theory of intelligent design is advocated by those who support creationist views. William A. Dembski, a leading advocate for intelligent design,[259] seeks to "unif[y] the Christian world around creation."[260] Other writers on the topic of intelligent design also have strong creationist views and religious beliefs.[261] Furthermore, the theory itself attributes the

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[249] *Edwards*, 482 U.S. at 587.

[250] *See, e.g., id.* at 590-93; Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309 (2000).

[251] 472 U.S. 38 (1985).

[252] *Id.* at 41; *id.* at 56-60 (examining the history behind the statute).

[253] *Id.* at 40.

[254] *Id.* at 59-60.

[255] 482 U.S. 578 (1987).

[256] *Id.* at 591.

[257] *Id.*

[258] *Id.* at 593.

[259] *See* House, *supra* note 27, at 401.

[260] MERE CREATION, *supra* note 28, at 13. Dembski further demonstrates his strong creationist views: "As Christians we know that naturalism is false. Nature is not self-sufficient. God created nature as well as any laws by which nature operates. Not only has God created the world, but also God upholds the world moment by moment." *Id.* at 14.

[261] *Mere Creation: Science, Faith & Intelligent Design* is a book on the theory of intelligent design. MERE CREATION: SCIENCE, FAITH & INTELLIGENT DESIGN (William A. Dembski, ed. 1998). The Foreword of this book describes a November 1996 conference that was sponsored by the Christian Leadership Ministries. Henry F. Schaefer III, *Foreword*, *in* MERE CREATION: SCIENCE, FAITH & INTELLIGENT DESIGN 9-12 (William A. Dembski, ed. 1998). The conference was held to bring together scholars and scientists who reject naturalism. *Id.* at 9. "Many of the participants could be described as evangelical Christians." *Id.* Michael Behe, John Mark Reynolds, and David Berlinski, who contributed to the compilation of works in *Mere Creation* were present at the conference. *Id.* The conferees sought, among other things, to "formulate

origin of life to "an intelligence."[262] Design theorists do not expressly identify this intelligent agent,[263] but reserve the task of "connect[ing] the intelligence inferred by the design theorist with the God of Scripture" for the theologian.[264] The intentionally unspoken identity of the intelligent agent as the "God of Scripture"[265] indicates that the intelligent design theory embodies certain religious tenets.[266] Therefore, the law requiring the teaching of intelligent design strongly resembles the Creationism Act in *Edwards*,[267] which the Court struck down because its purpose was to "advance the religious viewpoint that a supernatural being created humankind."[268] These factors weigh heavily in favor of a determination that the law was enacted with the purpose of promoting intelligent design and the religious views it embodies. The state would be unable to counter such a strong presumption with a secular purpose that is sincere and not a sham.[269] Therefore, considering the history of the evolution-creationism controversy and the source of the intelligent design theory, it is evident that a law requiring the teaching of intelligent design would be enacted with the purpose of promoting a religious viewpoint. A law requiring intelligent design in public schools would fail the purpose prong of the *Lemon* test.[270]

If a court were somehow to conclude that a law requiring the teaching of intelligent design was enacted with a secular purpose, it would then evaluate the primary effect of the law under the second prong of the *Lemon* test.[271] Under the effects test, the teaching of intelligent design would have the primary effect of advancing religion.[272] An examination of the message received by the students is instructive in determining the effect of teaching

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a general position statement on origins . . . that could be widely endorsed by Christians." *Id.* at 10. The creationist sentiments expressed are plainly evident in the Foreword and the Introduction of *Mere Creation*. *Id.* at 9-12; MERE CREATION, *supra* note 28, at 13-16.

[262] MERE CREATION, *supra* note 28, at 17.

[263] *Id.* at 17-18; *supra* note 208.

[264] *Id.* at 18.

[265] *Id.*

[266] *See supra* section III.A.

[267] *See* LA. REV. STAT. ANN. §§ 17:286.1 to 17:286.7 (West 1982); Edwards v. Aguillard, 482 U.S. 578, 581 (1987).

[268] *Edwards*, 482 U.S. at 591.

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

[270] In *Epperson* and *Edwards*, the only two cases in which the Supreme Court considered the validity of statutes prohibiting the teaching of evolution or requiring the teaching of creationism, the Court struck down the statutes based on a determination of impermissible religious motivation in the enactment of the statutes. Epperson v. Arkansas, 393 U.S. 97, 107-08, 109 (1968); *Edwards*, 482 U.S. at 591, 596-97.

[271] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[272] *Id.*

intelligent design in school.[273] The theory of intelligent design invokes guidance by an intelligent agent.[274] When an intelligent agent is invoked in the context of the origin of life, the similarity to the Biblical version of creation and the indirect religious message becomes apparent.[275] Therefore, a law requiring the teaching of such a theory would have the primary effect of advancing such religious views. The law would fail the effects test.

The third prong of the *Lemon* test is the least-applied,[276] but a statute may still be in violation of the Establishment Clause if the court finds that there is "excessive government entanglement."[277] A requirement that intelligent design is taught in the classrooms probably would not involve excessive government entanglement.[278] It is unlikely, however, that a court would even evaluate government entanglement since it would find that an intelligent design law fails both the purpose and effects prongs of the *Lemon* test.[279]

2. *Endorsement Test*

The endorsement test inquires whether the "government practice [has] the effect of communicating a message of government endorsement or disapproval of religion."[280] The intelligent design theory attributes the origin of life to "an intelligence"[281] and therefore strongly resembles creationism.[282] The underlying creationist views of the theory of intelligent design are apparent in

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[273] Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 346 (5th Cir. 1999) ("In assessing the primary effect of the contested disclaimer, we focus on the message conveyed by the disclaimer to the students who are its intended audience.").

[274] MERE CREATION, *supra* note 28, at 18.

[275] *See supra* notes 203-206 and accompanying text.

[276] Reule, *supra* note 27, at 2567 (describing the entanglement prong of the test as the "least-applied third prong").

[277] *Lemon*, 403 U.S. at 613. The Court in *Lemon* invalidated a statute that provided supplemental salaries to teachers in parochial schools because the statute would result in entanglement that would require "comprehensive, discriminating, and continuing state surveillance." *Id.* at 619.

[278] In *Agostini v. Felton*, the Court determined that unannounced monthly visits of public supervisors was not excessive government entanglement. Agostini v. Felton, 521 U.S. 203, 234 (1997). Therefore, where the government action does not extend beyond passage of a law and does not entail any "pervasive monitoring" by the state, a court will not find that there is excessive government entanglement. *Id.* at 233-34.

[279] *See supra* text accompanying notes 248-275.

[280] Lynch v. Donnelly, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring).

[281] MERE CREATION, *supra* note 28, at 17.

[282] *See supra* note 6 and accompanying text.

light of the historical antagonisms involved in the evolution-creationism controversy[283] and the source of the intelligent design theory.[284]

In *Allegheny v. ACLU*,[285] the Court explained that a crèche,[286] with its inherent ability to convey a religious message, and the presence of the display at the "'main' and 'most beautiful part' of the building that is the seat of county government"[287] required the conclusion that the crèche in the courthouse was an endorsement of religion.[288] Similarly, the required instruction of a theory that bears such resemblance to the well-known religious belief of creationism in a school setting, where the government "exerts great authority and coercive power" by compelling children to attend school,[289] would be a government endorsement of the religious tenets embodied in creationism and intelligent design. Examining all these factors in their totality, "an objective observer, acquainted with the text, legislative history, and implementation of the statute"[290] would perceive a law requiring the teaching of intelligent design in public schools as a state endorsement of religion. Under this test, the intelligent design law would violate the Establishment Clause.

3. Coercion Test

Coercion exists where the government's actions force objectors to participate in a religious activity and induces them to conform.[291] The Court in *Lee v. Weisman*[292] took great note of circumstances and experiences of objectors.[293] The students at the graduation ceremony in *Lee* experienced "public pressure, as well as peer pressure" to stand together as a group (or at a minimum to "maintain respectful silence during the invocation and benediction").[294] This pressure, reasoned the Court, could be "as real as any overt

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[283] Edwards v. Aguillard, 482 U.S. 578, 590-91, 593 (1987); *see supra* notes 113-116 and accompanying text.

[284] *See supra* notes 259-261 and accompanying text.

[285] 492 U.S. 573 (1989).

[286] *See supra* note 79 (defining "crèche" as a "representation of a Nativity scene").

[287] *Allegheny*, 492 U.S. at 599.

[288] *Id.* at 601-02.

[289] *See* Edwards v. Aguillard, 482 U.S. 578, 584 (1987); Sch. Dist. v. Schempp, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring).

[290] Wallace v. Jaffree, 472 U.S. 28, 76 (1985) (O'Connor, J., concurring).

[291] Lee v. Weisman, 505 U.S. 577, 599 (1992) ("The sole question presented is whether a religious exercise may be conducted . . . in circumstances where [objectors] are induced to conform."); *id.* at 593 (exploring the effect of the policy and finding it to be coercive).

[292] 505 U.S. 577 (1992).

[293] *Id.* at 593.

[294] *Id.*

compulsion."[295] The mere "act of standing or remaining silent" was, for many, "an expression of participation in the . . . prayer."[296] Although some of the participants did not want to join in the prayer but had little objection to standing respectfully, a dissenter could have had a reasonable perception of being forced to pray in a manner that "her conscience will not allow."[297] The Court further reasoned that although the prayer was brief, the "embarrassment and the intrusion" of the religious exercise was not *de minimus*.[298] The intrusion was more than the "two minutes or so" consumed by the prayer.[299]

In *Santa Fe Independent School District v. Doe*,[300] the Court examined the experience of a high school student faced with the prospect of prayer at a football game.[301] The Court recognized that high school football games are "traditional gatherings of a school community" where students, faculty, friends, and family come together for a common cause.[302] Further, the Court acknowledged that students may feel "immense social pressure" or may have a genuine desire to be involved in such an event.[303] Many students may be faced with the difficult choice of either facing a "personally offensive religious ritual" or foregoing participation in the event.[304] Although attending high school football games is purely voluntary,[305] the Establishment Clause did not permit the school district to condition attendance at the high school football game on compliance with a religious exercise.[306] The Court invalidated the policy,[307] demonstrating the higher standard of scrutiny that is required in school settings.

Similarly, it is important to examine carefully the circumstances of a student learning about intelligent design, as well as how an objector may feel.[308] As

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[295] *Id.*

[296] *Id.*

[297] *Id.*

[298] *Id.* at 594.

[299] *Id.*

[300] 530 U.S. 290 (2000).

[301] *Id.* at 311-12. In *Lee*, the Court focused more on the coercion involved with prayer at the specified high school event. *Lee*, 505 U.S. at 593-94. The *Santa Fe* Court, however, more closely examined the importance of the specified high school event in the tradition and experience of high school students. *Santa Fe*, 530 U.S. at 311-12.

[302] *Santa Fe*, 530 U.S. at 312.

[303] *Id.* at 311.

[304] *Id.* at 312.

[305] The Court noted that some students may not have the luxury of voluntary attendance at football games. Cheerleaders, members of the band, and football team members are required to attend the games, sometimes for class credit. *Id.* at 311.

[306] *Id.* at 312.

[307] *Id.* at 316.

[308] On the surface, the teaching of intelligent design in public school classrooms does not appear to qualify as a religious activity of the sort scrutinized under the coercion test in *Lee* or

coercion may be heightened by the school setting,[309] it is important to consider the uniqueness of this context. For elementary and secondary school students, there is an inherent understanding that receiving an education entails the learning of truths. Most students do not recognize this belief on a conscious level, but it exists. At a higher level of education (i.e. college or graduate school), the student may be better able to discriminate between a *viewpoint*, which the student is free to either criticize or agree with, and a *truth*. However, at the level of elementary and secondary education, the notion of learning truths permeates the meaning of being educated.[310]

The science classroom magnifies this belief that the student's education entails learning truths. Scientists strive to understand the nature of the world around us, and science teaches explanations of natural phenomena.[311] Some of these explanations are held with great confidence because they are so thoroughly tested and examined.[312] These explanations are essentially held out as truths. Evolution is one of these "well-established explanations."[313]

When intelligent design is taught alongside evolution in the science classroom, an objector may have the reasonable perception of being forced to believe the intelligent design theory which embodies religious views.[314] In a science class, the teaching of intelligent design carries with it a heightened sense that intelligent design is a truth and that it is a valid scientific theory--as well-established as evolution.[315] An objector who recognizes intelligent design as a religious view, one that does not conform with the objector's own religious views, may take great offense to being taught a different religious view through the machinery of the school system,[316] especially where the

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Santa Fe. *Lee*, 505 U.S. at 580 (addressing prayer by clergy at graduation ceremonies); *Santa Fe*, 530 U.S. at 294 (addressing student-initiated prayer at football games). Upon an examination of an objector's experience, however, it becomes apparent that the objector may perceive the teaching of the religious theory of intelligent design as a religious activity. *See infra* notes 314-318 and accompanying text.

[309] *See Lee*, 505 U.S. at 592.

[310] The reader need only think back to secondary school algebra class to appreciate the school setting and the unconscious assumption that students are learning truths. Students taking an algebra class inherently believe that the concepts that are being taught are correct. While there is ample time and even necessity for discussions as to various applications of the algebra concepts learned, there is no room for theoretical discussions on whether these concepts are correct.

[311] *See* PURVES ET AL., *supra* note 19, at 6.

[312] SCIENCE AND CREATIONISM, *supra* note 6, at 1.

[313] *Id.*

[314] *See supra* section III.A.

[315] SCIENCE AND CREATIONISM, *supra* note 6, at 1.

[316] Lee v. Weisman, 505 U.S. 577, 592 (1992) ("What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery

government holds this religious view out as a truth. The objector may feel pressured to believe this religious view, especially where this view is taught in the context of a science class. Objectors may feel pressured to participate in the educational experience by sitting quietly and continuing the façade of being receptive students learning truths from the teacher even though the objectors feel they are no longer hearing truths.[317] The objector is effectively "place[d] . . . in the dilemma of participating, with all that implies, or protesting."[318] A law requiring intelligent design is therefore coercive and impermissible under the Establishment Clause.

C. Scrutiny of Other Creationist Strategies

Proponents of creationism have pushed for other ways to counter evolutionary teachings and to bring creationism into the classroom.[319] An examination of three selected tactics employed by creationists to further their goals will provide a basis upon which to view the constitutionality of *any* efforts by creationists to further their goals. To this end, the following creationist approaches will be evaluated: (1) a law removing macroevolution from the state's science curriculum;[320] (2) a law requiring that teachers recite that evolution is a theory rather than a fact prior to teaching evolution;[321] and (3) a law requiring that a teacher present evidence against evolution.[322] By examining the constitutionality of these different creationist strategies under an Establishment Clause analysis, we find that these creationist strategies share factors highly persuasive in analysis of a law requiring the teaching of intelligent design.[323]

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of the State to enforce a religious orthodoxy.").

[317] *See, e.g., id.* at 593. The Court recognized in *Lee* that students at a high school graduation ceremony may experience public and peer pressure to "at least[] maintain respectful silence during the invocation and benediction." *Id.*

[318] *Id.*

[319] *See supra* notes 165-170 and accompanying text.

[320] This fact situation represents the action taken by the Kansas State School Board in 1999. *See supra* notes 18-23 and accompanying text.

[321] This fact situation is similar to the facts in *Freiler v. Tangipahoa Parish Board of Education*. Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 341 (5th Cir. 1999). In *Freiler*, the required disclaimer specifically stated that the teaching of evolution was for education and was not designed to "influence or dissuade the Biblical version of Creation." *Id.* The disclaimer to be analyzed in this section does not make any reference to the Bible or to creationism and therefore represents a potentially more difficult fact pattern to analyze.

[322] *See supra* note 170 and accompanying text.

[323] *See infra* section III.C.4; *see also* section III.B.

1. Removal of Macroevolution

A law requiring the removal of macroevolution from the public school science curriculum would be an impermissible advancement of religion under the *Lemon* test, the endorsement test, and the coercion test for many of the same reasons that a law requiring the teaching of intelligent design would be impermissible. In applying the *Lemon* test to a law requiring the removal of macroevolution from the school science curriculum, a court must first look to the purpose of the law.[324] The true purpose of a law removing macroevolution from school curriculum may be distilled by examining its direct effect.[325] Although the state has only prohibited the teaching of macroevolution and not the entire theory of evolution, macroevolution in particular represents ideas disfavored by creationists.[326] Macroevolution describes the greater changes that account for the appearance of new species and of major groups of animals and other organisms.[327] It deals with the idea that life forms, including humans, evolved from common ancestors.[328] In effect, the removal of

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[324] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[325] *See* Edwards v. Aguillard, 482 U.S. 578, 586 (1987). The Court examined the validity of the purpose by its effect:

> Even if "academic freedom" is read to mean "teaching all of the evidence" with respect to the origin of human beings, the Act does not further this purpose. The goal of providing a more comprehensive science curriculum is not furthered either by outlawing the teaching of evolution or by requiring the teaching of creation science.

Id. The Court indicated that the state's stated purpose was a sham because the statute did not, in fact, further that goal. *Id.* at 586-87. The Court did not consider the possibility that the statute may have sincerely intended the purpose but was drafted in a way that had unexpected results.

Additionally, in *Freiler*, the Fifth Circuit also determined that the stated purpose of encouraging informed freedom of belief was a sham because it did not serve its purpose. *Freiler*, 185 F.3d at 345 ("We . . . find that the disclaimer as a whole does not serve to encourage critical thinking and that the School Board's first articulated purpose is a sham."). In *Freiler*, the legitimacy of the statute's stated purpose was limited by its success in achieving that stated purpose. *Id.*

[326] *See* PURVES ET AL., *supra* note 19, at 448, G18; Numbers, *supra* note 6, at 313; *see also supra* notes 19-20 and accompanying text.

[327] *See* PURVES ET AL., *supra* note 19, at 448, G18; *see also supra* note 19 and accompanying text.

[328] *See* PURVES ET AL., *supra* note 19, at 448, G18; *see also supra* note 19 and accompanying text. According to the theory of evolution, humans evolved from the same lineage that gave rise to lemurs, New World and Old World monkeys, orangutans, gorillas, and chimpanzees. FUTUYMA, *supra* note 7, at 728-30. A widely-accepted phylogeny, or family tree, of the major primate groups indicates that humans are closely related to chimpanzees, gorillas, and organgutans. *Id.* Of these apes, humans are most closely related to chimpanzees. *Id.* The gorilla lineage first diverged from the chimpanzee-human lineage, and the chimpanzee and human lineages subsequently diverged from each other. *Id.* at 730. It is estimated that humans and chimpanzees diverged 4.6-5.0 million years ago. *Id.* The human-chimpanzee lineage

macroevolution serves to prohibit the teaching of the same evolutionary concepts that Arkansas's anti-evolution laws sought to prohibit in *Epperson v. Arkansas*,[329] where the purpose of the anti-evolution law was to "blot out a particular theory because of its supposed conflict with the Biblical account."[330] Considerations of the "historic and contemporaneous antagonisms" between religious teachings and evolution[331] would be relevant in this situation just as it would be in an analysis of a law requiring the teaching of intelligent design in public school classrooms.[332] The comparison of macroevolution with the concepts prohibited by Arkansas's anti-evolution laws demonstrates that the state's purpose in removing macroevolution from the curriculum is to preserve a religious view. The law fails the purpose prong of the *Lemon* test and is therefore in violation of the Establishment Clause.

In the event that a court somehow finds a secular purpose for the anti-macroevolution law, it would then examine the law under the effects test.[333] The immediately recognizable effect of a prohibition on teaching macroevolution in public schools is that the students do not learn the concepts taught in macroevolution. Macroevolution teaches concepts that directly conflict with the creationist accounts of the origin of life.[334] The primary effect is therefore to deprive students of views disfavored by creationists. Although this primary effect is not as overt as the promotion of the Biblical version of creation that is inherent in the theory of intelligent design,[335] the deprivation

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diverged from the gorilla lineage 0.3-2.8 million years earlier. *Id.*

> What are the implications of the apparent phylogeny of hominoids and the divergence of the human lineage about 5 [million years ago]? Although the common ancestor of humans and chimps need not have closely resembled either, it surely had many of the anatomical features of chimpanzees and gorillas, since these retain so many features of their common ancestor. Thus the common ancestor of humans and chimps was probably a large arboreal African ape, with an opposable big toe, long arms relative to its legs, luxuriant body hair, and an ape-sized brain. It may well have walked on its knuckles, as do African apes today, but surely not on its hind feet only.

Id.

[329] 393 U.S. 97 (1968); *see supra* note 19 and accompanying text; *Epperson*, 393 U.S. at 98-99 ("The Arkansas law makes it unlawful for a teacher in any state-supported school or university 'to teach the theory or doctrine that mankind ascended or descended from a lower order of animals' . . . .").

[330] *Epperson*, 393 U.S. at 109.

[331] Edwards v. Aguillard, 482 U.S. 578, 591 (1987); *see supra* notes 113-116 and accompanying text.

[332] *See supra* text accompanying notes 255-258.

[333] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[334] *See* PURVES ET AL., *supra* note 19, at 448, G18; Numbers, *supra* note 6, at 313; *see also supra* notes 19-20 and accompanying text.

[335] *See supra* notes 203-206 and accompanying text; *supra* text accompanying notes 272-275.

of views disfavored by creationists nonetheless results in the advancement of religious views embodied in creationism.[336] Thus, the law would fail the effects test of the *Lemon* test.

A law removing macroevolution from the state science curriculum would also be a government endorsement of religion. In light of the history of antagonisms between the teachings of certain religious groups and evolution[337] and the resemblance that a law prohibiting macroevolution has to the anti-evolution law in *Epperson*,[338] it is evident that the law serves to favor religious views by removing contradictory teachings from school.[339] This law would affect the education received in public schools, where the government has "great authority and coercive power."[340] Just as the required teaching of intelligent design, with its inherently religious messages, would be a government endorsement of religion,[341] the removal of teachings that conflict with Biblical teachings with the full support and endorsement of the government would give "an objective observer, acquainted with the text, legislative history, and implementation of the statute"[342] the perception that the government is endorsing religion.

In addition, a law removing macroevolution from the state science curriculum would be an act of coercion on the part of the government. In a science class where evolution is taught without the concepts of higher life forms evolving from lower life forms,[343] the government intentionally leaves students with the belief that science has no "well-established explanation" for the origin of life.[344] In a school setting, where the government "exerts great

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[336] *See Edwards*, 482 U.S. at 593. The Court in *Edwards v. Aguillard* stated that "[t]he Establishment Clause . . . 'forbids *alike* the preference of a religious doctrine *or* the prohibition of theory which is deemed antagonistic to a particular dogma.'" *Id.* at 593 (quoting Epperson v. Arkansas, 393 U.S. 97, 106-07 (1968)). In making this statement, the Court was discussing the purpose of the statute and not its effect. Nonetheless, the Court recognized that prohibiting teachings antagonistic to a religious view was similar to giving preference to the religious view. *Id.* Therefore, if the actual effect is to prohibit a theory that is antagonistic to a religious view, the effect is similar to advancing the preferred religious view.

[337] *Edwards*, 482 U.S. at 591; *see supra* notes 113-116 and accompanying text.

[338] *See supra* note 19 and accompanying text; *Epperson*, 393 U.S. at 98-99.

[339] *See Edwards*, 482 U.S. at 593; *see also supra* note 336.

[340] *See Edwards*, 482 U.S. at 584; Sch. Dist. v. Schempp, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring).

[341] *See supra* section III.B.2.

[342] Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

[343] *See* PURVES ET AL., *supra* note 19, at 448, G18; *see also supra* note 19 and accompanying text.

[344] SCIENCE AND CREATIONISM, *supra* note 6, at 1 (stating that evolution is one of "these well-established explanations" that have been "so thoroughly tested and confirmed that they are held with great confidence").

authority and coercive power" by compelling student attendance,[345] the wall of separation between church and state must remain high.

The coercive forces at play in this situation are evident from an examination of an objector's experience.[346] A student who has some awareness that evolution entails an explanation of the evolution of higher life forms from lower life forms, or change from one species to another,[347] may object to the state's representation that evolution entails only the microevolutionary concepts of change *within* species that do not address change from one species to another.[348] This offense is heightened if the objector views this deliberate omission of macroevolution from his science lesson as an attempt to suppress views that conflict with religious versions of creation. In a science classroom, where explanations of natural phenomena are essentially held out as truths,[349] students will feel great pressure to believe the incomplete version of evolution as representing the theory of evolution in its entirety. The objector is therefore forced to participate in this government activity by believing an incomplete version of the theory of evolution or by continuing to sit quietly in class and pretending to engage in the learning process.[350] The teaching of evolution without macroevolution is tantamount to the teaching of a religious view.[351] The experience of this objector would be similar to the experience of an objector who feels pressured to participate in the teaching of intelligent design[352] and would therefore be coercive and in violation of the Establishment Clause.

A public school is a unique setting, and the Supreme Court has repeatedly demonstrated its commitment to not allowing direct government action in violation of the Establishment Clause.[353] The objector here is forced to participate in the teaching of a religious view. Determining that an anti-macroevolution law is constitutional would begin to erode the wall of separation between church and state that must remain high in a public school

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[345] *Edwards*, 482 U.S. at 584; *see Schempp*, 374 U.S. at 307 (Goldberg, J., concurring).

[346] In *Lee v. Weisman* and *Santa Fe Independent School District v. Doe*, the Court examined the experience of objectors to determine whether there was coercion. Lee v. Weisman, 505 U.S. 577, 593 (1992); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311-12 (2000).

[347] *See* PURVES ET AL., *supra* note 19, at 448, G18; *see also supra* note 19 and accompanying text.

[348] *See* PURVES ET AL., *supra* note 19, at 442, G19; *see also supra* note 22 and accompanying text.

[349] *See supra* notes 309-313 and accompanying text.

[350] *See, e.g., Lee*, 505 U.S. at 593; *see also supra* note 317.

[351] *See* Edwards v. Aguillard, 482 U.S. 578, 593 (1987) ("The Establishment Clause . . . 'forbids *alike* the preference of a religious doctrine *or* the prohibition of theory which is deemed antagonistic to a particular dogma.'"); *see also supra* note 336.

[352] *See supra* notes 315-318 and accompanying text.

[353] *See supra* note 140 and accompanying text.

setting. The law requiring the teaching of intelligent design must, therefore, violate the Establishment Clause.

2. Disclaimer

A law requiring the recitation of a disclaimer stating that evolution is a theory, not a fact, and that alternative theories of the origin of life exist, would also be a violation of the Establishment Clause under the *Lemon* test, the endorsement test, and the coercion test. Under the *Lemon* test, a court would find that a law requiring a disclaimer is enacted with a religious purpose. In *Freiler v. Tangipahoa Parish Board of Education*,[354] the court recognized that when school children heard the evolution disclaimer in that case, they received an added message that what they were taught did not need to affect what they already knew.[355] Similarly, upon hearing the disclaimer that evolution is a theory and not a fact in the present hypothetical situation, students will receive the message that everything they are subsequently taught is simply a "guess" or a "hunch."[356] The effect of this message is that students will not open their minds to or be willing to embrace the teaching of evolution. Consequently, the validity of evolution as a prominent and well-established scientific theory[357] is significantly diminished. In the context of a school science curriculum, evolution should have more authority and support than a mere "guess" or "hunch"[358] and should not be diminished. Just as the larger history of the evolution and creationism debate would be considered in evaluating the purpose of a law requiring the teaching of intelligent design,[359] a consideration of the larger history would reveal that the purpose of a disclaimer is to diminish the teaching of evolution because it contradicts the creationist view.[360] This is an improper religious purpose under the *Lemon* test,[361] and a disclaimer is therefore unconstitutional.

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[354] 183 F.3d 337 (5th Cir. 1999).

[355] *Id.* at 345. The *Freiler* court noted that the disclaimer states: "[T]he 'Scientific Theory of Evolution . . . should be presented to inform students of the scientific concept' but that such teaching is 'not intended to influence or dissuade the Biblical version of Creation or any other concept.'" *Id.*

[356] TEACHING ABOUT EVOLUTION, *supra* note 43, at 56 ("In scientific terms, 'theory' does not mean 'guess' or 'hunch' as it does in everyday usage.").

[357] SCIENCE AND CREATIONISM, *supra* note 6, at 1.

[358] TEACHING ABOUT EVOLUTION, *supra* note 43, at 56.

[359] *See supra* text accompanying notes 255-258.

[360] *See supra* notes 6-7 and accompanying text; *see also* Edwards v. Aguillard, 482 U.S. 578, 593 (1987) ("The Establishment Clause . . . 'forbids *alike* the preference of a religious doctrine *or* the prohibition of theory which is deemed antagonistic to a particular dogma.'" (quoting Epperson v. Arkansas, 393 U.S. 97, 106-07 (1968)).

[361] *See Edwards*, 482 U.S. at 593.

The state may assert that it had the sincere purposes of either disclaiming orthodoxy of belief that could be inferred from the exclusive placement of evolution in the curriculum, or reducing offense to the sensibilities and sensitivities of any student or parent caused by the teaching of evolution.[362] The Fifth Circuit determined in *Freiler* that these stated purposes were permissible.[363] If a law requiring a disclaimer satisfies the purpose prong of the *Lemon* test with these secular purposes, it would be necessary to examine its primary effects.[364]

An examination of the circumstances under which a disclaimer is read reveals that a disclaimer has the primary effect of advancing religion. The diminishment of evolution's validity as a scientific theory, juxtaposed with the reminder that alternative theories exist, results in a primarily religious effect. As discussed in the purpose prong analysis, the direct effect of the disclaimer is to diminish the validity of evolution as a prominent scientific theory.[365] Additionally, a disclaimer's mention of alternative theories on the origin of life focuses the students' attention toward creationism. The theory of intelligent design does not expressly promote creationism, but by proposing that an intelligent agent provides guidance,[366] it conveys an indirect religious message that has the primary effect of advancing creationist views.[367] Similarly, it is unnecessary for a disclaimer to mention creationism specifically as an alternative to evolution, since the mere mention of alternative theories has the primary effect of advancing religion.[368] Many students are already familiar with the story of creationism, which has prominence as the first story in the Bible, or are familiar with stories of creative acts in other religions.[369] The effect of mentioning the existence of alternative theories, therefore, is the channeling of the students' thoughts toward creationism as the sole alternative to evolution. The combination of the students' thoughts channeled toward creationism and the indirect characterization of evolution as a "guess" or a

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[362] Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 344 (5th Cir. 1999). These purposes were asserted in *Freiler*, and the Fifth Circuit determined that these were permissible purposes. *Id.* at 345.

[363] *Id.*

[364] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[365] *See supra* text accompanying notes 354-358.

[366] MERE CREATION, *supra* note 28, at 18.

[367] *See supra* text accompanying notes 271-275.

[368] *Contra Freiler*, 185 F.3d at 346. The *Freiler* court noted that the "Biblical version of Creation" was the only alternative theory explicitly referenced in the disclaimer. *Id.*

[369] *Genesis* 1-11; *see also* McLean v. Arkansas Bd. of Educ., 529 F. Supp. 1255, 1265 (E.D. Ark. 1982) ("In traditional Western religious thought, the conception of a creator of the world is a conception of God. Indeed, creation of the world 'out of nothing' is the ultimate religious statement because God is the only actor.").

"hunch"[370] serves to foster the religious view of creationism. This effect is an impermissible advancement of religion,[371] and the disclaimer therefore fails the second prong of the *Lemon* test.

A law requiring a disclaimer also communicates a message of government endorsement of religion. As with a law requiring the teaching of intelligent design, laws implementing creationist strategies have the support and endorsement of the government.[372] The purpose of a disclaimer is to diminish the validity of the theory of evolution,[373] thus giving protection and support to the theory of creationism and the religious beliefs embodied in creationism. A law requiring the disclaimer therefore sends a message to supporters of the secular theory of evolution that "they are outsiders, not full members of the . . . community, and an accompanying message to adherents that they are insiders, favored members of the . . . community."[374]

A law requiring a disclaimer would also be a coercive government act favoring religion. The Supreme Court has recognized that the government's activities in the education of young and impressionable children may have a "magnified impact" on them.[375] Therefore, the effect of a disclaimer, to send a message that the theory of evolution is merely a "guess" or a "hunch,"[376] is heightened in a school setting. A student who understands that evolution is a well-established theory[377] may correctly perceive the disclaimer as an attempt to diminish the validity of this theory in order to preserve the creationist views.[378] The objector is therefore forced to participate in the recitation of the disclaimer and to participate in the teaching of its implicit religious message. The religious message in the case of a disclaimer is not as overt as the religious message conveyed through the teaching of intelligent design,[379] but objectors in both cases may take offense at the use of the government's machinery to promote a religious view contrary to their own or may feel pressured to believe such a view.[380] A law mandating a disclaimer would therefore be coercive and

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[370] TEACHING ABOUT EVOLUTION, *supra* note 43, at 56; *see supra* text accompanying notes 354-358.

[371] *See* Edwards v. Aguillard, 482 U.S. 578, 593 (1987); *see also supra* note 336.

[372] *See supra* section III.B.2.

[373] *See supra* text accompanying notes 356-361.

[374] Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

[375] Sch. Dist. v. Ball, 473 U.S. 373, 383 (1985); *see Edwards*, 482 U.S. at 584; Sch. Dist. v. Schempp, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring); *see generally supra* section II.D.

[376] TEACHING ABOUT EVOLUTION, *supra* note 43, at 56; *see supra* text accompanying notes 354-358.

[377] SCIENCE AND CREATIONISM, *supra* note 6, at 1.

[378] *See supra* text accompanying notes 354-361.

[379] *See supra* section III.A.

[380] *See supra* notes 314-318 and accompanying text.

unconstitutional under the Establishment Clause. It is important that courts maintain a wall of separation between church and state where there is direct government action that is readily perceived and experienced by students.

3. Evidence Against Evolution

A law requiring the teaching of evidence against evolution would also violate the Establishment Clause under the *Lemon* test because such a law would have an impermissible religious purpose. One criticism of evolution is that the fossil record is full of gaps.[381] The gaps in the fossil record are initially problematic from an evolutionary standpoint because evolution posits continuous change over time,[382] and therefore it would be expected that the fossil record contain transitional forms that represent the origins of major new forms of life.[383] If the evidence of gaps in the fossil records is taught without further clarification, it diminishes the validity of the theory of evolution.

In order to preserve the theory of evolution as a valid scientific theory, further instruction must be given to explain the evidence that is taught against evolution. Gaps in the fossil records, for example, do *not* discredit evolution.[384] First, many of the gaps in the fossil record that previously existed have been filled.[385] Also, evolutionary changes may occur too quickly to leave transitional forms to document in the fossil record the changes that occur.[386] Moreover, many organisms may have been unlikely to leave fossils because of their habitats or their lack of easily-fossilized body parts.[387] This example demonstrates the risks of zealously teaching the evidence against evolution. As with a law requiring the teaching of intelligent design and any other attempt to bring creationist views into the classroom, we must consider the larger historical background of the evolution-creationism debate together with the direct effect of this particular evidence-against-evolution law. It is apparent that the purpose here is to diminish the teaching of evolution because

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[381] *See* FUTUYMA, *supra* note 7, at 761; TEACHING ABOUT EVOLUTION, *supra* note 43, at 57.

[382] *See* FUTUYMA, *supra* note 7, at 21-22.

[383] *See id.* at 761. There *are* excellent transitional fossils in many cases, such as "between primitive fish and amphibians, amphibians and reptiles, reptiles and mammals, and reptiles and birds." TEACHING ABOUT EVOLUTION, *supra* note 43, at 57. *See also* FUTUYMA, *supra* note 7, at 760-62 (addressing the evidence against evolution as well as other creationist arguments).

[384] *See* TEACHING ABOUT EVOLUTION, *supra* note 43, at 57.

[385] *See* SCIENCE AND CREATIONISM, *supra* note 6, at 12-13.

[386] *See* TEACHING ABOUT EVOLUTION, *supra* note 43, at 57.

[387] *See id.*

it is antagonistic to creationism concepts.[388] This is a religious purpose in violation of the Establishment Clause.[389]

If a court finds that a law requiring evidence against evolution has a secular purpose, the effects of the law must be evaluated to determine if the primary effect is to advance religion.[390] As with an anti-macroevolution law, the validity of the theory of evolution is diminished upon presentation of the evidence against evolution because the students are deprived of learning concepts taught in evolution.[391] A law requiring evidence against evolution similarly results in the promotion of a religious view through the diminishment of the validity of a theory that contradicts religious views.[392]

A law requiring that evidence against evolution be taught is a government endorsement of religion. The purpose of teaching evidence against evolution is to diminish the validity of the theory of evolution.[393] This analysis is therefore similar to the analysis of a disclaimer law under the endorsement test[394] and reaches the same conclusion that the law sends a message to supporters of evolution that they are "outsiders" and a message to proponents of creationism that they are "insiders."[395]

The evidence-against-evolution law is also an impermissible coercive act on the part of the government. A student who is aware that evolution is a well-established theory[396] may perceive that the evidence against evolution incorrectly portrays evolution as an invalid theory that is taught to the students with the intent of diminishing the validity of the theory of evolution in order to preserve creationist views.[397] The objector in this case, much like the objector listening to the disclaimer,[398] is forced to participate in the teaching of this evidence against evolution, knowing that the purpose is to support certain religious views by discrediting the theory of evolution.[399] The courts

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[388] *See supra* notes 6-7 and accompanying text; *see also* Edwards v. Aguillard, 482 U.S. 578, 593 (1987) ("The Establishment Clause . . . 'forbids *alike* the preference of a religious doctrine *or* the prohibition of theory which is deemed antagonistic to a particular dogma.'" (quoting Epperson v. Arkansas, 393 U.S. 97, 106-07 (1968)).

[389] *See Edwards*, 482 U.S. at 593.

[390] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[391] *See supra* notes 333-338 and accompanying text.

[392] *See supra* notes 6-7 and accompanying text.

[393] *See supra* text accompanying notes 381-389.

[394] *See supra* text accompanying notes 372-374.

[395] Lynch v. Donnelly, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

[396] SCIENCE AND CREATIONISM, *supra* note 6, at 1.

[397] *See supra* notes 6-7 and accompanying text.

[398] *See supra* text accompanying notes 375-380.

[399] Edwards v. Aguillard, 482 U.S. 578, 593 (1987) ("The Establishment Clause . . . 'forbids *alike* the preference of a religious doctrine *or* the prohibition of theory which is deemed antagonistic to a particular dogma.'" (quoting Epperson v. Arkansas, 393 U.S. 97, 106-07 (1968)).

have recognized the uniqueness of the school setting.[400] It is essential that the Establishment Clause protect students from the government's establishment of religious views in schools. The law requiring the teaching of evidence against evolution is therefore in violation of the Establishment Clause under the coercion test.

4. Common Elements in Scrutinizing Any Approach Designed to Advance Creationist Views

The selected creationist strategies analyzed in this section share factors highly persuasive in analysis of a law requiring the teaching of intelligent design. The most compelling factor common to all efforts to advance creationist views is the "historic and contemporaneous antagonisms between the teachings of certain religious denominations and the teaching of evolution."[401] The history of the evolution-creationism controversy creates a strong presumption of a religious purpose where a law either diminishes the validity of evolution or promotes creationist views.[402] This factor is highly persuasive in determining constitutionality of a creationist strategy.[403] Specifically, where it is determined that a law has a religious purpose, the law fails the purpose prong of the *Lemon* test,[404] as seen in the analyses of an intelligent design law,[405] an anti-macroevolution law,[406] a disclaimer law,[407] and an evidence-against-evolution law,[408] all four creationist strategies examined in this paper. Viewing the analysis more generally, whether the law is scrutinized under the *Lemon* test, the endorsement test, or the coercion test, the historical background of the evolution-creationism controversy provides immediate fulfillment of the most basic requirement that there is a *religious* view being advanced.

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[400] *See generally supra* section II.D.

[401] *Edwards*, 482 U.S. at 591.

[402] *See id.* at 590 ("[W]e need not be blind in this case to the legislature's preeminent religious purpose in enacting this statute. There is a historic and contemporaneous link between the teachings of certain religious denominations and the teaching of evolution."). "These same historic and contemporaneous antagonisms between the teachings of certain religious denominations and the teaching of evolution are present in this case. The preeminent purpose of the Lousiana Legislature was clearly to advance the religious viewpoint that a supernatural being created humankind." *Id.* at 591. *See also Epperson*, 393 U.S. at 107-08 (comparing the law prohibiting the teaching of evolution at a state-supported school to Tennessee's Anti-Evoluton Act of 1925).

[403] *See supra* note 402.

[404] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[405] *See supra* notes 248-270 and accompanying text.

[406] *See supra* notes 324-332 and accompanying text.

[407] *See supra* notes 354-361 and accompanying text.

[408] *See supra* notes 381-389 and accompanying text.

Another compelling factor that is common to all efforts to advance creationist views is the setting. Public school classrooms serve as the battleground for the evolution-creationism debate. The fact that laws advancing creationist views impact public school children is persuasive in analyzing the constitutionality of such laws under the endorsement and coercion tests. Public school children have "impressionable young minds," and government "exerts great authority and coercive power" by compelling their attendance at school.[409] The fact that creationist views are being taught in the public school classroom heightens the perception that the law advancing creationist beliefs in the classroom is "communicating a message of government endorsement . . . of religion."[410] In examining the coercive forces of creationist strategies--where intelligent design is taught in the classroom,[411] macroevolution is removed from the school science curriculum,[412] a disclaimer is read before teaching evolution,[413] or evidence against evolution is taught[414]--the unique pressures created in the school setting were central to examining an objector's experience.[415] The coercive environment of school and the unique pressures to conform that student's experience[416] strongly favors a determination that a law advancing creationist views in school is coercive and impermissible under the Establishment Clause.

Finally, creationist strategies share the common goal of promoting creationist views, either by teaching such views[417] or by prohibiting the teaching of evolution,[418] and therefore share the actual effect of advancing this religious belief.[419] The actual effect of advancing a religious belief has a direct impact on the "primary effects" prong of the *Lemon* test.[420] In addition, *actual*

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[409] Sch. Dist. v. Ball, 473 U.S. 373, 383 (1985); Lee v. Weisman, 505 U.S. 577, 592 (1992).

[410] Lynch v. Donnelly, 465 U.S. 668, 692 (O'Connor, J., concurring); *see generally supra* section III.B.2; *supra* notes 337-343 and accompanying text; *supra* notes 372-374 and accompanying text; *supra* notes 393-395 and accompanying text.

[411] *See supra* notes 308-318 and accompanying text; *see generally* section III.B.3.

[412] *See supra* notes 343-353 and accompanying text.

[413] *See supra* notes 375-380 and accompanying text.

[414] *See supra* notes 396-400 and accompanying text.

[415] *See supra* notes 411-414.

[416] Lee v. Weisman, 505 U.S. 577, 593 (1992) ("Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity . . . .").

[417] For example, teaching intelligent design in classrooms teaches creationist views.

[418] For example, the removal of macroevolution from the school curriculum, the recitation of a disclaimer prior to teaching evolution, and the teaching of the evidence against evolution prohibit the effective teaching of evolution.

[419] *See supra* notes 271-275 and accompanying text; *supra* notes 325-330 and accompanying text, 333-336 and accompanying text; *supra* notes 354-358 and accompanying text, 365-371 and accompanying text; *supra* notes 390-392 and accompanying text.

[420] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (citations omitted).

advancement of religion heightens the perception of an "objective observer"[421] that there is government endorsement of religion.[422] Similarly, actual advancement of religion makes it easier to imagine the objector's experience under a coercion analysis.[423]

IV. CONCLUSION

By proposing to teach creationism as an alternative to evolution in Hawai'i's public school classrooms, the Hawai'i Board of Education demonstrated its lack of familiarity with the Establishment Clause jurisprudence concerning the introduction of creationist views into the classrooms.[424] In *Edwards v. Aguillard*,[425] the U.S. Supreme Court made it clear that a law designed to advance "the religious viewpoint that a supernatural being created humankind" was unconstitutional.[426] Nevertheless, the Hawai'i Board of Education proposed the teaching of the blatantly religious Biblical story of creationism;[427] if the board had adopted the proposal, such state action would have violated the Establishment Clause under any of the Supreme Court's primary tests, the *Lemon* test, the endorsement test, and the coercion test. Fortunately, the Hawai'i Board of Education unanimously voted to maintain the original science standards that did not mention creationism.[428]

Intelligent design is not blatantly religious, and it is therefore not immediately clear whether a law requiring the teaching of this theory in public school classrooms is unconstitutional. Upon examination of a law requiring the teaching of intelligent design, however, we find that such a law is in violation of the Establishment Clause.[429] Under scrutiny, this theory is not a scientific theory but a religious view, a variation of creationism.[430] Other creationist strategies, such as the removal of macroevolution from the state science curriculum,[431] the required recitation of a disclaimer,[432] and the

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[421] Wallace v. Jaffree, 472 U.S. 38, 76 (1985) (O'Connor, J., concurring).

[422] *See generally supra* section III.B.2; *supra* notes 337-343 and accompanying text; *supra* notes 372-374 and accompanying text; *supra* notes 393-395 and accompanying text.

[423] *See supra* notes 411-414.

[424] *Bible Gains Ground at BOE*, *supra* note 1; *see supra* notes 1-4 and accompanying text.

[425] 482 U.S. 578 (1987).

[426] *Id.* at 581, 591, 596-97.

[427] *Bible Gains Ground at BOE*, *supra* note 1; *see supra* notes 1-4 and accompanying text.

[428] *Ed Board Rejects Bible as Science*, *supra* note 4.

[429] *See supra* section III.B.

[430] *See supra* section III.A.

[431] *See supra* section III.C.1.

[432] *See supra* section III.C.2.

required teaching of evidence against evolution,[433] are similarly in violation of the Establishment Clause. A law requiring the teaching of intelligent design and the other creationist strategies share common elements.[434] First, the history of the evolution-creationism controversy creates a presumption of a religious purpose.[435] Second, the unique setting of the public school classroom heightens the perception of the government endorsement of religion.[436] The school setting is, by its nature, highly coercive, thereby lowering the threshold under the coercion test.[437] Finally, creationist strategies have the actual effect of advancing religion.[438] These factors are shared by any current or potential creationist strategies to advance creationist views and therefore compel a determination that any such strategy violates the Establishment Clause.

Although Establishment Clause jurisprudence is unclear as to the appropriate test to be applied in a given situation,[439] the Court remains true to its goal of maintaining a wall of separation between the church and state where there is direct intrusion of religion in the public schools.[440] This heightened scrutiny will therefore continue to prevent the implementation of creationist views in the public schools.

Wendy F. Hanakahi[441]

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[433] *See supra* section III.C.3.

[434] *See supra* section III.C.4.

[435] *See supra* notes 401-408 and accompanying text.

[436] *See supra* notes 409-410 and accompanying text.

[437] *See supra* notes 409 and accompanying text, 411-416 and accompanying text.

[438] *See supra* notes 417-423 and accompanying text.

[439] *See* Freiler v. Tangipahoa Parish Bd. of Educ., 185 F.3d 337, 343 (5th Cir. 1999) (stating that the Establishment Clause jurisprudence is "rife with confusion").

[440] *See supra* section II.D.

[441] Candidate for J.D., University of Hawai'i, William S. Richardson School of Law, 2003; A.B., Biology, Harvard University, 1998. Special thanks to Professor Jon Van Dyke for his valuable guidance and assistance. Thanks also to Professor Douglas Codiga, Becky Chestnut, Liann Ebesugawa, Joseph Kotowski, Stanton Oishi, and the 2002-2003 University of Hawai'i Law Review Editorial Board.

Driving into the Sunset: A Proposal for Mandatory Reporting to the DMV by Physicians Treating Unsafe Elderly Drivers

I. INTRODUCTION

Soon after his sixty-fifth birthday, Henry Gushikuma experienced memory lapses. They were trivial at first, where he had difficulty remembering names and dates, but his memory steadily deteriorated during the next two years. By 1999, Henry could not remember a conversation moments after it was finished, and he thought it was the year 1958. In fact, as he would drive home from church, which was only a few blocks from his Salt Lake, Hawai'i home, he would end up miles away in Kalihi, where he lived as a young boy.

Henry's family witnessed his worsening condition. Concerned about his safety because he occasionally left the stove on and wandered into neighbors' homes, his family approached his geriatrician for a recommendation of alternatives to Henry's driving. Dr. Wayne Harada informed the family that issues surrounding his driving would be difficult to mitigate. He told them that families of older drivers often come to him for help, but state law prevented him from doing anything more than simply advising the patient to stop driving. Dr. Harada stated that even if he took away Henry's driver's license, Henry would probably forget that he should not be driving. Dr. Harada also emphasized that revoking a person's driver's license, and the independence and freedom associated with that license, would lead to other problems.

Pursuant to Dr. Harada's advice, Henry's family urged him daily to let his wife drive instead. He displayed irritability, but would yield to letting his wife drive. This pleased his family at first, but as his physician warned, Henry often forgot that he had agreed not to drive. On August 30, 2001, while approaching an intersection near Kalākaua Elementary School, Henry crossed the center median and crashed into an oncoming car. Luckily, both Henry and the occupants in the other vehicle survived.[1]

Physicians often deal with similar situations involving elderly drivers. Although physicians have a duty to comply with the American Medical Association's Code of Ethics ("AMA Code"), which states that it is desirable and ethical for physicians to refer patients to the Department of Motor Vehicles ("DMV"),[2] Hawai'i law currently places physicians under liability

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[1] Henry Gushikuma is the author's grandfather. His inability to drive and his family's frustration with the law motivated this Comment.

[2] AMERICAN MEDICAL ASSOCIATION CODE OF MEDICAL ETHICS Opinion 2.24, http://www.ama-assn.org/ama/pub/category/2503.html (last visited Nov. 15, 2002) [hereinafter AMERICAN MEDICAL ASSOCIATION CODE OF MEDICAL ETHICS].

for such disclosure.[3] Physicians face suspension or revocation of their medical licenses for disclosing information without a patient's consent.[4] The dilemma physicians face in following their ethical duty to the AMA Code and their legal duty to Hawai'i law can be resolved by pursuing legislation requiring physicians to refer unfit elderly drivers to the DMV.

This Comment analyzes the various issues surrounding unsafe elderly drivers. Section II discuses Hawai'i's current driver's license regulations and their failure to sufficiently address Hawai'i's increasing number of elderly drivers. Section III outlines the four basic approaches states utilize in regulating elderly drivers. Section III also discounts constitutional challenges to mandatory reporting laws and argues that a state's interest in public safety outweighs an individual's privilege to drive. Section IV discusses the Hawai'i State Legislature's current trend towards permitting more disclosures of confidential medical information and also highlights physicians' support for mandatory reporting laws. Section V concludes that Hawai'i's increasing elderly population and the ethical dilemma faced by physicians necessitate the creation of a mandatory reporting statute for physicians to report unfit elderly drivers to the DMV.

II. HAWAI'I'S CURRENT DRIVER'S LICENSE REGULATIONS FAIL TO ADDRESS THE INCREASING NUMBER OF UNFIT ELDERLY DRIVERS

Hawai'i's current driver's license regulations directly conflict with the AMA Code's recommendation to report unfit drivers to the DMV. The exponential increase of elderly drivers in Hawai'i[5] and the pressing need to address public safety makes mandatory reporting essential. Although physicians raise concerns that mandatory reporting might violate physician-patient confidentiality, Hawai'i law currently permits disclosure of patient information for public safety.[6]

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[3] HAW. REV. STAT. § 436B-16(b) (1991) (physicians may be fined up to $1,000 per subsequent violation); *see also id.* §§ 436B-7(3) (2001) (physicians' licenses may be revoked, suspended, or limited); 436B-19(17) (1992) (refusing renewal, reinstatement, and restoration of physicians' licenses); 453-8.2(a)(1-4) (1992) (places physician on probation while revoking, suspending, or limiting his or her license).

[4] HAW. REV. STAT. § 436B-7(3); *see also id.* §§ 436B-19(17), 453-8.2(a)(1-4).

[5] *See* discussion *infra* section II.B.

[6] *See infra* notes 88-96 and accompanying text.

A. *Hawai'i's Current Law Regarding Unsafe Elderly Drivers Creates an Ethical Dilemma for Physicians*

Each state determines its own standards and regulations for motor vehicle licensing.[7] Although Hawai'i law does not mandate that physicians report elderly drivers to the DMV, it recognizes the reduced driving ability of older adults. This is evidenced in Hawai'i Revised Statutes ("H.R.S.") section 286-106, which reduces the renewal period of driver's licenses from six years to two years after a driver attains the age of seventy-two.[8]

Hawai'i physicians encounter an ethical dilemma when dealing with elderly patients that drive. The dilemma arises from their duties embodied in the AMA Code and Hawai'i statutes, which present conflicting responsibilities. The AMA Code advises physicians to assess their patients' impairments that may affect their driving ability.[9] It explicitly states that reporting unfit drivers

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[7] *See* U.S. CONST. amend. X. Under the Tenth Amendment to the U.S. Constitution, powers that are not delegated to the federal government are reserved to the states. *See also id.* U.S. Department of Transportation Federal Highway Administration, *Section III: Driver Licensing – Information*, *at* http://www.fhwa.dot.gov///ohim/hs00/dlinfo.htm (last visited Nov. 15, 2002) ("Each State and the District of Columbia administers its own driver licensing system."); Steven M. Rock, *Impact From Changes In Illinois Drivers License Renewal Requirements for Older Drivers*, 30 ACCIDENT ANNALS & PREVENTION 69, 69 (1998) ("Driver licensing procedures and requirements are determined in each state, and they vary substantially.").

No federal guidance exists on the issue of mandatory reporting to the DMV. During 1993-1995, Congress recognized that elderly drivers can be unsafe and attempted to pass the High Risk Drivers Act. *See* 139 CONG. REC. 4400, 4400-01 (1993); 140 CONG. REC. D323, D332 (1994); 140 CONG. REC. H11407, H11410 (1994); 141 CONG. REC. S2496, S2496 (1995). The purpose of the Act was to reduce the disproportionate number of highway crashes among older drivers and to prevent substantial economic and human loss due to automobile accidents. 139 CONG. REC. at 4400-01 (1993).

The proposed High Risk Drivers Act directed the Department of Transportation to conduct research on the abilities of older drivers. 139 CONG. REC. at 4401 (1993). Proponents of the Act also recognized the need to study the "identification of factors that predict the ability of older drivers." *Id.* Although Congress acknowledged that "[t]he number of older Americans who drive is expected to increase dramatically during the next 30 years" and that older drivers received very little assistance from the Department of Transportation during the prior 15 years, the High Risk Drivers Act was never enacted in whole or in part. *See* H.R. 1866, 104th Cong. (1995); S. 387, 104th Cong. (1995).

[8] HAW. REV. STAT. § 286-106(1) (1997). In 1997, House Bills 15 and 45 proposed to change the determinative age from "sixty" to "seventy" and "seventy-five" respectively. H.B. 15, 19th Leg., Reg. Sess. (Haw. 1997); H.B. 45, 19th Leg., Reg. Sess. (Haw. 1997). The legislature adopted the age of "seventy-two" as it stands in the current Hawai'i Revised Statutes. HAW. REV. STAT. § 286-106(1). This shortened renewal period also applies to licensees that "[e]xhibit[] a physical condition or conditions which the examiner of drivers reasonably believes has impaired the driver's ability to drive." *Id.* § 286-106(2).

[9] AMERICAN MEDICAL ASSOCIATION CODE OF MEDICAL ETHICS Opinion 2.24.

to the DMV is "desirable and ethical."[10] Landmark judicial decisions also guide physicians, such as *Tarasoff v. Regents of the University of California*,[11] in which the California Supreme Court held that a doctor incurs a legal obligation to provide a warning if it is essential to avert danger.[12] By contrast, Hawai'i law makes a physician who reports a patient to the DMV liable for breach of patient confidentiality.[13]

The solution to this problem, as proposed by the AMA Code,[14] is to create a statute through which physicians can report impaired elderly drivers to the DMV without incurring liability. The AMA Code states that ethical obligations exceed legal duties when the law mandates unethical conduct.[15] When physicians believe that the law is unjust, the AMA Code requests that they "work to change the law."[16]

B. The Number of Elderly Drivers Is Increasing

Laws regarding elderly drivers are essential because both Hawai'i[17] and the United States ("U.S.") are undergoing demographic transformations.[18] As baby-boomers age, the elderly population is growing faster than any other age group.[19] People are also living longer today because of improved medical

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[10] *Id.* Although the AMA Code does not require reporting to the DMV, it explicitly states that it is "desirable and ethical to notify the Department of Motor Vehicles" in situations where the patient's driving impairment implies a strong threat to patient and public safety. *Id.* The AMA Code also recognizes that the physician's role in reporting to the DMV is dictated by his or her state's mandatory reporting laws. *Id.*

[11] 551 P.2d 334 (Cal. 1976).

[12] *See id.* at 340, 342-43. The Hawai'i Supreme Court first followed *Tarasoff*'s analysis in 1979. Seibel v. City and County of Honolulu, 61 Haw. 253, 261, 602 P.2d 532, 538 (1979).

[13] HAW. REV. STAT. § 432D-21 (1995) ("[a]ny data or information pertaining to the diagnosis, treatment, or health of [a patient] . . . shall be held in confidence and shall not be disclosed"); *see also supra* note 3.

[14] AMERICAN MEDICAL ASSOCIATION CODE OF MEDICAL ETHICS Opinion 1.02.

[15] *Id.* "In exceptional circumstances of unjust laws, ethical responsibilities should supersede legal obligations." *Id.* The AMA Code recognizes, however, that "[e]thical values and legal principles are usually closely related." *Id.* It is only when the law mandates unethical conduct that ethical obligations exceed legal duties. *Id.*

[16] *Id.*

[17] *See generally* Hawai'i Medical Service Association Foundation, *Health Trends in Hawai'i: DEMOGRAPHICS - Overview, at* http://www.healthtrends.org/demographics (last visited Nov. 15, 2002).

[18] Patricia S. Hu et al., *Crash Risks of Older Drivers: A Panel Data Analysis*, 30 ACCIDENT ANNALS & PREVENTION 569, 569 (1998).

[19] Jane C. Stutts et al., *Cognitive Test Performance and Crash Risk in an Older Driver Population*, 30 ACCIDENT ANNALS & PREVENTION 337, 337 (1998).

practices and more active lifestyles.[20] By the year 2050, the U.S. Census Bureau expects the number of Americans aged sixty-five and older to grow to a total population of eighty-two million, a 137 percent increase from 1999.[21]

Hawai'i's demographic change is twice as significant as the national average. Since 1960, Hawai'i's population has more than doubled and is rapidly aging.[22] The proportion of elderly increased from five percent in 1960 to fourteen percent in 1999, at which time it exceeded the national average.[23] Population growth among the elderly in Hawai'i was greatest between 1990 and 1999.[24] During that period, the number of people aged sixty-five to seventy-four increased by thirteen percent, while the number of those aged seventy-five and older increased by sixty-two percent.[25] In contrast, the national average of these two age groups grew only one percent and twenty-four percent respectively.[26]

As the number of elderly increases, so does the older driving population.[27] The elderly rely heavily upon private automobiles for ninety percent of their transportation needs.[28] In 1983, sixty-one percent of persons aged sixty-five years and older held driver's licenses; by 1996, that number increased to seventy-four percent.[29] A survey by the U.S. Department of Transportation conducted during the year 2000 revealed that of the 190,625,023 licensed drivers in the U.S., 27,325,809 were older than age sixty-five, accounting for 14.33% of all licensed drivers.[30] In Hawai'i, twelve percent of the 769,383

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[20] K. Ball et al., *Driving Avoidance and Functional Impairment in Older Drivers*, 30 ACCIDENT ANNALS & PREVENTION 313, 313 (1998).

[21] U.S. Census Bureau, *Census Bureau Projects Doubling of Nation's Population by 2100*, *at* http://www.census.gov/Press-Release/www/2000/cb00-05.html (last visited Nov. 15, 2002).

[22] Hawai'i Medical Service Association Foundation, *Health Trends in Hawai'i: DEMOGRAPHICS - Overview*, *at* http://www.healthtrends.org/demographics (last visited Nov. 15, 2002).

[23] *Id.*

[24] Hawai'i Medical Service Association Foundation, *Health Trends in Hawai'i: DEMOGRAPHICS – Elderly Population Growth in Hawai'i*, *at* http://www.healthtrends.org/demographics/pop_growth_elderly_pop.html (last visited Nov. 15, 2002).

[25] *Id.*

[26] *Id.*

[27] Hu et al., *supra* note 18, at 569.

[28] American Association of Retired Persons, *Older Drivers*, *at* http://research.aarp.org/consume/fs51r_older_drivers.html (last visited Nov. 15, 2002).

[29] *Id.*

[30] U.S. Department of Transportation Federal Highway Administration, *Licensed Total Drivers, By Age*, *at* http://www.fhwa.dot.gov/ohim/hs00/dl22.htm (last visited Nov. 15, 2002). The drivers older than age sixty-five totaled 98,419 drivers. *Id.*

licensed drivers were aged sixty-five and older.[31] By the year 2024, one out of four drivers will be over age sixty-five.[32]

C. Cognitive Impairments Reduce Driving Ability

The increase in elderly drivers poses a serious highway safety issue.[33] Statistics show that older drivers are often unsafe.[34] They are involved in more accidents per mile driven than any other age group.[35] The crash rate of drivers increases at the age of seventy, and rapidly worsens at age eighty.[36] Drivers aged seventy-five and older, for example, have a thirty-seven percent higher crash rate than younger drivers,[37] and drivers aged eighty-five and older have a fatality rate nine times that of drivers aged twenty-five through sixty-nine.[38] Furthermore, drivers over age sixty-five will account for twenty-five percent of all fatal crashes during the next twenty-eight years.[39]

As a person ages, essential skills for safe driving, such as motor and sensory skills, become impaired.[40] Eyesight and hearing are compromised with the aging process, as are judgment and reaction.[41] As the visual field narrows, older drivers are less able to define and separate objects, two skills essential

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[31] *See id.* The breakdown of the actual ages of drivers are as follows: ages 64 and below = 670,964; ages 65-69 = 32,326; ages 70-74 = 30,237; ages 75-79 = 21,250; ages 80-84 = 10,428; ages 85 and over = 4,178. *Id.* Other states had similar percentages of elderly drivers: 11.95% in California, 14.29% in Florida, 15.0% in Oregon, and 16.98% in Pennsylvania. *Id.*

[32] Ball et al., *supra* note 20, at 313.

[33] Hu et al., *supra* note 18, at 569.

[34] Liisa Hakamies-Blomqvist & Barbro Wahlström, *Why Do Older Drivers Give Up Driving?*, 30 ACCIDENT ANNALS & PREVENTION 305, 305 (1998).

[35] *Id.*

[36] American Association of Retired Persons, *Older Drivers*, *at* http://research.aarp.org/consume/fs51r_older_drivers.html (last visited Nov. 15, 2002).

[37] Stutts et al., *supra* note 19, at 337.

[38] American Association of Retired Persons, *Licenses for Older Drivers Under Scrutiny*, *at* http://www.aarp.org/bulletin/departments/2001/news/article.html?SMContentIndex=2&SMContentSet=0 (last visited Feb. 19, 2002).

[39] Insurance Institute for Highway Safety, *Fatality Facts: Elderly*, *at* http://www.iihs.org/safety_facts/fatality_facts/elderly.htm (last visited Nov. 15, 2002).

[40] James Richardson et al., *Patterns of Motor Vehicle Crash Involvement by Driver Age and Sex in Hawaii*, 27 J. SAFETY RESEARCH 117, 118 (1996); American Association of Retired Persons, *Older Drivers*, *at* http://research.aarp.org/consume/fs51r_older_drivers.html (last visited Nov. 15, 2002); Hu et al., *supra* note 18, at 569; Gerald McGwin, Jr., Victoria Chapman & Cynthia Owsley, *Visual Risk Factors for Driving Difficulty Among Older Drivers*, 32 ACCIDENT ANNALS & PREVENTION 735, 735 (2000).

[41] Yasuo Mori & Mitsuo Mizohata, *Characteristics of Older Road Users and Their Effect on Road Safety*, 27 ACCIDENT ANNALS & PREVENTION 391, 391 (1995).

for safe driving.[42] Muscles atrophy and movement slows with advancing age.[43] Such physical and mental deterioration reduces the driving ability of the elderly.[44]

A single, definitive age, however, does not separate safe elderly drivers from those who are unsafe. Cognitive impairments, such as dementia[45] and Alzheimer's disease, are better indicators of reduced driving ability.[46] Cognitive functions important for safe driving include memory, attention, information processing, rapid decision making, and problem solving.[47] Alzheimer's disease and other dementing illnesses that disproportionately affect older adults hinder these functions.[48] In Hawai'i, a large portion of vehicular crashes is due to misjudgment, fatigue, illness, and lack of attention,[49] all of which are symptoms of dementia.

Elderly drivers are often involved in accidents at intersections, where cognitive awareness is especially important.[50] Divided attention, visual clutter, and threats from the periphery create obstacles for elderly drivers at intersections.[51] Navigating an intersection requires complex information processing.[52] Drivers with dementia, however, having slower judgment, need more time to process sensory inputs, decide on safe courses of action, and implement those actions needed to avoid potential crashes.[53]

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[42] David F. Preusser, *Fatal Crash Risk for Older Drivers at Intersections*, 30 ACCIDENT ANNALS & PREVENTION 151, 151 (1998).

[43] Mori & Mizohata, *supra* note 41, at 392.

[44] Hu et al., *supra* note 18, at 569; Mori & Mizohata, *supra* note 41, at 391.

[45] For the definition of dementia, *see infra* notes 54-55 and accompanying text.

[46] Hakamies-Blomqvist & Wahlström, *supra* note 34, at 305; L.J. Fitten et al., *Alzheimer and Vascular Dementias and Driving. A Prospective Road and Laboratory Study*, 27 J. SAFETY RESEARCH 270, 270 (1996). A study of 257 elderly drivers with various degrees of dementia verified that cognitive impairment is a better predictor of driving skill than age per se. Ball et al., *supra* note 20, at 313-14.

[47] Stutts et al., *supra* note 19, at 337-38.

[48] *Id.* at 338.

[49] Department of Transportation, *Hawai'i Crash Statistics: Contributing Circumstances – Human Factors*, *at* http://www.state.hi.us/dot/publicaffairs/safecommunities/crashstats/contribute-human.htm (last visited Nov. 15, 2002).

[50] *See* Preusser, *supra* note 42, at 151, 154; Mori & Mizohata, *supra* note 41, at 394. Other errors that elderly drivers commonly exhibit include making left turns unsafely and failing to yield to the right of way. *See* American Association of Retired Persons, *Licenses for Older Drivers Under Scrutiny*, *at* http://www.aarp.org/bulletin/departments/2001/news/article.html?SMContentIndex=2&SMContentSet=0 (last visited Feb. 19, 2002); Preusser, *supra* note 42, at 151.

[51] Mori & Mizohata, *supra* note 41, at 394.

[52] *Id.*

[53] *See* Preusser, *supra* note 42, at 151.

Dementia, while not a specific disease, is an umbrella term for various disorders that display similar symptoms.[54] To be diagnosed with dementia, a patient must experience decreased ability in at least two areas of complex brain function that impair the person from performing routine activities, hobbies, or pastimes.[55] Three common causes of dementia include Alzheimer's disease, Parkinson's disease, and severe or repeated head injuries.[56] Approximately thirteen percent of the population has dementia at age sixty-five, while fifty percent display symptoms of dementia at age eighty-five.[57]

Even mild dementia and early symptoms of such diseases can severely impair a person's ability to drive.[58] Perception, attention, and decision making processes necessary for safe driving diminish in even the mildest stages of dementia.[59] Drivers suffering from early symptoms are two to six times more likely to be involved in an automobile accident than age-matched controls that do not have dementia.[60]

As the number of elderly drivers on the road continues to increase, the issue of public safety becomes more critical.[61] Older drivers suffering from dementia pose grave danger to themselves and the public. These older drivers, if unfit to drive, should be referred to the DMV for an individual assessment of their driving ability. As physicians are the professionals most qualified to determine whether a person is mentally and physically incapable of driving, Hawai'i law must require them to refer those patients to the DMV. Without such a law, however, this referral will breach patient confidentiality and result in serious consequences for the physician.

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[54] Medical Care Corporation, *Dementia*, *at* http://www.mccare.com/english/dementia/ (last visited Nov. 15, 2002).

[55] *Id.* Examples of complex brain function include the ability to remember what was recently learned, recognize and name objects and people, speak sentences that are understandable to others, and make decisions or judgments that are personally important. *Id.*

[56] *Id.* Other causes of dementia include Lewy Body Dementia, Vascular or Multi-infarct Dementia, Frontal Temporal Lobe Dementia, Depressive Pseudodementia, Normal Pressure Hydrocephalus, and metabolic or biochemical causes. *Id.*

[57] *Id.* Although dementia is often exhibited in older adults, it can occur as early as age forty in high-risk individuals with strong family histories of dementia. *Id.*

[58] Kurt Johansson et al., *Alzheimer's Disease and Apolipoprotein E-4 Allele in Older Drivers Who Died in Automobile Accidents*, 349 LANCET 1143, 1143 (1997); L. Jaime Fitten, *Elderly Drivers With Cognitive Impairments at Risk for Automobile Accidents*, *at* http://www.ama-assn.org/ama/pub/article/4197-4856.html (last visited Nov. 15, 2002).

[59] Ball et al., *supra* note 20, at 314.

[60] Johansson et al., *supra* note 58, at 1143.

[61] Hu et al., *supra* note 18, at 569.

D. Breaches of Confidentiality in the Physician-Patient Relationship Result in Severe Consequences

Physicians generally have the duty to keep all patient communication within the context of the physician-patient relationship confidential.[62] The primary purpose for maintaining patient confidentiality is to encourage patients to divulge all relevant information to the physician, ensuring a full clinical determination and appropriate treatment.[63] For Hawai'i doctors, this constraint is set forth in the AMA Code,[64] the Bylaws of the Hawai'i Medical Association,[65] Hawai'i statutes,[66] federal statutes,[67] and the Hippocratic Oath.[68]

As Hawai'i law currently stands, physicians will not report unfit drivers to the DMV because they will be held liable for breaching the physician-patient confidentiality. The AMA Code values confidentiality as one of the "Fundamental Elements of the Physician-Patient Relationship."[69] Throughout the AMA Code, physicians are reminded that information provided by their patients must be kept confidential.[70]

The Hawai'i Revised Statutes also require that physicians keep patient information confidential.[71] The Uniform Information Practices Act ("UIPA"), found in Title 8 of the H.R.S., governs the physician-patient relationship at

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[62] S. SANDY SANBAR ET AL., LEGAL MEDICINE, 4TH ED. 126 (1998); MARCIA A. LEWIS & CAROL D. TAMPARO, MEDICAL LAW, ETHICS, AND BIOETHICS IN THE MEDICAL OFFICE 64 (1993). A physician-patient relationship exists when a physician serves a patient's medical needs, and is based on trust. AMERICAN MEDICAL ASSOCIATION CODE OF MEDICAL ETHICS Opinion 10.015.

[63] BRYAN A. LIANG, HEALTH LAW AND POLICY: A SURVIVAL GUIDE TO MEDICOLEGAL ISSUES FOR PRACTITIONERS 46 (2000).

[64] AMERICAN MEDICAL ASSOCIATION CODE OF MEDICAL ETHICS Opinion 5.05.

[65] HMA House of Delegates, *Hawaii Medical Association Bylaws*, § 12.2 (2001).

[66] HAW. REV. STAT. §§ 92F-14(a), (b)(1) (1995); 325-2 (1988); 350-1.1(a) (2000); 432D-21 (1995); 453-8.2(a)(1-4) (1992); 436B-7(3) (2001); 436B-16(b) (1991); 436B-19(17) (1992).

[67] Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-91 (1996).

[68] LIANG, *supra* note 63, at 49; GEORGE J. ANNAS, THE RIGHTS OF PATIENTS: THE BASIC ACLU GUIDE TO PATIENT RIGHTS 177 (1992). The Hippocratic Oath requires patient confidentiality: "What I may see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself holding such things shameful to be spoken about." LUDWIG EDELSTEIN, HIPPOCRATES THE OATH OR THE HIPPOCRATIC OATH 3 (1979).

[69] AMERICAN MEDICAL ASSOCIATION CODE OF MEDICAL ETHICS Opinion 10.01. Principle 12.2 of the Bylaws of the Hawai'i Medical Association requires Hawai'i physicians to follow the AMA Code's confidentiality requirements. HMA House of Delegates, *Hawaii Medical Association Bylaws*, § 12.2 (2001). "The Principles of Medical Ethics of the American Medical Association and such principles of ethics adopted by this Association shall govern the conduct of the members in their relations to each other and to the public." *Id.*

[70] *See generally* AMERICAN MEDICAL ASSOCIATION CODE OF MEDICAL ETHICS.

[71] HAW. REV. STAT. § 92F-14 (1995); 432D-21 (1995).

public hospitals and clinics.[72] In enacting UIPA, the Hawai'i State Legislature decided to permit the disclosure of certain medical information for public health and safety purposes.[73] Examples of information that must be disclosed include communicable diseases,[74] child abuse,[75] and acts of violence.[76]

A recently enacted federal statute, the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"),[77] governs patient confidentiality at all hospitals. It requires compliance with strict procedures prior to the disclosure of patient medical information.[78] Failure to follow those procedures results in serious consequences.[79]

The consequences for violating either state or federal laws regarding patient confidentiality are severe. The H.R.S. and administrative rules of the Hawai'i Board of Medical Examiners ("Medical Board") specify the consequences

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[72] *Id.* § 92F-14. *See generally* H.B. 201, H.R. STAND. COMM. REP. NO. 193, 21st Leg., Reg. Sess. (2001), *reprinted in* 2001 HAW. HOUSE J. 1205, 1205. Although the Hawai'i State Legislature repealed Act 87, the Privacy of Health Care Information Act, which dealt specifically with patients' confidentiality in their medical records, UIPA continues to govern the patient-physician relationship at public hospitals and clinics. *Id.*; HAW. REV. STAT. § 92F-14.

[73] HAW. REV. STAT. § 92F-14(a).

[74] HAW. REV. STAT. § 325-2 (1988).

[75] HAW. REV. STAT. § 350-1.1(a) (2000).

[76] HAW. REV. STAT. § 453-14 (1983).

[77] *See supra* note 67. Hawai'i originally enacted Act 87 in 1999, which dealt with physician-patient confidentiality duties to "protect the privacy of personal health care information and imposed a complex scheme of notification, authorization, and record-keeping enforced by civil and criminal penalties." H.B. 201, H.R. STAND. COMM. REP. NO. 193, 21st Leg., Reg. Sess. (2001), *reprinted in* 2001 HAW. HOUSE J. 1205, 1205. When the law became effective in July 2000, confusion about the law and concern over the Act's criminal penalties effectively paralyzed relationships among employers, employees, doctors, patients, and insurers, and resulted in high compliance costs. *Id.* The Hawai'i State Legislature repealed Act 87 specifically because of the superseding federal HIPAA. H.B. 201, STAND. COMM. REP. 1498 (2001); H.B. 201, CONF. COMM. REP. 91 (2001).

HIPAA imposes duties on all health care organizations and all physicians. Phoenix Health Systems, *HIPAA Primer*, *at* http://www.hipaadvisory.com/regs/HIPAAprimer1.htm (last visited Nov. 15, 2002) ("All health care organizations are affected. This includes all health care providers, even 1-physician offices, health plans, employers, public health authorities, life insurers, clearinghouses, billing agencies, information systems vendors, service organizations, and universities."). Physicians are not required to comply with HIPAA until April 14, 2003. *Id.*

[78] *See generally* 45 C.F.R. § 160.502 (2002).

[79] *See* Phoenix Health Systems, *HIPAA Primer*, *at* http://www.hipaadvisory.com/regs/HIPAAprimer1.htm (last visited Nov. 15, 2002). HIPAA may result in severe civil and criminal penalties for noncompliance, including: fines up to $25,000 for multiple violations of the same standard in a calendar year and fines up to $250,000 and imprisonment up to ten years for knowing misuse of patient information. *Id.*

befalling a physician who breaches patient confidentiality.[80] Violation of these laws may result in probation or in the revocation, suspension, or limitation of the physician's license.[81] Costs the physician may incur for disciplinary proceedings amount to "$100 for the first violation, $250 to $500 for the second violation, and $500 to $1,000 for subsequent violations."[82] Violations of HIPAA similarly lead to sanctions imposed on the physician.[83]

A breach of confidentiality may also result in consequences specific to medical torts.[84] In *Dubin v. Wakuzawa*,[85] the Hawai'i Supreme Court held that a breach of confidentiality is a medical tort defined by H.R.S. section 671-1 as "an error or omission in professional practice" that is likely to cause injury to the patient.[86] Physicians are adjudged for medical torts either civilly or criminally and must be reported to the Medical Board,[87] which determines whether the physician violated other medical professional rules.

Although the consequences for breaching confidentiality may be severe, exceptions for public health and safety apply to the doctrine of physician-patient confidentiality. Public health and safety have traditionally taken precedence over a physician's obligation to protect patient confidences.[88] Opinion 5.05 of the AMA Code, for example, recognizes that overriding social considerations may legally and ethically permit a breach of confidentiality.[89]

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[80] *See supra* note 3; HAW. ADMIN. R. § 16-85-1 (1997). H.R.S. chapter 436B, entitled the Professional and Vocational Licensing Act, provides duties and obligations generally for all licensed professions, including physicians. HAW. REV. STAT. § 436B-1 (1992). *See generally id.* §§ 436B-18 (1991); 436B-19(17) (1992); 436B-19.5 (1997); 436B-20 (1993); 436B-21 (1993); 436B-22 (1992); 436B-23 (1992); 436B-24 (1992); 436B-25 (1991). H.R.S. chapter 453 specifically addresses law pertinent to the medical profession. *See generally* HAW. REV. STAT. § 453-1 (1984). Hawai'i Administrative Rules Section 16-85-1 clarifies and implements H.R.S. chapters 436B and 453, which have been adopted by the Hawai'i Board of Medical Examiners. *See generally* HAW. ADMIN. R. § 16-85-1 ("This chapter is intended to clarify and implement chapters 453 and 463E, Hawaii Revised Statutes, adopted by the board of medical examiners").

[81] HAW. REV. STAT. §§ 436B-7(3) (2001); *see also id.* §§ 436B-19(17) (1992); 453-8.2(a)(1-4) (1992).

[82] HAW. REV. STAT. § 436B-16(b) (1991).

[83] *See supra* note 79.

[84] Dubin v. Wakuzawa, 89 Hawai'i 188, 194-95, 970 P.2d 496, 502-03 (1998). H.R.S. section 671-1 defines a "medical tort" as "professional negligence, the rendering of professional service without informed consent, or an error or omission in professional practice, by a health care provider, which proximately causes death, injury, or other damage to a patient." HAW. REV. STAT. § 671-1(2) (1992).

[85] 89 Hawai'i at 188, 970 P.2d at 496.

[86] *Id.* at 194-95, 970 P.2d at 502-03. Dubin's physician testified about diagnostic studies of Dubin and conversations Dubin had with his psychiatrist. *Id.* at 190, 970 P.2d at 498.

[87] HAW. REV. STAT. § 453-8.7(c) (1984).

[88] *See generally* ANNAS, *supra* note 68, at 181-84.

[89] AMERICAN MEDICAL ASSOCIATION CODE OF MEDICAL ETHICS Opinion 5.05.

Hawai'i's UIPA[90] and the federal HIPAA[91] also consider public health and safety in justifying exceptions for the disclosure of communicable diseases,[92] child abuse,[93] gunshot wounds,[94] venereal diseases,[95] and cancer.[96] In addition to these exceptions, other states permit medical disclosures to protect the safety of their roads.

III. STATE APPROACHES TO REGULATIONS CONCERNING ELDERLY DRIVERS

State driver's license regulations can be categorized into four basic approaches. States that have not yet adopted mandatory reporting are primarily concerned about potential constitutional ramifications and the valued independence and freedom associated with one's driver's license.[97] Those states that require physician reporting to the DMV, however, value the state's interest in public safety over an individual's interest in driving.[98]

A. States Utilize One of Four Approaches to Regulate Elderly Drivers

Each state has the undisputed authority to regulate driver's licensing requirements.[99] Individual states have different requirements and standards for elderly drivers that can be categorized into four basic approaches: (1) treat older drivers the same as younger drivers; (2) decrease the renewal period for older drivers; (3) grant physicians discretion to report unfit older drivers to the DMV; and (4) mandate that physicians report unfit drivers to the DMV. Each approach has benefits and drawbacks, which are further discussed below. From a public safety perspective, however, mandatory reporting provides the best protection for the health and safety of both the patient and the public.

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[90] HAW. REV. STAT. § 92F-14 (1995). "Disclosure of a government record shall not constitute a clearly unwarranted invasion of privacy if the public interest in disclosure outweighs the privacy interest of the individual." *Id.* § 92F-14(a).

[91] 45 C.F.R. § 164.512(b) (2002). Disclosures are permissible for public health reasons or upon request by a public health authority. *Id.*

[92] *See, e.g.*, HAW. REV. STAT. § 325-2 (1988); *see also* ANNAS, *supra* note 68, at 182; SANBAR ET AL., *supra* note 62, at 287.

[93] *See, e.g.*, HAW. REV. STAT. § 350-1.1(a) (2000); *see also* ANNAS, *supra* note 68, at 182.

[94] *See, e.g.*, HAW. REV. STAT. § 453-14 (1983); *see also* ANNAS, *supra* note 68, at 182; SANBAR ET AL., *supra* note 62, at 287.

[95] *See generally* SANBAR ET AL., *supra* note 62, at 287; ANNAS, *supra* note 68, at 182.

[96] *See generally* SANBAR ET AL., *supra* note 62, at 287.

[97] *See* discussion *infra* section III.B.

[98] *See* discussion *infra* section III.C.

[99] *See* U.S. CONST. amend. X; *see also supra* note 7.

1. Treating older drivers the same as younger drivers

Thirty-five states and the District of Columbia require identical procedures for both older and younger drivers.[100] These jurisdictions fail to acknowledge the reduced driving ability of older adults. Although DMV license examiners find that "the single most important criteria for identifying an impaired driver is how he or she looks coming through the door at the DMV," most of these states allow mail-in renewal applications.[101] Some states require in-person renewal only at every other renewal cycle, which could result in the DMV screening elderly applicants once every eight to ten years.[102] Such licensing procedures do not keep unsafe elderly drivers off of the road.

2. Reducing renewal periods for older drivers

Thirteen states, including Hawai'i, attempt to identify high-risk older drivers by limiting the duration of their licenses.[103] By shortening the time between renewal periods,[104] DMV licensors can examine factors such as competence and vision more frequently among older drivers. The two variables that differ throughout these states are the age at which the renewals are shortened and how frequent the renewal durations become. Arizona driver's licenses, for example, do not expire until the licensee's sixty-fifth birthday, after which time the renewal period is decreased to five years.[105] Illinois utilizes a tiered approach with the normal renewal period of four years decreasing to two years at the age of eighty-one, then to one year at the age of eighty-seven.[106]

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[100] Insurance Institute for Highway Safety, *U.S. Driver Licensing Renewal Procedures for Older Drivers*, *at* http://www.iihs.org/safety_facts/state_laws/older_drivers.htm (last visited Nov. 15, 2002).

[101] National Highway Traffic Safety Administration, *Safe Mobility for Older Drivers: Develop Tools Needed To Implement Model Programs*, *at* http://www.nhtsa.dot.gov/people/injury/olddrive/safe/01c01.htm (last visited Nov. 15, 2002).

[102] *Id.*

[103] Insurance Institute for Highway Safety, *U.S. Driver Licensing Renewal Procedures for Older Drivers*, *at* http://www.iihs.org/safety_facts/state_laws/older_drivers.htm (last visited Nov. 15, 2002).

[104] *Id.* The renewal periods for different jurisdictions are as follows: Arizona (renewal reduction to 5 years for drivers 65 and older), Colorado (5 years for drivers 61 and older), Hawai'i (2 years for drivers 72 and older), Idaho (4 years for drivers 63 and older), Illinois (2 years for drivers ages 81-86; 1 year for drivers 87 and older), Indiana (3 years for drivers 75 and older), Iowa (2 years for drivers 70 and older), Kansas (4 years for drivers 65 and older), Maine (4 year for drivers 65 and older), Missouri (3 years for drivers 69 and older), Montana (4 years for drivers 75 and older), New Mexico (4 years for drivers who would turn 75 in the last half of an 8-yr. renewal cycle), and Rhode Island (2 years for drivers 70 and older). *Id.*

[105] ARIZ. REV. STAT. § 28-3171(A)(1-2) (1999).

[106] 625 ILL. COMP. STAT. 5/6-115(a), (g) (2002).

In Hawai'i, H.R.S. section 286-106 reduces the renewal period of driver's licenses from six years to two years after a driver attains the age of seventy-two.[107] This shortened renewal period also applies to licensees that exhibit "a physical condition or conditions which the examiner of drivers reasonably believes has impaired the driver's ability to drive."[108] This approach, however, is ineffective at detecting unfit drivers because shortened renewal periods do not ensure the completion of detailed physical exams. Without proper examination, the DMV will not accurately identify unfit elderly drivers, and they will continue to pose a threat to public safety.

3. *Permitting physician reporting to the DMV*

Other states recognize that physicians are essential in identifying when patients are too impaired to drive and therefore grant physicians discretion to disclose patient information.[109] Of primary importance in these laws is the immunity given to physicians for breaching patient confidentiality.[110] Without waiving physician liability, physicians could be held criminally or civilly liable for disclosing any information to the DMV.[111]

In jurisdictions that merely permit physician reporting, the underreporting of unfit drivers continues to be a problem.[112] In a survey of 523 physicians, more than forty-two percent of the physicians indicated that they were either hesitant to report unfit drivers or were completely noncommittal to reporting.[113] Sixty-four percent of the respondents considered physicians to be the most qualified professionals at determining a person's fitness to drive.[114] They also felt that public safety should prevail over the interests of an individual driver, but their foremost concern was that disclosure would compromise the physician-patient relationship.[115]

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[107] HAW. REV. STAT. § 286-106(1).

[108] *Id.* § 286-106(2).

[109] FLA. STAT. ch. 322.126(2) (1996); GA. CODE ANN. § 40-5-35(b) (2000); MD. CODE. ANN., TRANSP. § 16-119(b)(1) (1981); N.D. CENT. CODE § 23-07-01.1(1) (1999); R.I. GEN. LAWS § 31-10-44(d) (2000).

[110] FLA. STAT. ch. 322.126(3); GA. CODE ANN. § 40-5-35(d); MD. CODE. ANN., TRANSP. § 16-119(e); N.D. CENT. CODE § 23-07-01.1(4); R.I. GEN. LAWS § 31-10-44(e).

[111] *See, e.g.*, N.D. CENT. CODE § 23-07-01.1(4); R.I. GEN. LAWS § 31-10-44(e).

[112] National Highway Traffic Safety Administration, *Safe Mobility for Older Drivers: Develop Tools Needed to Implement Model Programs*, *at* http://www.nhtsa.dot.gov/people/injury/olddrive/safe/01c01.htm (last visited Nov. 15, 2002).

[113] Shawn C. Marshall & Nathalie Gilbert, *Saskatchewan Physicians' Attitudes and Knowledge Regarding Assessment of Medical Fitness to Drive*, 160 CAN. MED. ASSOC. J. 1701, 1701-02 (1999).

[114] *Id.* at 1703.

[115] *Id.* at 1701, 1703-04.

4. Mandating physician reporting to the DMV

Pennsylvania, Oregon, and California require that physicians report unfit drivers to the DMV.[116] Pennsylvania was the first state to enact a mandatory reporting statute in 1976.[117] Under Pennsylvania law, the Pennsylvania Medical Advisory Board must "define disorders characterized by lapses of consciousness or other mental . . . disabilities affecting the ability of a person to drive safely."[118] The statute then requires that "[a]ll physicians . . . shall report to the [Department of Transportation], in writing, the full name, date of birth and address of every person" diagnosed with such a disabling disease within ten days of diagnosis.[119] Although the statute does not expressly state that dementia-related illnesses must be reported, the Pennsylvania Commonwealth Court, in *Reynolds v. Commonwealth*,[120] held that age-related diseases such as Alzheimer's disease fall under the statute.[121] The statute removes liability for the breach of patient confidentiality by expressing that "[n]o civil or criminal action may be brought against any person . . . for providing the information required under this system."[122]

Since the adoption of this law, the number of physician reports to the Pennsylvania Department of Transportation ("DOT") has skyrocketed.[123] Prior to an informational campaign in 1992 that publicized the statute and informed both physicians and the public that such a law existed, physicians made only 10,000 reports annually to the DOT.[124] As a result of the campaign, physicians

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[116] 75 PA. CONS. STAT. ANN. § 1518(b) (1977); OR. REV. STAT. § 807.710(1) (1999); CAL. HEALTH & SAFETY CODE § 103900(b-d) (1995). Several Canadian Provinces also have mandatory reporting statutes, including Manitoba, New Brunswick, the Northwest Territories, Ontario, Prince Edward Island, Saskatchewan, and Yukon Territory. *See* National Highway Traffic Safety Administration, *Safe Mobility for Older Drivers: Develop Tools Needed to Implement Model Programs*, *at* http://www.nhtsa.dot.gov/people/injury/olddrive/safe/01c01.htm (last visited Nov. 15, 2002).

[117] *See* 75 PA. CONS. STAT. ANN. § 1518.

[118] *Id.* § 1518(a).

[119] *Id.* §§ 1518(b), 102 (2002).

[120] 694 A.2d 361 (Pa. Commw. Ct. 1997) (holding that Alzheimer's disease falls under 75 PA. CONS. STAT. ANN. § 1518(a)).

[121] *Id.* at 362, 364.

[122] 75 PA. CONS. STAT. ANN. § 1518(f).

[123] National Highway Traffic Safety Administration, *Safe Mobility for Older Drivers: Develop Tools Needed to Implement Model Programs*, *at* http://www.nhtsa.dot.gov/people/injury/olddrive/safe/01c01.htm (last visited Nov. 15, 2002).

[124] *Id.*

filed 40,000 reports in 1994.[125] The incidence of these reports is the highest of any state and steadily increased by approximately 2,000 reports each year.[126]

In Pennsylvania, when a physician files a report, the DOT can exercise several options with respect to the impaired licensee. The DOT can revoke, suspend, or restrict the driver's license, or require the driver to provide more medical information or complete a driver's examination.[127] Approximately seventy-two percent of the referred patients have medical impairments significant enough to merit permanent or temporary license suspensions.[128] Fifty-one percent of the reports are for individuals over the age of forty-five, and sixteen percent are based on neurological disorders[129] such as dementia and Alzheimer's disease.

The Pennsylvania statute is the model after which the two other states enacted similar mandatory reporting laws. The Oregon statute, promulgated in 1983, states that "[a]ll persons authorized by the State of Oregon to diagnose and treat disorders of the nervous system shall report immediately to the Department of Transportation."[130] Disorders that must be reported are those "characterized by momentary or prolonged lapses of consciousness or control that is, or may become, chronic."[131] Similar to the success of the Pennsylvania statute, the number of physicians that reported to the Oregon DOT dramatically increased since the statute's enactment.[132]

In 1995, California adopted its mandatory reporting statute.[133] The California regulation requires that physicians report to the DMV the identity of patients having disorders characterized by lapses of consciousness.[134] The California Department of Health works with the DMV to define disorders for which there is "reason to believe that the patients' conditions are likely to impair their ability to operate a motor vehicle."[135] The statute explicitly mandates physicians to report "Alzheimer's disease and those related disorders

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[125] *Id.*

[126] *Id.* The large volume of physician reports can be contrasted with the annual 500 reports received from patients' families and friends. *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] OR. REV. STAT. § 807.710(1) (1999).

[131] *Id.*

[132] National Highway Traffic Safety Administration, *Safe Mobility for Older Drivers: Develop Tools Needed to Implement Model Programs*, *at* http://www.nhtsa.dot.gov/people/injury/olddrive/safe/01c01.htm (last visited Nov. 15, 2002). Physicians make most of the reports to the DMV regarding older drivers (31% of the reports), but other referral procedures have also been successful such as self-referral (29%), law enforcement (24%), family and friends (10%), and DMV personnel (4%). *Id.*

[133] CAL. HEALTH & SAFETY CODE § 103900 (1995).

[134] *Id.* § 103900(b).

[135] *Id.* § 103900(d).

that are severe enough to be likely to impair a person's ability to operate a motor vehicle."[136] California's statute continues to be the only law that explicitly requires reporting age-related cognitive impairments.[137] Such statutes that utilize age-based classifications, however, raise constitutional concerns.

B. Constitutional Issues Facing a Mandatory Reporting Law Are Easily Resolved

Fear of impermissible discrimination and denial of a property interest without due process[138] preclude the majority of states from adopting mandatory reporting statutes. The Fourteenth Amendment to the U.S. Constitution requires all states to equally treat similarly situated people and prohibits states from denying any person equal protection of the law.[139] Pursuant to its Due Process Clause, the Fourteenth Amendment further provides procedural safeguards before a person can be deprived of life, liberty, or property.[140]

1. The Equal Protection Clause

Pertinent to the constitutionality of mandatory reporting statutes for unfit elderly drivers is the classification based on age. Although the Equal Protection Clause of the Fourteenth Amendment prohibits discrimination by affording equal protection under the law,[141] age is not a suspect class, and is therefore reviewed under the rational basis test.[142] In 1976, the U.S. Supreme Court held, in *Massachusetts Board of Retirement v. Murgia*,[143] that age-based

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[136] *Id.* The statute also grants the physician discretion and permission to report a patient with other disorders "if [he/she] reasonably and in good faith believes that the reporting of a patient will serve the public interest." *Id.* § 103900(a).

[137] *Id.* § 103900(d).

[138] *See infra* note 162 and accompanying text.

[139] Reed v. Reed, 404 U.S. 71, 74 (1971). "[T]he Fourteenth Amendment's command [is] that no State deny the equal protection of the laws to any person within its jurisdiction." *Id.*

[140] U.S. CONST. amend. XIV, § 1.

[141] *See id.* The Fourteenth Amendment provides in relevant part: "No State shall . . . 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." *Id.*

[142] Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976). The rational basis test for judicial review of statutes is used for classifications in which the challenged legislation does not restrict a fundamental right or hinder a suspect class. Kadramas v. Dickinson Pub. Schs., 487 U.S. 450, 457-58 (1988). The party claiming discrimination bears the burden of proving that the legislation is irrational and must convince the court that the legislative facts on which the classification is based could not reasonably be conceived to be true. *See generally Murgia*, 427 U.S. at 314.

[143] *Id.* at 307.

classifications are subject to the rational basis test and must be rationally related to furthering a legitimate state interest.[144] In *Murgia*, a police officer challenged a state statute requiring uniformed state officers to retire at the age of fifty.[145] In reasoning that age does not constitute a suspect class, the Court stated that old age marks a stage that each person will attain if he or she lives out a normal lifespan and that people are not usually discriminated against because of their age.[146] Applying the rational basis test, the Court concluded that the age classification in the retirement statute was rationally related to the state's objective of protecting the public by removing those officers whose fitness has diminished.[147]

The Supreme Court, however, has not yet ruled on age-based regulations for driver's licenses. Judicial review of such regulations has been limited to state appellate courts. In *Kantor v. Parsekian*,[148] for example, the New Jersey Superior Court upheld policies mandating the re-examination of older drivers.[149] In that case, an eighty-seven year-old man was involved in a car accident, his first accident in forty-three years of driving.[150] New Jersey's DMV had a policy of re-examining all drivers over the age of sixty who were involved in at least one reportable accident, regardless of responsibility.[151] The policy required the driver to have a physical examination and submit to an additional driving test.[152] When he failed to pass the minimum acuity requirements, the DMV suspended his license.[153] In addressing the state's re-examination policies, the New Jersey court noted that practical necessities preclude frequent examinations of all drivers and require special classifications based on age, accident history, or other suitable standards.[154]

Under a rational basis analysis, courts must consider whether the state has a legitimate purpose for enacting the legislation, and whether the legislation rationally relates to that purpose.[155] The police power doctrine[156] is useful for

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[144] *Id.* at 314-15.

[145] *Id.* at 309.

[146] *Id.* at 313-14. The Court did note, however, that the treatment of the aged in our nation "has not been wholly free from discrimination." *Id.* at 313. The Court held that age did not constitute a suspect class and the right to employment was not a fundamental right, thus the strict scrutiny test did not apply. *Id.* at 313-14.

[147] *Id.* at 315.

[148] 179 A.2d 21 (N.J. Super. Ct. App. Div. 1962).

[149] *Id.* at 22-23. The court also ruled that the policies on the re-examination of older drivers did not violate due process requirements. *Id.* at 23.

[150] *Id.* at 22.

[151] *Id.*

[152] *Id.*

[153] *Id.*

[154] *Id.* at 23.

[155] Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 461-62 (1988).

[156] *See generally* Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

determining whether a legitimate state purpose exists. Under this doctrine, states have the authority to enact and enforce laws to protect the health, safety, and welfare of their citizens.[157] The U.S. Supreme Court has been extremely reluctant to second-guess similar legislative decisions.[158] The purpose of enacting a mandatory reporting law is to address both the increase in older drivers, who have high crash and fatality rates,[159] and public safety. The law also resolves the current conflict between the AMA Code and state confidentiality laws.

A reviewing court must then determine whether the mandatory reporting law promotes these purposes. Based on the empirical evidence that older drivers pose significant road hazards, a law that keeps unsafe drivers off the streets promotes public safety. Some courts have already recognized the purposes of age-based licensing requirements as legitimate state goals.[160] The Supreme Court also employs a high level of deference to states in determining whether laws further their legitimate purposes.[161]

2. *The Due Process Clause*

In addition to discrimination challenges under the Equal Protection Clause, mandatory reporting laws must also survive Due Process[162] claims. With mandatory reporting comes the threat of revoking one's driver's license. In *Bell v. Burson*,[163] the U.S. Supreme Court held that a driver's license is a

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[157] *Id.* (noting that a state has "the undoubted power to promote the health, safety, and general welfare" of its citizens).

[158] Ferguson v. Skrupa, 372 U.S. 726, 731 (1963) ("We refuse to sit as a 'superlegislature to weigh the wisdom of legislation.'").

[159] Stutts et al., *supra* note 19, at 337; American Association of Retired Persons, *Older Drivers, at* http://research.aarp.org/consume/fs51r_older_drivers.html (last visited Nov. 15, 2002); American Association of Retired Persons, *Licenses for Older Drivers Under Scrutiny, at* http://www.aarp.org/bulletin/departments/2001/news/article.html?SMContentIndex=2&SMContentSet=0 (last visited Feb. 19, 2002).

[160] *See* Reitz v. Mealey, 314 U.S. 33, 36 (1941) ("Any appropriate means adopted by the states to insure competence and care on the part of its licensees and to protect others using the highway is consonant with due process."); People v. Arthur W., 217 Cal. Rptr. 183, 189 n.6 (Cal. Ct. App. 1985) ("The safety of the public thoroughfares is, without question, an 'important' state interest.").

[161] New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("this Court consistently defers to the legislative determinations as to the desirability of particular statutory discriminations").

[162] U.S. CONST. amend. XIV, § 1. The Due Process Clause places limitations on a state's ability to interfere with an individual's rights and provides procedural safeguards before an individual can be deprived of his or her life, liberty, or property. Bell v. Burson, 402 U.S. 535, 539 (1971) (holding that the revocation of a driver's license requires due process).

[163] 402 U.S. 535 (1971).

constitutionally protected property interest under the Due Process Clause.[164] The Court further ruled that due process requires a state to afford notice and the opportunity for a hearing if it seeks to terminate a driver's license.[165] Without describing an appropriate hearing, the Court stated that revoking or suspending a license cannot be done arbitrarily.[166]

The Court further clarified licensing due process requirements in *Dixon v. Love*.[167] Therein, the Court ruled that a hearing held after the suspension or revocation of a license comports with the Due Process Clause.[168] In describing a requisite hearing, the Court stated that given the nature of the private interest involved, "something less than an evidentiary hearing" is sufficient.[169] The Court reasoned that granting pre-revocation hearings delayed the effectiveness of such actions and impeded the substantial public interest in administrative efficiency.[170]

The Court subsequently affirmed *Dixon*'s holding that a post-suspension hearing satisfies due process in *Mackey v. Montrym*.[171] After balancing the driver's interest against the government's interest, the Court stated that the standard for post-revocation reviews need only be "reasonably reliable."[172] The state's profound interest in public safety and reducing highway deaths justified the summary suspension of driver's licenses.[173]

Several Hawai'i cases follow the Supreme Court's decisions with respect to driver's licenses and due process. The Hawai'i Supreme Court first addressed

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[164] *Id.* at 539. A clergyman was involved in an accident when a five-year-old rode her bicycle into the side of his car. *Id.* at 537. The state statute required license suspension of an uninsured driver involved in an accident, unless he posted security for damages claimed by an aggrieved party. *Id.* at 535-36. The Court did not distinguish between a driver's license being a right or a privilege. *Id.* at 539.

[165] *Id.* at 542.

[166] *See generally id.* at 539.

[167] 431 U.S. 105, 112 (1977). A truck driver had his license suspended for three convictions within a twelve-month period, then received an additional suspension for driving while his license was suspended. *Id.* at 110. Subsequently, his license was revoked for three convictions of speeding. *Id.* at 5-6.

[168] *Id.* at 105-06, 112, 115.

[169] *Id.* at 113 (citations omitted).

[170] *Id.* at 114.

[171] 443 U.S. 1, 19 (1979). A driver was arrested after a collision and charged with operating a motor vehicle while intoxicated, driving to endanger, and failing to provide motor vehicle registration. *Id.* at 4. After he refused to take a breath-analysis test, his license was suspended. *Id.*

[172] *Id.* at 11, 13. In 1983, the U.S. Supreme Court revisited the due process issue with respect to driver's licenses. Illinois v. Batchelder, 463 U.S. 1112, 1116, 1119 (1983). In *Illinois v. Batchelder*, the Court affirmed *Mackey* and concluded that a hearing prior to the deprivation of a driver's license for failing to submit to a breath-analysis test accords more due process than the U.S. Constitution assures. *Id.*

[173] *Mackey v. Montrym*, 443 U.S. 1, 17-18 (1979).

these issues in *Kernan v. Tanaka*.[174] There, the court held that although driving is a privilege rather than a constitutional right, the license is a constitutionally protected property interest and requires due process before one can be deprived of his or her license.[175] In addressing the requisite procedures that would satisfy due process for driver's license suspensions or revocations, the Hawai'i Supreme Court balanced the property interest in a driver's license against the government's interest in public safety.[176] The court noted that the government has a substantial interest in removing dangerous drivers from the roads.[177]

Current Hawai'i Administrative Rules governing procedures for Hawai'i DMV hearings already require hearings for license revocations and suspensions,[178] thereby comporting with due process requirements articulated by the U.S. Supreme Court and the Hawai'i Supreme Court. Beyond due process concerns, the state legislature must recognize that public safety trumps an individual's privilege to drive.

C. The State's Interest in Public Safety Outweighs an Individual's Privilege to Drive

In addition to equal protection and due process challenges, opponents to mandatory reporting laws, such as the American Association of Retired Persons[179] ("AARP"), focus on the losses that elderly drivers will incur if their

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[174] 75 Hawai'i 1, 856 P.2d 1207 (1993). The Hawai'i Administrative Driver License Revocation Office revoked appellants' driver's licenses for driving while intoxicated. *Id.* at 13, 856 P.2d at 1214. The revocations were affirmed at administrative hearings. *Id.* Appellants challenged that the Administrative Revocation Program unconstitutionally violated their due process rights because it lacked certain procedural protections. *Id.* at 13, 21, 856 P.2d at 1214, 1218. The court noted a constitutionally protected interest in one's driver's license and that due process was required. *Id.* at 21, 856 P.2d at 1218. The court held that the procedural protections in the program were sufficient and did not violate appellant's due process rights. *Id.* at 41, 856 P.2d at 1227.

[175] *Id.* at 22, 856 P.2d at 1218. The Hawai'i Supreme Court affirmed the decision in 1995 and 1997. State v. Toyomura, 80 Hawai'i 8, 21, 904 P.2d 893, 906 (1995) ("This court has recognized that [a] driver's license is a constitutionally protected interest and due process must be provided before one can be deprived of his or her license."); Gray v. Admin. Dir., 84 Hawai'i 138, 146, 931 P.2d 580, 588 (1997) (brackets in original).

[176] *See Kernan*, 75 Hawai'i at 25, 29, 856 P.2d at 1219-20, 1222.

[177] *See id.* at 29, 856 P.2d at 1221.

[178] HAW. ADMIN. R. § 19-5-122.5(2) (1993).

[179] The AARP is a nonprofit organization dedicated to addressing the needs and interests of persons aged fifty and older. American Association of Retired Persons, *What Is AARP?*, *at* http://www.aarp.org/what_is.html (last visited Nov. 15, 2002). Through information, education, and advocacy, the AARP seeks to enhance the quality of life for all and promotes independence and dignity. *Id.*

driver's licenses are revoked. For some elderly, a license to drive represents independence, freedom, and connection to the outside world.[180] These ideals, however, must be balanced against public safety.

Efforts by the AARP and similar lobbying groups traditionally oppose any legislation that targets older individuals.[181] Groups like the AARP, which has more than thirty-five million members,[182] wield considerable clout and can completely shut down proposed laws affecting the interests of their constituents.[183] As a result, many state legislatures refuse to favor bills that the AARP opposes because of possible political repercussions.[184]

Notwithstanding its consistent opposition to mandatory reporting laws for elderly drivers, the AARP recognizes and supports the pressing need to research the driving ability of older drivers.[185] When Congress proposed the High Risk Drivers Act[186] in 1993 through 1995, the AARP supported the provisions that required state Departments of Transportation to thoroughly research the driving abilities of older adults.[187] Additionally, articles posted in the AARP Bulletin address driving concerns among the elderly.[188] At the very least, the AARP recognizes that public safety issues surround older drivers. To adequately protect these drivers, however, state legislatures must push for mandatory reporting legislation.

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[180] American Association of Retired Persons, *Licenses for Older Drivers Under Scrutiny, at* http://www.aarp.org/bulletin/departments/2001/news/article.html?SMContentIndex=2&SMContentSet=0 (last visited Feb. 19, 2002).

[181] American Association of Retired Persons, *Litigation: What We Do, at* http://www.aarp.org/litigation/what.html (last visited Nov. 15, 2002).

[182] American Association of Retired Persons, *What Is AARP?, at* http://www.aarp.org/what_is.html (last visited Nov. 15, 2002).

[183] American Association of Retired Persons, *Older Vote Carries Clout, at* http://www.aarp.org/bulletin/departments/2002/news/1010_news_1.html (last visited Nov. 15, 2002).

[184] *See generally* Influence, Inc., *Lobbyists, at* http://www.opensecrets.org/pubs/lobby98/ (last visited Nov. 15, 2002).

[185] 141 CONG. REC. S2496, S2496 (1995).

[186] For a discussion on the High Risk Drivers Act, *see supra* note 7.

[187] 141 CONG. REC. at S2496; *see also supra* note 7.

[188] American Association of Retired Persons, *Licenses for Older Drivers Under Scrutiny, at* http://www.aarp.org/bulletin/departments/2001/news/article.html?SMContentIndex=2&SMContentSet=0 (last visited Feb. 19, 2002).

IV. THE HAWAI'I STATE LEGISLATURE AND PHYSICIANS ARE MOVING TOWARD PERMITTING MORE EXCEPTIONS TO PHYSICIAN-PATIENT CONFIDENTIALITY

The Hawai'i State Legislature[189] is slowly moving toward permitting the disclosure of more patient information for public health and safety reasons.[190] While debating the confidentiality of medical records in the Uniform Information Practices Act, for example, the legislature decided that disclosure of certain medical information is necessary to serve the public interest.[191] The legislature balanced patients' privacy rights against the state's public safety interests.[192] It recognized that privacy rights could be violated in varying degrees.[193] As one legislator noted, disclosing medical records "may be injurious to an individual; it may, only, be embarrassing; or it may be simply a matter of privacy for its own sake."[194] He concluded that the freedom of information and the right to privacy "are in potential conflict," and proper guidelines are essential to prevent this conflict from ripening into irremedial and damaging collision.[195] With respect to physician-patient confidentiality, the legislature determined that public safety outweighs privacy rights in certain circumstances, thereby permitting exceptions to the general rule of confidentiality.[196]

In addition to the Hawai'i State Legislature's trend toward more exceptions to patient confidentiality, physicians are also moving toward mandatory reporting procedures. The AMA Council on Ethical and Judicial Affairs and

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[189] The U.S. Department of Health and Human Services, like the Hawai'i State Legislature, balanced public safety against medical privacy in determining HIPAA regulations. 45 C.F.R. § 164.512(b) (2002). HIPAA imposes serious consequences if a patient's medical records are disclosed without the requisite consent or authorization. *See supra* note 79. Exceptions to patient confidentiality exist, however. *See* 45 C.F.R. § 164.512. Disclosures are permissible for public health reasons or upon request by a public health authority, for judicial and administrative proceedings, or if "required by law." *Id.* § 164.512(a-b), (e).

[190] H.R. STAND. COMM. REP. NO. 726-88, 14th Leg., Reg. Sess. (1988), *reprinted in* 1998 HAW. HOUSE J. 1101, 1101.

[191] HAW. REV. STAT. § 92F-14(a) (1995). The legislative purpose in promulgating UIPA was to address "the often competing public and privacy interests in a single new law." H.R. STAND. COMM. REP. NO. 726-88, 14th Leg., Reg. Sess. (1988), *reprinted in* 1998 HAW. HOUSE J. 1101, 1101.

[192] *Id.* In deciding to mandate the reporting of tuberculosis to the Department of Health, for example, the Legislature conducted a balancing test which weighed the "need to continue tuberculosis surveillance" against the possible violations of privacy rights. SEN. STAND. COMM. REP. NO. 507, 15th Leg., Reg. Sess. (1989), *reprinted in* 1989 HAW. SEN. J. 1005, 1006.

[193] H.R. STAND. COMM. REP. NO. 726-88, 14th Leg., Reg. Sess. (1988), 1988 HAW. HOUSE J. 274, 274 (statement of Rep. Metcalf).

[194] *Id.*

[195] *Id.* at 275.

[196] *See supra* note 191.

the AMA House of Delegates view physician reporting to the DMV as "desirable and ethical" because physicians have a duty to both their patients and society.[197] Where reporting is merely permissible, but not mandated, underreporting of dangerous conditions continues to be a problem.[198] In a study of 523 doctors, 27.3% of the respondents indicated hesitation to report patients, and 15.1% were noncommittal.[199] Physicians were hesitant to report because of their concern that disclosing information might compromise the physician-patient relationship.[200] Nevertheless, most of the physicians (64.1%) felt that they are the professionals most qualified to identify unsafe drivers.[201] An overwhelming majority (92.5%) indicated that the interests of the public should prevail over the needs of the individual driver.[202]

The underreporting so evident in permissible reporting jurisdictions is determinative in deciding that Hawai'i should adopt a law for mandatory reporting. Section 2.24 of the AMA Code, entitled "Impaired Drivers and Their Physicians," suggests a workable approach for reporting patients to the DMV.[203] The AMA Code asks physicians to assess their patients' physical and mental impairments that might adversely affect driving ability.[204] It states that evaluations should be determined on a case-by-case basis because "not all impairments may give rise to an obligation on the part of the physician."[205] The AMA Code also enumerates two considerations for the appropriate evaluation of patients' driving abilities: "(a) the physician must be able to identify and document physical or mental impairments that clearly relate to the ability to drive; [and] (b) the driver must pose a clear risk to public safety."[206]

As suggested by the AMA Code, the Hawai'i Medical Board of Examiners should work with the DMV to determine which disorders and diseases impair a person's ability to drive.[207] These disorders should specifically include dementia-related illnesses such as Alzheimer's disease because of the

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[197] AMERICAN MEDICAL ASSOCIATION CODE OF MEDICAL ETHICS Opinion 2.24.

[198] National Highway Traffic Safety Administration, *Safe Mobility for Older Drivers: Develop Tools Needed to Implement Model Programs*, *at* http://www.nhtsa.dot.gov/people/injury/olddrive/safe/01c01.htm (last visited Nov. 15, 2002).

[199] Marshall & Gilbert, *supra* note 113, at 1702.

[200] *Id.* at 1701, 1704.

[201] *Id.* at 1703.

[202] *Id.*

[203] AMERICAN MEDICAL ASSOCIATION CODE OF MEDICAL ETHICS Opinion 2.24. The provision is meant to "articulate physicians' responsibility to recognize impairments in patients' driving ability that pose a strong threat to public safety and which ultimately may need to be reported to the [DMV]." *Id.*

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] *Id.*

correlation between dementia and reduced driving ability.[208] The Medical Board should also create guidelines for physicians to ensure that reporting is done on an objective and individual basis.[209] Such standards assure that only those drivers truly unfit to drive will be reported to the DMV.

V. CONCLUSION

Physicians are uniquely qualified to determine a person's ability to drive. They regularly conduct vision exams and understand the neurological changes that a person with dementia experiences. The exams notify physicians, on an individual basis, when an elderly patient becomes an unsafe driver. Accordingly, physicians are essential in removing unsafe drivers from Hawai'i's roads.

Under the current statutory scheme, physicians face conflicting duties with respect to reporting unsafe drivers. Although physicians have a duty to comply with the AMA Code of Ethics, which states that it is desirable and ethical for physicians to refer patients to the DMV, Hawai'i law currently places physicians under liability for such disclosure. The AMA Code encourages physicians to work with state legislatures to develop statutes that overcome conflicting ethical and legal duties.[210] A mandatory reporting statute requiring physicians to report unfit elderly patients to the DMV will resolve this conflict.

A law that requires physicians to report to the DMV will not only protect the public, but will also protect the older drivers themselves. Drivers like Henry Gushikuma will not endanger themselves, and families will feel confident that physicians can help protect their loved ones' safety. Statistics already show that the number of elderly drivers is steadily increasing, resulting in an increased number of accidents.[211] The time has come to resolve this dilemma and ensure the protection of the elderly and the safety of the general public. Without such a law, unsafe elderly drivers will continue to threaten the safety of Hawai'i's roads.

Kanoelani M. Kāne[212]

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[208] *See* discussion *supra* section II.C.

[209] AMERICAN MEDICAL ASSOCIATION CODE OF MEDICAL ETHICS Opinion 2.24.

[210] AMERICAN MEDICAL ASSOCIATION CODE OF MEDICAL ETHICS Opinion 1.02. "In general, when physicians believe a law is unjust, they should work to change the law." *Id.*

[211] *See supra* note 34 and accompanying text.

[212] J.D. Candidate 2003, William S. Richardson School of Law, University of Hawai'i at Mānoa.

Native Hawaiian Homestead Water Reservation Rights: Providing Good Living Conditions for Native Hawaiian Homesteaders

I. INTRODUCTION

Mōhala i ka wai ka maka o ka pua.[1] This Hawaiian saying translated into English literally means "unfolded by the water are the faces of the flowers."[2] The saying is better understood as, "flowers thrive where there is water, as thriving people are found where living conditions are good."[3]

Like flowers, people need water to flourish. Water is essential to the survival of any type of life. But for Hawaiians, both of the past and present, survival is dependent on both land and water.[4] The two are inseparable in providing for good living conditions. The centrality of the 'āina[5] and wai[6] to Hawaiians is reflected in the language, stories, and in the ability to thrive in Hawai'i today.[7]

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[1] While the BLUEBOOK requires foreign words and phrases to be italicized, Hawaiian is not a foreign language in the State of Hawai'i, and will not be italicized in this paper. HAW. REV. STAT. ANN. § 1-13 (LEXIS through 2002) ("English and Hawaiian are the official languages of Hawaii"); THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 7 at 50 (Columbia Law Review Ass'n et al. eds., 17th ed. 2000).

[2] Mary Kawena Pukui, 'Ōlelo No'eau: Hawaiian Proverbs and Poetical Sayings, 237 (1983).

[3] *Id.*

[4] "Uwe ka lani, ola ka honua," is another Hawaiian proverb meaning, "when the sky weeps, the earth lives." *Id.* at 315. This saying acknowledges the importance of water to life on land. *See also* Reppun v. Board of Water Supply, 65 Haw. 531, 540, 656 P.2d 57, 64 (1982). In *Reppun*, the cultural importance of water and the traditional water system was described as:

> a matter of great importance to the Hawaiians, they were, in general, willing to contribute their efforts to the water system. The konohikis aimed to secure equal rights to all makaainana and to avoid disputes. Beneficial use of water by the makaainana were also essential to the continued delivery of water.

Id. at 540 (citing to Van Dyke et al., *Water Rights in Hawaii, in* LAND AND WATER RESOURCE MANAGEMENT IN HAWAII 141 (1977)).

[5] 'Āina is the Hawaiian word for land. *See* MARY KAWENA PUKUI & SAMUEL H. ELBERT, HAWAIIAN DICTIONARY, 11 (1985)[hereinafter HAWAIIAN DICTIONARY].

[6] Wai is the Hawaiian word for fresh water. *Id.* at 377.

[7] *See generally*, MARTHA BECKWITH, HAWAIIAN MYTHOLOGY (1970); E.S. CRAIGHILL HANDY & MARY KAWENA PUKUI, THE POLYNESIAN FAMILY SYSTEM IN KA'U, HAWAI'I (1991); GEORGE HU'EU SANFORD KANAHELE, KŪ KANAKA – STAND TALL A SEARCH FOR HAWAIIAN VALUES 89, 93-94 (1986) (discussing the major gods of the Hawaiian culture); HERB KAWAINUI KANE, PELE GODDESS OF HAWAI'I'S VOLCANOES 11-15 (1987) (describing a Hawaiian story in

The 'āina and wai sustained the people of ancient Hawai'i.[8] In ancient

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which Pele, the goddess of the volcanoes, and her sister Nāmakaokaha'i, goddess of the sea, clashed with each other); Antonio Perry, *Hawaiian Water Rights*, *in* HAWAIIAN ALMANAC & ANN. FOR 1913 at 91-96 (Thos. G. Thrum ed., 1912) (discussing the role of water and water rights in ancient Hawai'i).

The gods of ancient Hawaiian culture were connected to nature and relied upon for basic necessities. Lono, one of four major gods, was the provider of many things, including rain, and thus was integral to the success or poor showing of crops. KANAHELE, *supra* at 89. Lono was important to the agrarian lifestyle of the Hawaiians, as insufficient rain led to a bad harvest, which could lead to a famine. *Id.* Kāne, another of the four major gods, came in many forms, went by various names, and was associated with a variety of duties. *Id.* at 93. One of Kāne's forms was as the deity of fresh water. *Id.* "For the planter he was, as embodied in fresh water for irrigation, *ka-wai-ola-a-Kane*, water-of-life invoked in taro planting." HANDY & PUKUI, *supra* at 34. Kāne can also be viewed as the god of wealth because water was so valued to ancient Hawaiian culture, as seen in the word for wealth, waiwai, derived from the Hawaiian word for water, wai. KANAHELE, at 94. The connection of the major gods to water helps to display the important role water played in Hawaiian culture, especially the ancient, agrarian lifestyle.

Another god, who was and still is central to the Hawaiian culture is Pele, goddess of the volcano. KANE, *supra* at 5-7. It is said that Pele sought a deep pit in which she could protect the sacred fires and she began her search in the northernmost islands of the archipelago and worked her way down to Ni'ihau and Kaua'i. *Id.* at 13. But each time Pele began to dig a pit for the flame, her sister would wash out the area. *Id.* Pele continued down the islands and finally found a safe haven on the Big Island of Hawai'i. *Id.* This story highlights the importance of the elements of water, fire and the land, and at the same time recognizes that each element is individually central to the culture.

The importance of water is also reflected in the Hawaiian language as seen, for example, in the word kānāwai, Hawaiian for the word law. HAWAIIAN DICTIONARY, *supra* note 5, at 127. One belief is that the word kānāwai is based in the regulation of water. Perry, *supra* at 91-92. "The very first laws or rules of any consequence that the ancient Hawaiians ever had are said to have been those relating to water." *Id.* at 92.

Similarly, the word 'āina itself indicates the importance of the land to Hawaiian survival. HANDY & PUKUI, *supra* at 3. "The term *'aina* represented a concept essentially belonging to an agricultural people . . . ." *Id.* 'Āina is rooted in "the verb *'ai*, to feed, with the substantive suffix *na* added, so that it signified 'that which feeds' or 'feeder.'" *Id.*

In addition to its association with gods and deities, water use had a religious element to it. Perry, *supra* at 94. Constructing and diverting water for a dam was an earnest event, involving priests, praying "to the local water god, invoking his assistance and protection." *Id.* at 94. All parcels of land received their share of water from the ditches and all water recipients were expected to contribute to the maintenance of the ditches. *Id.* Failure to do so was punishable by "temporary suspension or [an] entire deprivation of their water rights or even to total dispossession of their lands." *Id.*

[8] *See* HANDY & PUKUI, *supra* note 7, at 3.

> The evidence of the cultural dominance of the taro, the food plant that was the Hawaiian staple of life, is implicit in the use of the terms *'aina* and *'ohana*. *'Ai* may designate food or eating in general, but specifically it refers to the paste termed *poi* made from the corm of the taro . . . The Hawaiian diet was built around *poi*. Now the taro differs from all other food plants in Hawai'i in propagating itself by means of the *'oha* or sprouts from

times, the land and its resources were under the control of the king, who in turn parceled out areas to his chiefs and supporters down to the common people.[9] Everyone who had a parcel of land had access to most of the vegetation and could gather food from the land and the water.[10] Hawai'i's traditional land system was eliminated in 1848, by the Māhele, which converted Hawai'i's land to governance by a private property system.[11] The Western property system quickly took hold in Hawai'i, and coupled with various factors, eventually forced many Hawaiians off their ancestral lands.[12]

Homesteading came about as a response to the post-Māhele "decimation of the Hawaiian population and the social conditions under which they lived."[13] In 1921, the United States Congress adopted the Hawaiian Homes Commission Act ("HHCA"),[14] providing government land[15] to be leased to native Hawaiians[16] on a long-term (ninety-nine year) basis at a nominal fee.[17] The Act, backed by Prince Jonah Kūhiō Kalaniana'ole, Hawai'i's delegate in the U.S. Congress, intended to provide native Hawaiians with an opportunity to reconnect with the land as homesteaders.[18]

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the side or base of the main crom (which is termed *makua*, meaning parent or "father"). The planter breaks off and transplants the *'oha*. As the *'oha* or sprouts from the parent taro (or *makua*) serve to propagate the taro and produce the staple of life, or *'ai*, on the land (*'ai-na*) cultivated through generations by a given family, so the family or *'oha-na* is identified physically and psychically with the homeland (*'ai-na*) whose soil has produced the staple of life (*'ai*, food made from taro) that nourishes the dispersed family (*'oha-na*).

HANDY & PUKUI, *supra* note 7, at 3-4. *See also* Wong Nin v. City & County of Honolulu, 33 Haw. 379, 380 (1935) (noting the need to have flowing water to successfully grow taro).

[9] JON J. CHINEN, THE GREAT MĀHELE: HAWAII'S LAND DIVISION OF 1848 5 (1958).

[10] *Id.*

[11] NATIVE HAWAIIAN RIGHTS HANDBOOK 6-9 (Melody Kapilialoha MacKenzie ed., 1991) [hereinafter HANDBOOK] (discussing the conversion of the land tenure system).

[12] *Id. See* discussion *infra* Part II.A.

[13] HANDBOOK, *supra* note 11, at 44.

[14] Hawaiian Homes Commission Act, 1920, Pub. L. No. 67-34, 42 Stat. 108 (1921), (codified as amended at HAW. CONST. art. XII, §§ 1, 2, 3 (1978)), *available at* http://www.state.hi.us/dhhl/. [hereinafter HHCA, 1920].

[15] Government land refers to the land conveyed to "the chiefs and people" during the Māhele. *See* HANDBOOK, *supra* note 11, at 7. The Kingdom's legislative council later ratified the lands as for the government. *Id.*

[16] HHCA § 201(a). In the HHCA, a "native Hawaiian" is defined as a person who is a descendant of not less than fifty-percent blood quantum of the race inhabiting Hawai'i prior to 1778. *Id.* Throughout this paper, "native Hawaiian" will be used to refer to those meeting the HHCA definition of a person with not less than fifty-percent Hawaiian blood. This paper will use "Native Hawaiian" to refer to all persons descending from the race of people inhabiting Hawai'i prior to 1778.

[17] HHCA §§ 207-208.

[18] *See* HANDBOOK, *supra* note 11, at 46.

The HHCA recognized various rights, including rights to both land and water use.[19] Converting the written word of the HHCA into reality has proven difficult, however, leaving Native Hawaiian rights unenforced. One right that has not been fully enforced is the right to a reservation of water. Hawaiian home land beneficiaries have a right to a water reservation for current and foreseeable uses.[20] The failure to ensure a water reservation violates both the HHCA and the Hawai'i State Constitution.[21] Furthermore, failing to ensure a water reservation breaches the State's fiduciary duty to Native Hawaiians.

The Commission on Water Resource Management ("Water Commission"), recognizes and enforces all water reservations, including reservations for homesteaders.[22] The creation of the Water Commission was a response to concerns over the adequacy of the State's water supply.[23] To that end, the State Legislature established the Water Commission as the State's water resource agency, with the responsibility of protecting and managing water resources.[24] The Water Code, adopted in 1987,[25] declares that its policy is to make adequate provisions for "the protection of traditional and customary Hawaiian rights."[26] The Water Code, in conjunction with the HHCA and State Constitution, provide native Hawaiian homesteaders with water rights, including the right to a water reservation.[27]

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[19] HHCA § 207(a) (stating that "[t]he department is authorized to lease to native Hawaiians the right to the use and occupancy of a tract or tracts of Hawaiian home lands" for agricultural, aquacultural, pastoral, or residential purposes); *Id.* at § 220(d) (stating that "sufficient water shall be reserved for current and foreseeable domestic, stock water, aquaculture, and irrigation activities on tracts leased to native Hawaiians").

[20] *See* discussion *infra* Part III.B.

[21] *See* discussion *infra* Part V.

[22] *See* HAW. REV. STAT. ANN. § 174C-49(d) (LEXIS through 2002). "The commission, by rule, may reserve water in such locations and quantities and for such seasons of the year as in its judgment may be necessary." *Id.*

[23] Interview with Eric Hirano, Deputy Director, Board of Land and Natural Resources, in Honolulu, Haw. (Feb. 9, 2002) (record on file with author). Mr. Hirano served on the Water Commission from 1990 until January 2002. *Id.*

[24] *See* HAW. REV. STAT. ANN. §§ 174C-5, 174C-7 (LEXIS through 2002). Hawai'i Revised Statute section 174C-5 lists the duties charged to the commission stating that the commission

> [s]hall designate water management areas for regulation under this chapter where the commission, after the research and investigations mentioned in paragraph (1), shall consult with the appropriate county council and county water agency, and after public hearing and published notice, finds that the water resources of the areas are being threatened by existing or proposed withdrawals of water.

Id. at § 174C-5(2). Hawai'i Revised Statute section 174C-7 discusses the structure of the six-member commission. *Id.* at § 174C-7.

[25] Act 45, 1987 Haw. Sess. Law 74.

[26] HAW. REV. STAT. ANN. § 174C-2(c) (LEXIS through 2002).

[27] *See* HAW. CONST. art. XII, § 1 ("[T]he Hawaiian Homes Commission Act, 1920, enacted by the Congress, . . . is hereby adopted as a law of the State. . . ."). The State Constitution acknowledges that

This paper argues that Hawaiian Home Land beneficiaries have a constitutional right to a water reservation for current and foreseeable needs and that a failure to ensure a reservation breaches the State of Hawai'i's fiduciary duty to native Hawaiian homesteaders. Part II of this paper provides a historical background of the HHCA, the Hawai'i Water Code, and the Water Commission. Part III discusses and compares Native American and Native Hawaiian water reservation rights. Part III also analyzes the issues surrounding quantifying reserved water. Part IV argues that the ambiguity in the Water Code leads to a failure to secure a constitutionally protected water reservation right. Finally, Part V concludes that this failure to enforce a reservation right breaches the State of Hawai'i's fiduciary duty to native Hawaiian homesteaders.

> [t]he State and its people do hereby accept, as a compact with the United States, . . . relating to the management and disposition of the Hawaiian home lands, the requirement that section 1 hereof be included in this constitution, . . . it being intended that the Act . . . shall be definitive of the extent and nature of such compact, conditions or trust provisions . . . . The State and its people do further agree and declare that the spirit of the Hawaiian Homes Commission Act looking to the continuance of the Hawaiian homes projects for the further rehabilitation of the Hawaiian race shall be faithfully carried out.

Id. at § 2; *id.* at § 7 ("The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes . . . of native Hawaiians. . . . "); HHCA, 1920, Pub. L. No. 67-34, § 221(b), 42 Stat. 108 (1921), (codified as amended at HAW. CONST. art. XII, §§ 1, 2, 3 (1978)), *available at* http://www.state.hi.us/dhhl/.

> All water licenses issued after the passage of this Act shall be deemed subject to the condition, . . . that the licensee shall. . . grant to it the right to use, free of all charge, any water which the department deems necessary adequately to supply the livestock, aquaculture operations, agriculture operations, or domestic needs of individuals upon any tract.

HHCA § 221(b); HAW. REV. STAT. ANN. §§ 171-58(g) (LEXIS through 2002) ("Any lease of water rights or renewal shall be subject to the rights of the department of Hawaiian home lands as provided by section 221 of the Hawaiian Homes Commission Act."); *id.* at § 174-16 ("The department shall assure that adequate water is reserved for future development and use on Hawaiian home lands that could be served by the proposed water project."); *id.* at § 174-17 ("The department shall assure that adequate water is reserved for future development and use on Hawaiian home lands that could be served by the proposed water project."). The statute states

> [d]ecisions of the commission on water resource management relating to the planning for, regulation, management, and conservation of water resources in the State shall, to the extent applicable and consistent with other legal requirements and authority, incorporate and protect adequate reserves of water for current and foreseeable development and use of Hawaiian home lands as set forth in section 221 of the Hawaiian Homes Commission Act.

Id. at § 174C-101; *see also* HAW. CONST. art. XI, § 7 (declaring that "[t]he State has an obligation to protect, control and regulate the use of Hawaii's water resource for the benefit of its people").

II. BACKGROUND

A. Hawaiian Homes Commission Act, 1920

1. Historical development of the Hawaiian Homes Commission Act

In 1848, Hawai'i's land system completely changed in the Māhele,[28] where land was converted to a private, fee simple property system.[29] In ancient times, the king retained land for himself and divided the remaining land among his chiefs.[30] The chiefs then alloted parcels to the commoners.[31] An allotment of land did not lead to unquestionable ownership, but instead granted land on a "revocable basis".[32]

The Māhele of 1848 divided all the land in the islands. The king retained his private lands, one third of the remaining land went to the government, one third to the chiefs, and one third "to be set aside for the tenants, the actual possessors and cultivators of the soil."[33] All of these land divisions were, however, subject to the rights of the native tenants; commoners were provided with an avenue to claim title to their home property.[34] To claim title, a native

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[28] Māhele is literally defined as "portion, division, section, zone, lot, piece," but is also the term given to the 1848 kingdom-wide land division. HAWAIIAN DICTIONARY, *supra* note 5, at 219.

[29] *See* HANDBOOK, *supra* note 11, at 6-9 (listing the various types of land divisions that occurred during the Māhele and analyzing the affects the Māhele had on Hawaiians); Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95 (1998).

> The most significant event in the conversion of the communal land system to the western system of private property ownership was the Māhele of 1848, during which the King conveyed about 1.5 million acres of the 4 million acres in the islands to the main chiefs, retaining about one million for himself (which became the "Crown Lands") and assigning the final 1.5 million to the government (as "Government Lands"). Although it was expected that the common people would receive a substantial share during this distribution, only 28,600 acres were given to about 8,000 individual farmers. The fewer than 2,000 Westerners who lived on the islands were able to obtain large amounts of acreage from the chiefs and from the Government Lands, and by the end of the nineteenth century they had taken "over most of Hawaii's land . . . and manipulated the economy for their own profit."

Id. at 101-02 (quoting Neil M. Levy, *Native Hawaiian Land Rights*, 63 CAL. L. REV. 848, 858 (1975)).

[30] CHINEN, *supra* note 9, at 5.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 15-16. *See* HANDBOOK, *supra* note 11, at 7.

[34] CHINEN, *supra* note 9, at 29.

tenant had to prove to the Land Commission[35] that the land in question was actually being cultivated for subsistence living.[36]

Although the Land Commission granted thousands of awards to native tenants, many did not receive title to the land, often for failing to file their claims within the required time period.[37] In addition to obtaining an award from the Land Commission, as a prospective title-holder, a native tenant had to pay for a survey of the land in question.[38] Many native tenants could not afford to pay for a survey, which also accounts for their inability to receive title to their lands.[39] Out of approximately 4,000,000 acres of land, Native Hawaiians, as native tenants, were allotted less than 30,000 acres.[40]

The ultimate result of the Māhele was that many Hawaiians were forced off their ancestral lands.[41] This loss of a land base devastated Hawaiians, especially when coupled with the difficulties of surviving the imposition of Western society, namely a "cultural crisis and the decimation of their population."[42]

In the early 1900s, many of Hawai'i's political leaders recognized the poor social and economic state of Native Hawaiians and advocated for a "rehabilitation" plan.[43] The pure Hawaiian population decreased at an

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[35] After the Māhele, the Land Commission was responsible for "authorizing the sale of lands in fee simple [and] . . . award[ing] . . . kuleanas to native tenants." *Id.* at 12. One definition of a "kuleana" includes a "small piece of property." HAWAIIAN DICTIONARY, *supra* note 5, at 179. "Kuleana" is also defined as responsibility. *Id.* The use of the same word for both property and responsibility accentuates the attitude Hawaiians had for the land as being something that they care for and have a duty towards.

[36] CHINEN, *supra* note 9, at 30.

[37] *Id.* at 31.

[38] HANDBOOK, *supra* note 11, at 8.

[39] *Id.*

[40] CHINEN, *supra* note 9, at 31. Other factors likely influenced the small amounts of land claimed by the commoners. HANDBOOK, *supra* note 11, at 8. Because the lands granted to the chiefs were subject to claims of native tenants, some Hawaiians feared reprisals from the chiefs and chose not to claim their kuleana. *Id.* Other factors such as the requirement that the kuleana be actually cultivated, the rapidly declining native Hawaiian population, and the four-year limit on making a kuleana claim may have also resulted in the lack of land obtained by Hawaiians. *Id.* Whatever the reason, Hawaiians were left with only a small percentage of the available lands. *Id.* at 9.

[41] HANDBOOK, *supra* note 11, at 10.

[42] *Id.* at 44.

[43] *See* Marylyn M. Vause, Hawaiian Homes Commission Act, 1920: History and Analysis 1-2 (1962) (unpublished Master's Thesis, University of Hawai'i) (on file with University of Hawai'i at Mānoa, Hamilton Library).

Similarly, Native American tribes were allocated lands for homesteading under treaties with the federal government, commonly known as the Indian General Allotment Act, established in 1887. 25 U.S.C. § 331 (1887) (repealed 2000). The Indian Allotment Act created a federal program of Native American Indian homesteading. Raymond Cross, *Tribes as Rich Nations*,

79 OR. L. REV. 893, 908 (2000). Under the act "homestead-sized parcels of agricultural land [were given] to each eligible tribal member on reservations throughout Indian Country." *Id.* Unlike homesteading under the HHCA, the Native Americans would become the owners of their homesteads and were free to sell their land "subject to the approval of the Secretary of the Interior." 25 U.S.C. § 331 (1887) (repealed 2000). Those Indian lands that "were deemed surplus to the allotment needs of a particular reservation would be deemed 'opened' for settlement and sold to non-Indian homesteaders for about a $1.25 an acre." Cross, *supra* at 908.

Although 90-100 million acres were taken from various Native American tribes, only about 40 million acres were returned as allotments from the federal government. *Id.* at 909. Some of the allotted lands later fell to the state when allottees were unable to pay property taxes. *Id.*; *cf.* discussion *supra* note 39 (detailing the inability of many native (Hawaiian) tenants to pay the taxes on lands awarded to them as kuleana awards after the Māhele). Much of the remaining land was sold to non-Indian ranchers and farmers. Cross, *supra* at 907.

The Allotment Act greatly encouraged the alienation of Native Americans from their tribal culture. *Id.* Land was allotted for agricultural purposes, farming and ranching, which conflicted with traditional means of subsistence. *Id.* As an incentive to further assimilate Native Americans, allottees that were accomplished ranchers or farmers would be granted American citizenship. *Id.* at 910. Children of allottees were encouraged to attend boarding schools, away from the reservations and their families, to obtain an "American-type education." *Id.* An animosity developed between individuals that participated in the assimilation programs and tribe members who were struggling to maintain what was left of the traditional lifestyle. *Id.* at 913.

Similarly, the fifty-percent Hawaiian blood quantum requirement of the HHCA served as a divisive tool amongst eligible and non-eligible Hawaiians. Michael M. McPherson, Trustees of the Office of Hawaiian Affairs v. Yamasaki *and the Native Hawaiian Claim: Too Much of Nothing*, 21 EVNTL. L. 453, 468 (1991). "This law [requiring HHCA beneficiaries to have at least fifty-percent Hawaiian blood quantum] is inflammatory, demeaning, and suggestive of an intent to avoid fully addressing earlier wrongs." *Id.* Amending the law to allow the children of Native Hawaiian homestead recipients with less than fifty-percent Hawaiian to succeed to homestead leases again divided the Native Hawaiian community. Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of the Native Hawaiians*, 106 YALE L.J. 537, 556, 612 n.82 (1996) (noting the 1986 amendment allowing children and spouses with at least twenty-five-percent Hawaiian to succeed to an HHL lease). Some Native Hawaiians felt the amendment was necessary because many Hawaiians with more than fifty-percent, but less than one-hundred-percent Hawaiian, were marrying non-Native Hawaiians (either with no Hawaiian blood at all or with less than fifty-percent Hawaiian). *Id.* at 612. Others argued that a reduction in the required fifty-percent eligibility would adversely effect their rights as beneficiaries with at least fifty-percent Hawaiian blood quantum. *Id.*

The Indian General Allotment Act was replaced with the Indian Land Consolidation Act Amendments of 2000. 25 U.S.C.A. § 2201 (West 2000). The statute recognizes that the Allotment Act enabled the passage of land out of the ownership of individual tribe members as well as allowed for the exploitation of Native Americans by non-natives who obtained the allotted lands without conveying a proper benefit to the native owners. *Id.* The purpose of the Consolidation Act was "to prevent the further fractionation of trust allotments made to Indians" as well as "to enhance tribal sovereignty," and "promote self-sufficiency and self-determination." *Id.*

See also Joseph William Singer, *Legal Theory: Sovereignty and Property*, 86 NW. U. L. REV. 1, 8, 21-22, 25-27 (1991) (discussing Native American property rights under federal law including the impact of the Indian General Allotment Act of 1887 and the Indian Reorganization

alarming rate since the 1830s and continued to decline into the next century.[44] An 1853 census estimated the "Native"[45] population to be about 70,036.[46] But by 1900, the "Native" population had fallen to an estimated 29,787.[47] This decline was due to a combination of factors including high infant mortality rates, an influx of Western diseases, and intermarriage with non-Hawaiians.[48]

The need to reestablish a land base for Hawaiians was important; many suffered from the continuing effects of "the aftermath of the *Mahele* of 1848, which transformed Hawai'i's communal land tenure system into a *private* property system."[49] The Māhele left many Hawaiians exiled from their kulāiwi,[50] lands that their families had taken care of for generations upon generations, because of the completely foreign concept of land ownership.[51] Many were left without access to the ocean to fish or without land to farm, making Hawaiians unable to live subsistent lives as they had done for centuries.[52]

Homesteading was seen as the best method to rehabilitate the Native Hawaiian maka'āinana[53] population.[54] The topic of homesteading was first raised in the Organic Act,[55] as amended in 1910.[56] For many years, leaders of the Territory debated whether homesteading should be implemented and how such a program would be developed.[57] Homesteading bills were proposed in

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Act of 1934). Singer argues that the Allotment Act was unconstitutional and was never intended to allow the transfer of allotted lands to non-natives. *Id.* at 26-27.

[44] Vause, *supra* note 43, at 2.

[45] HAWAIIAN ALMANAC & ANN. FOR 1900 at 39 (Thos. G. Thrum ed., 1900). The census did not define the nationalities listed in the census, but provides separate categories for "Natives," and "Part Hawaiians." *Id.* "Natives" presumably meant full-blooded Hawaiians, while "Part Hawaiians" were anyone with less than one hundred percent blood quantum.

[46] *Id.*

[47] HAWAIIAN ALMANAC & ANN. FOR 1905 at 18 (Thos. G. Thrum ed., 1904). By 1919, two years before the HHCA became law, the Native Hawaiian population was down to 22,600. HAWAIIAN ALMANAC & ANN. FOR 1920 at 19 (Thos. G. Thrum ed., 1919).

[48] Vause, *supra* note 43, at 2-3; *see also id.*, at 99 (proposing that some of Hawai'i's political leaders, namely Prince Kūhiō and Senator John Wise, advocated for homesteading as a means to increase their political standing with the Hawaiian community); HANDBOOK, *supra* note 11, at 44.

[49] HANDBOOK, *supra* note 11, at 43.

[50] Kulāiwi is translated to mean homeland or native land, *see* HAWAIIAN DICTIONARY, *supra* note 5, at 179.

[51] *See* Vause, *supra* note 43, at 120-21 (stating that Hawaiians did not know the true ramifications of the Māhele and the ownership of property as an acquisition).

[52] HANDBOOK, *supra* note 11, at 44.

[53] HAWAIIAN DICTIONARY, *supra* note 5, at 224 (defining maka'āinana as commoner).

[54] Vause, *supra* note 43, at 1-2.

[55] Hawaiian Organic Act, ch. 339, 31 Stat. 141 (1900) (repealed 1959).

[56] Vause, *supra* note 43, at 17.

[57] *Id.* at 19-26.

the Territorial Legislature as early as 1918 and continued to be an unresolved issue for the next few years.[58]

Years of proposed legislation failed to satisfy the demands of the pro-homesteading and anti-homesteading factions.[59] Proponents of a rehabilitation bill argued that Hawaiians had a right to the Crown lands,[60] which had been taken from the monarchy at annexation,[61] and that it was imperative for Hawaiians to "return to the soil," in order to save the dying race.[62] "The Hawaiians were likened to the Indians and precedence for the racial rehabilitation program was found in the policies of the federal government relative to the Indians."[63]

The sugar and ranching industries and other large private land holders opposed Hawaiian homesteading.[64] The sugar companies were also interested in the Crown lands; they leased about 26,000 acres of Crown lands, the most fertile lands of the Territory.[65] These leases were set to expire between 1917 and 1921.[66] Similarly, the ranching industry also opposed homesteading; it risked losing its government leased pasture lands.[67] Both the sugar and ranching industries wanted to maintain their use of the fertile and prosperous Crown lands, while pro-homesteaders saw an opportunity to provide Hawaiians with "the top lands," specifically, "the acreage in sugar."[68]

Compromises between the pro- and anti-homesteading interests resulted in the designation of "second-class land," mostly pasture lands for the homesteading program.[69] A local sugar expert wrote to a U.S. Senator, stating that the lands decided on were "wholly unsuited" for homesteading.[70] The letter went on to say:

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[58] *Id.* at 26-34.

[59] *Id.* at 71, 91-92.

[60] *See supra* note 29 (noting that Crown lands were lands kept by the King for his personal ownership at the time of the Māhele).

[61] *See* Pele Defense Fund v. Paty, 73 Haw. 578, 585 (1992) ("Hawaii's ceded lands are lands which were classified as government or crown lands prior to the overthrow of the Hawaiian monarchy in 1893. Upon annexation in 1898, the Republic of Hawaii ceded these lands to the United States.").

[62] Vause, *supra* note 43, at 113.

[63] *Id.* at 114.

[64] *Id.* at 71, 82, 91-92.

[65] *Id.* at 114-15.

[66] *Id.* at 115.

[67] *Id.* at 82.

[68] *Id.* at 115.

[69] *Id.* at 116-17.

[70] *Id.* at 184 (citing to Letter from Albert Horner, Hawaiian Canneries Co. Ltd., Honolulu, Hawai'i, to United States Senator Miles Poindexter, Washington, D.C. (Nov. 18, 1920)).

> [t]hese lands have for years been available to the capitalistic element of the Territory but who have passed them by for the very good reason that those parts having fertile soil but no water would require such a large expenditure to bring water to them that compensating returns would not follow. How public officials can so far forget their obligation and duty to their Hawaiian constituents as to try and put through such a measure is beyond my ken.[71]

Even John Wilson, then-mayor of Honolulu, stated that the "possibility of putting necessary water on many of these acres is dim and unattainable."[72]

When Native Hawaiian homesteading finally became a reality under the HHCA in 1921,[73] the final version of the homesteading act exempted much of the most prosperous, fertile land in the islands, thus appeasing the sugar and ranching industries.[74] Because the lands designated for homesteading were second-class, dry and arid lands, providing enough water for homesteading, and ultimately rehabilitation, concerned many from the very beginning of Hawaiian homesteading.

The HHCA designated nearly 200,000 acres for homesteading purposes, to be "disposed of in accordance with the provisions of this Act."[75] The purpose of the HHCA is to "enable native Hawaiians to return to their lands in order to fully support self-sufficiency for native Hawaiians and the self-determination of native Hawaiians in the administration of this Act, and the

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[71] *Id.*

[72] *Id.* at 118 (citing to John H. Wilson, *The Hawaiian Rehabilitation Bill*, THE FRIEND, Dec. 1920, at 112).

[73] *Id.* at 90-96. Territorial leaders finally agreed to amend the homesteading resolution so that "1. Three instead of two members of the Hawaiian Homes Commission be native Hawaiians; 2. Additional lands be added to the land grants; 3. Additional lands be added to the experimental settlement." *Id.* at 90. Kūhiō then introduced the resolution to the U.S. Congress and the bill was approved July 9, 1921. *Id.* Lands designated for native Hawaiian homesteading (land located in more arid, less fertile areas) appeased the sugar and ranching industries' opposition. *Id.* at 91-92; HANDBOOK, *supra* note 11, at 47.

[74] *See* Vause, *supra* note 43, at 89-91 (discussing recognition by some of Hawai'i's political leaders' that the land selected for homesteading was not hospitable to agricultural use). Better lands were allowed to remain with sugar plantations or private ranchers. *Id.* at 89. In addition to private interests in the fertile lands, racial prejudice against Native Hawaiians also fueled the decision to grant undesirable land. *See id.*

[75] HHCA, 1920, Pub. L. No. 67-34, §§ 203, 204(a), 42 Stat. 108 (1921), (codified as amended at HAW. CONST. art. XII, §§ 1, 2, 3 (1978)), *available at* http://www.state.hi.us/dhhl/; *see* HANDBOOK, *supra* note 11, at 66 n.2 (stating that the actual acreage set aside for the HHCA is unclear because of a failure to specify the exact boundaries of the lands granted). Over the years different surveys have produced differing amounts. *Id.* at 66 n.2. Conflicting accounts occurred because "[t]he HHCA did not specify the boundaries of these lands, but identified them only by place names, with estimates of acreage". *Id.*

preservation of the values, traditions, and culture of native Hawaiians."[76] The other principal goals of the HHCA are: to create long-term land grants for native Hawaiian domestic, farming, and ranching purposes; to provide adequate water and supporting infrastructure for homesteaders; and to create financial support to assist in community development.[77]

Homesteading lots are designated for agriculture, aquaculture, pastoral or residential use.[78] Although the lots are leased on a long-term basis to native Hawaiians, title to the land remains with the State.[79] Available lands were set aside for homesteading purposes on all of the major islands.[80] Such areas include Keaukaha and Waiākea on the Big Island, Kula on Maui, Kalama'ula and Ho'olehua on Moloka'i, Auwaiolimu, Waimānalo and Wai'anae on O'ahu, and Waimea and Anahola on Kaua'i.[81]

An eligible lessee must be native Hawaiian, with at least fifty percent native Hawaiian blood quantum,[82] and at least eighteen years of age.[83] The lease is

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[76] HHCA § 101(a); *see* HANDBOOK, *supra* note 11, at 68 n.63 (stating that the Hawai'i Legislature amended the HHCA to include a stated purpose in Act 369, 15th Leg., 2d Sess. (1990)). The purpose of the HHCA was not included in the original bill passed by the United States Congress in 1921, but was instead entered into state law in 1990 by the Hawai'i State Legislature. Act 349, 1990 Haw. Sess. Laws, 1075.

[77] HHCA § 101(b).

[78] HHCA § 207(a).

[79] *Id.* at § 207(b).

[80] *See* Vause, *supra* note 43, at 88-92 (discussing a prior homesteading bill that proposed homesteading run as a trial basis on Moloka'i before granting land on other islands).

[81] HHCA § 203. HHCA § 203 excluded certain types of public lands from being used for homesteading purposes. Excluded lands are "(a) all lands within any forest reservation, (b) all cultivated sugar-cane lands, and (c) all public lands held under a certificate of occupation, homestead lease, right of purchase lease, or special homestead agreement." *Id. See* Bradley Hideo Keikiokalani Cooper, *A Trust Divided Cannot Stand–An Analysis of Native Hawaiian Land Rights*, 67 TEMP. L. REV. 699, 707, 716 (1994) (arguing that the lands given to homesteaders were in areas not suitable for agriculture and that while there are many eligible recipients, few lands are actually distributed); Lesley Karen Friedman, *Native Hawaiians, Self-Determination, and the Inadequacy of the State Land Trusts*, 14 U. HAW. L. REV. 519, 537-38 (1992) (discussing the development of the HHCA and the influence of the sugar and ranching interests over the quality of the land allotted for Hawaiian homesteading). Friedman states that "Congress acceded to the sugar growers' and ranchers' demands, excluding from the HHCA program all lands then under cultivation . . . As a result, the lands set aside for Hawaiian homesteading are for the most part incapable of supporting homesteading activities." *Id.* at 538. "Many lots are arid and lack proximate sources of irrigation water; others are covered with lava or have poor soil." *Id. See* Vause, *supra* note 43, at 65, 71-72, 89, 91-98 (exploring the impact of sugar and ranching interests in selecting the lands to be designated for homesteading).

[82] The definition of an eligible Hawaiian changed over time. A bill proposing Hawaiian homesteading in 1920 would have provided homestead leases for a native Hawaiian of "whole or part Hawaiian ancestry." *See* Vause, *supra* note 43, at 53. House Bill 13500, which revised certain homesteading conditions, proposed limiting homesteading to "those with 1/32 Hawaiian blood, where in the previous bill, anyone with any Hawaiian blood was eligible." *Id.* at 72.

valid for ninety-nine years with a one-dollar annual rent charged to the lessee.[84] Lots must be used for the purposes designated by the HHCA.[85] For example, lessees must reside on domestic lots or ranch on pastoral lots.[86] The lessee may transfer the lease to another qualified native Hawaiian, but only upon approval by the Department of Hawaiian Home Lands ("DHHL"), the State agency charged with administering the HHCA.[87]

2. Transfer to the State of Hawai'i

In 1959, responsibility for enforcing the HHCA transferred from the United States government to Hawai'i upon its admission to the union.[88] Coupled with the duty to administer the provisions of the HHCA, the State succeeded to title of all lands held by the Territory, and to all public lands and lands designated as available lands under the HHCA,[89] both of which were previously held by the United States government.[90] Article XII, section 2 of the Hawai'i Constitution provides that "[t]he State and its people do hereby accept, as a compact with the United States or as conditions or trust provisions imposed by the United States, relating to the management and disposition of the Hawaiian home lands, the requirement that section 1 hereof be included in this constitution."[91] The section goes on to say that "[t]he State and its people do further agree and declare that the spirit of the Hawaiian Homes Commission Act looking to the continuance of the Hawaiian homes projects for the further

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After several revised homesteading proposals, a bill was adopted by the United States Congress and became law on July 9, 1921, defining an eligible applicant as having at least 1/2 Hawaiian blood. *Id.* at 91. Although not entirely clear why the latter bill narrowed eligibility from 1/32 Hawaiian to 1/2 Hawaiian, the reduction was presumably to limit the number of Hawaiians eligible for homesteading while simultaneously narrowing the quantity of land needed for homesteading. *Id.* at 90-91. Another possible explanation for the change in eligibility was to appease those political interests that could only justify the program on the basis that homesteading would sustain the dying *pure* Hawaiian race. *Id.* at 131-32.

[83] HHCA § 208.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*; HAW. REV. STAT. ANN. § 26-17 (LEXIS through 2002).

[88] HAW. CONST. art. XII, § 1; Hawaii Statehood Admissions Act, Pub. L. No. 86-3, § 4, 73 Stat. 4 (1959); *see also* Cooper, *supra* note 81, at 707-08; Friedman, *supra* note 81, at 542.

[89] *See* HHCA, § 203.

[90] Hawaii Statehood Admissions Act, Pub. L. No. 86-3, §§ 4, 5(a), (b), 73 Stat. 4 (1959); *see also* Office of Hawaiian Affairs v. State of Hawaii, 96 Hawai'i 388, 390; 31 P.3d 901, 903 (2001) (stating that the state accepted a duty to keep certain lands in public trust as a condition of statehood).

[91] HAW. CONST. art. XII, § 2.

rehabilitation of the Hawaiian race shall be faithfully carried out."[92] The State Constitution calls on the legislature to support the provisions of the HHCA by making "sufficient sums available" for the development of home, agriculture, farm and ranch lots, to provide financial support through loans, and to support "the administration and operating budget of the department of Hawaiian home lands."[93]

Upon accepting responsibility of the HHCA, the State created the DHHL to administer the provisions of the act.[94] The Hawaiian Homes Commission, ("HHC") is the executive board that heads the department.[95] There are nine members on the commission, each appointed by the governor, and each must be a resident of the State and have at least twenty-five-percent Hawaiian blood quantum.[96]

Although the State, through the DHHL and HHC, manages the HHCA program, the Federal Government has not completely severed all ties with the administration of the HHCA.[97] As another condition of statehood, the Admissions Act prevents the State from amending certain provisions of the HHCA, including the qualifications of eligible lessees, without approval of the U.S. government.[98] It has been argued that the Federal Government has, in effect, maintained a trust relationship with native Hawaiians by retaining ultimate authority for amending the HHCA.[99] Furthermore, "the United States has never expressed a desire to discharge itself of its 'guardianship role' and thus terminate the HHCA trust."[100]

While the Federal Government may bear a fiduciary duty to native Hawaiian homesteaders, there is no doubt of the State's duty to homesteaders. When the State of Hawai'i accepted the "management and disposition of the Hawaiian home lands," it also accepted the fiduciary duty of carrying out the goals of providing native Hawaiians with the means of attaining self-sufficiency, specifically through long-term property leases and economic support to further homesteading goals.[101] The rights given to native Hawaiians under the HHCA are constitutionally protected.[102] The State bears an absolute

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[92] *Id.*

[93] HAW. CONST. art. XII, § 1.

[94] HAW. REV. STAT. ANN. § 26-17 (LEXIS through 2002).

[95] *Id.*

[96] HHCA § 202.

[97] *See* Hawaii Statehood Admissions Act, Pub. L. No. 86-3, §§ 4, 5, 74 Stat. 422 (1959).

[98] *Id.* at § 4.

[99] Mark A. Inciong, *The Lost Trust: Native Hawaiian Beneficiaries Under The Hawaiian Homes Commission Act*, 8 ARIZ. J. INT'L & COMP. L. 171, 178 (1991).

[100] *Id.*

[101] HAW. CONST. art. XII, §§ 1, 2.

[102] HAW. CONST. art. XII, § 2.

fiduciary duty to administer the HHCA in the best interest of native Hawaiian homesteaders.[103]

B. Water Code

Part of the State's fiduciary duty is to provide sufficient quantities of water to homesteaders.[104] The State also has an additional duty under the public trust doctrine to protect Hawai'i's water sources for all people of the State.[105] Under a mandate created by the 1978 Constitutional Convention, the State Legislature adopted the Water Code in 1987 to protect Hawai'i's water resources.[106] The Water Code also established the Water Commission, a branch of the Department of Land and Natural Resources ("DLNR"), to regulate and manage the State's water resources in accordance with the Water Code.[107] The Water Commission's duties include surveying and researching water use, regulating water management sites, protecting and enhancing in-stream water use and cataloging water use and resources statewide.[108]

The State's duty to homesteaders includes the provision of enough water to "adequately supply livestock, aquaculture operations, agriculture operations, or domestic needs of individuals upon any tract."[109] Even before the

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[103] Ahuna v. Dep't of Hawaiian Home Lands, 64 Haw. 327, 338, 640 P.2d 1161, 1168 (1982).

[104] HHCA, 1920, Pub. L. No. 67-34, §§ 220, 221, 42 Stat. 108 (1921), (codified as amended at HAW. CONST. art. XII, §§ 1, 2, 3 (1978)), *available at* http://www.state.hi.us/dhhl/.

[105] HAW. CONST. art. XI, § 7 (declaring that "[t]he State has an obligation to protect, control and regulate the use of Hawaii's water resources for the benefit of its people"). *See In re* Water Use Permit Applications, 94 Hawai'i 97, 113, 9 P.3d 409, 426 (2000) (stating that the State has a duty under the public trust doctrine and the State Constitution to protect the State's fresh water resources).

[106] HAW. REV. STAT. ANN. § 174C (LEXIS through 2002); Interview with Eric Hirano, *supra* note 23.

[107] HAW. REV. STAT. ANN. §§ 26-15, 174C-5 (LEXIS through 2002) (stating that administration of the Water Code lies with the Water Commission); HAW. REV. STAT. ANN. § 174C-6 (LEXIS through 2002) (providing that the first deputy for the Water Commission will also serve on the Board of Land and Natural Resources, ("BLNR") and that the duties of the Commission are to "administer and implement,. . . the state water code and all rules"); *id.* at § 174C-7 (LEXIS through 2002); Interview with Eric Hirano, *supra* note 23; *see also* HAW. CONST. art. XI, § 7.

> The legislature shall provide for a water resources agency which, as provided by law, shall set overall water conservation, quality and use policies; define beneficial and reasonable uses; protect ground and surface water resources . . . establish criteria for water use priorities . . . and establish procedures for regulating all uses of Hawaii's water resources.

Id.

[108] HAW. REV. STAT. ANN. § 174C-5 (LEXIS through 2002).

[109] HHCA, 1920, Pub. L. No. 67-34, § 221, 42 Stat. 108 (1921), (codified as amended at HAW. CONST. art. XII, §§ 1, 2, 3 (1978)), *available at* http://www.state.hi.us/dhhl/.

legislature passed the HHCA in 1921, there was concern over the ability of homesteaders to access water, further lending to criticisms that the lands set aside for homesteaders were too arid to be productive.[110] Water rights continue to be a complex issue for both Native Hawaiians as a whole and homesteaders in particular.[111]

The Hawai'i Constitution,[112] the HHCA,[113] and State statutes[114] recognize Native Hawaiians' water rights. Furthermore, the Water Code must protect the water rights of native Hawaiians under the constitution and the HHCA.[115] One section of the Water Code orders the State to make "adequate provision[s]" to protect "traditional and customary Hawaiian rights,"[116] in

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[110] Vause, *supra* note 43, at 117-18, 184 (quoting Letter from Albert Horner, Hawaiian Canneries Co. Ltd., to Senator Miles Poindexter, United States Senate (Nov. 18, 1920); quoting Honolulu Mayor John Wilson, *The Hawaiian Rehabilitation Bill*, THE FRIEND, Dec. 1920, at 112) (both Horner and Poindexter state that the lands designated for homesteading needed to import water). Building infrastructure to provide for homesteaders' water needs would be very expensive and the government was not likely to support the project. *Id.* at 118, 184 (quoting Letter from Albert Horner, Hawaiian Canneries Co. Ltd., to Senator Miles Poindexter, United States Senate (Nov. 18, 1920)).

[111] *See* Appellant's Opening Brief at 17, *In re* Contested Case Hearing on Water Use, Well Construction and Pump Installation Permit Application Filed by Wai'ola o Moloka'i, Inc. and Moloka'i Ranch, (*In re* Wai'ola), No. 22250 (Haw. filed Jul. 8, 1999) [hereinafter Wai'ola, Opening Brief] (DHHL, the appellant, is currently appealing a decision made by the Water Commission, claiming that the Water Commission violated DHHL's priority water rights); Appellant's Notice of Appeal at 1, 9, *In re* Contested Case Hearing on the Water Use Permit Applications filed by Kukui (Moloka'i), Inc., (*In re* Kukui), No. 24856 (Haw. filed Jan. 23, 2002) [hereinafter *In re* Kukui] (DHHL is appealing a decision made by the Water Commission granting Kukui Moloka'i, Inc.'s existing and proposed water use). The Water Commission found Kukui's existing and proposed use of a total of 1.018 mgd to be allowable under Hawai'i Revised Statute sections 174C-3, 174C-2(c), 174C-49(a), and 174C-50(b). *Id.* at 9. DHHL argues that granting Kukui's existing and proposed water uses are not in compliance with the Water Code and violates their water rights. *Id.* at 8.

See generally Cooper, *supra* note 81; Douglas W. MacDougal, *Private Hopes and Public Values In The "Reasonable Beneficial Use" of Hawai'i's Water: Is Balance Possible?*, 18 U. HAW. L. REV. 1, (1996) (discussing State laws requiring the protection of Native Hawaiian water Rights such as the provision of adequate water reserves for DHHL and the prevention of permits that would interfere with HHL water use); Elizabeth Ann Ho'oipo Kala'ena'auao Pa Martin et al., *Cultures In Conflict In Hawai'i: The Law and Politics of Native Hawaiian Water Rights*, 18 U. HAW. L. REV. 71, 147-58 (1996) (contending that the Water Code fails to enforce all the water rights designated for DHHL and that the reservations currently reserved for homesteaders in water management areas are not sufficient).

[112] *See* HAW. CONST. art. XII, § 7.

[113] *See* HHCA §§ 220, 221.

[114] *See* HAW. REV. STAT. ANN. §§ 174-16, 174-17, 174-19, 174-58, 174C-2, 174C-17, 174C-31, 174C-101 (LEXIS through 2002); HAW. ADMIN R. §§ 13-171-60, 13-171-61, 13-171-62, 13-171-63 (LEXIS through 2002).

[115] *See* HAW. CONST. art. XII, § 7; HHCA § 221.

[116] HAW. REV. STAT. ANN. § 174C-2(c) (LEXIS through 2002).

order to comply with the State Constitution.[117] Section 221 of the HHCA

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[117] *See* HAW. CONST. art. XII, § 7. In 1994 a commission was formed and given the task of reviewing the Water Code and recommending changes that should be made to the Water Code. Act 45, 1987 Haw. Sess. Law 47 (establishing a review commission); REVIEW COMMISSION ON THE STATE WATER CODE, FINAL REPORT TO THE HAWAI'I STATE LEGISLATURE (1994). The Review Commission submitted a report to the State Legislature making several recommendations, but the Legislature did not adopt the recommendations.

See also In re Water Use Permit Applications, 94 Hawai'i 97, 195, 9 P.3d 409, 507 (2000) (Ramil, J., dissenting) (noting that "the review commission recommended that the Code be amended to establish a hierarchy of water uses" but that the legislature had yet to adopt the proposals at the time of publication) (citations omitted); Ko'olau Agricultural Co., Ltd. v. Comm'n on Water Resource Mgmt., 83 Hawai'i 484, 491, 927 P.2d 1367, 1374 (1996) (observing that the legislature had not "taken action on the report" submitted by the review commission); Martin et al., *supra* note 111, at 187 (noting that the recommendations of the Review Committee were not warmly received by the 1995-1996 State Legislature). While the Review Commission conducted extensive work to address the broad issues raised by the public and allowed for open public forums, the "House Committee on Water and Land Use Planning was unwilling to hold public hearings." *Id.*, at 186-87. Implementation of the Review Commission's recommendations would have likely altered the outcome of recent cases.

The Hawai'i Supreme Court stated that the Review Commission's recommendations of a statewide permit system would have likely "'eliminate[d] the two sets of water laws under which water is currently regulated in Hawai'i' and 'do away with the designation process, which is cumbersome, costly, and time-consuming.'" *Ko'olau Agricultural Co.*, 83 Hawai'i at 491, 927 P.2d at 1374 (citations omitted).

The report submitted by the Review Commission stated:

> Even though only appurtenant rights are mentioned in the State Constitution, the Review Commission recognizes that other rights to water exist. These include: (1) the right of the Department of Hawaiian Home Lands (DHHL) to reserve sufficient quantities of stream and groundwater to carry out the federal mandate of the Hawaiian Homes Commission Act of 1920, (2) the rights of users of stream and ground waters who have assured uses under Article XI, Section 7, of the State Constitution . . . .

REVIEW COMMISSION ON THE STATE WATER CODE, FINAL REPORT TO THE HAWAI'I STATE LEGISLATURE 9 (1994). The Review Commission recommended a hierarchy of reserved water uses for both ground and stream waters. *Id.* These reserved uses are given priority over other users and include "[t]he right of the DHHL to reserve water which dates back to the enactment of the Hawaiian Homes Commission Act of 1920; more recently, the reservation right was clarified in Act 325, Session Laws of Hawaii 1991." *Id.* at 9-10. "The Hawaiian home lands reserve is for the amount of water for the 'current and foreseeable development and use needs' of the DHHL." *Id.* at 10. The Review Commission also recommended that:

> 1. Hawaiian water rights, as set forth in the State Constitution, the Hawaiian Homes Commission Act of 1920, the State Water Code, and Act 325 of 1991 be recognized in the Hierarchy of Water Uses as reserved uses of water; 2. The DHHL be required to prepare a water plan that quantifies the Department's water needs for the foreseeable future; 3. The Office of Hawaiian Affairs be requested to prepare a water plan that quantifies all other Hawaiian water rights, including adequate amounts of water to (1) maintain stream flow to ensure the propagation of native species and (2) to grow taro and other traditional crops on lands that were used for the purposes when those lands were converted to private ownership in the middle of the last century; 4. The CWRM adopt by

requires the Water Commission to provide an adequate supply of water for homesteader use and also subjects new water licenses to the rights of DHHL.[118] Specifically, a new water license can only be granted if doing so will not "interfere with the rights of the department of Hawaiian home lands."[119]

In addition to granting rights to water use, certain sections of the Water Code specifically allow for water reservation for Hawaiian home lands.[120] The Water Code allows the Commission to "reserve water in such locations and quantities and for such seasons of the year as in its judgment may be necessary."[121] The Water Code also directs the Water Commission to "incorporate and protect adequate reserves of water" for homesteaders in its decisions on water resource management.[122]

When the Water Commission considers recognizing a reservation of water, it must take into account the public interest, as well as current and foreseeable use by homesteaders.[123] If DHHL seeks a water reservation, both the DHHL and the DLNR must agree to a "reservation sufficient to support the current and future homestead needs."[124]

Under its current policy, the Commission will only allow a reservation of water when an aquifer[125] is placed under "water management."[126] An aquifer

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rule procedures to validate claims to appurtenant rights; and 5. A Special Assistant, at the level of branch chief, be added to the staff of the CWRM to ensure that issues relating to Hawaiian water rights are adequately addressed.

Id. at 15-16.

[118] HHCA § 221; HAW. REV. STAT. ANN. § 171-58(g) (LEXIS through 2002).

[119] HAW. REV. STAT. ANN. §§ 174C-49(a)(7), 174C-49(e) (LEXIS through 2002).

[120] *See, e.g., id.* §§ 174C-49(d), 174C-101 (LEXIS through 2002).

[121] *Id.* § 174C-49(d) (LEXIS through 2002).

[122] *Id.* § 174C-101(a) (LEXIS through 2002).

Decisions of the commission on water resource management relating to the planning for, regulation, management, and conservation of water resources in the State shall, to the extent applicable and consistent with other legal requirements and authority, incorporate and protect adequate reserves of water for current and foreseeable development and use of Hawaiian home lands as set forth in section 221 of the Hawaiian Homes Commission Act.

Id.; *see also* HAW. REV. STAT. ANN. § 174-17 (LEXIS through 2002) (stating that the BLNR has the responsibility of "assur[ing] that adequate water is reserved for future development and use on Hawaiian home lands that could be served by the proposed water project").

[123] Haw. Admin. R. § 13-171-60(b) (2002); *see generally* Act 325, 1991 Haw. Sess. Law. 1013-1021.

[124] HAW. REV. STAT. ANN. § 171-58(g) (LEXIS through 2002).

[125] "Aquifers may be thought of as underground reservoirs. They are rock formations that yield water in significant quantities." DAVID H. GETCHES, WATER LAW IN A NUTSHELL 238(2d ed. 1990); *see generally In re* Water Use Permit Applications, 94 Hawai'i 97, 178, 9 P.3d 409, 490 (2000) (the Hawai'i Supreme Court found that although *City Mill v. Honolulu Sewer and Water Commission*, 30 Haw. 912, 921-22 (1929), involved artesian water, there is "no sound

is classified as a water management area[127] when the Commission finds that the resource is at risk of excessive use and needs monitoring to ensure its integrity.[128] There are several factors that the Commission must consider

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basis for distinguishing "artesian" water from any other category of ground water"); City Mill v. Honolulu Sewer and Water Commission, 30 Haw. 912, 921-22 (1929) (detailing the theory of artesian waters, underground pockets of fresh water originating from rain and stream water). The Hawai'i Supreme Court defines three classes of underground water: "artesian," "percolating," and "underground watercourses." *In re* Water Use Permit Applications, 94 Hawai'i 97, 178 n.93, 9 P.3d 409, 490 n.93. Aquifers encompass "all diffuse waters," including artesian waters. *Id.* HAW. REV. STAT. ANN. § 328D-1 (LEXIS through 2002) (defining artesian water as "bottled water from a well tapping a confined aquifer in which the water level stands above the water table"). *See also* Interview with Eric Hirano, *supra* note 23 (there are a total of 110 aquifers statewide; Kaua'i has 13, O'ahu has 22, 25 on Maui, 16 on Moloka'i, Lana'i has 9, and the Big Island has 24).

[126] HAW. REV. STAT. ANN. § 174C-41(a) (LEXIS through 2002); Interview with Eric Hirano, *supra* note 23.

[127] "'Water management area' means a geographic area which has been designated pursuant to section 174C-41 as requiring management of the ground or surface water resource, or both." HAW. REV. STAT. ANN. § 174C-3 (LEXIS through 2002).

[128] HAW. REV. STAT. ANN. § 174C-41(a) (LEXIS through 2002); Haw. Admin. R. § 13-171-60(b) (2002); Interview with Eric Hirano, *supra* note 23. In order to help protect the water source, users must first obtain a permit from the commission. HAW. REV. STAT. ANN. § 174C-48(a) (LEXIS through 2002). "No person shall make any withdrawal, diversion, impoundment, or consumptive use of water in any designated water management area without first obtaining a permit from the commission." HAW. REV. STAT. ANN. § 174C-48(a) (LEXIS through 2002).

Hawai'i Revised Statutes, section 174C-41 outlines the process to designate water management areas:

> (a) When it can be reasonably determined, after conducting scientific investigations and research, that the water resources in an area may be threatened by existing or proposed withdrawals or diversions of water, the commission shall designate the area for the purpose of establishing administrative control over the withdrawals and diversions of ground and surface waters in the area to ensure reasonable-beneficial use of the water resources in the public interest.
>
> (b) The designation of a water management area by the commission may be initiated upon recommendation by the chairperson or by written petition. It shall be the duty of the chairperson to make recommendations when it is desirable or necessary to designate an area and there is factual data for a decision by the commission.

HAW. REV. STAT. ANN. § 174C-41 (LEXIS through 2002).

Once the Commission has made a recommendation for a water management designation, it must "hold a public hearing at a location in the vicinity of the area proposed for designation and give public notice of the hearing." HAW. REV. STAT. ANN. § 174C-42 (LEXIS through 2002). The Water Code further allows the Commission to conduct investigations or studies to aid in determining if the source should be designated as a water management area. HAW. REV. STAT. ANN. § 174C-43 (LEXIS through 2002).

> After public hearing and any investigations deemed necessary have been completed, the chairperson, after consultation with the appropriate county council, county mayor, and county water board, shall make a recommendation to the commission for decision. The commission shall render its decision within ninety days after the chairperson's

when deciding whether an area qualifies as a water management site.[129] After considering these factors, the Commission decides if management is needed and decides whether to designate it as a management area.[130] If the area reaches ninety-percent sustainable yield, [131] the Commission will automatically designate it as a management area.[132] Without a water

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recommendation to the commission. If the commission decides to designate a water management area, it shall cause a public notice of its decision to be given in the appropriate county and when so given, its decision shall be final unless judicially appealed.

HAW. REV. STAT. ANN. § 174C-46 (LEXIS through 2002).

[129] HAW. REV. STAT. ANN. § 174C-44 (LEXIS through 2002). The Commission must consider:

(1) [w]hether an increase in water use or authorized planned use may cause the maximum rate of withdrawal from the ground water source to reach ninety per cent of the sustainable yield of the proposed ground water management area; (2) [t]here is an actual or threatened water quality degradation as determined by the department of health; (3) [w]hether regulation is necessary to preserve the diminishing ground water supply for future needs, as evidenced by excessively declining ground water levels; (4) [w]hether the rates, times, spatial patterns, or depths of existing withdrawals of ground water are endangering the stability or optimum development of the ground water body due to upconing or encroachment of salt water; (5) [w]hether the chloride contents of existing wells are increasing to levels which materially reduce the value of their existing uses; (6) [w]hether excessive preventable waste of ground water is occurring; (7) [s]erious disputes respecting the use of ground water resources are occurring; or (8) [w]hether water development projects that have received any federal, state, or county approval may result, in the opinion of the Commission, in one of the above conditions.

Id.

[130] *Id.*

[131] Sustainable yield is "the maximum rate at which water may be withdrawn from a water source without impairing the utility or quality of the water source as determined by the commission." HAW. REV. STAT. ANN. § 174C-3 (LEXIS through 2002).

[132] *Id.* There are several water management areas throughout the state, most of which are on O'ahu. *In re* Water Use Permit Applications, 94 Hawai'i 97, 111, 9 P.3d 409, 423 (2000) involved five aquifer systems on the windward side of O'ahu that were designated as water management areas by the Water Commission on July 15, 1992. In *Ko'olau Agricultural Co., Ltd. v. Comm'n on Water Resource Mgmt.*, 83 Hawai'i 484, 927 P.2d 1367 (1996), the plaintiff, an aquifer user, sought declaratory and injunctive relief against the Water Commission from the Supreme Court of Hawai'i. At issue was the Commission's designation of five Windward O'ahu aquifers as water management areas. *Id.* at 486-87. The specific aquifers placed under water management were the Kawailoa, Ko'olauloa, Kahana, Ko'olaupoko and Waimanalo aquifers. *Id.* "On May 5, 1992, following various meetings and public hearings, the Commission, acting pursuant to H.R.S. chapter 174C, Part IV, Regulation of Water Use, designated the aquifer systems in the Windward O'ahu area from Makapu'u Point, around Kahuku Point, to Waimea Bay, as 'ground water management areas.'" *Ko'olau Agricultural Co., Ltd. v. Comm'n on Water Resource Mgmt.*, 76 Hawai'i 37, 38, 868 P.2d 455, 456 (1994).

management area designation, homesteaders cannot obtain a water reservation under the Water Commission's current policy.[133]

C. Current Conditions of Water Reservation and Homesteaders

The Commission recognizes water reservations for those homestead areas within a water management area.[134] All of O'ahu and Moloka'i are under water management, allowing homesteaders a reservation of the water.[135] In 1994, the Water Commission conveyed a reservation to DHHL for O'ahu homesteads.[136] The Water Commission reserves 1.724 million gallons a day (mgd) from the Waipahu-Waiawa aquifer for homesteads in Papakōlea, Nānākuli and the Wai'anae-Lualualei area.[137] On the Windward side of the island, the Water Commission reserves 0.124 mgd for Waimānalo homesteaders from the Waimānalo aquifer.[138] The Water Commission set a water reservation for all homestead lands on Moloka'i in 1995.[139] On Moloka'i, 2.905 mgd are reserved from the Kualapu'u aquifer to supply all homesteaders island-wide.[140]

No reservation is recognized for any of the other neighbor islands because the Water Commission has yet to find that there is a need to place any of the aquifers on the neighbor islands under water management.[141] Under certain provisions of the Water Code, the Water Commission has the discretion to recognize native Hawaiian water reservations.[142] But other sections of the Water Code, as well as the Constitution and the HHCA, guarantee native Hawaiians water reservations, notwithstanding the Water Commission's inclinations.[143] This conflict leaves native Hawaiian homesteader rights in a precarious situation.[144]

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[133] HAW. ADMIN. R. § 13-171-60(b) (2002).

[134] HAW. ADMIN. R. §§ 13-171-61, 13-171-62, 13-171-63 (2002).

[135] *Id*; *see also* HAW. ADMIN. R. § 13-171-60(b) (2002); Martin et al., *supra* note 111, at 153-56 (suggesting that the amounts reserved for DHHL are insufficient to fulfill the current and future needs of both residential and agricultural homesteaders).

[136] HAW. ADMIN. R. §§ 13-171-61, 13-171-62 (2002).

[137] HAW. ADMIN. R. § 13-171-61 (2002).

[138] HAW. ADMIN. R. § 13-171-62 (2002).

[139] HAW. ADMIN. R. § 13-171-63 (2002).

[140] *Id.*; *see also* Interview with Eric Hirano, *supra* note 23 (stating that the entire island of Moloka'i is currently drawing from the Kualapu'u aquifer).

[141] Interview with Eric Hirano, *supra* note 23.

[142] *See* discussion *infra* Part IV.

[143] *See* discussion *infra* Part IV.

[144] *See* discussion *supra* note 27.

III. Native American and Native Hawaiian Water Reservation Rights

It is helpful to compare Native Hawaiian water rights with water rights of other Native groups. Both Native Hawaiians and Native Americans are indigenous people of lands that were incorporated into the United States. Indigenous people are entitled to rights that are different from non-native people.[145]

A. Native American Water Reservation Rights

1. The Winters Doctrine

The U.S. Ninth Circuit Court of Appeals first acknowledged a right to water reservation for Native Americans in 1906 in *Winters v. United States*.[146] The *Winters* court was asked to determine the rights given by the Treaty of May 1, 1888.[147] The treaty stated that the Assiniboine and Gros Ventres Tribes[148] of Montana would cede to the United States "all their right, title and interest in and to all the lands embraced within the aforesaid reservations, not herein specifically set apart and reserved as separate reservations to which they are herein assigned as their permanent homes."[149] In exchange for permanent settlement on reservation land, the U.S. would provide the tribe with livestock, tools, goods, clothing and other materials needed to aid in building homes and establishing agriculture and ranching on the reservation and to "promote their civilization, comfort and improvement."[150]

At issue was whether the May 1, 1888 treaty recognized a water reservation in the (surface) water of Montana's Milk River for the Assiniboine and Gros

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[145] *See, e.g.*, 22 U.S.C.A. § 262p-4 (West 2002) (listing the requirements given to banks when entering into loans with indigenous people); 22 U.S.C.A. § 262p-4o (West 2002) (stating directions from the Secretary of the Treasury to international financial institutions to promote and protect indigenous people); Morton v. Mancari, 417 U.S. 535 (1995) (holding that the Bureau of Indian Affairs' hiring policy giving preference to Native Americans was not a racial discrimination, but instead was a preference given based on membership to a quasi-sovereign group that has a special relationship with the United States).

[146] Winters v. United States, 143 F. 740 (1906).

[147] *Id.* at 743.

[148] While the Ninth Circuit Court never names the specific tribes that were apart of the May 1, 1888 treaty, the Assiniboine and Gros Ventres tribes now reside at Ft. Belknap. *See* Natural Resources Conservation Service Montana, *Partnerships with American Indian Tribes*, *at* http://www.mt.nrcs.usda.gov/pas/tribes/tribesmt.html (last modified Apr. 4, 1999); *Winters*, 143 F. at 741, (the two tribes were placed on the Ft. Belknap reservation in northern Montana).

[149] Winters v. United States, 143 F. 740, 744 (1906) (citing 25 Stat. 114, c. 213, art. 2).

[150] *Id.* at 744.

Ventres tribes in addition to the land reservation.[151] The *Winters* court held that when the Federal Government entered into a treaty to reserve land for the tribes, it also intended to reserve sufficient waters of the river for the tribes to irrigate their lands.[152] The Court said that finding otherwise would not be within the "true intent and meaning of the terms of the treaty,"[153] and stated that "[w]e must presume that the government and the Indians, in agreeing to the terms of the treaty, acted in the utmost good faith toward each other; that they knew that 'the soil could not be cultivated' without the use of water to 'irrigate the same.'"[154] *Winters* was the first case to acknowledge that the government intended to include a water reservation right for the tribes in addition to and for the irrigation of the land reservation.

Winters is still good law and has been followed in several cases.[155] Thirty years later in 1936, the Federal District Court of Montana followed *Winters* in *United States v. Powers*[156] by holding that "use of the waters of the streams on the reservation were reserved to the Indians" along with the land set aside for the Crow tribe.[157] The right to water was reserved for the Crow under the Treaty of May 7, 1868, under which the tribe ceded their native lands to the United States in exchange for living permanent and non-nomadic lives on a reservation in Montana.[158]

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[151] *Id.* at 745.

[152] *Id.* at 746.

[153] *Id.* at 745.

[154] *Id.*

[155] *See, e.g.*, Arizona v. California, 373 U.S. 546, 600-01 (1963) (holding that Native Americans were reserved water rights upon the creation of a land reservation that includes water for present and future needs to irrigate reservation land); United States v. Powers, 16 F. Supp. 155, 159 (1936) (holding that treaties between the U.S. and Native Americans creating a land reservation included reservation of water use); United States v. Conrad Inv. Co. 156 F. 123, 126-27 (1907) (affirming the *Winters* doctrine and finding a reserved right to water use attaching to a reserved right to land use).

[156] *Powers*, 16 F. Supp. 155 (1936).

[157] *Id.* at 159. *Powers* did somewhat limit the uses of reserved water saying "[w]hen the Indians made the treaty with the government, they reserved rights to the use of the waters at least to the extent necessary to irrigate their lands." *Id.* The Court also held that a reservation of one inch per acre was in excess of what was needed to irrigate the land. *Id.* at 164.

The main issue brought to the U.S. District Court was whether water could be diverted from the Lodge Grass creek and Little Big Horn river. *Id.* at 156. Both bodies of water flowed within the boundaries of the Crow Indian Reservation. *Id.* The defendants in this case were all Caucasian men who had come to own property within the Crow reservation by way of a public sale held by the heirs of Crow who originally possessed the area. *Id.* at 159. The defendants argued that they had a right to divert and use water from Lodge Grass creek and Little Big Horn river for irrigation purposes because they had rights to the land. *Id.* The District Court agreed with the defendants and held that under *Winters* the tribe had "reserved rights to the use of the waters" and that this right to water transfers with a transfer of the land. *Id.* at 159, 163.

[158] *Id.* at 159.

In 1963, the U.S. Supreme Court, in *Arizona v. California*,[159] also supported the *Winters* decision, finding that a reservation of water was created for Native Americans at the same time a land reservation was established.[160] In that case, the Supreme Court was faced with the question of how to apportion water between the states of Arizona, California, Nevada, and New Mexico, in addition to considering how the Boulder Canyon Project Act[161] affected prior treaties involving Native Americans.[162] The Supreme Court affirmed the *Winters* doctrine, finding that Native Americans had a right to a reservation of water, and that the right was in existence before the Project Act, giving the tribes a priority to water use.[163]

Not only did the U.S. Supreme Court affirm a right to water reservations in *Arizona*, but it also extended the reservation right stating that "the water was intended to satisfy the future as well as the present needs of the Indian Reservations,"[164] thus ensuring a reservation of sufficient water supplies for the generations to come.[165]

The *Winters* and *Powers* courts found that water reservations were included in the treaties entered into by the United States and the Native American tribes.[166] The U.S. Supreme Court in *Arizona*, however, did not rely on

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[159] Arizona v. California, 373 U.S. 546 (1963).

[160] *Id.* at 600.

[161] 43 U.S.C. § 617 (2002). This Act was meant to determine the use and distribution of water from the Colorado River System to California, Arizona and Nevada. *Id.*

[162] *Arizona*, 373 U.S. at 551-52.

[163] *Id.* at 596-600.

[164] *Id.* at 600.

[165] *Id.*

[166] Both the *Winters* and *Powers* courts relied on *Jones v. Meehan*, 175 U.S. 1 (1898) in interpreting the two treaties in question. *See* Winters v. United States, 143 F. 740, 746 (1906); United States v. Powers, 16 F. Supp. 155, 162 (1936). The Supreme Court explained in *Jones* that when construing a treaty between the U.S. and Native American tribes, the court must consider the imbalance of power between the two parties. *Jones*, 175 U.S. at 11. The U.S. and Native Americans have a guardian-ward relationship, with a heavier duty falling on the U.S. as "an enlightened and powerful nation," that entered into the treaty through "representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language." *Id.* Conversely, the Native Americans

> are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

Id. Whatever inaccuracies the Court's description of Native Americans may contain, the Court did at least acknowledge that the U.S. had the upper hand in executing treaties that would be

interpreting treaties, but instead viewed the importance of water under a practical lens. Recognizing that Arizona, California and Nevada are dry, arid, desert areas, the Court said:

> It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind – hot, scorching sands – and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.[167]

One commentator argued that water reservation rights apply to all lands held in trust, or as a reservation for Native Americans.[168] The basis for this argument lies in *United States v. John*.[169] In this case, the U.S. Supreme Court was asked to decide whether state or federal jurisdiction controlled over crimes committed within Choctaw Indian reservation lands.[170] The Supreme Court held that "Indian country" included reservation land; Indian communities within the United States; and "all Indian allotments, the Indian titles to which have not been extinguished."[171] Again, the Supreme Court seemingly extended water reservation rights by providing Native American communities residing on non-reservation lands the same rights and obligations owed to communities living on federal reservations.[172] Under the *John* definition of Indian country, all Native American communities may be able to claim a water reservation under *Winters*.[173]

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more favorable to their interests than to the tribe's interests. The *Winters* court rightly acknowledged that greater leniency was owed to Native Americans in interpreting treaties between tribes and the U.S. It also properly held that while a tribe may not have been familiar with the word 'irrigation,' they certainly understood the inseparability of land and water and its necessity to their survival. *Winters*, 143 F. at 746. The court noted that the Native Americans "believed they had as much right to the water as to the land included in the boundaries for their permanent homes for the uses and purposes of the agreement made with the government." *Id.* In citing to *United States ex rel. Ray v. Hibner*, 27 F.2d 909, 912 (1936), and *Skeem v. U.S.*, 273 F. 93 (1921), the *Powers* court supported the connection between land and water by allowing water rights to attach to a purchase of land, finding that water use was implied with a transfer of title. United States v. Powers, 16 F. Supp. 155, 160 (1936).

[167] *Arizona*, 373 U.S. at 598-99.

[168] Taiawagi Helton, *Indian Reserved Water Rights in the Dual-System State of Oklahoma*, 33 TULSA L.J. 979, 993-94 (1998) (stating that lands that are not specifically designated as reservations include a water right, so long as the land is part of the trust set aside for Native Americans).

[169] United States v. John, 437 U.S. 634 (1978).

[170] *Id.* at 634.

[171] *Id.* at 648 n.17; Helton, *supra* note 168, at 993.

[172] *John*, 437 U.S. at 648.

[173] Helton, *supra* note 168, at 994. The Court of Appeals of Oregon in *State v. Jim*, 37 P.3d 241 (Or. App. 2002), has stated that "[t]he tract in dispute [in *John*, 437 U.S. at 649] had been

2. Winters Doctrine extended to groundwater

After the *Arizona* decision, it was clear that the U.S. Supreme Court recognized a reservation right in surface water, but the law was unclear on the rights of Native Americans to groundwater reservation. The *Winters* court faced the question of whether there was a reservation in surface water, specifically the Milk River in Montana.[174] Later courts used *Winters* to support finding a right to water reservation in other river waters.[175] But the courts did not deal with reservation rights of non-surface water until 1976, when the Supreme Court extended the applicability of *Winters* to groundwater in *Cappaert v. United States*.[176] Citing water studies, the Court found that surface water and groundwater are so closely connected that the use of one (surface water), affected the quantity of the other (groundwater).[177] *Cappaert* thus established that Native Americans have a reserved right to both surface water and groundwater.[178]

B. Native Hawaiian Homesteader Water Reservation Rights

Native Americans clearly have a right to water reservations. The extensive case law, which ultimately resulted in this definitive right, may be due in part to the unique relationship Native Americans have with the federal government. Federal law recognizes many Native American tribes as separate "quasi-sovereign" political entities, having a guardian-ward relationship with the United States.[179] The boundaries of a Native Hawaiian-federal

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declared by Congress to be held in trust for the benefit of the Mississippi Choctaw Indians, who were at the time under federal supervision. Congress later expressly declared that the tract was a 'reservation.'" *Jim*, 37 P.3d at 244. The court went on to say "[a]t best, *John* stands for the proposition that a tract of land held in trust for a tribe is a reservation." *Id.*

[174] Winters v. United States, 143 F. 740, 740-43 (1906).

[175] *See* Arizona v. California, 373 U.S. 546 (1963) (involving a reserved water right to use water from the Colorado River); United States v. Conrad Inv. Co. 156 F. 123, 124 (1907) (involving the use of water from the Birch and Dupuyer Creeks in Montana); United States v. Powers, 16 F. Supp. 155 (1936) (involving the diverting of water from the Lodge Grass creek and the Little Big Horn River).

[176] Cappaert v. United States, 426 U.S. 128, 142-43 (1976).

[177] *Id.* at 142. The court cites to C. Corker, Groundwater Law, Management and Administration, National Water Commission Legal Study No. 6, p. xxiv (1971), for the proposition that "[g]roundwater and surface water are physically interrelated as integral parts of the hydrologic cycle." *Id.*

[178] *See* William A. Wilcox, Jr., *Maintaining Federal Water Rights in the Western United States*, 1996 ARMY LAW. 3, 6-7 (1996) (discussing the facts of *Cappaert* and the Court's extension of *Winters* reservation rights to include groundwater).

[179] Morton v. Mancari, 417 U.S. 535, 554 (1974); *see also* U.S. CONST. art. I, § 8, cl. 3.

government relationship are not as distinct. The U.S. Supreme Court found that in the context of a state-run election, Native Hawaiians do not comprise a political group, but rather a racial category,[180] and thus do not share the same federal status as Native Americans.[181] Nevertheless, Congress has passed acts, both prior to and since *Rice v. Cayetano*,[182] recognizing that Native Hawaiians have a political status comparable to Native Americans, contrary to the court's recent holding.[183] Thus, the political status of Native Hawaiians under federal law is unclear.

Although both Native Americans and Native Hawaiians have government administered housing programs, they have different systems of home land distribution. Native American tribes entered into independent treaties establishing reservations, while the HHCA established homesteading for all

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[180] *See* Rice v. Cayetano, 528 U.S. 495 (2000) (holding that a Hawaiians-only voting scheme violated the 15th Amendment by placing a racial requirement on the right to vote). The Court found *Mancari* inapplicable to the case at hand because Native Hawaiians lack federal recognition as a political group. *Id.* at 519-20. Gavin Clarkson, *Not Because They Are Brown, But Because of Ea:* Rice v. Cayetano, 528 U.S. 495 (2000), 24 HARV. J.L. & PUB. POL'Y 921, 962 (2001) (arguing for federal recognition for Native Hawaiians through passage of the Akaka Bill or a similar bill that would establish Native Hawaiians as a political entity); Le'a Malia Kanehe, Recent Development: *The Akaka Bill: The Native Hawaiians' Race For Federal Recognition*, 23 U. HAW. L. REV. 857 (2001) (discussing the legislation surrounding the Akaka Bill and the impact federal recognition would have on Hawaiians); Annmarie M. Liermann, Comment: *Seeking Sovereignty: The Akaka Bill and the Case for the Inclusion of Hawaiians in Federal Native American Policy*, 41 SANTA CLARA L. REV. 509 (2001) (arguing that the Akaka Bill is a means of achieving sovereignty and does not preclude the possibility of establishing a completely independent Hawaiian Nation).

[181] *But see* Clarkson, *supra* note 180, at 929 (stating, "[i]t is important to note that all of the treaties between the United States and the Kingdom of Hawaii treated Native Hawaiians as a collective political entity, not as an ethnic group").

[182] *Rice v. Cayetano*, 528 U.S. 495 (2000).

[183] Native Hawaiian Education Act 20 U.S.C.A. § 7512 (West 2002) (this act was passed on January 8, 2002 after *Rice* held that Native Hawaiians are not politically comparable to Native American tribes). Several other congressional acts have acknowledged a political relationship between Native Hawaiians and the Federal Government. *See, e.g.*, National Historic Preservation Act 16 U.S.C.A. § 470 (West 2000); National Museum of the American Indian Act 20 U.S.C.A. § 80q (West 1999); American Indian, Alaska Native, and Native Hawaiian Culture and Art Development Act 20 U.S.C.A. § 4401 (West 1999); Native American Languages Act 25 U.S.C.A. § 2901 (West 2001); Native American Graves Protection and Reparation Act 25 U.S.C.A. § 3001 (West 2001); American Indian Religious Freedom Act 42 U.S.C.A. § 1996 (West 1994); Native American Programs Act of 1974 42 U.S.C.A. § 2991 (West 1975); Older Americans Act of 1965 42 U.S.C.A. § 3001 (West 1995); Hawaiian Homelands Homeownership Act of 2000 25 U.S.C.A. § 4221 (West 2001). *See also*, Van Dyke, *supra* note 29, at 108-09, 112-13, 119-26 (while portions of Prof. Van Dyke's arguments have been countered by the U.S. Supreme Court's decision in *Rice*, he presents evidence that recognizes a special relationship between Native Hawaiian and the U.S. that rightly merit a political rather than racial classification).

eligible native Hawaiians. The federal government transferred lands to both under similar goals of "obtain[ing] the means and enabl[ing] them to become self-supporting, as a pastoral and agricultural people, and to educate their children in the paths of civilization."[184] The federal government has legal responsibility for Native American reservations,[185] and gave the State of Hawai'i legal responsibility for native Hawaiian homestead land as a condition of statehood.[186]

Native Hawaiians have rights similar to Native Americans,[187] including a right to the reservation of water.[188] Even though their histories and treatment under the law are not identical, the similarities are analogous enough to share certain rights as indigenous people. The Hawai'i Supreme Court has found that homesteaders have certain water rights.[189] After analyzing the legislative history of the HHCA, the Admissions Act and the State Constitution, the State Supreme Court in *Ahuna v. Department of Hawaiian Home Lands*,[190] concluded:

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[184] Winters v. United States, 143 F. 740, 744 (1906); *accord* HHCA, 1920, Pub. L. No. 67-34, § 101, 42 Stat. 108 (1921), (codified as amended at HAW. CONST. art. XII, §§ 1, 2, 3 (1978)), *available at* http://www.state.hi.us/dhhl/ (stating that the purpose of the Act "is to enable native Hawaiians to return to their lands in order to fully support self-sufficiency for native Hawaiians and the self-determination of native Hawaiians in the administration of this Act, and the preservation of the values, traditions, and culture of native Hawaiians").

[185] *See generally* Sharon O'Brien, *Tribes and Indians: With Whom Does the United States Maintain A Relationship?*, 66 NOTRE DAME L. REV. 1461 (1991).

[186] HAW. CONST. art. XII, § 2.

[187] For example, the National Historic Preservation Act 16 U.S.C.A. § 470 (West 2000); National Museum of the American Indian Act 20 U.S.C.A. § 80q(8) (West 1999); American Indian, Alaska Native, and Native Hawaiian Culture and Art Development Act 20 U.S.C.A. § 4401 (West 1999); Native American Languages Act 25 U.S.C.A. § 2901 (West 2001); Native American Graves Protection and Reparation Act 25 U.S.C.A. § 3001 (West 2001); American Indian Religious Freedom Act 42 U.S.C.A. § 1996 (West 1994); Native American Program Act of 1974 42 U.S.C.A. § 2991 (West 1995); Older Americans Act of 1965 42 U.S.C.A. § 3001 (West 1995); Hawaiian Homelands Homeownership Act of 2000 25 U.S.C.A. § 4221 (West 2001) all confer similar rights to both Native Americans and Native Hawaiians under federal law.

[188] *See supra* notes 146-154 discussing Winters v. United States, 143 F. 740 (1906) (acknowledging a water reservation for Native Americans in conjunction with land reservations); HHCA § 221 (stipulating that adequate amounts of water must be provided for Native Hawaiian homesteaders).

[189] *See* Ahuna v. Dep't of Hawaiian Home Lands, 64 Haw. 327, 640 P.2d 1161 (1982).

[190] *Id.* In this case, DHHL appealed a decision from the Third Circuit, which ordered DHHL to lease a 10-acre homestead lot to plaintiff. *Id.* at 328. The Hawai'i Supreme Court affirmed the lower court's decision. *Id.* at 344. Plaintiffs, a group of Native Hawaiians, eligible for homestead lots, sought agricultural homestead leases from DHHL. *Id.* at 329. Plaintiffs challenged DHHL's lease permissive use distribution system, arguing that lots must be given to all eligible "applicants who were qualified to perform the conditions of the lease." *Id.*

> (1) that the federal government set aside certain public lands to be considered Hawaiian home lands to be utilized in the rehabilitation of native Hawaiians, thereby undertaking a *trust obligation* benefiting the aboriginal people; and (2) that the State of Hawai'i assumed this *fiduciary obligation* upon being admitted into the Union as a state.[191]

The State inherited a fiduciary duty towards homesteaders.[192] In looking at the "general policy underlying" the bill that would eventually become the HHCA, the *Ahuna* court recognized that the HHCA was meant to provide home lands for rehabilitation purposes, adequate amounts of water for all residents, and financial support for homesteaders to develop home and agricultural activity.[193] By holding that the State assumed fiduciary obligations to native Hawaiians, the *Ahuna* court found the State responsible for ensuring that the policies of the HHCA are administered, including providing an adequate supply of water for homestead use.[194]

The *Ahuna* court recognized that the Federal courts and the U.S. Congress often confer similar rights on all native people including "American Indians, Eskimos, and Alaska natives."[195] The Court thus allowed for the comparison of rights between Native Americans and Native Hawaiians, saying "[e]ssentially, we are dealing with relationships between the government and aboriginal people. Thus, reason dictates that we draw the analogy between native Hawaiian homesteaders and other native Americans."[196] Like the fiduciary relationship between the Federal government and Native Americans, particularly those on reservation lands, the State has a fiduciary duty to native Hawaiian homesteaders, including providing adequate amounts of water.[197]

Native Hawaiian Homesteaders have a constitutionally protected right to water reservations, just as Native Americans have federally protected reservations rights. When the State of Hawai'i accepted the "management and disposition of the Hawaiian home lands"[198] in its constitution, it simultaneously bound itself to fulfill HHCA section 220, which reserves water to homesteaders.[199] In particular, section 220(d) states that "sufficient water

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[191] *Id.* at 1168 (emphasis added); *see also In re* Ainoa, 60 Haw. 487, 591 P.2d 607 (1979) (The Hawai'i Supreme Court notes that the HHCA's purpose was to rehabilitate Native Hawaiians).

[192] *Ahuna*, 64 Haw. at 336-37, 640 P.2d at 1167.

[193] *Id.*

[194] *Id.* at 338, 640 P.2d at 1168.

[195] *Id.* at 339, 640 P.2d at 1168-69.

[196] *Id.* at 339, 640 P.2d at 1169.

[197] *See* discussions *infra* Part III.A on Native American water reservation rights and Part V on the duty owed to Native Hawaiians by the State of Hawai'i.

[198] HAW. CONST. art. XII, § 2.

[199] *Id.*

shall be reserved for current and foreseeable domestic, stock water, aquaculture, and irrigation activities" for all home land lots.[200] With the constitutional adoption of the HHCA, homesteader rights to water reserves became constitutionally protected.

The State also recognizes a reservation for homesteaders in several sections of the Water Code.[201] These provisions require that the Commission reserve adequate amounts of water for current and foreseeable homestead needs. Section 171-58(g) of the Water Code calls on the Commission and DHHL to "jointly develop a reservation of water rights sufficient to support current and future homestead needs."[202] The Commission is further required to "incorporate and protect adequate reserves of water for current and foreseeable" homestead use when planning for, regulating, and managing water resources.[203] Sections 174-16 and 17 of the Water Code require that the Commission reserve water for future homestead development when considering new water projects.[204]

Homesteaders have a right to water reservation under state law. This right is found in the constitution, the HHCA, and in the State Water Code.

C. *Quantification of Water Reservations*

Recognition of reservation rights is important to the survival and development of Native American and native Hawaiian homesteaders, but the recognition alone fails to assert how much water is allotted in the reservation. Following recognition of the right, the next step is determination of how much water should be reserved and how to quantify water needs.[205] Quantification

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[200] HHCA, 1920, Pub. L. No. 67-34, §§ 220(d), 42 Stat. 108 (1921), (codified as amended at HAW. CONST. art. XII, §§ 1, 2, 3 (1978)), *available at* http://www.state.hi.us/dhhl.

[201] *See* HAW. REV. STAT. ANN. §§ 171-58(g), 174-16, 174-17, 174C-101 (LEXIS through 2002).

[202] HAW. REV. STAT. ANN. §§ 171-58(g) (LEXIS through 2002). Hawai'i Revised Statute section 171-58(g) goes on to say that "[a]ny lease of water rights or renewal shall be subject to the rights of the department of Hawaiian home lands as provided by section 221 of the Hawaiian Homes Commission Act." *Id.*; *see also* HAW. REV. STAT. ANN. § 174C-49(e) (LEXIS through 2002) ("All permits issued by the commission shall be subject to the rights of the department of Hawaiian home lands as provided in section 221 of the Hawaiian Homes Commission Act, whether or not the condition is explicitly state in the permit.") The language in these sections is argued to convey to homesteaders a priority or "first call" on water use over both new and existing water users. This issue is currently being debated before the Supreme Court of Hawai'i in *In re* Wai'ola O Molokai, Inc. and Molokai Ranch, (Supreme Court of Hawai'i) (No. 22250). *Cf.* Wai'ola, Opening Brief *supra* note 111, at 17-33.

[203] HAW. REV. STAT. ANN. § 174C-101(a) (LEXIS through 2002).

[204] HAW. REV. STAT. ANN. §§ 174-16, 174-17 (LEXIS through 2002).

[205] *See* Sylvia F. Liu, Comment: *American Indian Reserved Water Rights: The Federal Obligation to Protect Tribal Water Resources and Tribal Autonomy*, 25 ENVTL. L. 425 (1995);

of Native American water reserve amounts required court determination of factors used in determining water needs,[206] and of limitations, if any, to be placed on reserved water use.[207] The same considerations should apply to quantifying native Hawaiian water reserves, even though the procedures discussed below, as set forth by federal and state law, are limited to the quantification of Native American tribal reserves.[208] Quantifying water reservations is important to ensure that Native American and Native Hawaiian rights will be properly executed and utilized.[209]

1. Methods of quantification for Native American water reservations

Currently, Federal law and most states quantify reserve water for tribes under the practicably irrigable acreage ("PIA") standard.[210] The *Arizona* court held that the PIA standard reserves enough water to supply the tribe's "acreages of irrigable land."[211] Some factors used to determine PIA are: "1) arability of the land; 2) engineering feasibility of irrigation projects; and 3) economic feasibility of irrigation projects, which essentially consists of a cost-benefit analysis."[212]

One commentator raises arguments against continuing to use the PIA standard and in favor of other methods of quantification.[213] The PIA standard is criticized for failing to provide clear criteria for determining what

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Elizabeth Weldon, *Practically Irrigable Acreage Standard: A Poor Partner for the West's Water Future*, 25 WM. & MARY ENVTL. L. & POL'Y REV. 203 (2000); *cf.*, Helton, *supra* note 168, at 990 (reserved water rights "arise from land ownership. They are not lost through nonuse and may be asserted at any time . . . reserved rights are quantifiable and are not subject to sharing during shortages").

[206] *See* Barbara A. Cosens, *The 1997 Water Rights Settlement Between the State of Montana and the Chippewa Cree Tribe of the Rocky Boy's Reservation: The Role of Community and of the Trustee*, 16 UCLA J. ENVTL. L & POL'Y 255 (1997); Lee Herold Storey, Comment: *Leasing Indian Water Off the Reservation: A Use Consistent With the Reservation's Purpose*, 76 CAL. L. REV. 179 (1988).

[207] *See* Andrew C. Mergen & Sylvia F. Liu, *A Misplaced Sensitivity: The Draft Opinions in* Wyoming v. United States, 68 U. COLO. L. REV. 683 (1997).

[208] *See also* Martin, *supra* note 111, at 147-58 (arguing that the amount of water reserved for O'ahu and Moloka'i homesteaders is insufficient and fails to consider factors such as location, topography, and lifestyles in the reservation).

[209] *See* Cosens, *supra* note 206, at 262 (stating that "quantified right[s] [are] more readily enforced and protected.").

[210] "The PIA standard determines the amount of water to be annually allotted or reserved for Indian reservations by determining how many of the acres of the reservation can be reasonably irrigated." Weldon, *supra* note 205, at 206.

[211] Arizona v. California, 373 U.S. 546, 601 (1963).

[212] Liu, *supra* note 205, at 430.

[213] *Id.* at 431 (arguing that the PIA standard is not clearly stated by the Court, that it wrongly considers economic efficiency and that it does not match the reality of the tribe's needs).

reasonable needs are, and for failing to provide adequate amounts of water for both agricultural and domestic use for present and future needs.[214] Another argument against the PIA standard concerns the uncertainty that reserved water will be used for agricultural purposes.[215] Because the PIA quantifies water based on the needs of the tribe at the time the land reservation was created, others worry that the amount reserved fails to meet the current water needs of the tribes.[216]

One suggestion is to replace the PIA standard of quantification with a "sensitivity doctrine" approach.[217] This standard would reserve an amount of water that supplies the tribe's needs without being detrimental to non-native water users.[218] Another proposal includes quantification under a utilitarian approach, where excess water is sold rather than wasted on land where it is not needed.[219] Other recommendations include a "true use" standard that accounts for both native and non-native users, for efficient water use, and actual use.[220]

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[214] *See id.* at 403-31; Cosens, *supra* note 206, at 259-60 (1997) (arguing that the Court has never settled the issue of what happens when the PIA approach fails to provide adequate potable water for a growing community).

[215] Weldon, *supra* note 205, at 214. "The United States has become a largely non-agricultural society, and the tribes should be enabled to keep pace with this trend, which makes the PIA standard seem archaic and unresponsive in this time of changing focuses." *Id.*

[216] *Id.* at 207, 211. "The PIA standard can be considered to be too limiting and even incorrect by today's varying and disputed purposes for reservation lands." *Id.* at 211. "Because of the impending dangers of growing populations and an inflexible amount of water to provide to those populations, the PIA standard is one of many standards and ideas about our natural resources that must be re-examined." *Id.* at 221.

[217] Mergen & Liu, *supra* note 207, at 702 (presenting background on the sensitivity doctrine, but arguing against implementing quantification under the sensitivity doctrine). "Proponents of the sensitivity doctrine assert that because a federal reserved water right will frequently require a 'gallon-for-gallon' reduction in the amount of water available to junior private appropriators, courts should apply the reserved rights doctrine with 'sensitivity' to state water users." *Id.* at 697. The counter argument is that "the sensitivity analysis fails to promote either tribal well-being or the efficient use of scarce water resources. The emphasis on balancing needs and 'practicality,' while paying lip service to notions of equity and economic realities, in fact undermines basic fairness and results in the ineffective use of water resources." *Id.* at 710.

[218] *Id.*; *but see* Liu, *supra* note 205, at 460 (stating that "an approach that defers to the needs of non-Indian water users in quantifying a water right for Indian tribes would repeat historical inequities"). "Allowing courts to quantify Indian water rights by balancing the interests of non-Indian water users would only exacerbate the historical disparity between federal support of Indian and non-Indian water development." *Id.*

[219] Liu, *supra* note 205, at 440. Under a utilitarian approach, tribes would be able to sell or lease any surplus water to other users, while at the same time making efficient water use an additional benefit to the tribe. *Id.*

[220] Weldon, *supra* note 205, at 226.

> A true use standard could require that the tribe quantifying their reserved water rights provide: 1. The specific, detailed use of the water-agricultural, municipal, recreational, industrial, etc.; 2. How the tribe or reservation will benefit by the use of water-

Recently, the Arizona Supreme Court was asked to determine "the appropriate standard to be applied in determining the amount of water reserved for federal lands."[221] The court rejected the use of the PIA standard, finding that it not only allows "for inequitable treatment of tribes based solely on geographical location"[222] but is also "economically unrealistic."[223] The court in *Gila IV* found that the PIA standard prohibits economic development of Native American tribes by limiting reserved water to agricultural purposes.[224] Rather than using the PIA standard, the *Gila IV* court provided a list of several factors that lower courts should consider in quantifying water reserves.[225] Courts should consider tribal history and culture and ensure that enough water is reserved to enable the continuation of historical and cultural practices.[226] The geography, topography and natural resources of the tribal land, the tribe's economic base, past water use, and the tribe's present and projected population are other factors that should be considered.[227] The list created by the Arizona Supreme Court is not meant to be an exclusive list, but the court did require that all proposed reserve water uses be "reasonably feasible."[228] This rejection of PIA standard applies to the state of Arizona; it is not clear if other courts will also abandon it.[229]

Under any method of reserving water, quantification requires a knowledge of the "soil composition, water supply, land status, climate, topography, viable crop types, and the economics of irrigation" of the area.[230] Other proposed

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economically, socially, etc.; 3. Amount of water needed; 4. Cost of the use or project; 5. Financial backing for the project-tribal, governmental, private; 6. Affect on other water users, specifically prior appropriators.

Id. at 227. A true use standard is argued to be more encompassing of self-sufficiency in modern (non-agrarian) times. *Id.* at 228.

[221] *In re* Gen. Adjudication of all Rights to Use Water in the Gila River Sys. & Source, 35 P.3d 68, 71 (Ariz. 2001) [hereinafter "Gila IV"].

[222] *Id.* at 78.

[223] E. Brendan Shane, *Arizona Supreme Court Rejects Practicably Irrigable Acreage Standard for Allocating Indian Water Rights*, 5 U. DENV. WATER L. REV. 500, 500 (2002).

[224] *Gila IV*, 35 P.3d at 76.

[225] *Id.* at 79-81.

[226] *Id.*

[227] *Id.* at 80.

[228] *Id.* at 81.

[229] Shane, *supra* note 223, at 503; *see* Debbie Shosteck, *Arizona Supreme Court Designates Reservations as Permanent Homelands and Adopts a Balancing Approach to Quantifying Reserved Rights*, 29 ECOLOGY L.Q. 449, 449, 454 (2002) (arguing that the decision of the Arizona Supreme Court in *Gila IV* "failed to establish a meaningful standard by which the trial court can equitably determine the full extent of reserved rights afforded Indian tribes." The author further states that "[w]ithout the PIA standard, the trial court lacks meaningful guidelines for quantifying the reserved rights of tribes involved in the Gila River adjudication").

[230] Cosens, *supra* note 206, at 272-73.

considerations include accounting for the reservation's impact on other water users, and the social and financial benefits incurred by the tribe from the water use.[231] Quantification should also account for the size of the area's current population as well as any current or foreseeable development.[232] Quantification must include both present and foreseeable future needs under the *Arizona* holding, regardless of what methodology is used to quantify the reservation.[233] The inclusion of future needs in water reserves proves challenging as it requires knowledge of the tribe's lifestyle and periodic reevaluation of reserved quantities to be sure that projected future uses comply with actual use.[234]

Whereas the *Winters*' holding limited the reserved right to water to the "extent reasonably necessary to irrigate their lands,"[235] some argue that the PIA standard does not limit water use to irrigation alone.[236] Because *Arizona* held that Native Americans had a reserved water right for both current and future needs, the court presumably allowed for water use change as the community grows and evolves.[237] As the Native American community moves away from an agrarian lifestyle, their water needs will change.

In addition to the lack of restrictions on current and foreseeable uses provided by the *Arizona* holding, the government allowed the use of reserved water for other activities on reservations like "mining and industrial operations, recreation, and education."[238] Some argue that reserved water should be available for "fishing, recreation, tourism, manufacturing, mining, the operation of a nuclear power plant, or any other activity, including off-reservation leasing of Indian water rights."[239] Others argue that there should not be any limitations on reserved water usage so long as water use confers a benefit upon the tribe economically or socially.[240]

From an economic perspective, some argue that Native Americans should be able to sell or lease surplus water.[241] Selling or leasing reserved water promotes efficiency of use, maintains the water supply for non-native users, and prevents waste.[242] Leasing also supports the government's goal of native self-sufficiency by allowing the tribe to decide on the best use of the water and

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[231] Weldon, *supra* note 205, at 227.

[232] Martin et al., *supra* note 111, at 151.

[233] Arizona v. California, 373 U.S. 546, 600 (1963).

[234] *See* Storey, *supra* note 206, at 198.

[235] Winters v. United States, 143 F. 740, 749 (1906).

[236] Mergen & Liu, *supra* note 207, at 714.

[237] *Id.*

[238] Storey, *supra* note 206, at 198.

[239] *Id.* at 207.

[240] *Id.* at 210.

[241] Liu, *supra* note 205, at 440; Mergen & Liu, *supra* note 207, at 720.

[242] Liu, *supra* note 205, at 440; Mergen & Liu, *supra* note 207, at 720.

what to do with any surplus.[243] Leasing surplus water also provides additional financial support to the community.[244] The opposite argument is that water transfers should be regulated by law to protect all users and should not take place unless non-native users can be assured that their water supply will not be hindered.[245] Although there are differing views on the best methods of utilizing water resources, all sides agree that there is a need for efficient, non-wasteful use.

2. *Methods of quantification for native Hawaiian homesteader water reservations*

The method of quantifying native Hawaiian reserve water is not as hotly debated as Native American quantification methods, possibly because reserves are recognized in only a few areas of the State.[246] The State of Hawai'i has codified water reserves for DHHL lots on the islands of O'ahu and Moloka'i.[247] The Water Commission reserved 1.724 mgd and 0.124 mgd for the Leeward and Windward sides of O'ahu, respectively, and 2.905 mgd for the entire island of Moloka'i.[248]

The Water Commission is not bound to quantify reserved water under the PIA standard set by *Arizona*, because management of both water resources and the native Hawaiian homestead program belong to the State and are governed by Hawai'i law.[249] Instead, the Water Commission quantified water by using estimations of current and foreseeable needs and sustainable yield of aquifers under water management.[250]

Current and foreseeable needs were not included among the factors to consider when quantifying water reserves until the State Legislature passed Act 325 in 1991.[251] Act 325 amended certain provisions of the Water Code to provide for both present and foreseeable water needs rather than just current water needs, the same way *Arizona* affected Native American rights.[252] Section 174C-101 of the Water Code was amended to add the following to subsection (a): "[d]ecisions of the commission on water resource management relating to the planning for, regulation, management, and conservation of

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[243] Mergen & Liu, *supra* note 207, at 717-19.

[244] *Id.*

[245] Storey, *supra* note 206, at 212.

[246] *See* HAW. ADMIN. R. §§ 13-171-61, 13-171-62, 13-171-63 (LEXIS through 2002).

[247] *Id.*

[248] *Id.*

[249] HAW. CONST. art. XI, § 2.

[250] Interview with Eric Hirano, *supra* note 23.

[251] Act 325, 1991 Haw. Sess. Law 1013-1021.

[252] *Id.*

water resources in the State shall, . . . incorporate and protect adequate reserves of water for *current and foreseeable development* and use of Hawaiian home lands."[253] Act 325 also amended section 220 of the HHCA, adding subsection (d), which states that homesteaders have a right to water reserves to supply both current and foreseeable needs.[254] Act 325 amended other statues, all of which required water reservations for foreseeable future home land development in addition to current needs.[255]

Criticisms have been raised against both the methods of quantification and the amount of water reserved for homesteaders. One concern is that the amounts of reserved waters were quantified based on withdrawal from one or two specific aquifers.[256] More water would be available if the Water Commission included water from more than one aquifer in DHHL's reservation.[257]

Another criticism against the current DHHL reservation is that the amount DHHL requested failed to consider factors such as "'ohana, subsistence lifestyles and homestead locations."[258] Water needs vary substantially by location; the Windward side of the islands are naturally wetter while the Leeward sides are very dry. This difference affects the water needs of homesteaders.[259] This assessment also extends to DHHL's failure to include in their petition emergency water needs for "fire protection, maximum day capacity (heavy usage), and other contingencies."[260] Failure to consider these various factors, it is argued, has led DHHL to request reserve amounts that underestimate homesteaders' actual water needs.[261]

Proper quantification of reserve amounts falls to the Water Commission under its public interest duty to protect and provide water resources for all users.[262] It is up to the Commission to accurately evaluate and balance the water supply with water needs.[263] In spite of the fact that it is far more difficult to get an accurate measure of groundwater resources than it is to get

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[253] HAW. REV. STAT. ANN. § 174C-101 (LEXIS through 2002) (emphasis added).

[254] HHCA, 1920, Pub. L. No. 67-34, §§ 220(d), 42 Stat. 108 (1921), (codified as amended at HAW. CONST. art. XII, §§ 1, 2, 3 (1978)), *available at* http://www.state.hi.us/dhhl/.

[255] HAW. REV. STAT. ANN. §§ 171-58, 174-16, 174-17, 174C-31, 174C-101 (LEXIS through 2002).

[256] Martin et al., *supra* note 111, at 154.

[257] *Id.*

[258] *Id.*

[259] *Id.*

[260] *Id.* at 155.

[261] *Id.*

[262] MacDougal, *supra* note 111, at 61.

[263] *Id.*

surface water measurements, it is just as important to know how much water is available for use by all interested parties.[264]

IV. THE HAWAI'I WATER CODE

In maintaining the State's commitment to protecting Native Hawaiian rights, the Water Code states that "adequate provisions shall be made for the protection of traditional and customary Hawaiian rights," finding this goal incorporated into the State's duty to protect and provide for the public interest.[265] Moreover, native Hawaiian homesteaders have statutorily protected water rights in both the HHCA and throughout the Water Code.[266] Ambiguities arise when certain parts of the Water Code conflict with other parts of the Water Code, leaving the actual rights of homesteaders in question.

As discussed above, homesteaders have a right to water reservations. This right is set forth in the State Constitution, HHCA, and several sections of the Water Code.[267]

In addition to reservation rights, homesteaders, through the rights given to DHHL, have a first call priority over other water permit users.[268] This includes "the right to use, free of all charge, any water which the department deems necessary."[269] The phrase "any water" extends DHHL's right to include water allocated under a private permit and government-owned water, whether the water is covered by a water license or not.[270]

HHCA section 221 limits the Water Commission's ability to grant or renew water leases and water use permits by requiring that the needs of homesteaders be fulfilled prior to awarding or renewing a lease.[271] The Water Commission grants water permits on the condition that use does not interfere with the water rights of homesteaders, and subjects all permits to the rights specified under HHCA section 221.[272] The requirements that non-homestead water users not interfere with the water rights of DHHL give homesteaders a priority right to water.[273]

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[264] *Id.*; *see* Interview with Eric Hirano, *supra* note 23 (stating that all measurements taken concerning amounts of fresh water located within an aquifer is a best estimate only).

[265] HAW. REV. STAT. ANN. § 174C-2(c) (LEXIS through 2002).

[266] *See* discussion *supra* Part III.C.

[267] *See* discussion *infra* Part IV.

[268] *See* discussion *supra* Part III.B.

[269] HHCA, 1920, Pub. L. No. 67-34, § 221, 42 Stat. 108 (1921), (codified as amended at HAW. CONST. art. XII, §§ 1, 2, 3 (1978)), *available at* http://www.state.hi.us/dhhl/.

[270] *Id.*

[271] HAW. REV. STAT. ANN. §§ 171-58(g), 174C-49(7) (LEXIS through 2002).

[272] HAW. REV. STAT. ANN. § 174C-49(7) (LEXIS through 2002).

[273] *See* Wai'ola, Opening Brief *supra* note 111, at 23-24.

A. Ambiguity In Conflicting Sections of the Water Code

While certain provisions of the HHCA and Water Code give an absolute reservation right, other sections of the Water Code hold that reservations are subject to the discretion of the Water Commission. H.R.S. section 174C-49(d) states that the Commission "*may reserve* water in such locations and quantities and for such seasons of the year as *in its judgment* may be necessary."[274] Aside from the Water Commission's judgment, the Water Code lacks a list of criteria for the Commission to follow when establishing a reservation. Although the Commission *may* reserve water, it is not *required* to under section 174C-49(d). The Water Code fails to set a standard for the Commission to observe in making such decisions, apparently leaving the choice entirely up to the whims of the Commission.

Conversely, section 174-17 directly applies to homesteaders and states that the BLNR "shall assure that adequate water is reserved for future development and use on Hawaiian home lands that could be served by [a] proposed water project."[275] Section 174C-101 says, "[d]ecisions of the [Water Commission] relating to the planning for, regulation, management, and conservation of water resources in the State shall, . . . protect adequate reserves of water for current and foreseeable development and use of Hawaiian home lands as set forth in section 221 of the [HHCA]."[276] Neither section leaves enforcement of reservation rights to the Commission's discretion. Instead, these provisions mandate a recognition of water reservations for current and foreseeable needs as set forth in the HHCA, regardless of the Commission's percepts on what is necessary.[277]

Furthermore, the Water Code itself contains conflicting provisions. Under one section, the decision to allow a reservation lies solely with the Water Commission,[278] while other sections convey an outright reservation that is not limited to the Commission's approval.[279] This conflict creates an ambiguity over what rights the State must recognize and implement for homesteaders. Where statutes conflict, the rights guaranteed to Native Hawaiians risk being disregarded.

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[274] HAW. REV. STAT. ANN. § 174C-49(d) (LEXIS through 2002) (emphasis added).

[275] HAW. REV. STAT. ANN. § 174-17 (LEXIS through 2002).

[276] HAW. REV. STAT. ANN. § 174C-101 (LEXIS through 2002).

[277] HAW. REV. STAT. ANN. §§ 174-17, 174C-101(a) (LEXIS through 2002).

[278] *See, e.g.*, HAW. REV. STAT. ANN. §§ 174C-49(d), 174C-101(a) (LEXIS through 2002).

[279] *See, e.g.*, HAW. REV. STAT. ANN. §§ 174-16, 174-17, 171-58(g), 174C-31(n) (LEXIS through 2002).

B. Reservation By Water Management Designation

The Water Code provides standards in designating management sites, but fails to provide standards for recognizing reservations. Hawai'i Revised Statutes section 174C-44 lists a number of factors that the Commission must consider in designating an area for management.[280] Factors include increased use, water quality, diminishing supply, stability and development of supply, chloride content, preventable waste, serious dispute over use of resource, and new developments in the area.[281] While the Commission may consider the above criteria in determining whether to designate the water source as a management area, it must designate an area as a management site if withdrawal from the source reaches ninety-percent of sustainable yield.[282]

Reservation rights are only enforced when aquifers are placed under management,[283] despite statutes that confer an unconditional water reservation right to DHHL and its beneficiaries.[284] The Commission's policy of implementing water reservations only if an aquifer is designated as a water management site is problematic.[285] No such requirement is found in the Water Code itself. The Water Code states that the Commission "may reserve water in such locations and quantities and for such seasons of the year as in its judgment may be necessary," and that it "shall adopt . . . specific reservations of water in water management areas in such quantities as are deemed necessary . . . including the provision of water for current and foreseeable development and use of Hawaiian home lands."[286] Thus, the Water Code does not limit reservations to water management areas only.[287] Clearly, when the aquifer is under water management, the Commission "shall adopt" reservations, but the Commission is permitted to reserve water even in non-

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[280] HAW. REV. STAT. ANN. § 174C-44 (LEXIS through 2002).

[281] *Id.*

[282] *See* Interview with Eric Hirano, *supra* note 23.

[283] *Cf.* Ko'olau Agricultural Co., Ltd. v. Comm'n on Water Resource Mgmt., 83 Hawai'i 484, 491, 927 P.2d 1367, 1374 (1996) (The Supreme Court of Hawai'i notes that the Water Commission can only regulate the use of groundwater with permits in water management areas. "[T]he Commission has no authority to regulate water use through permitting in an undesignated area.").

[284] *Id.*; *see* HAW. ADMIN. R. § 13-171-60(e) (LEXIS through 2002).

[285] *See* Martin et al., *supra* note 111, at 152.

> [B]ased upon the position of the Water Commission that its only authority to allocate water is limited to designated water management areas, it has indicated that it will consider only requests for water reservations in water management areas. While there are some indications the Water Commission may see the error of this position, neither the Water Commission nor DHHL has initiated water reservations for non-designated areas.

Id.; Interview with Eric Hirano, *supra* note 23.

[286] HAW. ADMIN. R. §§ 13-171-60(a), (b) (LEXIS through 2002).

[287] *Id.*

water management sites.[288] It is unclear why the Commission would limit reserves to certain cases when all homesteaders—those that draw from water management aquifers and those that draw from aquifers not designated as management sites—have the same reservation rights.[289]

It appears that the Commission exercises total discretion over when to allow a reservation, regardless of homesteaders' rights. While homesteaders have a constitutional right to water reservations, the Commission ignores this right by failing to recognize water reservations for all homesteaders statewide.[290] The Water Commission acted in accordance with the HHCA and State Constitution in reserving water for O'ahu and Moloka'i homesteaders because these two islands have water management areas. However, it ignored the rights of Kaua'i, Maui, Lāna'i and Big Island homesteaders simply because there are no water management areas on these islands. Neither the Water Code nor any other state statute authorizes such discretion.

C. Crisis Management

The Commission may argue that there is no need to reserve water in non-water management areas, where aquifers can sustain the needs of all users. Instead, reservations are only necessary where water is scarce and there are competing interests at stake.[291] The point of necessity, where the Commission intercedes, occurs when the aquifer is operating at ninety-percent sustainable yield.[292] Only at that time will reservations be enforced.[293]

Setting aside the fact that homesteaders have a right to reservation regardless of whether an aquifer is under water management, the Commission's stance that reservation and management is not necessary until the aquifer reaches ninety-percent of sustainable yield places all users at risk. Quantification of groundwater supply is based solely on best estimates.[294] Because truly accurate information is impossible to obtain, the Commission should err on the conservative side in its decisions.[295] Finding that an aquifer

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[288] *Id.* at § 13-171-60(b).

[289] *See* HHCA, 1920, Pub. L. No. 67-34, § 221, 42 Stat. 108 (1921), (codified as amended at HAW. CONST. art. XII, §§ 1, 2, 3 (1978)), *available at* http://www.state.hi.us/dhhl/; HAW. REV. STAT. ANN. §§ 174-16, 174-17, 174C-49, 174C-101 (LEXIS through 2002).

[290] *See* HAW. ADMIN. R. § 13-171-61 (LEXIS through 2002) (reserving 1.724 mgd of ground water for homesteaders in Honolulu and Leeward O'ahu); *id.* § 13-17-62 (reserving 0.124 mgd of groundwater for Windward O'ahu homesteaders); *id.* § 13-171-63 (reserving 2.905 mgd of groundwater from the Kualapu'u aquifer for Moloka'i homesteaders).

[291] *See* Interview with Eric Hirano, *supra* note 23.

[292] *Id.*; HAW. ADMIN. R. § 13-171-60(b) (LEXIS through 2002).

[293] HAW. ADMIN. R. § 13-171-60(b) (LEXIS through 2002).

[294] *See* Interview with Eric Hirano, *supra* note 23.

[295] *Id.*

is operating at ninety-percent of its sustainable yield is an estimate; the aquifer may, in reality, be operating beyond its sustainable yield. It would, in fact, be in the public's best interest for the Commission to intercede before an aquifer reaches a critical point, since the Commission will never know with certainty what amount of withdrawal an aquifer can sustain.

At ninety-percent sustainable yield, the Commission's job would be one of crisis management rather than water regulation.[296] The Commission may not be able to ensure that the needs of all users are met if it waits until the ninety-percent mark to control the area, thereby placing all users at risk. Such a wait-and-see attitude is inconsistent with its duty to "obtain maximum beneficial use of the waters of the State."[297] A more proactive Commission could prevent crisis management by monitoring and regulating water withdrawals before an aquifer reaches ninety-percent sustainable yield. Forward thinking and diligent planning on the Commission's part would include quantifying and codifying water reservation for all homesteaders statewide.

Quantifying a reservation will, at minimum, provide notice to all users that homesteaders do have a claim in groundwater and provide an estimate as to how much water remains for non-homestead use.[298] Most importantly, properly quantifying adequate reserves now ensures water availability for current and foreseeable homestead uses if resources become scarce in the future.[299]

The Commission can codify water reservations for all homesteaders now and ensure that all water interests are satisfied if the State faces insufficient groundwater supplies in the future.[300] This would be another way to avoid crisis management in favor of regular maintenance.[301]

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[296] *See* Interview with Eric Hirano, *supra* note 23; Interview with Alan Murakami, Litigation Director, Native Hawaiian Legal Corporation in Honolulu, Haw. (February 25, 2002).

[297] HAW. REV. STAT. ANN. § 174C-2(c) (LEXIS through 2002).

[298] *See* Interview with Alan Murakami, *supra* note 296; Appellant Department of Hawaiian Home Lands' Reply Brief at 3, *In re* Wai'ola O Molokai, Inc. and Molokai Ranch, (Supreme Court of Hawai'i) (No. 22250) [hereinafter Wai'ola, Reply Brief].

[299] *See* Wai'ola, Reply Brief, *supra* note 298.

[300] Under Hawai'i Revised Statute section 174C-41, "designation of a water management area by the commission may be initiated upon recommendation by the chairperson or by written petition. It shall be the duty of the chairperson to make recommendations when it is desirable or necessary to designate an area and there is factual data for a decision by the commission." Decisions to quantify amounts of water reserves require an agreement by both the Commission and DHHL under section 171-58(g).

[301] Note the conclusion of the Hawai'i Supreme Court in *In re* Water Use Permit Applications, 94 Hawai'i 97, 189, 9 P.3d 409, 501 (2000).

> In the introduction to its decision and order, the Commission projected that, "by the year 2020, water demand for projected growth of Oahu will exceed the remaining groundwater resources on the island." This forecast underscores the urgent need for planning and preparation by the Commission and the counties before more serious complications

V. BREACH OF FIDUCIARY DUTY

Although native Hawaiian homesteaders do have a right to reserve water, reservations have been made for only the islands of O'ahu and Moloka'i, leaving Kaua'i, Maui, Lāna'i and the Big Island without any reservation.[302] It has even been argued that the amounts reserved for O'ahu & Moloka'i are not adequate and fail to meet the actual needs of homesteaders.[303] While water reservation rights exist, that right is not available to all homesteaders.[304] By failing to enforce homesteaders' constitutional rights to water reservations, the State has breached its fiduciary duty.

The DHHL is the agency directly responsible for executing provisions of the HHCA, and it bears a fiduciary duty to eligible homesteaders.[305] In addition to DHHL's constitutionally mandated duty, the Hawai'i Supreme Court charged DHHL with "the obligation to administer the trust solely in the interest of the beneficiary" and "to use reasonable skill and care to make trust property productive."[306] Failing to ensure all homesteaders with adequate water reservations violates section 220 of the HHCA and the State Constitution, and places the DHHL in breach of its fiduciary duty.

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develop. The constitutional framers and the legislature designed the Commission as an instrument for judicious planning and regulation, rather than crisis management. The Commission's decision reflects the considerable time and attention it devoted to this case; we commend its efforts. But much more work lies in the critical years ahead if the Commission is to realize its constitutionally and statutorily mandated purpose.

Id.

[302] HAW. ADMIN. R. §§ 13-171-61, 13-171-62, 13-171-63 (LEXIS through 2002).

[303] Martin et al., *supra* note 111, at 154-56.

[304] *See* Wai'ola, Opening Brief, *supra* note 111, at 17. DHHL, appellants, argue that the Commission violated DHHL's reservation in the Kualapu'u, Moloka'i well by allowing appellee, Wai'ola, to draw from the Kamiloloa well. *Id.* DHHL argues that because the two wells are so closely connected, drawing water from Kamiloloa will reduce the amount of fresh water available from Kualapu'u, thereby reducing the 2.905 mgd that is reserved for their use. *Id.* DHHL contends that even with a reservation, Moloka'i homesteaders still lack sufficient supplies of water to adequately meet their needs. *Id.*

[305] HAW. CONST. art. XII, § 2; HAW. REV. STAT. ANN. § 26-17 (LEXIS through 2002).

[306] Ahuna v. Dep't of Hawaiian Home Lands, 64 Haw. 327, 340, 640 P.2d 1161, 1169 (1982); *see* Office of Hawaiian Affairs v. State of Hawai'i, 96 Hawai'i 388, 401, 31 P.3d 901, 914 (2001) (stating that the State has a constitutional obligation to Native Hawaiians and while the court cannot order the legislature on what form the obligation should take, it will strike down support that is contrary to the constitution); Kepo'o v. Watson, 87 Hawai'i 91, 97, 952 P.2d 379, 385 (1998) (stating that the State assumed trust obligations due to homesteaders in *Ahuna*). The fiduciary duty requires the State to provide for the proper management and disposition of homelands). *Id.* State v. Jim, 80 Hawai'i 168, 171, 907 P.2d 754, 757 (1995) (noting that home lands are held in trust by the State and the Federal Government); Cooper, *supra* note 81, at 709-10.

The DHHL is likely to fulfil its duty to homesteaders if it simply petitions the Water Commission to reserve water for all homesteaders.[307] Under the Commission's current policy, reserves are made only where there is a water management site, thus DHHL could petition for designation of a water management area on all islands without water reservations. Although the final decision to reserve water lies with the Water Commission, any party can submit a written petition to designate a water management area and "any interested person with proper standing" can request a reservation of water from a water management area.[308] As trustee for native Hawaiian homesteaders, DHHL should, at a minimum, petition the Water Commission to designate certain aquifers as water management areas in order to satisfy DHHL's obligations.

DHHL has not made such requests of the Commission.[309] DHHL is unable to provide for all the water needs of all homesteaders due, in large part, to budgetary limits.[310] Even if the Commission did recognize a reservation, DHHL would bear the costs of establishing the infrastructure needed to access the water and distribute it to homesteaders, including an estimated 7 to 8 million dollars to drill a single well.[311] DHHL's primary focus is on building

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[307] *See* Interview with Alan Murakami, *supra* note 296. There are no statutory specifications delineating DHHL's responsibilities on petitioning for water reservations, but the Hawai'i Supreme Court has stated that "[i]n dealing with eligible native Hawaiians collectively or individually, appellant [DHHL] must adhere to high fiduciary duties normally owed by a trustee to its beneficiaries." *Ahuna*, 64 Haw. at 338, 640 P.2d at 1168. The court also stated that "[o]ne specific trust duty is the obligation to administer the trust solely in the interest of the beneficiary." *Id.* at 340, 640 P.2d at 1169. "A second fundamental trust obligation is to use reasonable skill and care to make trust property productive, [citation omitted] or simply to act as an ordinary and prudent person would in dealing with his own property." *Id.* Generally, "the conduct of the government as trustee is measured by the same strict standards applicable to private trustees." *Id.* at 339, 640 P.2d at 1169.

[308] HAW. REV. STAT. ANN. § 174C-41(b) (LEXIS through 2002); HAW. ADMIN. R. § 13-171-60(c)(2) (LEXIS through 2002).

[309] Telephone Interview with Becky Alakai, Resource Management Specialist, Department of Hawaiian Home Lands (Mar. 27, 2002).

[310] *Id.*

[311] *Id.*

homes and its budget[312] does not allow for both building new homes and developing new wells.[313]

In addition to the expenses of developing new wells, DHHL contends that it cannot request a reservation unless the Commission places an area under water management.[314] Requesting a reservation is also problematic, because quantification itself poses difficulties since DHHL provides residential, agricultural and pastoral lots, each of which possess different water needs.[315] The amount of water needed per lot will depend on the extent to which the individual homesteader irrigates his or her lot.[316] This lack of uniformity makes quantification of reserves difficult.[317]

While budgetary limits are no doubt a large obstacle to providing for the immense expenses associated with developing new wells and supporting infrastructure, petitioning for a reservation simply requires submitting a written request to the Commission.[318] Submitting a petition could be enough to meet DHHL's duty to homesteaders.[319] Requesting a reservation is in the

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[312] *See* HAW. REV. STAT. ANN. § 171-18 (LEXIS through 2002).

> [A]ll proceeds and income from the sale, lease, or other disposition of lands ceded to the United States by the Republic of Hawaii under the joint resolution of annexation, approved July 7, 1898 (30 Stat. 750), or acquired in exchange for lands so ceded, and returned to the State of Hawaii by virtue of section 5(b) of the Act of March 18, 1959 (73 Stat. 6), and all proceeds and income from the sale, lease or other disposition of lands retained by the United States under sections 5(c) and 5(d) of the Act . . . shall be held as a public trust . . . for the betterment of the conditions of native Hawaiians as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible. . . .

Id.; *cf.* Arakaki v. Cayetano, 198 F. Supp. 2d 1165 (2002) (challenging the State's funding of the Hawaiian Homes Commission, DHHL and the Office of Hawaiian Affairs and their race-based programs).

[313] Telephone Interview with Becky Alakai, *supra* note 309.

[314] *Id. But see* discussion *supra* Part IV (arguing that the Water Code does not specify that reservations are limited to water management sites).

[315] Telephone Interview with Becky Alakai, *supra* note 309.

[316] *Id.*

[317] *Id.*

[318] HAW. REV. STAT. ANN. § 174C-41(b) (LEXIS through 2002).

[319] *See* discussion on the fiduciary duties assigned to the DHHL, *supra* note 307; *see also* United States v. Mitchell, 463 U.S. 206, 224 (1983) (statutes and regulations "establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities" to Native Americans under the General Allotment Act); NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1981) ("[u]nder principles of equity, a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties"); United States v. Mason, 412 U.S. 391, 398 (1973) ("[t]here is no doubt that the United States serves in a fiduciary capacity with respect to these Indians and that, as such, it is duty bound to exercise great care in administering its trust"); Richards v. Midkiff, 48 Haw. 32, 53, 396 P.2d 49, 61 (1964) ("[t]rustees are under a duty to the beneficiaries to take all reasonable steps to realize claims held in trust").

best interest of the homesteaders, DHHL's beneficiaries. The creation and distribution of more homes is imperative to assisting native Hawaiians,[320] but if homesteading land lacks adequate supplies of water, the purpose of the HHCA is defeated. If DHHL submits a petition and the Commission denies the request, DHHL would probably have fulfilled its duty to homesteaders and the burden would then shift to the Commission to enforce homesteaders' water reservation rights.

Ultimately, the State holds a duty to native Hawaiians, as it assumed responsibility for administering the HHCA from the Federal Government upon statehood.[321] The Hawai'i Supreme Court consistently affirms the State's duty, citing prior cases, the Admissions Act, and State Constitution when holding that "the State's obligation to native Hawaiians is firmly established."[322]

The State accepted an obligation to protect native Hawaiian rights when it agreed to administer the HHCA in the Admissions Act and later formalized its continued desire to aid and protect Native Hawaiian rights in its constitution.[323] The State thus owes a fiduciary duty to Native Hawaiians to enforce the rights that it pledged to protect.

Water reservation for native Hawaiians involves two State agencies–the Water Commission and DHHL. As both are State actors, each must carry out the provisions of the HHCA on water reservation. Both are bound to follow HHCA sections 220 and 221, providing for water reservation and water use.[324] Neither has successfully implemented these provisions.[325] Ultimately, the burden falls on the State for the failure of the Commission and DHHL, as State agents, to provide adequate water reserves for homesteaders, and for failing to uphold the HHCA, the Admissions Act and the State Constitution.[326]

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[320] *See* Kepo'o v. Watson, 87 Hawai'i 91, 97, 952 P.2d 379, 385 (1998) (stating that the State's fiduciary duties include proper management and disposition of homelands).

[321] *See* discussion *supra* Part II.A.

[322] Office of Hawaiian Affairs v. State, 96 Hawai'i 388, 401, 31 P.3d 901, 914 (2001); *see State v. Jim*, 80 Hawai'i 168, 171, 907 P.2d 754, 757 (1995); Ahuna v. Dep't of Hawaiian Home Lands, 64 Haw. 327, 338, 640 P.2d 1161, 1168 (1982).

[323] *See* Inciong, supra note 99, at 188 (stating that when the HHCA was enacted in 1921, Native Hawaiians were intended to be wards of the Federal Government, thus transferring a fiduciary duty to the State upon statehood).

[324] HHCA, 1920, Pub. L. No. 67-34, §§ 220, 221, 42 Stat. 108 (1921), (codified as amended at HAW. CONST. art. XII, §§ 1, 2, 3 (1978)), *available at* http://www.state.hi.us/dhhl/; *see* discussion *supra* Parts II.B, IV.

[325] *Id.*

[326] *See* Cosens, *supra* note 206, at 257 (stating that the Federal Government's failure to secure and settle Native American water reservation rights is a failure to fulfill its trust obligations); Liu, *supra* note 205, at 456 (discussing the argument that when the Federal Government conveys Native water reserves to other parties, it is breaching its duty as trustee to the tribes).

VI. CONCLUSION

Water reservation for current and foreseeable use is a constitutional right guaranteed to native Hawaiian homesteaders. That right is being selectively enforced by the Water Commission, recognizing O'ahu & Moloka'i homesteaders' reservations, but failing to do the same for the remaining homesteaders throughout the State. A right guaranteed to all homesteaders must be provided to all homesteaders.

Failing to reserve water for homestead use could leave homesteaders without sufficient amounts of water when resources become limited, and will place their needs at odds with the needs of non-homestead users. At that time, the Water Commission will have to determine whose interests merit what quantification of water, putting the Commission into crisis management mode. Reserving water now for homesteaders ensures that their needs will be met and is in the best interest of the public.

Just as flowers thrive where there is water, so will Native Hawaiians thrive where living conditions are good. The State must fulfill its obligations to Native Hawaiians by enforcing the rights that provide them with better living conditions. Under the proper conditions, Hawaiians will take root, blossom and flourish. Mōhala i ka wai ka maka o ka pua.

Shaunda A.K. Liu[327]

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[327] J.D. Candidate 2003, William S. Richardson School of Law, University of Hawai'i at Mānoa. Many thanks to the 2002-2003 University of Hawai'i Law Review staff for their assistance; Professor Melody K. MacKenzie, for her invaluable guidance on an earlier draft of this comment; Professor Karen M. Gebbia-Pinetti, for providing me with ample opportunities to develop my researching skills; and my grandfather, Stanley H.L. Lum, Sr., for assisting in the selection of this topic and development of this paper.

RFRA II: The Failure of the Religious Land Use and Institutionalized Persons Act of 2000 Under Section 5 of the Fourteenth Amendment*

I. INTRODUCTION

Envision a seventy-year-old church, built at the center of town. The church management intends to tear the church down as part of its plans for expansion. The city, however, refuses approval because it declared the church a "historic landmark," part of a downtown "historical district." The church files a lawsuit; it claims that the city violated a recently enacted federal statute that protects religious freedom. Although these are essentially the facts from *City of Boerne v. Flores*,[1] the decision in which the United States Supreme Court declared the Religious Freedom Restoration Act of 1993 ("RFRA")[2] unconstitutional, this scenario may soon become commonplace, due to the enactment of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").[3]

Congress enacted RLUIPA in response to *City of Boerne*.[4] Under the Act, land use regulations may neither substantially burden the practice of religion, nor discriminate or exclude on the basis of religion.[5] Like RFRA, RLUIPA mandates the application of strict scrutiny analysis in cases involving laws of general applicability that burden the free exercise of religion.[6] This comment argues that RLUIPA, although narrower in scope than RFRA, similarly fails under the congruence and proportionality analysis set forth in *City of Boerne*.[7]

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[1] 521 U.S. 507 (1997); *see infra* Part II.B.

[2] 42 U.S.C. §§ 2000bb to bb-4 (2000) (current version at 42 U.S.C.A. §§ 2000bb to 2000bb-4 (West 1994 & Supp. 2001)); *see infra* Part II.A.

[3] Pub. L. No. 106-274, 114 Stat. 803 (codified as 42 U.S.C.A. §§ 2000cc to cc-5 (West Supp. 2001)); *see infra* Part III.

[4] *See infra* notes 65 and accompanying text, 91 and accompanying text.

[5] 42 U.S.C.A. § 2000cc.

[6] *Compare id.* (RLUIPA) *with* 42 U.S.C. § 2000bb-1 (RFRA).

[7] *City of Boerne*, 521 U.S. at 529-36; *see infra* Part II.B.2. This analysis determines the validity of congressional legislation enacted under Section 5 of the Fourteenth Amendment ("Section 5"). *See infra* Part II.B.2.

When enacting RLUIPA, Congress relied on its Spending Clause and Commerce Clause powers, in addition to its Section 5 enforcement power. Evan M. Shapiro, Comment, *The*

Part II of this comment provides insight into the historical background that led to RLUIPA. It opens with a discussion of RFRA, explaining both the Act's provisions and Congress's motivation behind its enactment. Part II continues by examining *City of Boerne v. Flores*,[8] the United States Supreme Court decision that declared RFRA unconstitutional. It discusses the background of the case, followed by an explanation of the congruence and proportionality analysis adopted by the Court to determine the validity of legislation enacted under Section 5 of the Fourteenth Amendment ("Section 5"). Part II closes with a discussion of the *City of Boerne* Court's application of this analysis to RFRA. Part III summarizes RLUIPA by explaining the Act's provisions that are relevant to land use regulation. Part IV scrutinizes RLUIPA under the congruence and proportionality analysis. It argues that the Act fails to meet the standards set by the Court in *City of Boerne*.

II. BACKGROUND

RLUIPA was not enacted in a vacuum. Its historical background transcends the legislative record. An understanding of this background is essential to any discussion of the Act. This section therefore provides an introduction to the interplay between Congress and the Supreme Court that led to the enactment of RLUIPA.

Religious Land Use and Institutionalized Persons Act: An Analysis Under the Commerce Clause, 76 WASH. L. REV. 1255, 1266 & n.102 (2001) (citing 146 Cong. Rec. S7774-76 (daily ed. July 27, 2000) (exhibit 1)); *see infra* notes 18-19 and accompanying text, 92-95 and accompanying text; *see also infra* Part IV.B.1. It also included provisions relating to "institutionalized persons." *See* 42 U.S.C.A. § 2000cc-1. This comment, however, focuses on the Act's land use provisions and their enactment under Congress's Section 5 power. For discussion on the other aspects of RLUIPA and their constitutionality, see Shapiro, *supra*, and Gregory S. Walston, *Federalism and Federal Spending: Why the Religious Land Use and Institutionalized Persons Act of 2000 is Unconstitutional*, 23 U. HAW. L. REV. 479 (2001). *See also* Roman P. Storzer & Anthony R. Picarello, Jr., *The Religious Land Use and Institutionalized Persons Act of 2000: A Constitutional Response to Unconstitutional Zoning Practices*, 9 GEO. MASON L. REV. 929 (2001); Shawn Jensvold, Article, *The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA): A Valid Exercise of Congressional Power?*, 16 BYU J. PUB. L. 1 (2001); Ada-Marie Walsh, Note, *Religious Land Use and Institutionalized Persons Act of 2000: Unconstitutional and Unnecessary*, 10 WM. & MARY BILL RTS. J. 189 (2001).

[8] 521 U.S. 507.

A. The Religious Freedom Restoration Act

Congress enacted RFRA in 1993[9] to "guarantee [the application of the 'compelling interest test'] in all cases where free exercise of religion [was] substantially burdened."[10] It

> prohibit[ed] "[g]overnment" from "substantially burden[ing]" a person's exercise of religion even if the burden result[ed] from a rule of general applicability unless the government [could] demonstrate the burden "(1) [was] in furtherance of a *compelling governmental interest*; and (2) [was] the *least restrictive means* of furthering that compelling governmental interest."[11]

RFRA thus provided "privileges [for] religiously motivated conduct" by mandating the use of the strict scrutiny standard of review.[12]

The reach and scope of RFRA's protection was astonishing.[13] The Act "applie[d] to any 'branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States,' as well as to any 'State, or . . . subdivision of a State.'"[14] RFRA furthermore "applie[d] to all federal and state law, statutory or otherwise, whether adopted before or after its enactment."[15] The reach and scope of RFRA's provisions was not only universal, but was unprecedented.[16]

Congress based RFRA on its enforcement power granted by the Fourteenth Amendment.[17] Section 1 of the Fourteenth Amendment declares that:

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[9] Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified as 42 U.S.C. §§ 2000bb to bb-4 (2000) (current version at 42 U.S.C.A. §§ 2000bb to bb-4 (West 1994 & Supp. 2001))).

[10] 42 U.S.C. § 2000bb(b)(1) (citing Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972)); *see infra* note 134 (explaining *Sherbert*).

[11] *City of Boerne*, 521 U.S. at 515-16 (emphasis added) (second and third alterations in original) (quoting 42 U.S.C. § 2000bb-1).

[12] Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437, 437 (1994).

[13] *City of Boerne*, 521 U.S. at 532 ("[RFRA's s]weeping coverage ensure[d] its intrusion at every level of government . . . .").

[14] *Id.* at 516 (quoting 42 U.S.C. § 2000bb-2(1) (current version at 42 U.S.C.A. § 2000bb-2(1) (West 1994 & Supp. 2001))).

[15] *Id.* at 532 (citing 42 U.S.C. § 2000bb-3 (current version at 42 U.S.C.A. § 2000bb-3 (West 1994 & Supp. 2001))).

[16] *Id.* ("The reach and scope of RFRA distinguish it from other measures passed under Congress'[s] enforcement power . . . .").

[17] *Id.* at 516 (citing S. REP. NO. 103-111, at 13-14 (1993); H.R. REP. NO. 103-88, at 9 (1993)). Congress enacted RFRA to enforce the protections provided by the First Amendment, which states: "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I (emphasis added). The religious protections of the First

> No State shall make or enforce any law which shall abridge the privileges or immunities of the 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.[18]

Section 5 provides that: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[19] Congress believed RFRA was appropriate legislation because of its perception that widespread discrimination against religious freedom existed.[20]

Section 5, however, was not the sole basis for the Act. Congress also drafted RFRA in response to *Employment Division v. Smith*,[21] the decision in which the Supreme Court rejected the use of the strict scrutiny standard of review in free exercise of religion cases involving government actions based on neutral laws of general applicability.[22] Prior to *Smith*, "a state [law] could not impose a substantial burden on religion unless the state could demonstrate [that] the law was narrowly tailored for a compelling state interest."[23] The *Smith* Court, however, rejected that standard as unworkable.[24] RFRA

Amendment apply to "state legislatures and, by extension, state governments generally through incorporation in the [D]ue [P]rocess [C]lause of the Fourteenth Amendment." Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 932 (Cal. 1996) (citing Cantwell v. Connecticut, 310 U.S. 296, 303 (1940), *quoted in* Kenneth J. Brown, Comment, *Establishing a Buffer Zone: The Proper Balance Between the First Amendment Religion Clauses in the Context of Neutral Zoning Regulations*, 149 U. PA. L. REV. 1507, 1531 n.101 (2001) ("The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact . . . laws [that violate the First Amendment Religion Clauses]." (quotation marks omitted) (alteration in original))).

[18] U.S. CONST. amend. XIV, § 1.

[19] U.S. CONST. amend. XIV, § 5.

[20] *See City of Boerne*, 521 U.S. at 517, 529 (summarizing the respondent's arguments in defense of RFRA); *see also id.* at 530-31 (examining the Act's legislative history).

[21] 494 U.S. 872 (1990); *see City of Boerne*, 521 U.S. at 512; 42 U.S.C. § 2000bb(a)(4) (2000). *Smith* involved two members of the Native American Church who "were fired from their jobs with a private drug rehabilitation organization" after ingesting peyote for sacramental purposes. *Smith*, 494 U.S. at 874. The Employment Division, Department of Human Resources of Oregon ("Employment Division"), denied the pair unemployment benefits because "they had been discharged for work-related 'misconduct.'" *Id.* Oregon law proscribed the "knowing or intentional possession" of peyote, which the law defined as a "controlled substance." *Id.* The two men, however, challenged the Employment Division's decision on the basis that it burdened their right to the free exercise of religion. *Id.* at 876.

[22] *Smith*, 494 U.S. at 885; *see also City of Boerne*, 521 U.S. at 514 (explaining *Smith*).

[23] Walston, *supra* note 7, at 481 (citing Sherbert v. Verner, 374 U.S. 398, 403 (1963); Wisconsin v. Yoder, 406 U.S. 205, 220 (1972)); *see infra* note 134.

[24] Walston, *supra* note 7, at 482 (citing *Smith*, 494 U.S. at 887-88); *see also Smith*, 494 U.S. at 885 ("We conclude today that the sounder approach . . . is to hold the [compelling state interest] test inapplicable to such challenges.").

embodied Congress's disagreement with the Supreme Court concerning the protection of religious freedom.

B. City of Boerne v. Flores

The Supreme Court responded to RFRA with its 1997 decision, *City of Boerne v. Flores*.[25] The Court questioned the validity of RFRA's enactment under the enforcement power granted to Congress by the Fourteenth Amendment. Finding that the Act lacked congruence and proportionality with the purported discrimination it remedied,[26] the Court declared RFRA unconstitutional.[27]

1. Background

The dispute in *City of Boerne* focused on a Spanish mission style church built in 1923.[28] The church applied for renovation permits in 1993 because it was too small to accommodate its parishioners.[29] However, the church had been designated a historic landmark;[30] it formed the "centerpiece of the [City of Boerne's] mile-long downtown historic district."[31] Relying on its historic landmark ordinance, the city accordingly denied the request[32] "because the expansion would radically alter the exterior of the Spanish mission style building."[33]

The Archbishop of San Antonio filed a federal lawsuit that "relied upon RFRA as one basis for relief from the [City of Boerne's] refusal to issue the permit."[34] Although the district court concluded that Congress exceeded the scope of its Section 5 enforcement power by enacting RFRA,[35] the Fifth Circuit reversed: it found RFRA constitutional.[36] The Supreme Court granted

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[25] 521 U.S. 507.

[26] *Id.* at 529-36; *see infra* Part II.B.2.

[27] *City of Boerne*, 521 U.S. at 536; *see infra* Part II.B.2.

[28] *See id.* at 511.

[29] *Id.* at 512.

[30] *Id.*

[31] Julie Bennett, *Church and State*, PLAN., June 1998, at 11.

[32] *City of Boerne*, 521 U.S. at 512.

[33] Bennett, *supra* note 31, at 11.

[34] *City of Boerne*, 521 U.S. at 512.

[35] *Id.*; *see* Flores v. City of Boerne, 877 F. Supp. 355 (W.D. Tex. 1995).

[36] *City of Boerne*, 521 U.S. at 512 (citing Flores v. City of Boerne, 73 F.3d 1352 (5th Cir. 1996)).

certiorari[37] to determine the validity of RFRA's enactment under the Fourteenth Amendment.[38]

2. The Court's analysis: Congruence and proportionality

City of Boerne established a congruence and proportionality analysis that determines the validity of congressional legislation enacted pursuant to Section 5 of the Fourteenth Amendment.[39] As the Court explained, the power granted by Section 5 "extends only to 'enforc[ing] the provisions of the Fourteenth Amendment.'"[40] It is "remedial" or "preventative" in nature:[41] "Congress [may not] decree the substance of the Fourteenth Amendment's restrictions on the States,"[42] because only the judiciary holds the power and responsibility to "define the substance of constitutional guarantees."[43] Accordingly, legislation that changes the definition of the Free Exercise Clause does not truly enforce the Clause.[44]

Under this analysis, Section 5 legislation that enforces the Fourteenth Amendment must exhibit "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[45] It "should be adapted to the mischief and wrong which the [Fourteenth A]mendment was intended to provide against."[46] Otherwise, "[Section 5] legislation may become substantive in operation and effect,"[47] and therefore unconstitutional. Thus, for "Congress to invoke [Section] 5, it must [(1)] identify conduct [that]

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[37] City of Boerne v. Flores, 519 U.S. 926 (1996) (mem.).

[38] *See City of Boerne*, 521 U.S. at 529.

[39] *Id.* at 529-36.

[40] *Id.* at 519 (alteration in original).

[41] *Id.* (citing South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966)).

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

[43] Bd. of Trs. v. Garrett, 531 U.S. 356, 365 (2001) (citing *City of Boerne*, 521 U.S. at 519-24); *see City of Boerne*, 521 U.S. at 524; *see also id.* at 529 ("If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'" (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))); *infra* notes 63, 179 and accompanying text.

[44] *City of Boerne*, 521 U.S. at 519.

[45] *Id.* at 520. The Court explained: "The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Id.* at 530 (citing South Carolina v. Katzenbach, 383 U.S. at 308, 334).

[46] *Id.* at 532 (quotation marks omitted) (alterations in original) (quoting The Civil Rights Cases, 109 U.S. 3, 13 (1883)); *see also* United States v. Morrison, 529 U.S. 598, 625-26 (2000) (explaining the congruence and proportionality analysis).

[47] *City of Boerne*, 521 U.S. at 520.

transgress[es] the Fourteenth Amendment's substantive provisions, and [(2)] tailor its legislative scheme to remedying or preventing such conduct."[48]

After defining the congruence and proportionality analysis, the Court applied it to RFRA[49] by first examining the legislative record of the Act.[50] Contrasting RFRA with the Voting Rights Act of 1965,[51] which survived constitutional challenge in *South Carolina v. Katzenbach*,[52] the *City of Boerne* Court found that RFRA's legislative record did not support the Act.[53] It held that the examples of state legislation provided in the record were neither "enacted or enforced due to animus or hostility,"[54] nor indicative of "some widespread pattern of religious discrimination."[55]

The Court then focused on the "reach and scope of RFRA[, which] distinguish[ed] it from other measures passed under Congress'[s] enforcement power."[56] Due to the substantial costs exacted by the Act,[57] combined with its "sweeping coverage,"[58] the Court found that "[t]he stringent test RFRA demand[ed] of state laws . . . lack[ed] proportionality or congruence between

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[48] Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank, 527 U.S. 627, 639 (1999) (explaining *City of Boerne*).

[49] *City of Boerne*, 521 U.S. at 529-36.

[50] *Id.* at 530; *see also id.* at 525 ("The constitutional propriety of [legislation adopted under the Enforcement Clause] must be judged with reference to the historical experience . . . it reflects." (quotation marks omitted) (alteration in original) (quoting South Carolina v. Katzenbach, 383 U.S. at 308)).

[51] 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000).

[52] 383 U.S. 301 (1966). In *South Carolina v. Katzenbach*, the Court considered whether the Voting Rights Act was "appropriate" legislation to enforce the Fifteenth Amendment's protection against racial discrimination in voting. *See id.* at 308. Noting that "Congress explored . . . the problem of racial discrimination in voting" with great care, *id.*, the Court concluded that the Act was a valid exercise of Congress's enforcement power granted by Section 2 of the Fifteenth Amendment. *Id.* at 337.
Although Congress enacted the Voting Rights Act under its Fifteenth Amendment enforcement powers, the Court's comparison is valid because "Section 2 of the Fifteenth Amendment is virtually identical to [Section] 5 of the Fourteenth Amendment." Bd. of Trs. v. Garrett, 531 U.S. 356, 373 n.8 (2001). *Compare* U.S. CONST. amend. XIV, § 5 *with* U.S. CONST. amend. XV, § 2.

[53] *City of Boerne*, 521 U.S. at 531. "RFRA's legislative record lack[ed] examples of modern instances of generally applicable laws passed because of religious bigotry." *Id.* at 530.

[54] *Id.* at 531.

[55] *Id.* The Court determined that "Congress's concern was with the incidental burdens imposed, not the object or purpose of the legislation" provided as examples in the record. *Id.*

[56] *Id.* at 532.

[57] *Id.* at 534. The Court noted that the "practical [effects] of imposing a heavy litigation burden on the [s]tates," as well as the "curtailing [of] their traditional general regulatory power, far exceed[ed] any pattern or practice of unconstitutional conduct." *Id.*

[58] *Id.* at 532. RFRA "intru[ded into] every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." *Id.*

the means adopted and the legitimate end to be achieved."[59] It concluded that "RFRA . . . cannot be understood as [either] responsive to, or designed to prevent unconstitutional behavior."[60] Rather, the Act represented a congressional "attempt [to make] a substantive change in constitutional protections,"[61] which conflicted with both Fourteenth Amendment[62] and separation of power principles.[63] The Court accordingly found RFRA unconstitutional as an impermissible expansion of congressional power under Section 5 of the Fourteenth Amendment.[64]

Undaunted by this apparent setback, Congress wasted no time in drafting a replacement for RFRA. The United States House Judiciary Committee promptly held a "series of hearings to discuss possible responses to [*City of Boerne*]."[65] These hearings resulted in two bills, the Religious Liberty Protection Act of 1998,[66] and the Religious Liberty Protection Act of 1999 ("RLPA").[67] Although RLPA passed the House in 1999, it failed to pass the Senate.[68] Concerns over its scope[69] led to a third bill, RLUIPA, which "focus[ed] only on local land use regulation and institutionalized persons."[70]

III. THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT

Senators Orrin G. Hatch (R-Utah) and Edward M. Kennedy (D-Mass) introduced RLUIPA as an amended version of RLPA.[71] "Although the legislative history behind . . . RLUIPA is limited because it passed both houses without committee action,"[72] both "Senators Hatch and Kennedy indicated that

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[59] *Id.* at 533; *see also id.* at 534 ("Simply put, RFRA [was] not designed to identify and counteract state laws likely to be unconstitutional").

[60] *Id.* at 532.

[61] *Id.*

[62] *See supra* notes 40-48 and accompanying text.

[63] *See City of Boerne*, 521 U.S. at 535-36 ("Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches."); *see also supra* note 43 and accompanying text; *infra* note 179 and accompanying text.

[64] *City of Boerne*, 521 U.S. at 536.

[65] Storzer & Picarello, *supra* note 7, at 943.

[66] *Id.* (citing S. 2148, 105th Cong. (1997); H.R. 4019, 105th Cong. (1997)).

[67] *Id.* (citing H.R. 1691, 106th Cong. (1999)).

[68] *Id.*; Shapiro, *supra* note 7, at 1263 (2001) (citing H.R. 1691, 106th Cong. (1999); 146 CONG. REC. S7778 (daily ed. July 27, 2000) (statement of Sen. Reid)).

[69] Storzer & Picarello, *supra* note 7, at 943.

[70] Shapiro, *supra* note 7, at 1263; Storzer & Picarello, *supra* note 7, at 943.

[71] Storzer & Picarello, *supra* note 7, at 943 (citing 146 CONG. REC. S6687 (daily ed. July 13, 2000) (statement of Sen. Hatch)).

[72] Shapiro, *supra* note 7, at 1266 (citing 146 CONG. REC. E1563 (daily ed. Sept. 22, 2000) (statement of Rep. Canady)).

. . . RLUIPA target[ed] land use regulation because local land use decisions frequently burden religious liberty";[73] it "[was] intended to protect the right to 'gather and worship.'"[74] RLUIPA thus invokes the protections provided by the First Amendment.[75] After passing both the House and the Senate,[76] President Clinton signed RLUIPA into law on September 22, 2000.[77]

RLUIPA revives the application of the compelling interest test. It declares that:

> No government[[78]] shall impose or implement a *land use regulation*[[79]] in a manner that imposes a substantial burden on the religious exercise[[80]] of a person, including a religious assembly or institution, *unless* the government demonstrates that imposition of the burden on that person, assembly, or institution—
>
> (A) is in furtherance of a *compelling governmental interest*; and
>
> (B) is the *least restrictive means* of furthering that compelling governmental interest.[81]

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[73] Shapiro, *supra* note 7, at 1266 (citing 146 CONG. REC. S7774-95 (daily ed. July 27, 2000) (exhibit 1)).

[74] *Id.* (quoting 146 CONG. REC. H7191 (daily ed. July 27, 2000) (statement of Rep. Canady)).

[75] *See supra* note 17; *infra* text accompanying note 81; *infra* note 85 and accompanying text.

[76] Storzer & Picarello, *supra* note 7, at 944 (citing 146 CONG. REC. S7779 (2000); 146 CONG. REC. H7190 (2000)).

[77] Storzer & Picarello, *supra* note 7, at 944 (citing William J. Clinton, *Statement on Signing the Religious Land Use and Institutionalized Persons Act of 2000*, 36 WEEKLY COMP. PRES. DOC. 2168 (Sept. 22, 2000)).

[78] RLUIPA defines "government" as: "(i) a State, county, municipality, or other governmental entity created under the authority of a State; (ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and (iii) any other person acting under color of State law." 42 U.S.C.A. § 2000cc-5(4)(A) (West Supp. 2001). Thus, despite the Act's focus on land use regulation, *see infra* note 82 and accompanying text, RLUIPA's provisions affect an extensive array of government activity, paralleling RFRA. *Compare id.* (RLUIPA) *with* 42 U.S.C. § 2000bb-2(1) (2000) (current version at 42 U.S.C.A. §§ 2000bb-2(1) (West 1994 & Supp. 2001)) (RFRA); *see supra* notes 13-16 and accompanying text.

[79] RLUIPA defines "land use regulation" as

> a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

42 U.S.C.A. § 2000cc-5(5).

[80] RLUIPA defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5(7)(A).

[81] 42 U.S.C.A. § 2000cc(a)(1) (West Supp. 2001) (emphasis added).

Thus, RLUIPA focuses on a much narrower subset of law than RFRA:[82] it only addresses religious burdens imposed by land use decisions.[83] Nevertheless, "RLUIPA codifies the same strict scrutiny standard found in . . . RFRA."[84]

Congress, however, attempted to limit the application of the Act's protections. RLUIPA declares that it only applies where:

> (A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;
> (B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or
> (C) the substantial burden is imposed in the *implementation of a land use regulation or system of land use regulations*, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, *individual assessments of the proposed use for the property involved*.[85]

Even with these "jurisdictional limitations," RLUIPA's protections retain a broad reach and scope.[86]

Notwithstanding these apparent limitations on its imposition of the strict scrutiny standard, RLUIPA provides additional protections. First, it prohibits the "impos[ition] or implement[ation of] a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution."[87] Second, RLUIPA prohibits any "land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination."[88] Third, it prohibits any "land use regulation that—(A) totally excludes religious assemblies from a jurisdiction; or (B) unreasonably limits religious assemblies, institutions or structures within a jurisdiction."[89] Congress placed no limits on these prohibitions,

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[82] Shapiro, *supra* note 7, at 1265.

[83] *Id.*; *see* 42 U.S.C.A. § 2000cc. Although RLUIPA also addresses religious burdens imposed "through regulation of persons housed in state institutions," Shapiro, *supra* note 7, at 1265; *see* 42 U.S.C.A. § 2000cc-1 (West Supp. 2001), only the land use aspects of the Act are relevant to this comment. *See supra* note 7.

[84] Shapiro, *supra* note 7, at 1265; *see also* Walsh, *supra* note 7, at 213-14 ("At the core, . . . RLUIPA and . . . RFRA are virtually identical pieces of legislation."). *Compare* 42 U.S.C. §§ 2000bb-1(a), (b) (2000) (RFRA), *with* 42 U.S.C.A. § 2000cc(a)(1) (RLUIPA).

[85] 42 U.S.C.A. § 2000cc(a)(2) (emphasis added).

[86] *See infra* Part IV.B.1; *see also supra* note 78.

[87] 42 U.S.C.A. § 2000cc(b)(1).

[88] *Id.* § 2000cc(b)(2).

[89] *Id.* § 2000cc(b)(3).

although they largely mimic protections that currently exist under the Constitution.[90]

RLUIPA represents an attempt by Congress to reenact RFRA in a form that could withstand constitutional challenge.[91] Congress not only attempted to limit the scope of the Act, but also attempted to invoke its Spending Clause[92] and Commerce Clause[93] powers, in addition to its Section 5 enforcement power,[94] as the constitutional authority for enacting RLUIPA.[95] Despite these revisions, the Act raises many of the same concerns originally associated with RFRA.

IV. THE FAILURE OF RLUIPA AS ENFORCEMENT LEGISLATION UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT

When drafting RLUIPA, Congress made a specific effort to comply with the Supreme Court's decision in *City of Boerne v. Flores*.[96] Its attempt nevertheless failed. An examination of the Act under the congruence and proportionality analysis set forth by the *City of Boerne* Court illustrates its failure as Section 5 enforcement legislation.

A. RLUIPA's Legislative History

The validity of Section 5 legislation depends on its congruence and proportionality with the discrimination that Congress sought to redress.[97]

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[90] Storzer & Picarello, *supra* note 7, at 981-83; *cf., e.g.*, U.S. CONST. amends. I (Free Exercise Clause), XIV (Equal Protection Clause).

[91] National Trust for Historic Preservation, *Congress Enacts Religious Land Use Law; Three More States Adopt RFRAs (Preservation Law Reporter, 2000)*, SG040 A.L.I.-A.B.A. 757, 764 (2001) (citing 146 CONG. REC. S7774-76 (daily ed. July 27, 2000) (joint statement of Senator Hatch and Senator Kennedy)); *see also* Walston, *supra* note 7, at 481 ("[I]n its own words, Congress has reenacted RFRA . . . .").

[92] U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."); *see* 42 U.S.C.A. § 2000cc(a)(2)(A); *see also infra* notes 125-27 and accompanying text.

[93] U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."); *see* 42 U.S.C.A. § 2000cc(a)(2)(B); *see also infra* notes 128-29 and accompanying text.

[94] U.S. CONST. amend. XIV, §§ 1, 5; *see* 42 U.S.C.A. § 2000cc(b); *see also supra* text accompanying notes 18-19.

[95] Shapiro, *supra* note 7, at 1266 & n.102 (citing 146 Cong. Rec. S7774-76 (daily ed. July 27, 2000) (exhibit 1)); *see infra* Part IV.B.1.

[96] 521 U.S. 507; *see supra* Parts II.B.2, III.

[97] *See supra* notes 45-48 and accompanying text.

Congress must first "identify conduct [that] transgress[es] the Fourteenth Amendment's substantive provisions."[98] The need for remedial legislation must exist. The congruence and proportionality analysis thus begins with the determination of the legislation's purpose.[99]

Although Congress did not include either a "Findings" or "Purpose" section in RLUIPA,[100] the Court attaches little significance to these declarations when reviewing Section 5 legislation.[101] For example, in *Board of Trustees v. Garrett*,[102] which held that Congress improperly enacted the Americans with Disabilities Act of 1990 ("ADA")[103] as Section 5 legislation, the Court scrutinized the ADA's "Findings and declaration of purpose."[104] Due to the lack of support in the Act's legislative history,[105] the *Garrett* Court determined that the "enactment of the ADA represent[ed Congress's] judgment that there should be a 'comprehensive national mandate for the elimination of discrimination against individuals with disabilities.'"[106] Thus, when conducting the

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[98] Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank, 527 U.S. 627, 639 (1999); *see also* Bd. of Trs. v. Garrett, 531 U.S. 356, 368 (2001) ("Congress [must] identif[y] a history and pattern of unconstitutional . . . discrimination by the [s]tates."); *see supra* note 48 and accompanying text.

[99] *City of Boerne*, 521 U.S. at 529-30; *see supra* text accompanying notes 49, 50. The Court continues to reaffirm this approach when determining the validity of Section 5 legislation. *See, e.g.*, *Garrett*, 531 U.S. at 368; Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 88 (2000); *Fla. Prepaid*, 527 U.S. at 639-40. Although the *Garrett* and *Kimel* Courts made a preliminary determination of the level of protection that applied to the classes referenced by the legislation, *Garrett*, 531 U.S. at 365-68; *Kimel*, 528 U.S. at 83-86, that portion of the analysis does not apply to RLUIPA. Both *Garrett* and *Kimel* involved discrimination against a class of individuals not explicitly protected by the Constitution, i.e. the disabled, *Garrett*, 531 U.S. at 365, and the elderly, *Kimel*, 528 U.S. at 83, whereas RLUIPA invokes the protections of the First Amendment. *See supra* notes 17, 73-75 and accompanying text, 81 and accompanying text, 85 and accompanying text.

[100] *Compare* 42 U.S.C. § 2000bb (2000) (RFRA) (including both "Findings" and "Purpose" sections) *with* 42 U.S.C.A. §§ 2000cc to cc-5 (West Supp. 2001) (RLUIPA) (excluding "Findings" and "Purpose" sections).

[101] *See, e.g.*, *Garrett*, 531 U.S. at 369.

[102] 531 U.S. 356.

[103] Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-12213 (2000) & 47 U.S.C. § 225 (2000)).

[104] 42 U.S.C. § 12101(b)(1).

[105] *See Garrett*, 531 U.S. at 370 ("Congress assembled . . . minimal evidence of unconstitutional state discrimination in employment against the disabled."); *see also id.* at 372 ("[T]here is also strong evidence that Congress'[s] failure to mention [s]tates in its legislative findings addressing discrimination in employment reflects that body's judgment that no pattern of unconstitutional state action had been documented.").

[106] *Id.* at 374 (quoting 42 U.S.C. § 12101(b)(1) (Congressional findings and declaration of purposes)).

congruence and proportionality analysis, the Court will examine an act's legislative history, rather than simply accepting Congress's declarations.[107]

Even though RLUIPA's actual legislative history is limited, Congress "attempted to document the need for [Section 5] legislation."[108] It asserted that "the problem [of religious discrimination] is pervasive."[109] The Act's legislative history "explain[s] that religious discrimination 'is a nationwide problem' and '[w]here it occurs, it is covert.'"[110] Congress further asserted "that churches 'were frequently discriminated against' where zoning codes 'frequently exclude churches in places where they permit theaters, meeting halls, and other places where large groups of people assemble for secular purposes.'"[111]

According to its legislative history, RLUIPA "preempts certain laws and practices that discriminate against or substantially burden religious exercise, and it leaves all other policy choices to the states."[112] It proclaims that "[t]he state may eliminate the discrimination or burden in any way it chooses, so long as the discrimination or substantial burden is actually eliminated."[113] The legislative history further declares that the Act "is triggered only by a substantial burden on, a discrimination against, a total exclusion of, or an unreasonable limitation on the free exercise of religion."[114]

Although Congress compiled a more robust legislative record for RLUIPA than for RFRA,[115] the congruence and proportionality analysis does not rely

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[107] *See, e.g.*, *id.* at 368-72; Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 89-91 (2000); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank, 527 U.S. 627, 639-46 (1999); City of Boerne v. Flores, 521 U.S. 507, 530-32 (1997); *see also supra* notes 49-55 and accompanying text.

[108] National Trust for Historic Preservation, *supra* note 91, at 764 (quoting 146 CONG. REC. S7774-75 (daily ed. July 27, 2000) (joint statement of Senator Hatch and Senator Kennedy)).

[109] *Id.* (citing 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Senator Hatch and Senator Kennedy)).

[110] *Id.* (quoting 146 CONG. REC. S7775 (daily ed. July 27, 2000) (joint statement of Senator Hatch and Senator Kennedy)).

[111] Omnipoint Communications, Inc., v. City of White Plains, 202 F.R.D. 402, 403 (S.D.N.Y. 2001) (quoting 146 CONG. REC. S7774 (daily ed. July 27, 2000)).

[112] 146 CONG. REC. S7774-76 (daily ed. July 27, 2000) (joint statement of Senator Hatch and Senator Kennedy).

[113] *Id.*

[114] *Id.* at S7776.

[115] *Compare* Storzer & Picarello, *supra* note 7, at 984 (stating that "Congress has 'compiled massive evidence'" in support of the "widespread religious discrimination in this country" (quotation marks omitted) (quoting 146 CONG. REC. S7774 (daily ed. July 27, 2000); City of Boerne v. Flores, 521 U.S. 507, 531 (1997)) (citing H.R. REP. NO. 106-219, at 18-24 (1999)), *with City of Boerne*, 521 U.S. at 530-31 ("RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. . . . Congress'[s] concern was with the incidental burdens imposed, not the object or purpose of the legislation." (citations omitted)); *see also* Jensvold, *supra* note 7, at 29.

solely on legislative history.[116] In *City of Boerne v. Flores*,[117] the Court concluded that "[r]egardless of the state of its legislative record, RFRA cannot be considered remedial, preventative legislation."[118] Likewise, the *Garrett* Court found that "even if it were possible to squeeze . . . a pattern of unconstitutional discrimination by the States [out of the ADA's legislative record], the rights and remedies created by the [Act] would raise the same sort of concerns as to congruence and proportionality as were found in *City of Boerne*."[119] The Court thus emphasizes its own determination of the scope and effect of Section 5 legislation when conducting congruence and proportionality analyses.[120]

B. Scope and Effect

Even though much narrower in scope than RFRA, RLUIPA represents a significant intrusion into state sovereignty. RLUIPA retains a broad reach, comparable to "[RFRA's s]weeping coverage [that] ensure[d] its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."[121] Justice Kennedy's portrayal of RFRA, as "a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the

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[116] *See, e.g.*, *City of Boerne*, 521 U.S. at 531-32 ("Judicial deference, in most cases, is based not on the state of the legislative record Congress compiles but 'on due regard for the decision of the body constitutionally appointed to decide.'" (quoting Oregon v. Mitchell, 400 U.S. 112, 207 (1970)); Bd. of Trs. v. Garrett, 531 U.S. 356, 372 (2001) (citing *City of Boerne*, 521 U.S. 507).

[117] 521 U.S. 507.

[118] *Id.* at 532.

[119] *Garrett*, 531 U.S. at 372 (emphasis added).

[120] This lack of deference comports with the Court's analysis of legislation enacted under Congress's other powers. In *United States v. Morrison*, 529 U.S. 598 (2000), the Court declared 42 U.S.C. § 13981, part of the Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (codified as amended in scattered sections of 16 U.S.C., 18 U.S.C., & 42 U.S.C.), unconstitutionally enacted, despite a "significant amount of evidence" provided by Congress. Shapiro, *supra* note 7, at 1275 (citing *Morrison*, 529 U.S. at 614); *see Morrison*, 529 U.S. at 614 ("[T]he existence of congressional findings is *not sufficient by itself*, to sustain the constitutionality of Commerce Clause legislation." (emphasis added)). Although *Morrison* primarily focused on the constitutionality of the statute's enactment under the Commerce Clause, it provides an example of the Court's increasing reluctance to defer to Congress when reviewing the constitutionality of federal legislation. *See, e.g.*, *Garrett*, 531 U.S. 356; *Morrison*, 529 U.S. 598; Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savs. Bank, 527 U.S. 627 (1999); *City of Boerne*, 521 U.S. 507; United States v. Lopez, 514 U.S. 549 (1995); *see generally* Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 DUKE L.J. 435 (2001).

[121] *City of Boerne*, 521 U.S. at 532; *see supra* notes 13-16 and accompanying text, 78.

health and welfare of their citizens,"[122] aptly describes RLUIPA. Thus, like the ADA in *Garrett*, RLUIPA "raises the same sort of concerns as to proportionality and congruence" as RFRA.[123]

1. RLUIPA's "jurisdictional provisions"

RLUIPA's three "jurisdictional provisions"[124] provide the Act with an extremely broad reach and scope, even though they purport to narrow RLUIPA's application. The first "restriction" applies the Act's "substantial burden clause"[125] to any "program or activity that receives Federal financial assistance,"[126] thus invoking Congress's Spending Clause power.[127] The reach and scope established by this requirement is practically universal. For example, RLUIPA would apply to land use regulations through programs such as those established under the Coastal Zone Management Act and the National Flood Insurance Program. The congruence and proportionality analysis does not apply to this provision because it is derived from Article I of the Constitution, whereas the congruence and proportionality analysis only applies to legislation enacted under the Fourteenth Amendment. Nevertheless, this provision demonstrates RLUIPA's broad reach.

Similarly, the second restriction applies RLUIPA whenever a perceived effect on "commerce with foreign nations, among the several States, or with Indian tribes" exists.[128] This provision thus invokes Congress's Commerce Clause power.[129] Although also unaffected by the congruence and proportion

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[122] *City of Boerne*, at 534.

[123] *Garrett*, 531 U.S. at 372; *see supra* notes 53-64 and accompanying text; *see also* Walsh, *supra* note 7, at 197-201.

[124] *See* 42 U.S.C.A. § 2000cc(a)(2) (West Supp. 2001).

[125] *Id.* § 2000cc(a)(1); *see supra* text accompanying note 81.

[126] 42 U.S.C.A. § 2000cc(a)(2)(A).

[127] U.S. CONST. art. I, § 8, cl. 1; *see supra* note 92; *see also* Shapiro, *supra* note 7, at 1266 n.102 (citing 146 Cong. Rec. S7774-76 (daily ed. July 27, 2000) (exhibit 1)). Under its Spending Clause power, "Congress may attach conditions on the receipt of federal funds." South Dakota v. Dole, 483 U.S. 203, 207 (1987). Although the Constitution does not place direct limits on "the power of Congress to authorize expenditures of public moneys for public purposes" under its grants of legislative power, *id.* (quotation marks omitted) (quoting United States v. Butler, 297 U.S. 1, 66 (1936)), the spending power is not unfettered. *Id.* (citing Penhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 & n.13 (1981)). In *South Dakota v. Dole*, the Court articulated four general restrictions on Congress's use of the spending power. *Id.* at 207-08. For further discussion on the constitutionality of RLUIPA under the Spending Clause, see, for example, Walston, *supra* note 7, Storzer & Picarello, *supra* note 7, at 992-94.

[128] 42 U.S.C.A. § 2000cc(a)(2)(B).

[129] U.S. CONST. art. I, § 8, cl. 3; *see supra* note 93, *see also* Shapiro, *supra* note 7, at 1266 (citing 146 Cong. Rec. S7774-75 (daily ed. July 27, 2000) (exhibit 1)). Congress may regulate "three broad categories of activity" under its Commerce Clause power: (1) "the use of channels

ality analysis, this provision, like the first, indicates the extensive scope Congress intended for RLUIPA's protections.

The third restriction raises the most concern under the congruence and proportionality analysis. It applies RLUIPA to any "implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved."[130] Like RLUIPA's other jurisdictional provisions, it provides a near-universal reach and scope to the Act: "Given the pervasive availability of variances, special use permits and the like, most land use restrictions ultimately include the possibility of discretionary judgment by local officials."[131]

Congress intended this provision to take advantage of the so-called "*Smith* exception."[132] This exception arose from *Employment Division v. Smith*,[133] where the Court explained its application of the *Sherbert v. Verner*[134]

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of interstate commerce"; (2) "the instrumentalities of interstate commerce"; and (3) "activities having a substantial relation to interstate commerce." United States v. Morrison, 529 U.S. 598, 608-09 (2000) (quotation marks omitted) (quoting United States v. Lopez, 514 U.S. 549, 558-59 (1995)). The legislative history states the basis for Congress's belief in its authority under the Commerce Clause, i.e. that "it believed land use regulation substantially affects interstate commerce." Shapiro, *supra* note 7, at 1267 (citing 146 CONG. REC. S7775 (daily ed. July 27, 2001) (exhibit 1)). However, in *United States v. Lopez*, which held the Gun-Free School Zones Act of 1990 ("GFSZA"), Pub. L. No. 101-647, tit. XVII, § 1702, 104 Stat. 4789, 4844-45 (current version at 18 U.S.C. §§ 921, 922, 924 (2000)), unconstitutionally enacted, the Court recognized the limitations on Congress's Commerce Clause power. *Lopez*, 514 U.S. at 551, 553. The *Lopez* Court found that the GFSZA "ha[d] nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define that term." *Id.* at 561. Likewise, despite Congress's declared belief, the link between the regulation of religious land use and religion is extremely tenuous at best: in all likelihood, Congress's reliance on the Commerce Clause as its authority for RLUIPA is misplaced. *See* Shapiro, *supra* note 7; Walsh, *supra* note 7, at 207-11. *But see* Storzer & Picarello, *supra* note 7, at 987-92.

[130] 42 U.S.C.A. § 2000cc(a)(2)(C).

[131] Lawrence G. Sager, *Panel One: Free Exercise After* Smith *and* Boerne, 57 N.Y.U. ANN. SURV. AM. L. 9, 14 (2001); *see also* RELIGIOUS INSTITUTIONS GROUP & RLUIPA LITIGATION TASK FORCE, SIDLEY AUSTIN BROWN & WOOD, QUESTIONS & ANSWERS ABOUT THE FEDERAL RELIGIOUS LAND USE LAW OF 2000 7 (2001), http://www.sidley.com/practice/group.asp?groupid=312 (last visited Mar. 24, 2002) ("Because nearly all land-use regulations have mechanisms to deal with property on an individual, case-by-case basis, this provision is likely to apply to many claimants' situations.").

[132] *See* Storzer & Picarello, *supra* note 7, at 951; *see also* Jensvold, *supra* note 7, at 15-18; Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan, 87 Hawai'i 217, 246, 953 P.2d 1315, 1344 n.31 (1998) (explaining its application of the *Smith* exception in a case that involved a Free Exercise Clause challenge to the height restrictions imposed by a local zoning code).

[133] 494 U.S. 872, 884 (1990); *see supra* notes 21-24 and accompanying text.

[134] 374 U.S. 398 (1963). *Sherbert* involved a member of the Seventh-day Adventist Church who was denied unemployment compensation by the State of South Carolina because of her

compelling interest test in free exercise of religion cases that involved a denial of unemployment compensation:[135] "[O]ur decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."[136] The Court seemingly expanded this exception in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*[137] by apparently applying it when striking down an ordinance that forbade the unnecessary killing of animals.[138] However, the *Lukumi Babalu Aye* Court found the ordinance unconstitutional not only because it "require[d] an evaluation of the particular justification for the killing," but more importantly, because it had only been enforced in instances of animal sacrifice for religious reasons.[139] *Lukumi Babalu Aye* thus involved laws "enacted with the unconstitutional object of targeting religious beliefs and practices,"[140] rather than neutral laws of general applicability.[141]

Moreover, many federal courts "have . . . concluded that zoning ordinances which regulate the location of churches within the community impose only a minimal burden on the right to free exercise of religion."[142] These courts "have consistently held that limiting church operations to a specific area or requiring a conditional use permit does not regulate either religious beliefs, [or] conduct related to those beliefs, and does not have the purpose of impeding religion or the effect of discriminating among religions."[143] These

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refusal to work on Saturday, her Sabbath. *Id.* at 399-401. When declaring this denial an unconstitutional violation of the Free Exercise Clause of the First Amendment, *id.* at 406, the United States Supreme Court set forth a balancing test, under which "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest." *Smith*, 494 U.S. at 883 (explaining *Sherbert*) (citing *Sherbert*, 374 U.S. at 402-03)).

[135] *Smith*, 494 U.S. at 883-84. By contrast, *Smith* involved a "generally applicable criminal law." *Id.* at 884; *see* City of Boerne v. Flores, 521 U.S. 507, 514 (1997) (explaining *Smith*).

[136] *Smith*, 494 U.S. at 884 (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)), *quoted in* City of Boerne v. Flores, 521 U.S. 507, 514 (1997); *see supra* note 135.

[137] 508 U.S. 520 (1993).

[138] *Id.* at 537.

[139] *Id.* (quoting *Smith*, 494 U.S. at 884); *see infra* note 144 and accompanying text.

[140] *City of Boerne*, 521 U.S. at 529 (citing *Lukumi Babalu Aye*, 508 U.S. at 533).

[141] *Cf. id.* at 513-14 ("The only instances where a neutral, generally applicable law . . . failed to pass constitutional muster . . . were cases in which other constitutional protections were at stake." (citing *Smith*, 494 U.S. at 881-82)).

[142] Tran v. Gwinn, 554 S.E.2d 63, 66 (Va. 2001).

[143] *Id.* (emphasis added) (citing Christian Gospel Church v. City & County of San Francisco, 896 F.2d 1221, 1224 (9th Cir. 1990); Messiah Baptist Church v. County of Jefferson, 859 F.2d 820, 825 (10th Cir. 1988); Lakewood, Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood, 699 F.2d 303, 307 (6th Cir. 1983); Grosz v. City of Miami Beach, 721 F.2d 729, 739 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984)). Although most of these cases were decided prior to the Supreme Court's decision in *Smith*, the *Tran v. Gwinn* court "[n]evertheless

decisions support the conclusion that "[a] procedure requiring review by government officials on a case-by-case basis for [the] grant of a special use permit . . . does not alter the generally applicable nature of the ordinance."[144]

Thus, the *Smith* exception would not apply to the majority of cases in which RLUIPA mandates the application of strict scrutiny. RLUIPA's coverage, like that of RFRA, is therefore sweeping.[145] Simply stated, RLUIPA "is not designed to identify and counteract state laws likely to be unconstitutional because of their treatment of religion."[146]

2. RLUIPA redefines "substantial burden" and "religious exercise"

The *City of Boerne v. Flores*[147] Court was concerned not only with the reach and scope of RFRA, but also with the substantive changes the Act attempted to make in constitutional interpretation.[148] When drafting RLUIPA, Congress "indicat[ed] that it did not intend to change traditional Supreme Court jurisprudence on the definition of 'substantial burden.'"[149] Under the traditional strict scrutiny standard, "courts . . . evaluate[d] whether the prohibited conduct was essential to the religious belief"[150] "to determine whether the burden on religion was substantial."[151] RLUIPA's definition of "religious exercise," however, expressly includes "any exercise of religion, whether or not compelled by, or central to a system of religious belief."[152]

[found these] cases . . . instructive in determining the First Amendment tolerance for zoning regulation of land used for religious purposes." *Id.* at 67.

[144] *Tran*, 554 S.E.2d at 68 (citation omitted). The court, however, noted that such a procedure "may support a challenge based on a specific application of the special use permit requirement." *Id.* (citing Islamic Ctr. of Miss., Inc. v. City of Starkville, 840 F.2d 293 (5th Cir. 1988) (holding the City of Starkville's refusal of an exception to allow the use of a building as a Muslim mosque unconstitutional because *exceptions had been made that allowed use by Christian churches*)); *see supra* text accompanying note 139.

[145] *Cf.* City of Boerne v. Flores, 521 U.S. 507, 532 (1997).

[146] *Id.* at 534-35; *see also* United States v. Morrison, 529 U.S. 598, 625-27 (2000) (determining that Congress's Section 5 enforcement power did not extend to 42 U.S.C. § 13981, part of the Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (codified as amended in scattered sections of 16 U.S.C., 18 U.S.C., & 42 U.S.C.), in part because "[§] 13981 [was] not aimed at proscribing discrimination by [state] officials which the Fourteenth Amendment might not itself proscribe").

[147] 521 U.S. 507.

[148] *Id.* at 532; *see supra* text accompanying notes 61-64.

[149] Murphy v. Zoning Comm'n, 148 F. Supp. 2d 173, 188 (D. Conn. 2001) (emphasis added) (citing 146 CONG. REC. S7774-01, S7776 (daily ed. July 27, 2000)).

[150] Walston, *supra* note 7, at 482 (emphasis added) (citing Employment Div. v. Smith, 494 U.S. 872, 887 (1990)).

[151] *Id.* (citing *Smith*, 494 U.S. at 887).

[152] 42 U.S.C.A. § 2000cc-5(7)(A) (West Supp. 2001) (emphasis added), *quoted in Murphy*, 148 F. Supp. 2d at 188.

RLUIPA thus demands a broader context for the application of the language actually used by the Court when discussing "substantial burden."[153]

RLUIPA also declares that "[t]he use, building or conversion of real property for the purpose of religious exercise shall be considered [the] religious exercise of the person or entity that uses or intends to use the property for that purpose."[154] Combining this definitional provision with the one previously discussed[155] results in a highly restrictive substantial burden analysis.[156] Despite its declaration to the contrary, Congress formulates a new definition of substantial burden with RLUIPA, one with startling effects.

For example, in *Korean Buddhist Dae Won Sa Temple of Hawaii v. Sullivan*,[157] the Hawai'i Supreme Court determined that the administrative denial of a Buddhist temple's "application for a [height] variance for its 'Main Temple Hall' which had previously been found to exceed the allowable height limit under the zoning code"[158] did not substantially burden its right to free exercise of religion.[159] When determining whether the temple suffered a substantial burden, the *Korean Buddhist Temple* court applied a test from the Eleventh Circuit Court of Appeals, which distinguished between religious belief and religious conduct.[160] RLUIPA, however, erases this distinction. Under the Act, the Temple's belief "that the 'balance and harmony' of the buildings forming the Temple compound are ingredients essential to the generation of the meditative state [which] is fundamental to Chogye Buddhist practice,"[161] combined with the construction of those buildings, would constitute religious exercise.[162]

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[153] *Murphy*, 148 F. Supp. 2d at 188.

[154] 42 U.S.C.A. § 2000cc-5(7)(B) (emphasis added).

[155] *See supra* text accompanying note 152.

[156] *See* Walsh, *supra* note 7, at 193 ("With this incredibly expansive definition, a local government's land use laws may be 'hampering a personal ideology that it could not have known existed.'" (quoting Stuart Meck, *Religious Land Use and Institutionalized Persons Act*, ZONING NEWS (American Planning Association), Jan. 2001, at 1)).

[157] 87 Hawai'i 217, 953 P.2d 1315 (1998).

[158] *Id.* at 221, 953 P.2d at 1319 (footnote omitted).

[159] *Id.* at 249, 953 P.2d at 1347.

[160] *Id.* at 246, 953 P.2d at 1344 (citing Grosz v. City of Miami Beach, 721 F.2d 729, 733 (11th Cir. 1983), *cert. denied*, 469 U.S. 827 (1984)). The court applied the compelling interest test because it concluded that the "City[of Honolulu's] variance law clearly create[d] a 'system of individualized exemptions' from the general zoning law," *id.* at 247, 953 P.2d at 1345 n.31 (citing Keeler v. Mayor of Cumberland, 940 F. Supp. 879, 885-86 (D. Md. 1996)), and therefore fell within the *Smith* exception. *Id. But see supra* text accompanying notes 142-44; *see also supra* notes 132-41 and accompanying text (explaining the *Smith* exception).

[161] *Korean Buddhist Temple*, 87 Hawai'i at 248, 953 P.2d at 1346.

[162] *See* 42 U.S.C.A. § 2000cc-5(7) (West Supp. 2001).

Although the *Korean Buddhist Temple* court relied on its determination "that the Temple's troubles were self-inflicted,"[163] the factors that led to this conclusion would be subject to RLUIPA as well. The court found the Temple Abbot's belief "that the property chosen would be convenient for parking, beautiful, or even 'holy,'"[164] insufficient to counter the facts that the Temple (1) "need not have chosen to purchase land and build within the R-5-zoned residential district,"[165] and (2) "initially proposed construction plans for the Hall that prescribed a height limit of sixty-six feet, but then deliberately chose not to abide by its own plans, as approved."[166] However, under RLUIPA, both the Abbot's belief and the Temple's acquisition of the property would constitute religious exercise.[167] Had the Temple requested approval of the height change prior to construction,[168] either the denial of that request or the denial of the Temple's application for a height variance[169] would, arguendo, establish prima facie evidence of a substantial burden on its right to the free exercise of religion.[170]

Similarly, *City of Boerne v. Flores*[171] provides another example of the potential effects of RLUIPA. The City of Boerne's historic landmark ordinance would most likely trigger RLUIPA's "individual assessment" clause,[172] because, under the ordinance, "construction [that] affect[ed] historic landmarks or buildings in a historic district" required pre-approval from the Boerne Historic Landmark Commission.[173] Under RLUIPA, the "religious exercise" of the church would include not only its use of the property, but the planned renovations as well.[174] Again, this would likely establish prima facie evidence of a substantial burden on the church's right to the free exercise of religion.[175]

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[163] *Korean Buddhist Temple*, 87 Hawai'i at 248, 953 P.2d at 1346.

[164] *Id.* (citation omitted); *see also id.* at 224, 953 P.2d at 1322 (quoting the Temple Abbot's written testimony).

[165] *Id.*

[166] *Id.* The city issued a building permit based on the Temple's original construction plans. *Id.* at 221-22, 953 P.2d at 1319-20. Nevertheless, as constructed, the Temple included "an extra floor"; it stood "seventy-four to seventy-five feet—nine feet higher than authorized by the building permit." *Id.* at 222, 953 P.2d at 1320.

[167] *See supra* text accompanying notes 152, 154.

[168] *See Korean Buddhist Temple*, 87 Hawai'i at 248, 953 P.2d at 1346.

[169] *See supra* text accompanying note 158.

[170] *See* City of Boerne v. Flores, 521 U.S. 507, 534 (1997) ("Claims that a law substantially burdens someone's exercise of religion will often be difficult to contest." (citing Employment Div. v. Smith, 494 U.S. 872, 887 (1990)).

[171] 521 U.S. 507.

[172] *See supra* notes 130-31 and accompanying text.

[173] *City of Boerne*, 521 U.S. at 512.

[174] *See supra* text accompanying notes 152, 154.

[175] *See supra* note 170.

These examples vividly illustrate the concerns that the *City of Boerne* Court discussed when declaring RFRA unconstitutional.[176] Not only is RLUIPA's reach and scope "sweeping,"[177] but the Act makes substantive changes to the judiciary's interpretation of constitutional law.[178] Although these concerns alone render RLUIPA suspect under the congruence and proportionality analysis, the Act goes further in its expansion of constitutional rights.

3. RLUIPA represents a congressional expansion of constitutional rights

RLUIPA directly expands constitutional rights, in violation of separation of powers principles, which "prohibit Congress from interfering with the core functions of another branch."[179] First, RLUIPA declares that "[i]f a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the [defendant] government shall bear the burden of persuasion on any element of the claim."[180] The Act embodies a "congressional decision to dispense with proof of deliberate or overt discrimination."[181] However, discriminatory intent forms the keystone in the Court's analysis of free exercise of religion cases that involve laws of general applicability.[182] "Where Congress enacts a statute

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[176] *See supra* notes 53-64 and accompanying text; *see also* Walsh, *supra* note 7, at 197-201.

[177] *See City of Boerne*, 521 U.S. at 532.

[178] *See id.* at 532.

[179] Walston, *supra* note 7, at 486; *see id.* at 486 n.54 (citing Immigration & Naturalization Servs. v. Chadha, 462 U.S. 919, 942 (1983); Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469, 471 (1996)); *see also supra* notes 43 and accompanying text, 63.

[180] 42 U.S.C.A. § 2000cc-2(b) (West Supp. 2001) (emphasis added). Even though the plaintiff "bear[s] the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion," *id.*, "[c]laims that a law substantially burdens someone's exercise of religion will often be difficult to contest." *City of Boerne*, 521 U.S. at 534 (citing Employment Division v. Smith, 494 U.S. 872, 887 (1990)).

[181] *City of Boerne*, 521 U.S. at 517.

[182] *E.g.*, Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993); *see supra* notes 137-41 and accompanying text; *see also City of Boerne*, 521 U.S. at 513-14 ("The only instances where a neutral, generally applicable law . . . failed to pass constitutional muster . . . were cases in which other constitutional protections were at stake." (citing *Smith*, 494 U.S. at 881-82)). Furthermore, other areas of the Court's constitutional jurisprudence also focus on discriminatory intent. *See, e.g.*, Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 482 (1997) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause" (quotation marks omitted) (quoting Vill. of Arlington Heights v. Metropolitan Development Corp., 429 U.S. 252, 265 (1977))); *see also Arlington Heights*, 429 U.S. at 264-65 ("[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact. 'Disproportionate impact is not irrelevant, but it is not the

that re-interprets a constitutional provision by changing the requisite standard of showing a constitutional violation, the statute is an impermissible usurpation of the powers of the judiciary in violation of separation of powers principles."[183]

Second, like RFRA, RLUIPA imposes a least restrictive means requirement in every case.[184] However, the pre-*Smith* jurisprudence purportedly codified by the Act did not include such a requirement.[185] Furthermore, as the Court noted in *City of Boerne v. Flores*:[186] "Requiring a [s]tate to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law."[187] Such a test "open[s] the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind."[188] RLUIPA would therefore invalidate many otherwise legitimate land use regulations, regardless of their purpose.[189] The Act thus represents a significant congressional intrusion into state sovereignty.[190]

C. RLUIPA Fails Under the Congruence and Proportionality Analysis

As a whole, RLUIPA, like RFRA, fails under the congruence and proportionality analysis. When enacting RFRA, Congress created constitutional rights in excess of its authority under Section 5, and thus usurped the judiciary's exclusive authority to interpret the Constitution.[191] RLUIPA's imposition of its own definitions for "substantial burden" and "religious exercise" similarly exceeds Congress's Section 5 authority.

Congress did not adequately establish the need for such sweeping, intrusive legislation. Although RLUIPA's legislative history provides examples of

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sole touchstone of an invidious racial discrimination.'" (quoting Washington v. Davis, 426 U.S. 229, 242 (1976)), *quoted in* Hernandez v. New York, 500 U.S. 352, 359-60 (1991).

[183] Walston, *supra* note 7, at 486-87 (citing *City of Boerne*, 521 U.S. at 524; Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 937 (Cal. 1996) (Mosk, J. concurring) (explaining the lack of congressional authority to change the requisite standard of showing a constitutional violation)); Joanne C. Brandt, *Taking the Supreme Court at Its Word: The Implications of RFRA and Separation of Powers*, 56 MONT. L. REV. 5, 12-13 (1995)).

[184] *See* 42 U.S.C.A. § 2000cc(a) (West Supp. 2001); *City of Boerne*, 521 U.S. at 535.

[185] *City of Boerne*, 521 U.S. at 535.

[186] 521 U.S. 507.

[187] *Id.* at 534 (emphasis added).

[188] *Id.* (quotation marks omitted) (quoting Employment Div. v. Smith, 494 U.S. 872, 888 (1990)); *see* Walsh, *supra* note 7, at 193, 200-01.

[189] *Cf. id.* ("Laws valid under *Smith* would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise.").

[190] *See supra* text accompanying note 122; *see also* Walsh, *supra* note 7, at 201.

[191] *City of Boerne*, 521 U.S. at 536; *see* Walston, *supra* note 7, at 485-86; *see also supra* Part II.B.2.

discrimination against religion in the context of land use regulation,[192] it cannot save the Act from the congruence and proportionality analysis.[193] RLUIPA "is so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."[194]

First, RLUIPA's "[s]weeping coverage [over land use regulation] ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."[195] The Smith exception that RLUIPA attempts to implement does not apply to a majority of the cases included under its reach.[196] However, under RLUIPA, "[a]ny [land use] law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion."[197]

By contrast, the Voting Rights Act of 1965,[198] which survived constitutional challenge in *South Carolina v. Katzenbach*,[199] "confined [its provisions] to those regions of the country where voting discrimination had been most flagrant."[200] The class of laws affected by the Voting Rights Act, to wit, specific portions of state voting laws, embodies a much more discrete class than those affected by RLUIPA, i.e. land use regulations.[201] Furthermore, Congress limited the "reach of the Voting Rights Act . . . to those cases in which constitutional violations were most likely."[202] Although not required for

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[192] *See supra* text accompanying notes 108-11.

[193] *See supra* notes 115-20 and accompanying text.

[194] *City of Boerne*, 521 U.S. at 532; *see supra* note 146 and accompanying text.

[195] *City of Boerne*, 521 U.S. at 532; *see* Walsh, *supra* note 7, at 197-201.

[196] *See supra* text accompanying notes 142-44.

[197] *City of Boerne*, 521 U.S. at 532; *see supra* Part IV.B.1; *supra* note 78; *see also* Walsh, *supra* note 7, at 193, 200-01.

[198] Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000)).

[199] 383 U.S. 301, 315 (1966); *see supra* note 52.

[200] *City of Boerne*, 521 U.S. at 532-33 (citing South Carolina v. Katzenbach, 383 U.S. at 315).

[201] *Id.* at 533.

[202] *Id.* In addition to placing regional limitations on the Act, *see supra* text accompanying note 200, Congress further limited its coverage by providing both a termination date, *City of Boerne*, 521 U.S. at 533 (citing South Carolina v. Katzenbach, 383 U.S. at 331), and by focusing the Act's provisions on particular types of voter discrimination, for example literacy tests. *Id.* (citing Katzenbach v. Morgan, 384 U.S. 641 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970); South Carolina v. Katzenbach, 383 U.S. at 355).

Section 5 legislation,[203] "limitations of this kind tend to ensure Congress'[s] means are proportionate to ends legitimate under [Section] 5."[204]

Second, RLUIPA redefines both "substantial burden" and "religious exercise."[205] Despite its claims to the contrary, the Act applies the Supreme Court's language that discusses "substantial burden" in a much broader context.[206] RLUIPA's definition that considers "[t]he use, building or conversion of real property for the purpose of religious exercise" as "religious exercise"[207] not only creates a highly restrictive analysis for "substantial burden"[208] but also blurs the distinction between religious conduct and religious belief.[209] RLUIPA therefore makes a substantive change to constitutional protections,[210] contravening the same separation of power principles violated by RFRA in *City of Boerne v. Flores*.[211]

Third, RLUIPA directly expands constitutional rights, which also violates separation of power principles.[212] The Act places the burden of proof in an RLUIPA claim on the defendant government,[213] thus changing the requisite standard of showing a constitutional violation, in contradiction with separation of power principles.[214] Furthermore, RLUIPA imposes a least restrictive means requirement in every case.[215] This requirement did not originally form a part of the jurisprudence purportedly codified by the Act,[216] which further "indicates that the legislation is broader than appropriate if the goal is to prevent and remedy constitutional violations."[217]

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[203] *Id.* ("This is not to say, of course, that [Section] 5 legislation requires termination dates, geographic restrictions, or egregious predicates.").

[204] *Id.*; *see also* United States v. Morrison, 529 U.S. 598, 626-27 (2000) (explaining the important role these types of limitations played in two decisions which upheld legislation enacted under Congress's Section 5 power (citing Katzenbach v. Morgan, 384 U.S. 641; South Carolina v. Katzenbach, 383 U.S. 301)).

[205] *See supra* Part IV.B.2.

[206] *See supra* text accompanying notes 149, 153.

[207] 42 U.S.C.A. § 2000cc-5(7)(B) (West Supp. 2001); *see supra* text accompanying notes 154-56.

[208] *See supra* notes 155-56 and accompanying text.

[209] *See supra* text accompanying notes 157-62, 174.

[210] *See supra* text accompanying note 178.

[211] *See supra* notes 43 and accompanying text, 63 and accompanying text; *supra* text accompanying note 179.

[212] *See supra* notes 43 and accompanying text, 63 and accompanying text; *supra* text accompanying note 179.

[213] *See supra* text accompanying note 180.

[214] *See supra* note 183 and accompanying text; *see also supra* notes 43 and accompanying text, 63 and accompanying text; *supra* text accompanying note 179.

[215] *See supra* note 184 and accompanying text.

[216] *See supra* note 185 and accompanying text.

[217] City of Boerne v. Flores, 521 U.S. 507, 535 (1997); *see supra* text accompanying notes 187-90.

RLUIPA not only "attempt[s] a substantive change,"[218] but it actually makes substantive changes in constitutional protections.[219] Congress, however, "has been given the power 'to enforce,' *not* the power to determine what constitutes a constitutional violation."[220] The Act cannot be considered remedial or preventative Section 5 legislation. Like RFRA, RLUIPA fails the congruence and proportionality analysis because it violates separation of power principles.

V. CONCLUSION

The recent enactment of RLUIPA opened a new chapter in the dispute between Congress and the Supreme Court over religious freedom. This dispute originated in 1990 with the *Employment Division v. Smith*[221] Court's rejection of the compelling interest test for cases involving laws of neutral applicability that place incidental burdens on the free exercise of religion.[222] Although Congress quickly enacted RFRA under its Fourteenth Amendment enforcement power as an attempt to overrule *Smith*,[223] the Court responded in 1997 with *City of Boerne v. Flores*.[224] When declaring RFRA unconstitutionally enacted, the Court looked to the separation of power principles set forth by the founders of the nation, as well as at the principles of the Fourteenth Amendment.[225] The *City of Boerne* Court established that Fourteenth Amendment legislation must exhibit congruence and proportionality with the harm it redresses.[226] RFRA failed this analysis because it attempted to make a substantive change in constitutional protections.[227] The Court found that when Congress enacted RFRA, it usurped the power of the courts because only the judiciary holds "[t]he power to interpret the Constitution in a case or controversy."[228]

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[218] *City of Boerne*, 521 U.S. at 532.

[219] *See supra* Part IV.B.3.

[220] *City of Boerne*, 521 U.S. at 519; *see supra* notes 40-48 and accompanying text.

[221] 494 U.S. 872 (1990).

[222] *Id.* at 888; *see supra* notes 21-24 and accompanying text.

[223] *City of Boerne*, 521 U.S. at 512; *see* David S. Stolle, Comment, *A Holy Mess: School Prayer, the Religious Freedom Restoration Act of Texas, and the First Amendment*, 32 ST. MARY'S L.J. 153, 166 (2000); *see also supra* text accompanying note 21.

[224] 521 U.S. 507; *see supra* Part II.B.

[225] *See supra* notes 40-45 and accompanying text, 63 and accompanying text, 179 and accompanying text.

[226] *See supra* notes 46-48 and accompanying text.

[227] *See supra* notes 61-63 and accompanying text.

[228] *City of Boerne*, 521 U.S. at 524; *see supra* notes 43 and accompanying text, 63 and accompanying text, 179 and accompanying text.

RLUIPA represents Congress's attempt to reenact RFRA in a form that complies with *City of Boerne*.[229] Although the Act revives the compelling interest test,[230] it purports to comply with congruence and proportionally by applying it to a narrower scope, i.e. land use regulations.[231] Congress also provided a stronger basis for this legislation than for RFRA.[232] Nevertheless, RLUIPA still fails under the congruence and proportionality analysis.

RLUIPA's provisions give it a sweeping reach and scope, unlike that of the Voting Rights Act of 1965,[233] which applied not only to a narrow subset of voting laws, but to specific regions of the country.[234] RLUIPA parallels RFRA, which the Court found entirely unproportional and utterly incongruent with the harm it purportedly redressed.[235] Furthermore, RLUIPA contains other, more serious shortcomings. It redefines both "substantial burden" and "religious exercise."[236] It also changes the requisite standard of showing a constitutional violation.[237] Moreover, it mandates the use of a least drastic means requirement.[238] The Act thus makes substantive changes in the judiciary's interpretation of constitutional rights, which the *City of Boerne* Court declared impermissible.[239] RLUIPA directly expands constitutional rights,[240] violating separation of power principles, the basis for the decision in *City of Boerne*.[241] Thus, like RFRA, RLUIPA fails as remedial Section 5 legislation.

Stanton K. Oishi[242]

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[229] *See supra* note 91 and accompanying text.

[230] *See supra* text accompanying note 81.

[231] *See supra* note 83 and accompanying text.

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

[233] Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000)).

[234] *See supra* notes 198-204 and accompanying text.

[235] *See supra* text accompanying note 60.

[236] *See supra* notes 205-11 and accompanying text.

[237] *See supra* notes 213-14 and accompanying text.

[238] *See supra* notes 215-17 and accompanying text.

[239] *See supra* text accompanying notes 61, 64.

[240] *See supra* notes 213-19 and accompanying text.

[241] *See supra* notes 43 and accompanying text, 62-63 and accompanying text, 179 and accompanying text; *see also supra* Part II.B.2 (discussing the Court's analysis of RFRA).

[242] J.D. Candidate 2003, William S. Richardson School of Law, University of Hawai'i at Mānoa; B.Sc. 1997, Cornell University.

Severing the Bond of Life: When Conflicts of Interest Fail to Recognize the Value of Two Lives

When a child is conceived, a dream is born. The dream imagines a healthy, strong, and clever child, who with confidence and success, fulfills a desire to bear a child. That vision turns into a nightmare when the doctor says there are some problems[: "You are having conjoined twins."][1]

I. INTRODUCTION

Picture two little girls bonded by a single heart and a single liver. Natasha and Courtney were twin girls whose lives represented this illustration. Upon their birth, they would be kept under observation for about one month until they were strong enough to undergo an operation to separate their bond.[2] The operation would have sacrificed one to give the other a chance at life.[3] They were conjoined twins.[4]

Their story surfaced as their mother, Tina May, prepared for their April 2002 cesarean delivery. Tina May and Dennis Smith, the twins' father, were informed that in the operation to separate their daughters, the heart they shared

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[1] Megan Anne Jellinek, Note, *Disease Prevention and the Genetic Revolution: Defining A Parental Right to Protect the Bodily Integrity of Future Children*, 27 HASTINGS CONST. L.Q. 369, 394 (2000).

[2] On April 29, 2002, weighing a total of 9 lbs., 7 ozs., Natasha and Courtney were born. *See* Kathryn Lister, *I Melted With Love As My Two Gorgeous Babies Lay There*, THE SUN (London), April 30, 2002, *available at* LEXIS, Nexis Library, News File (exclusive interview with Tina May and Dennis Smith). As they entered the world, their mother explained, "As soon as I heard that sound I felt the surge of love for them that all new mums feel. I was so relieved by the cries because I knew then that they were safe." *Id.* Natasha's and Courtney's father echoed their mother's sentiments, "[T]hey . . . [were] so gorgeous that it didn't make any difference and I will never forget the sight of them hugging. They're my daughters—and I am so proud." *Id.* However, on May 18, 2002, only nineteen days after their birth, Natasha and Courtney passed away. *See* Kathryn Lister & Michael Lea, *Their Little Lives Were So Short . . . But We Have Some Beautiful Memories*, THE SUN (London), May 18, 2002, *available at* LEXIS, Nexis Library, News File (detailing that the girls developed serious breathing problems).

[3] Sarah Boseley, *Parents Face Life Or Death Decision Over Conjoined Twins With One Heart: Courts Expected To Rule On Plan To Sacrifice Weaker Child To Save Sister*, THE GUARDIAN (London), Feb. 5, 2002, *available at* LEXIS, Nexis Library, News File (explaining that prior to the operation, the parents would have signed a consent form acknowledging that the operation would result in the death of one child to save the life of the other child).

[4] Natasha's and Courtney's story is used for the purpose of illustrating a situation that could have been decided according to a balancing test, as proposed and discussed *infra* Section IV.

would go to Natasha, while Courtney, the "weaker passenger" would die.[5] Though the parents claimed that saving the life of one daughter justified their decision to proceed with the operation, they simply explained, "one thing that . . . [would] ease our grief is knowing Courtney would have looked exactly the same as Natasha—so she . . . [would] be a constant living reminder of our lost little girl."[6]

The separation of conjoined twins invokes both ethical and legal problems. The primary dilemma emerges when separation means parents having to decide which baby will live and which will die. The moral tribulations induced by this difficult decision of whether or not to separate conjoined twins reveals a heart-wrenching story telling of a societal view of the value of life. Natasha's and Courtney's story illustrates the ethical difficulties encountered with the birth of conjoined twins. By learning the details of their story, without a predictable ending, the urgency of the struggle that physicians, courts, states, and especially parents, face when conjoined twins are born is illuminated.

The issue regarding the separation of conjoined twins generates numerous questions. When twins are born conjoined, especially those sharing one set of organs, what should be done? Should the twins be separated if deaths of both will likely result from leaving them conjoined? Or more specifically, should they be separated if it means one will be sacrificed to save the other? What happens when doctors and parents disagree? When should the judicial system intervene? How do we decide who will live and who will die? More importantly, who decides? This article addresses these moral and ethical questions regarding the separation of conjoined twins, especially when one must die to save the other.

Specifically, this article argues that although traditionally parents have been the primary authority in making medical decisions for their children, when confronted with conjoined twins, courts must be more proactive instead of deferring to parental decisions. Essentially, courts should apply a careful balancing of specific interests to make the ultimate determination regarding the

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[5] Boseley, *supra* note 3 ("[T]he shared heart [was] further inside Natasha's body than Courtney's and one of the chambers [had] been pulled out of shape by the demands of the smaller baby's body."); *see also Siamese Twin to be Sacrificed for the Sake of Her Sister*, THE ADVERTISER, Feb. 5, 2002, *available at* LEXIS, Nexis Library, News File [hereinafter *Siamese Twin to be Sacrificed*] ("Doctors . . . told the couple that the dominant twin, Natasha, [had] most of the heart and [stood] the best chance of survival."). Although the twins shared a liver, which would have been divided in the operation, the doctors were not too concerned because they believed that the liver would regenerate after being split. *Siamese Twin to be Sacrificed*, *supra*.

[6] Kathryn Lister & Michael Lea, *We Will Hold Little Courtney's Hand But Then Have to Tell Her Goodbye*, THE SUN (London), Feb. 4, 2002, *available at* LEXIS, Nexis Library, News File (documenting an exclusive interview with Tina May and Dennis Smith).

separation. Section II sets forth a brief history of conjoined twins and discusses the ethical problems associated with their separation. This section further highlights stories of conjoined twins, including one story of twins who lived long, productive lives. Section III is a focused inquiry into the established rights and duties of children, parents, and physicians, with respect to medical decisions made for children, as well as the state's interest in these decisions. In addition, this section examines legislation and regulations that address these rights. Section IV identifies factors courts must consider in determining whether or not to separate conjoined twins. Particularly, this section argues that courts need to intervene in situations involving conjoined twins and discusses how courts should utilize the proposed guideline through a careful balancing of interests. Ultimately, it recommends that performing a balancing test, which weighs the parties' interests (parents, state, and physician) against the right to life of each twin, produces the best possible solution. This section concludes by analyzing the case of Natasha and Courtney through an application of the proposed balancing test and recommends a possible solution.

II. BACKGROUND

A. The History of Conjoined Twins

Since 1811, siamese twins,[7] otherwise known as conjoined twins,[8] established their presence in society.[9] From the beginning, people have referred to conjoined twins as "freaks," "beastly," and even "double-headed monster[s]."[10] One scholar explained the rationale for these attitudes and discerned that conjoined twins defy the social norm that adults should be

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[7] The term "siamese twins" came from history's most famous conjoined twins, Eng and Chang Bunker, who were born in Siam in 1811 and lived until 1874. *See* GEORGE J. ANNAS, STANDARD OF CARE: THE LAW OF AMERICAN BIOETHICS 234 (1993).

[8] "[C]onjoined twinning is the appropriate medical term for identical twins that are physically connected." Laura Moyer, *Conjoined Twins: Two Individuals, One Body, at* http://www.goshn.edu/ bio/Biol410/bsspapers00/laura.html (last visited Feb. 3, 2002).

[9] *See* ANNAS, *supra* note 7, at 234 (describing how Eng and Chang Bunker, born in 1811, were exhibited around the world by P.T. Barnum until their death in 1847 at the age of sixty-three); *see also Surgeons Have Mixed Results in Separating Conjoined Babies*, THE INDEP. (London), Feb. 5, 2002, *available at* LEXIS, Nexis Library, News File [hereinafter *Surgeons Have Mixed Results*] (explaining that Eng and Chang Bunker were exhibited in circus sideshows around the world prior to settling in the United States, where they married two sisters, and fathered many children).

[10] ANNAS, *supra* note 7, at 234.

independent and self-sufficient.[11] As a result of this defiance, conjoined twins have not only become objects of public pity, but also of disgust.[12]

Conjoined twins are rare. Occurring in about one in every 200,000 live births,[13] only sixty-five percent of conjoined twins survive past day one.[14] Like identical twins, conjoined twins are the product of a single fertilized egg. In the case of conjoined twins, however, the egg only partially separates, thereafter developing into a conjoined fetus.[15] As a result, "[c]onjoined twins are always identical";[16] two individuals having the same chromosomal composition.[17] Undoubtedly, they are the same sex.[18] Although the reasons are unknown, over seventy percent of conjoined twins are female.[19] Conjoined twins are classified according to the point at which they are joined.[20] Over

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[11] Wendy Anton Fitzgerald, *Engineering Perfect Offspring: Devaluing Children and Childhood*, 24 HASTINGS CONST. L.Q. 833, 847-48 (1997).

[12] *Id.*

[13] *Types of Conjoined Twins*, *at* http://zygote.swarthmore.edu/ cleave4a.html (last visited Jan. 30, 2002); *see also* Christine Middap, *Separated Twins go Home for Christmas*, THE DAILY TELEGRAPH (Sydney), Dec. 26, 2001, *available at* LEXIS, Nexis Library, News File. In the United States, there are about forty live cases of conjoined twins each year as compared to ordinary identical twins, which are 400 times more common. Claudia Wallis, *The Most Intimate Bond*, TIME, Mar. 25, 1996, *available at* http://www.time.com/time/magazine/archive/1996/dom/ 960325/medicine.html.

[14] *See* Moyer, *supra* note 8; *see also* Wallis, *supra* note 13 (explaining that about forty percent of conjoined twins are stillborn and that although there are about forty pairs of conjoined twins born in the United States each year, most die in their early infancy while still joined).

[15] *See* Moyer, *supra* note 8 ("[Conjoined twins are] the result of a delay in the division of a single fertilized ovum."); *see also* Middap, *supra* note 13 ("[Conjoined twins are formed when] the developing embryo starts to split into identical twins on the 13th day after fertilization but stops part of the way."); *Surgeons Have Mixed Results*, *supra* note 9.

[16] Wallis, *supra* note 13 ("Conjoined twins are always identical: the product of a single egg that for some unknown reason failed to divide fully into separate twins during the first three weeks of gestation.").

[17] ANNAS, *supra* note 7, at 234.

[18] *See* Fitzgerald, *supra* note 11, at 846 ("All conjoined twins are 'identical,' sharing identical genetic compositions."). *See generally* Wallis, *supra* note 13 (explaining that conjoined twins are always identical).

[19] Moyer, *supra* note 8; *see also Types of Conjoined Twins*, *supra* note 13 ("Conjoined twins . . . are more often female than male, at a ratio of 3:1.").

[20] *Types of Conjoined Twins*, *supra* note 13. There are four major types of conjoined twins: (1) *Thoracopagus* twins are joined from sternum to navel and "usually share a liver, heart and gastrointestinal tract"; (2) *Ischiopagus* twins are "connected from belly button to pelvis [and] often [have] many of the same internal organs"; (3) "*Craniopagus* twins are joined at the head, [where s]ome face each other, [while] others face away"; and (4) *Pygopagus* twins are "[a]ttached at the lower back, rump and hip, . . . [and] share parts of the spinal cord and column, some bone, the lower portion of their gastrointestinal tract and certain musculature." Sherry Suib Cohen, *Twins Triumphant*, ROSIE MAGAZINE, *available at* http://www.rosiemagazine.com/people/0202_reallife.html (last visited Jan. 30, 2002); *see also* ANNAS,

three-quarters of conjoined twins are connected at mid-torso, either along the chest wall or upper abdomen, about twenty-three percent are joined at the lower torso with shared hips, legs or genitalia, and about four percent are connected at the head.[21]

Once born, conjoined twins "struggle to survive against physical and psychological difficulties."[22] The decision of whether or not to separate them is painstaking and emotional. Physicians, the state, and especially the parents, endure this "bittersweet" struggle. Although conventional medical treatment urges surgically separating conjoined twins,[23] most conjoined twins "share limbs or vital organs," thus leaving surgeons to choose the one twin who will receive the single heart or shared limb.[24] Consequently, the separation of conjoined twins "often results in the death of one, or [even] both of the

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supra note 7, at 234 ("Approximately three-quarters of all such twins are joined at the chest (*thoracopagus* twins) and have a conjoined heart.").

[21] *Surgeons Have Mixed Results*, *supra* note 9. Because survival of conjoined twins is heavily dependent on whether vital organs are shared, the point at which they are joined has caused "mixed results" for surgeons when determining whether or not separation should occur. *Id.* One reason for these mixed results is the grim survival rate. For example, Great Ormond Street Hospital in London, the most experienced hospital, having serviced over seventeen sets of conjoined twins, provides bleak statistics:

> [S]urvivors include only four complete pairs of twins. For five sets of twins, no operation was considered possible and all the children died. In another seven cases, emergency surgery was carried out because one or both of the children were already dead or dying. Four children are still alive from these cases. The remaining five sets of twins were sufficiently well to undergo a planned operation and eight of these children survived, although two subsequently died for other reasons.

Id. Thus, although attempts are often made to separate conjoined twins, the point at which they are joined, the organs that they share, and the survival rate often cause physicians to have mixed results in terms of surgical separation. *See id.*

[22] Moyer, *supra* note 8, ("Studies have shown that conjoined twins have a much higher incident of *situs inverses* (a physical reversal of internal organs such as the heart or liver) than normal identical twins or singletons, supporting one-egg origin.").

[23] Telephone Interview with Dr. Garner Bemis, Head Physician, Kaiser Pediatric Neonatal Intensive Care Unit (NICU) (Apr. 11, 2002) (on file with author). Throughout his fourteen years as a pediatric physician in Hawai'i, Dr. Bemis has never encountered a situation involving conjoined twins. *Id.* Dr. Bemis, however, explains that the surgical separation of conjoined twins depends on where the twins are joined. *Id.* Thus, Dr. Bemis ultimately looks at the brain function of each twin, determining whether or not they are one person or two. *Id.* From this information, the decision-making process for surgical separation would proceed. *Id.*; *see also* Jennifer N. Sawday, Notes and Comments, *Separating Conjoined Twins, Legal Reverberations of Jodie and Mary's Predicament*, 24 LOY. L.A. INT'L & COMP. L. REV. 65, 66 (2002) (mentioning that the surgical separation of conjoined twins is "commonplace in modern medicine"). Since 1950, there have been over 200 attempted surgeries to separate conjoined twins and "[i]n close to 150 cases, one or both of the conjoined twins . . . survived." *Id.* at 69.

[24] Fitzgerald, *supra* note 11, at 846.

twins."[25] In many cases, however, no medical prognosis can reliably guide parents as to whether surgery is in the best interest for both twins.[26]

B. Stories of Conjoined Twins

"What monstrous sights!"[27] "They must be separated!"[28] "You cannot kill one just to save the other!"[29] These are just a few of the many expressions that surface when people hear the term "conjoined twins."[30] Despite common opinions regarding this distinct form of twinning, people should realize that these children belong to parents whose personal values and beliefs determine their fate. Often, however, people fail to recognize the "human" aspect conjoined twins display, focusing only on their physical defect. The lives of Eng and Chang Bunker exemplify the human side.

Envision living connected to another person by a small band of skin in the chest area. That was life for Eng and Chang Bunker, the namesakes for the term "siamese twins."[31] Born in Siam in 1811,[32] Eng and Chang led productive lives until their death at the age of sixty-three.[33] At their birth, Mrs. Bunker refused to allow doctors to attempt to separate the boys, fearing that

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[25] *See, e.g.*, *Conjoined Twin Girls Die After Separation*, SAN DIEGO UNION-TRIB., May 28, 2000, *available at* 2000 WL 13967355. Milagro and Marta were twin girls who were joined at the chest and shared a single heart. *Id.* The girls' mother was told that in order to save one girl, the other would need to be sacrificed. *Id.* After the separation surgery was performed, both girls died. *Id.*

[26] Fitzgerald, *supra* note 11, at 846.

[27] *Ideas in Society, 1500-1700: Monsters and prodigies, at* http://www.nd.edu/~dharley/HistIdeas/monsters.html (last visited Oct. 30, 2002) [hereinafter *Ideas in Society*] (depicting images of conjoined twins with the caption: "From monstrosity as Providence to monstrosity as a freak of Nature").

[28] *Conjoined Twins Must Be Separated, at* http://www.news24.com/News24/Africa/Northern_Africa/0,1113,2-11-38_1213607,00.html (last visited Oct. 30, 2002).

[29] *Twins, at* http://www.dwc.org/questions/Morality/twins.htm (last visited Oct. 30, 2002).

[30] *See Types of Conjoined Twins*, *supra* note 13; *see also Ideas in Society*, *supra* note 27; Kathleen Minutaglio, *Surgical Separation of Conjoined Twins: Jodie and Mary, at* http://www.molloy.edu/academic/ philosophy/sophia/ethics/bioforum/twins.htm (last visited Oct. 30, 2002) ("Conjoined twins were thought to be omens of the future or God's punishment for man's wickedness. As late as 1874, physicians who performed an autopsy referred to them as monsters.").

[31] *See* ANNAS, *supra* note 7, at 234. *See generally* IRVING WALLACE & AMY WALLACE, THE TWO: A BIOGRAPHY (1978) (detailing the lives of Eng and Chang Bunker).

[32] Upon learning of Eng's and Chang's birth, the King of Siam wanted the boys executed because he believed their birth was an evil omen signaling the end of the world. *See* WALLACE & WALLACE, *supra* note 31, at 17.

[33] *See id.* at 297-98; *see also* ANNAS, *supra* note 7, at 234.

to do so would result in the death of one or both.[34] Instead, she taught Eng and Chang to stretch the tissue that joined them so that they could stand side-by-side rather than always face-to-face.[35] After touring with P.T. Barnum as an exhibition, they moved to the United States and settled in North Carolina, eventually living as farmers.[36] Over time, Chang fell in love with Adelaide Yates.[37] Soon thereafter, Eng fell in love with Adelaide's sister, Sarah.[38] In 1843, the couples married in a double wedding and eventually produced a total of twenty-one children.[39] In 1874, after a long and prosperous life, Chang died, and about two and a half hours later, Eng passed away.[40]

In distinct contrast to Eng and Chang's situation, more than one hundred years after their death, a mother's and father's decision regarding the medical treatment for their sons resulted in charges of conspiracy to murder and endangering a child's well-being.[41] Joined at the waist, Jeff and Scott Mueller were bonded.[42] Once born, both Mr. and Mrs. Mueller, along with the physicians, decided against surgically separating the boys.[43] Although their decision did not seem harmful, it became apparent that the boys would suffer when the parents ordered the physicians not to feed Jeff and Scott.[44] As a result, the Illinois Department of Children and Family Services filed a petition with the Illinois Family Court to gain custody of the twins.[45] Awarding custody to the Department, the *Mueller* court explained that "the twins' 'inalienable right to life,' granted by the Illinois State Constitution, could not be disregarded by any 'individual, professional group, legal, medical, or

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[34] *See* WALLACE & WALLACE, *supra* note 31, at 18 (explaining that Eng and Chang's mother dreaded "the pain that would be imposed on her sons").

[35] *Id.* at 22-23.

[36] *See id.* at 158-66.

[37] *See id.* at 169-79 (revealing Chang and Adelaide's "love story"); *see also Eng and Chang Bunker: The Siamese Twins*, *at* http://www.lib.unc.edu/ncc/ gallery/ twins.html (last visited Oct. 30, 2002).

[38] *See* WALLACE & WALLACE, *supra* note 31, at 169-79 (detailing Eng and Sarah's "love story"); *see also Eng and Chang Bunker: The Siamese Twins*, *supra* note 37.

[39] WALLACE & WALLACE, *supra* note 31, at 177-79. Eng fathered six boys and five girls, and Chang fathered seven girls and three boys. *See Chronology of Eng and Chang Bunker and Their Children*, *at* http://engandchang.twinstuff.com/tree.htm (last visited Oct. 30, 2002). Today, some of Eng's and Chang's descendants are still living. *Id.* (tracing Eng and Chang Bunker's family tree down to their great-grandchildren).

[40] *See* WALLACE & WALLACE, *supra* note 31, at 297-98.

[41] *See* John A. Robertson, *Dilemma in Danville*, 11 HASTINGS CENTER REP. 5, Oct. 1981, at 5.

[42] *Id.*

[43] *See id.*

[44] *Id.* (noting that written on Jeff's and Scott's medical chart was, "Do not feed in accordance with parents' wishes").

[45] *Id.*

otherwise.'"[46] The court rationalized that child neglect laws authorized the judicial system to order treatment for the boys, explaining that "under the Illinois child neglect laws, the twins were entitled to both an expert examination and an attempt to correct their problem, neither of which had been done."[47] The Mueller's legal problems, however, did not end. In an unprecedented move, less than a month after the decision, an Illinois State Attorney filed attempted murder charges against Mr. and Mrs. Mueller as well as the attending physicians.[48] Thereafter, a grand jury was asked to indict the parents on charges of attempted murder.[49] The grand jury found a lack of probable cause and therefore, issued no indictment.[50]

These stories[51] illustrate the constant struggle parents endure when confronted with the possibility of raising conjoined twins and foster an understanding of what motivates the separation of conjoined twins. Many

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[46] John M. Maciejczyk, Note, *Withholding Treatment from Defective Infants: "Infant Doe" Postmortem*, 59 NOTRE DAME L. REV. 224, 232 (1983) (quoting In re Jeff and Scott Mueller, No. 81J300 & 81J301 (Ill. 5th Cir., May 15, 1981)).

[47] *Id.* (explaining that neglect resulted from the failure to provide an expert examination and treatment).

[48] *Id.*; *see also* Robertson, *supra* note 41, at 5. The charges were eventually dismissed because the parents and the physicians could not be linked to the statement that food be withheld from the boys. *Id.*

[49] Robertson, *supra* note 41, at 5.

[50] *Id.*

[51] Although only two stories are presented, there are numerous accounts of conjoined twins in which parents authorized the surgical separation of their twins as well as refused any separation.

Amy and Angela Lakeberg illustrate the heartbreak one set of parents endured when they decided to separate their daughters, ultimately resulting in the death of both girls. Despite authority advising against the separation of the twins, Reitha and Kenny Lakeberg decided to separate Amy and Angela, ultimately sacrificing Amy for Angela. Anastasia Toufexis, *The Brief Life of Angela Lakeberg: After 10 months of great hope and healing, the Siamese twin rejoins her sister in death*, TIME, June 27, 1994, *available at* http://www.time.com/magazine/archive/1994/940627/940627.medicine.html. Ten months after surgery, however, Angela died unexpectedly. *Id.*

On the other hand, the story of Abby and Brittany Hensel defy all people who say conjoined twins should be separated. Although they share a bloodstream and all organs below the waist, Abby and Brittany "have separate necks and heads, separate hearts, stomachs and spinal cords." Wallis, *supra* note 13. Both parents dismissed the idea of separating the twins when doctors told them that there was little chance that both could survive the procedure, saying "How could you pick between the two?" *Id.* Today, both girls could not imagine their life any other way, with one twin insisting, "I'm not going to be separated." *Id.*

Laleh and Laden Bijani, however, are conjoined twins whose parents decided against surgically separating them after it was discovered that they were joined at the head. Today, twenty-seven years later, these conjoined twins from Iran are appealing to the international community to help them undergo a separation operation. *Conjoined Twins Seek Surgery*, THE HONOLULU ADVERTISER, Mar. 21, 2002, at A3.

parents explain that the financial burdens of raising such twins are too enormous for them to bear.[52] Other parents believe that providing their children with a "normal" life necessitates their separation.[53] However, most critics of the separation of conjoined twins explain that society's attitude towards such "abnormal" humans is the underlying motivator.[54]

One scholar, evaluating the devaluation of "imperfect" children in society, concluded that negative and reluctant attitudes toward conjoined twins result from "cultural hostility toward . . . interdependence."[55] This scholar explains, "intimately attached twins defy the cultural and social norm of adult independence and self-sufficiency. If not independent and self-sufficient, twins appear lacking and perhaps inferior compared with the norm."[56] The result of such intolerance fuels the desire to separate conjoined twins. Sadly, this devaluation fails to recognize that conjoined twins are not just a physical defect, but rather a "different, instructive, and often wonderful [way] of being human."[57]

Conjoined twins represent perhaps the greatest bond of human life. Like identical twins, conjoined twins "enjoy paranormal communication and other special psychological and emotional bonds."[58] As a result of this unusual bond, conjoined twins are "able to experience such intimate interdependencies despite their development . . . of disparate personalities."[59] Conjoined twins, therefore, "seem to personify human attributes of connectedness and interdependence, of fluidity in identity, and of the value of co-operation."[60]

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[52] *See* Lisa M. Hewitt, Casenote, *A(Children): Conjoined Twins and their Medical Treatment*, 3 J. L. & FAM. STUD. 207, 210 (2001) (explaining that the Attards, parents of Jodie and Mary, did not believe that they were financially able to care for the girls).

[53] Fitzgerald, *supra* note 11, at 837 (concluding that "culturally, socially, and legally, we promote an exclusive standard of perfection for our offspring which undermines tolerance for human difference and devalues all children").

[54] *See id.*

[55] *Id.* at 847.

[56] *Id.*

[57] *Id.* at 837.

[58] *Id.* at 847 (citing studies that "confirm the phenomena of idiosyncratic languages between identical twins, [which describes the appearance of all conjoined twins,] consonance of emotions, and a preference for each other's company").

[59] *Id.*

[60] *Id.* at 848.

III. RIGHTS, DUTIES, AND INTERESTS

A. Children's Rights

Historically, children, especially infants, lacked the heightened degree of constitutional protection that adults enjoy.[61] The principle underlying this constitutional indifference is "the presumption that minors, by virtue of their age and inexperience, are not as capable as adults either to understand the risks and consequences of their actions or to exercise sound judgment in making important decisions."[62] This presumption "also applies in the context of medical decision-making," and minors are consequently presumed legally incompetent to consent to medical care.[63] Thus, "a parent, guardian or other legally authorized person must give consent to any medical procedure."[64] As a result, parents maintain the authority to make important decisions essential to the health and welfare of a child.

In 1967, the United States Supreme Court established that constitutional protections of due process extend to children as well as adults in *In re Gault*.[65] *In re Gault* involved a minor, Gerald Gault, who was arrested for making an obscene telephone call and held and questioned by the police without any formal notice to his parents.[66] Although the hearing to determine whether Gault's parents should retain custody failed to satisfy due process requirements, the Arizona Juvenile Court moved to commit Gault to a state industrial school for six years.[67] The United States Supreme Court set aside the

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[61] *See* Michele D. Sullivan, Note, *From Warren to Rehnquist: The Growing Conservative Trend in the Supreme Court's Treatment of Children*, 65 ST. JOHN'S L. REV. 1139, 1139 (1991) (citing cases such as *H.L. v. Matheson*, 450 U.S. 398 (1981), which held that states could require parental notification prior to minor children obtaining abortions).

[62] Matthew S. Feigenbaum, Comment, *Minors, Medical Treatment, and Interspousal Disagreement: Should Solomon Split the Child?*, 41 DEPAUL L. REV. 841, 851 (1992).

[63] *Id.* Feigenbaum is careful to cite exceptions to this general rule. For example, certain jurisdictions allow minors to consent for specific types of medical treatment, such as an abortion. *Id.*; *see, e.g.*, Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (allowing minors to consent to an abortion).

[64] Walter Wadlington, *David C. Baum Memorial Lecture: Medical Decision Making for and by Children: Tensions between Parent, State, and Child*, 1994 U. ILL. L. REV. 311, 314 (1994) (noting that a tort action for battery can be brought against a physician for performing a nonemergency surgery without authorization).

[65] 387 U.S. 1, 13 (1967) ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.").

[66] *Id.* at 4-5. Apparently, Gault's older brother, learning the news of his younger brother's arrest from his neighbor, informed his mother of the arrest. *Id.*

[67] *Id.* at 7-8. If Gerald Gault violated the provision under which he was convicted, as an adult, he would have either been fined between five and fifty dollars or incarcerated for not more than two months. *Id.* at 8-9.

conviction by reasoning that although a juvenile justice hearing does not need to conform with all the requirements of a criminal trial or an administrative hearing, it "must measure up to the essentials of due process and fair treatment."[68]

Despite *In re Gault*, children continue to lack protected rights. Until birth, children are essentially disregarded as human beings.[69] This lack of recognition means that children have basically no control to exercise choices with respect to their lives. Without a voice, children face much uncertainty in their life decisions.

B. Parental Rights and Duties

Traditionally, parents have the primary responsibility of making all essential decisions with respect to their children's well being.[70] Specifically, "parental decision making, at all stages of children's development, is a discretion that has . . . been afforded great protection."[71] This traditional deference is premised on the family's right to privacy and the presumption that parents generally act in their child's best interest.[72]

Seemingly, this deference also extends to parental health care decisions made on the behalf of children.[73] In a series of cases commencing with *In re Infant Doe*[74] and extending to *In re Baby K*,[75] the right of parents to make

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[68] *Id.* at 30. Juveniles are granted specific due process protections: (1) notice of the charges setting forth the allegations with particularity, *id.* at 33; (2) notice to the child and parents of the child's right to counsel or appointed counsel, *id.* at 41; (3) a privilege against self-incrimination, *id.* at 55; and (4) absent a confession, a requirement that testimony be sworn and an opportunity for cross-examination. *Id.* at 57.

[69] Roe v. Wade, 410 U.S. 113, 157 (1973) (excluding a fetus from the definition of persons entitled to the rights and privileges granted under the Constitution).

[70] *See* Feigenbaum, *supra* note 62, at 852.

[71] Jellinek, *supra* note 1, at 386.

[72] Parham v. J.R., 442 U.S. 584, 602 (1979) ("[N]atural bonds of affection lead parents to act in the best interests of their children."); *see also* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (explaining that the decisions of the United States Supreme Court "have respected the private realm of family life which the state cannot enter"); Rebecca H. Heartz, *Guardians Ad Litem in Child Abuse and Neglect Proceedings: Clarifying the Rules to Improve Effectiveness*, 27 FAM. L.Q. 327, 329 (1993) ("Historically, society believed that parents always acted in their children's best interests and that children's interests were the same as their parents.").

[73] *See* Jennifer L. Rosato, *Using Bioethics Discourse to Determine When Parents Should Make Health Care Decisions for Their Children: Is Deference Justified?*, 73 TEMP. L. REV. 1, 5-6 (2000).

[74] In re Infant Doe, No. GU8204-004A (Monroe County Cir., Ind. Apr. 12, 1982), *cert. denied*, 464 U.S. 961 (1983) (cited in Maciejczyk, *supra* note 46) (deferring to parental decision to withhold treatment for their son).

[75] 832 F. Supp. 1022 (E.D. Va. 1993), *aff'd*, 16 F.3d 590 (4th Cir. 1994), *cert. denied*, 513 U.S. 825 (1994) (reaffirming the strong parental right to make health care decisions for their

difficult medical decisions for their children is legally acknowledged. In addition to case law, Congressional legislation and federal regulations also recognize this parental right, which is premised "upon the special relationship that parents have with their children [that gives] rise to reciprocal rights and obligations."[76] For example, parents are considered the primary authority in deciding whether or not to treat their disabled infant.[77] Additionally, parental decision-making on behalf of children is recognized in the context of end-of-life care for their children.[78] Although not explicit, "the presumption that parents will act in the best interest of their children . . . gives credence to broad parental discretion."[79] As discussed in Section B.1, the law reaffirms this well-established belief regarding parental rights.[80]

1. The evolution of parental rights in making medical decisions for their children under U.S. law

American jurisprudence has long recognized the right of parents to make decisions concerning their children.[81] Implicit in the law is the presumption

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children).

[76] Angie L. Guevara, Note, *In Re K.I.: An Urgent Need for a Uniform System in the Treatment of the Critically Ill Infant—Recognizing the Sanctity of Life of the Child*, 36 U.S.F. L. REV. 237, 252 (2001); *see also* Barbara Bennett Woodhouse, *From Property to Personhood: A Child-Centered Perspective On Parents' Rights*, 5 GEO. J. ON FIGHTING POVERTY 313, 315 (1998) ("Family privacy and parental autonomy were accorded powerful constitutional protections and respect because they are crucial to the development of children as human beings, and necessary for the provision of a safe environment for children.").

[77] *See* Guevara, *supra* note 76, at 252.

[78] *See* Jellinek, *supra* note 1, at 395. Formal prohibitions, however, apply to end-of-life decisions for children. Ann MacLean Massie, *Withdrawal of Treatment for Minors In A Persistent Vegetative State: Parents Should Decide*, 35 ARIZ. L. REV. 173, 188-89 (1993). Some of the formal prohibitions that apply to end-of-life decisions for children include: (1) the competence of parents to make the decision after being fully informed of the necessary information; (2) the absence of any conflict of interest between the parents and their child; and (3) the lack of any basis upon which a reasonable person could characterize the parents' actions as abuse or neglect with respect to their child. *Id.*

[79] Jellinek, *supra* note 1, at 384; *see also In re* Guardianship of Barry, 445 So. 2d 365, 371 (Fla. Dist. Ct. App. 1984) ("[D]ecisions of this character have traditionally been made within the privacy of the family relationship based on competent medical advice and consultation by the family with their religious advisors, if that be their persuasion.").

[80] The *parens patriae* right of the State, however, conflicts with this well-established right of parents to make difficult health care decisions on behalf of their children. *See* discussion *infra* Section III.C (detailing that in the United States, parental rights are not absolute).

[81] Over an extended period of time, the United States Supreme Court specifically recognized the rights of parents to make decisions with respect to their children. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), one of the earliest cases establishing the right of parental autonomy, the Court reasoned that the right of parents to direct the education of their children

that "parents will do what is best for their children, and consequently[,] courts [generally do not] interfere with a parent's decision" surrounding the welfare of their child.[82] This recognition remains true with respect to medical care.

Parham v. J.R.[83] is the quintessential case for parental rights. *Parham* involved a class action challenge against Georgia Health Officials, proclaiming that procedures for voluntarily committing children to state mental hospitals violated children's due process rights.[84] The United States Supreme Court, however, determined that parents have certain heightened procedural due process rights.[85] The rationale behind the Court's ruling was that "[t]he law's concept of the family rests on a presumption that . . . [the] natural bonds of affection lead parents to act in the best interests of their children."[86]

Parental rights were further recognized when the Indiana Supreme Court upheld the decision of a mother and father to withhold treatment for their son in *In re Infant Doe*.[87] *Infant Doe* involved a hospital's challenge to parental authority regarding medical treatment decisions made for their disabled infant.[88] Upon entering this world on April 9, 1982, Infant Doe was diagnosed with Down's Syndrome and *tracheo-esophageal fistula*,[89] and therefore, could not be fed orally.[90] Although Infant Doe's disability could be corrected with

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is implicit in the Fourteenth Amendment. *Id.* at 399-400 (explaining that liberty "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, . . . and bring up children"). One year later, the Court reaffirmed parental rights. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1924). Thereafter, a broader recognition of parental autonomy surfaced. As noted by the Court in *Prince v. Massachusetts*, 321 U.S. 158 (1944):

> It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder . . . [a]nd it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter.

Id. at 166.

[82] Daniel S. Duggan, Comment, *Protection for Handicapped Infants: Decision by Committee under the Child Abuse Amendments of 1984*, 59 U. COLO. L. REV. 367, 369 (1988).

[83] 442 U.S. 584 (1979).

[84] *Id.* at 588.

[85] *See generally id.* at 602.

[86] *Id.*

[87] In re Infant Doe, No. GU8204-004A (Monroe County Cir., Ind. Apr. 12, 1982), *cert. denied*, 464 U.S. 961 (1983) (cited in Maciejczyk, *supra* note 46).

[88] *Id.*

[89] *Tracheo-esophageal fistula* is an esophageal blockage, from the mouth to the stomach, which prevents normal feeding. *See* Robyn S. Shapiro & Richard Barthel, *Infant Care Review Committees: An Effective Approach to the Baby Doe Dilemma?*, 37 HASTINGS L.J. 827, n.62 (1986) ("A *tracheoesophageal fistula* is a congenital abnormality involving an anormal communication between the windpipe and the gullet that prevents normal ingestion of food."). This condition, however, can be corrected by surgery. *Id.*

[90] Maciejczyk, *supra* note 46, at 234.

surgery, Infant Doe's parents refused to consent to the procedure and requested that treatment, along with food and water, be withheld from their son.[91] Despite the hospital's request for court intervention, the Indiana court refused, explaining that the parents had a right to choose any reasonable course of medical treatment,[92] and, thereafter, ordered the hospital to comply with the parent's decision for non-treatment.[93] To the court, "the value of parental autonomy outweighed the infant's right to life where 'a minimally adequate quality of life was non-existent.'"[94] Six days after the decision, Infant Doe died from, among other things, the lack of food and water.[95]

Attempting to limit the courts' recognition of parental discretion, the immediate aftermath of the *Infant Doe* decision culminated in the enactment of federal measures designed to prevent withholding of treatment from infants. Otherwise known as the "Baby Doe" regulations, the federal government enacted regulations, "which embody certain implications about the role of physicians and state child welfare personnel when parents refuse to consent to treatment that a physician deems medically necessary."[96] Additionally, in response to the Reagan administration's urging, the Department of Health and Human Services (HHS) wanted to enact regulations under section 504 of the Rehabilitation Act of 1973[97] requiring "hospitals to provide medically-indicated treatment to handicapped infants."[98]

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[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.* at 235 (deferring to the parents' decision, the court explained that it was unable to determine whether or not Infant Doe's parents were acting in his best interest). The court recognized that Infant Doe was not being neglected by his parent's decision to withhold treatment, food, and water from him. *Id.* at 236.

[95] On the evening of April 15, 1982, Infant Doe died. *Id.* at 235. He died while an emergency appeal to the United States Supreme Court was being made by a county prosecutor and an Indiana University law professor. *Id.* Dehydration and lack of food were cited by the coroner as contributing factors to Infant Doe's death. *Id.*

[96] Kathleen Knepper, *Withholding Medical Treatment From Infants: When Is It Child Neglect?*, 33 U. LOUISVILLE J. FAM. L. 1, 2 (1995).

[97] 29 U.S.C. § 794 (West Supp. 1989). Section 504 of the Rehabilitation Act of 1973 provides in relevant part: "No otherwise qualified individual with [handicaps] . . . shall, solely by reason of his or her [handicap], be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." *Id.*

[98] Knepper, *supra* note 96, at 12. *See generally Developments in the Law--Medical Technology and the Law: Neonatal Treatment Decisions*, 103 HARV. L. REV. 1584, 1587-88 (1990) [hereinafter *Developments in the Law--Medical Technology and the Law*]. The Department's regulations required: (1) health care providers receiving federal funds to post notices that health care should not be withheld from infants on the basis of their handicap or mental or physical impairment; (2) state child protective services agencies to establish procedures to prevent unlawful medical neglect of handicapped infants; (3) immediate access

One year after *Infant Doe*, the New York Court of Appeals faced a similar challenge in *In re Jane Doe*,[99] which became the first test for HHS regulations.[100] There, the court upheld the decision of parents who refused surgery for their infant suffering from *spina bifida*.[101] Born on October 11, 1983, Baby Jane Doe had many birth defects, which included *spina bifida*, *hydrocephalus*, *microcephaly*, and other neurological defects.[102] Baby Jane Doe's birth defects "left her immobile and incapable of controlling her body waste."[103] Having consulted with physicians, Baby Jane Doe's parents learned that without surgery, death was imminent within six weeks, but with surgery, their daughter could live to age twenty.[104] The parents declined to proceed with surgery to correct their daughter's birth defects and opted for a more "conservative" treatment.[105] Thereafter, a local resident unconnected to Baby Jane Doe's family filed a petition with the Suffolk County Supreme Court, resulting in the appointment of a legal guardian for Baby Jane Doe.[106] Subsequently, Baby Jane Doe's legal guardian urged the court to order surgery for Baby Jane Doe.[107] Although the court initially ordered surgery, within a

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to patient records; and (4) expedited compliance actions. 45 C.F.R. § 84.55 (2002).

Prior to the enactment of these "Final Rules," an "Interim Final Rule" was contemplated whereby health care providers who received federal assistance were required to post in a conspicuous place in each delivery ward, each maternity ward, each pediatric ward, and each nursery, including each intensive care nursery a notice advising of the applicability of section 504 of the Rehabilitation Act of 1973 and the availability of a telephone hotline to report suspected violations of the law. 48 Fed. Reg. 9631 (1983).

Upon challenges to the Interim Final Rules, the Federal District Courts for the Southern District of New York and the District of Columbia declared that these rules were promulgated in violation of the Administrative Procedure Act because the Secretary had improperly failed to solicit public comment prior to issuing the Rule. American Acad. of Pediatrics v. Heckler, 561 F. Supp. 395, 399-401 (D.D.C. 1983). Thereafter, the "New Proposed Rules" were issued and the public was invited to comment. These "Proposed Rules" required health care institutions to post notices in conspicuous places, authorized the expedited access to records and expedited compliance actions, and required child protective services agencies to utilize their full authority pursuant to state law to prevent instances of medical neglect of handicapped infants. 48 Fed. Reg. 30,851 (1983). Subsequently, after the period for notice and comment had passed, the Final Rules were promulgated. 45 C.F.R. § 84 (2002).

[99] Weber v. Stony Brook Hosp., 95 A.D.2d 587 (N.Y. App. Div. 1983).

[100] It is important to note that Baby Jane Doe was born after the Department's "Interim Final Rule" had been declared invalid but prior to the promulgation of the "Final Rules."

[101] *Weber*, 95 A.D.2d at 588-89.

[102] *Id.* at 588.

[103] *See* James Barron, *Judge Blocks An Operation For L.I. Baby*, N.Y. TIMES, Oct. 21, 1983, at B1 [hereinafter *Judge Blocks An Operation*].

[104] *Id.*

[105] *Weber*, 95 A.D.2d at 588.

[106] *Id.*

[107] *See Judge Blocks An Operation*, *supra* note 103, at B1.

few hours of the decision the Appellate Division stayed the order.[108] Recognizing that Baby Jane Doe's parents opted for treatment "well within accepted medical standards," the court dismissed the action.[109] Moreover, the court determined that because the parents had never consented to the operation and hospital records indicated that their decision was reasonable, the hospital had no right to perform the procedure.[110] Thereafter, the United States District Court for the Eastern District of New York affirmed.[111]

After the *In re Baby Jane Doe* decision, *Bowen v. American Hospital Ass'n*[112] seriously questioned and invalidated section 504 regulations. *Bowen* involved a challenge by health care providers to the HHS regulations concerning the procedures relating to the health care for handicapped infants.[113] Specifically, the health care providers challenged the four mandatory components of the Final Rules: (1) requiring every health care provider that provides health care services to infants and receives federal financial assistance to post informational notices of section 504's application;[114] (2) requiring every designated agency to establish and maintain procedures to ensure that "the agency utilizes its full authority pursuant to state law to prevent instances of unlawful medical neglect of handicapped infants";[115] (3) requiring immediate access to patient records on a twenty-four hour basis;[116] and (4) requiring expedited compliance when necessary to protect the life or health of a handicapped individual.[117] Although the United States Supreme Court recognized the existing state-law framework governing the medical care of handicapped infants, the Court clarified that the "withholding of consent by parents does not equate with discriminatory denial of treatment by hospitals."[118] As a result, the Court held that "[a] hospital's withholding of treatment from a handicapped infant when no parental consent has been given cannot violate [section] 504 [of the Rehabilitation Act]."[119]

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[108] *Id.*

[109] *Weber*, 95 A.D.2d at 589.

[110] *Id.*

[111] United States v. Univ. Hosp., 575 F. Supp. 607, 611 (E.D.N.Y. 1983).

[112] 476 U.S. 610 (1986).

[113] *Id.* at 613. The challengers to these regulations included: The American Medical Association, The American Hospital Association, The Hospital Association of New York State, The American College of Obstetricians and Gynecologists, The Association of American Medical Colleges, and The American Academy of Family Physicians, as well as certain individual physicians. *Id.* at 613, n.2.

[114] 45 C.F.R. § 84.55(b) (2002).

[115] *Id.* § 84.55(c)(1).

[116] *Id.* § 84.55(d).

[117] *Id.* § 84.55(e).

[118] *Bowen*, 476 U.S. at 632.

[119] *Id.* at 610 (reasoning that "without the parents' consent the infant is neither 'otherwise qualified' for treatment nor has he been denied care solely by reason of his handicap").

The rationale for the Court's decision was that the Secretary of Health, in the promulgation of the Final Rules, "acknowledged that a hospital has no statutory treatment obligation in the absence of parental consent," making it clear that the regulations were unnecessary "to prevent hospitals from denying treatment to handicapped infants."[120] Consequently, the Department exceeded its statutory authority in the promulgation of the "Final Rules."[121]

As a result of *Bowen*, the federal government amended the Child Abuse Prevention and Treatment Act[122] by establishing the Child Abuse Amendments of 1984.[123] Although not binding, these regulations provide interpretive guidelines for states to follow where "failure to provide medical treatment to an infant may be a form of child neglect, enforceable under state laws by state child welfare agencies."[124] In addition to these implementing regulations, HHS issued a companion set of regulations entitled "Model Guidelines for Health Care Providers to Establish Infant Care Review Committees."[125] Today, the Child Abuse Amendments of 1984 remain the pivotal legislation directly affecting medical decisions for newborns with disabilities.[126]

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[120] *Id.* at 631 ("The Secretary's belated recognition of the effect of parental nonconsent is important, because the supposed need for federal monitoring of hospitals' treatment decisions rests entirely on instances in which parents have refused their consent.").

[121] *Id.* at 647. In rendering its decision, the Court explained:

> The administrative record demonstrates that the Secretary has asserted the authority to conduct on-site investigations, to inspect hospital records, and to participate in the decisional process in emergency cases in which there was no colorable basis for believing that a violation of § 504 had occurred or was about to occur . . . . [T]hese investigative actions were not authorized by the statute and that the regulations which purport to authorize a continuation of them are invalid.

Id.

[122] 42 U.S.C. § 5101 *et. seq.* (2002).

[123] Pub. L. No. 98-457, 98 Stat. 1749 (1984). In attempting to address the selective nontreatment of infants with disabilities, Congress established the Child Abuse Amendments of 1984, which required "states to establish policies and procedures for the reporting of and responding to medical neglect and by defining medical neglect to include the withholding of medically indicated treatment for a disabled infant with life-threatening conditions." Mary Crossley, *Infants with Anencephaly, the ADA, and the Child Abuse Amendments*, 11 ISSUES L. & MED. 379, 393 (1996).

[124] Pub. L. No. 98-457, 98 Stat. 1749 (1984); *see also* Knepper, *supra* note 96, at 18-19 (explaining that the regulations provide that "medical treatment should be provided to infants, [notwithstanding] certain exceptions").

[125] 50 Fed. Reg. 14,893 (1985). The purpose of the Infant Care Review Committees would be to: (1) educate hospital personnel and families of disabled infants with life-threatening conditions; (2) recommend institutional policies and guidelines concerning the withholding of medically indicated treatment from such infants; and (3) offer counsel and review in cases involving disabled infants with life-threatening conditions. *Id.*

[126] Pub. L. No. 98-457, 98 Stat. 1749 (1984).

The judicial trend to defer to parental decisions with respect to their child's medical care, however, continued in *In re Baby K*.[127] Although *Baby K* involved the legal consequences of the Emergency Medical Treatment and Active Labor Act (EMTALA),[128] the strong parental right to make medical treatment decisions for their minor children is explained throughout the decision. This right is clearly evidenced when the Virginia District Court upheld the mother's decision to seek continued treatment for her daughter.[129] *Baby K* concerned conflicting views of the course of treatment for a disabled child.[130] As an anencephalic child, Baby K suffered from chronic and serious respiratory problems.[131] After the parents returned to the hospital a second time, the hospital sought a declaratory judgment, under EMTALA, asking the court to declare it relieved of any duty to provide future respiratory treatment to Baby K, insisting that the physicians only be allowed to provide warmth, food, and fluids.[132] Despite the hospital's refusal to treat Baby K, Baby K's mother sought continued treatment for her daughter's life, explaining that "all life, however limited, has value and should be preserved and that God, not humans, should decide the time of death."[133] The trial court ruled in favor of the mother,[134] the Fourth Circuit affirmed,[135] and the U.S. Supreme Court

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[127] 832 F. Supp. 1022 (E.D. Va. 1993), *aff'd*, 16 F.3d 590 (4th Cir. 1994), *cert. denied*, 513 U.S. 825 (1994).

[128] 42 U.S.C. § 1395dd (2002); *see also* Dionne Koller Fine, *Government As God: An Update on Federal Intervention in the Treatment of Critically Ill Newborns*, 34 NEW ENG. L. REV. 343, 348 (2000) ("EMTALA was enacted to prevent 'patient dumping,' where a hospital does not treat or transfers a patient before giving stabilizing treatment because the patient is uninsured or otherwise unable to pay."). To comply with this Act, "participating hospitals [must] provide stabilizing medical treatment to any person who comes to an emergency department in an 'emergency medical condition' when treatment is requested on that person's behalf." *In re Baby K*, 832 F. Supp. at 1026.

[129] *In re Baby K*, 832 F. Supp. at 1031.

[130] *Id.* at 1025.

[131] *Id.* Although having trouble breathing from the time of her birth, Baby K, over a period of time, was able to breathe without the use of a mechanical ventilator. *Id.* However, after being moved to a nursing home, Baby K began experiencing respiratory distress and needed to use a mechanical ventilator to help with her breathing. *Id.* (noting that there were at least three instances when she experienced respiratory distress).

[132] *In re Baby K*, 16 F.3d at 592 (arguing that it was not required to provide extraordinary treatment to Baby K after her mother repeatedly sought to have her resuscitated). The physicians argued that the treatment would be futile in improving Baby K's disability. *Id.*

[133] *See* Jacqueline J. Glover & Cindy Hylton Rushton, *From Baby Doe to Baby K: Evolving Challenges to Pediatric Ethics*, 23 J.L. MED. & ETHICS 5, 5 (1995).

[134] *In re Baby K*, 832 F. Supp. at 1031.

[135] *In re Baby K*, 16 F.3d at 598 (affirming on the ground that EMTALA gives rise to a duty on the part of the hospital to provide respiratory support to Baby K when she is presented at the hospital in respiratory distress and treatment is requested for her).

denied certiorari.[136] Consequently, doctors implanted an endotracheal tube in Baby K, resulting in a significant improvement in her breathing.[137] Today, people recognize *Baby K* as a "triumph of parents' rights to make health care decisions for their children."[138]

This line of cases, legislation, and regulations illustrate the evolution of parental rights under American law. As demonstrated by these cases, parents are the traditional source of consent, and courts give parents considerable deference in matters concerning medical treatment for their children.[139] This traditional view remains constant.[140] Under the laws of England, however, courts do not strictly adhere to giving deference to parental decisions.[141]

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[136] *In re Baby K*, 513 U.S. 825 (1994).

[137] *In re Baby K*, 832 F. Supp. at 1025-26.

[138] Glover & Rushton, *supra* note 133, at 5; *cf.* Troxel v. Granville, 530 U.S. 57, 57 (2000) (recognizing the right of parents to make decisions on behalf of their children). Although not a medical decision case, *Troxel* represents the continued recognition that parents have the fundamental right to make decisions concerning the care, custody, and control of their children. *Id.* at 65-66 ("[T]he custody, care and nurture of a child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."). Therefore, as long as parents adequately care for their children, "there will normally be no reason for the State to inject itself in the private realm of the family to further question the ability of [parents] to make the best decisions concerning the rearing of [their] children." *Id.* at 68-69.

[139] *See* Feigenbaum, *supra* note 62, at 852; *see also* Parham v. J.R., 442 U.S. 584, 602 (1979) ("[O]ur constitutional system long ago rejected any notion that a child is 'the mere creature of the state' and, on the contrary, asserted that parents generally 'have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations.'"). Deference to parental authority, however, should have some limitations. For example, parents who decide not to feed their disabled infants or to just abandon them after birth should not be afforded considerable deference. In these situations when bodily harm could result, parental authority must be limited. *See generally* Maciejczyk, *supra* note 46.

[140] *See Troxel*, 530 U.S. at 57. The *Troxel* Court established how far it would extend parental rights. The Washington Supreme Court determined that parents were in the best position to choose "whether to expose their children to certain people or ideas." *Id.* at 63.

[141] British law is not binding authority in the United States. Despite the lack of authority, however, it is important to examine British law in connection with conjoined twins because England is the primary location for the birth of conjoined twins and, if needed, their separation surgery. Moreover, England recently decided a landmark case overriding parents' decisions regarding the separation of their conjoined daughters. Consequently, because British law addresses many issues regarding the ultimate decision maker in the separation of conjoined twins, U.S. courts can look to British law for guidance.

2. In Re A*(Children) and the limits of parental rights in making medical decisions for their children under British law*

In distinct contrast to U.S. courts' strong position in deferring to parental decisions for the medical care of their children,[142] British law recently abandoned parental deferment.[143] Traditionally, under British law, courts respect the wishes of parents concerning the health care treatment of children but regard children's welfare as paramount.[144] For example, when authorizing the sterilization of a sexually active teenage girl despite her parent's lack of consent, the British Court, in *In re B(A Minor)*,[145] reasoned that a child's welfare is paramount to the court's consideration in a child's upbringing.[146] Thus, British law does not automatically defer to parental discretion.

Although British law is not binding in the United States, the United States should recognize and examine British law in connection with decision-making authority concerning the separation of conjoined twins. This is particularly true, since England is the primary location for both the births of conjoined twins and their separation surgeries, and especially important after the British Supreme Court's decision against parental deferment in *In re A(Children)*.[147] *In re A(Children)* concerned physicians' challenge to a parental decision that conflicted with the physicians' view of the best medical treatment for newborn infants.[148] Born on August 8, 2000, "Jodie"[149] and "Mary"[150] were conjoined twins.[151] Joined at the pelvis, or lower abdomen, with a fused spine, each girl

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[142] *See supra* Section III.B and cases discussed therein.

[143] *See generally* In re A(Children)(Conjoined Twins: Surgical Separation), 2001 Fam. 147 (2000).

[144] *See* In re B(A Minor)(Wardship: Medical Treatment), 1 W.L.R. 1421 (1981); *see also* In re B(A Minor)(Wardship: Sterilisation), A.C. 199 (1988).

[145] A.C. 199 (1988).

[146] *Id.* (explaining that when determining any question with respect to the upbringing of a child, "the first and paramount consideration is the well being, welfare, or interests . . . of the human being concerned").

[147] 2001 Fam. 147 (2000).

[148] *Id.* at 172-74.

[149] In the interest of protecting her identity, one twin was given the name "Jodie." *See* Jacob M. Appel, *Ethics: English High Court Orders Separation of Conjoined Twins*, 28 SYMP. J.L. MED. & ETHICS 312, 312 (2000). "Jodie's" real name is Gracie. Sarah Boseley, *Law Decreed Fate of Jodie and Mary*, THE GUARDIAN (London), Feb. 5, 2002, *available at* LEXIS, Nexis Library, News File.

[150] Like her sister, the other twin was given the name "Mary" to protect her identity. *See* Appel, *supra* note 149, at 312. "Mary's" real name is Rose. Boseley, *supra* note 149.

[151] In re A(Children), 2001 Fam. 147 (2000). In graphic detail, the court describes the degree of conjoinedness:

> Between these two heads is a single torso about 40 cm long with a shared umbilicus in the middle. Two legs, Mary's right and Jodie's left, protrude at an acute angle to the

had two arms and two legs.[152] Internally, Jodie and Mary had their "own brain, heart, lungs, liver, and kidneys."[153] Most importantly, however, and crucial in determining the fate of the girls, was that, as a result of the conjoinment, Mary depended on Jodie for life.[154]

Prior to their birth, doctors knew that the twins could not survive for more than three to six months if they remained conjoined.[155] Once born, physicians

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spine at the center of the torso, lying flat on the cot but bending to form a diamond shape. The external genitalia appear on the side of the body.

Id. at 158. Even more graphic is the consultant's report:

> The nature of the conjoin produces a grossly abnormal laterally placed vulval configuration on each side and a markedly splayed perineum. The vulva for each twin is composed of two halves, each coming from the other twin. There is a single orifice in each vulva, which drains urine and meconium, and each twin has an imperforate anus. Each twin has two hemi-vaginae and two hemi-uteri. Such ano-urogenital disposition is consistent with a cloacal abnormality. The gonads and fallopian tubes could not be assessed.

Id.

[152] *Id.* In medical terms, Jodie and Mary are *ischiopagus tetrapus* conjoined twins:

> The ischium is the lower bone, which forms the lower and hinder part of the pelvis--the part which bears the weight of the body in sitting. The lower ends of the spines are fused and the spinal cords joined. There is a continuation of the coverings of the spinal cord between one twin and another. The bodies are fused from the umbilicus to the sacrum. Each perineum is rotated through [ninety] degrees and points laterally.

Id.; *see also* George J. Annas, *The Limits of Law at the Limits of Life: Lessons from Cannibalism, Euthanasia, Abortion, and the Court-ordered Killing of one Conjoined Twin to Save the Other*, 33 CONN. L. REV. 1275, 1282 (2001) [hereinafter Annas, *The Limits of the Law*]; Appel, *supra* note 149, at 312 ("Their legs were independently formed, criss-crossing each other, and they were capable of lying flat on their back.").

[153] *In re A(Children)*, 2001 Fam. at 158 (describing that the sisters each had their own vital organs).

[154] *Id.* The extent of the twins' deformity was explicitly stated by the court: "Jodie's aorta feeds into Mary's aorta and the arterial circulation runs from Jodie to Mary. The venous return passes from Mary to Jodie through a united inferior vena cava and other venous channels in the united soft tissues." *Id.*; *see also* Hewitt, *supra* note 52, at 208 (explaining that the result of the deformity was that Mary depended on Jodie to live); *English Law—Court of Appeal Authorizes Surgical Separation of Conjoined Twins Although Procedure Will Kill One Twin.—Re A(Children) (Conjoined Twins: Surgical Separation), [2000] 3 F.C.R. 577 (C.A.)*, 114 HARV. L. REV. 1800, 1800 (2001) [hereinafter *English Law*] ("Jodie's heart provided almost all the circulation of both twins."); Appel, *supra* note 149, at 312 (depicting how Mary completely depended on Jodie's heart and lungs for blood circulation and oxygen because her cardiopulmonary system was not working).

[155] *In re A(Children)*, 2001 Fam. at 155 (explaining that death will likely result within a few months because, eventually, Jodie's heart will fail); *see also* Annas, *The Limits of Law*, *supra* note 152, at 1282 ("[P]hysicians saw no hope of the twins surviving for more than a year if they remained joined."); Boseley, *supra* note 3, at 3.

were certain that, without separation, death would result.[156] Jodie's and Mary's parents, however, adamantly refused to separate them.[157] The parents' decision not to separate Jodie and Mary conflicted with the physicians' opinion on what course of action should be pursued for the girls.[158]

Consequently, on August 18, 2000, the physicians petitioned the High Court of Justice, Family Division, seeking the court's permission to allow them to proceed with Mary and Jodie's separation, despite their parents' wishes.[159] The High Court granted the physicians' request.[160] Mr. and Mrs. Attard, the twins' parents, appealed the High Court's decision.[161] Ultimately, the Supreme Court of Judicature in the Court of Appeals decided the case.[162]

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[156] Annas, *The Limits of Law*, *supra* note 152, at 1282 (explaining that the doctors believed that if Jodie were separated from Mary, who was the weaker twin and whose "survival depended on sharing Jodie's circulatory system[,]" Jodie would survive and do well, even if Mary would certainly die). Mary's birth defects were detrimental to her health. For example, Mary's brain was underdeveloped, she had an extremely inflated heart, and her lung tissue did not operate properly. Hewitt, *supra* note 52, at 208. In effect, Jodie's healthy heart was sustaining Mary's life. *Id.*; *see also* Appel, *supra* note 149, at 312 ("While Jodie showed the same awareness as other newborns, the extent of Mary's cognitive development remained unclear.").

[157] *In re A(Children)*, 2001 Fam. at 155-57. Proclaiming their religion, the parents announced, "[w]e cannot begin to accept or contemplate that one of our children should die to enable the other to survive. That is not God's will." Hewitt, *supra* note 52, at 210 ("[T]heir religious belief [Roman Catholic] that no one should ever intentionally cause the death of another human being, guides their decision."). The decision to choose between the lives of two innocent children runs contrary to their religious belief. *See* Annas, *The Limits of Law*, *supra* note 152, at 1282. Mr. and Mrs. Attard also cited the financial burden as a reason for their decision. They did not have the financial resources or possess adequate medical facilities to care for Jodie once she was separated, in the event that the worst-case scenario occurred. *See* Hewitt, *supra* note 52, at 210.

[158] Hewitt, *supra* note 52, at 209.

[159] *See* Annas, *The Limits of Law*, *supra* note 152, at 1282 (acknowledging that although "[p]hysician's have historically honored the wishes of parents in cases like this," the physicians in this case declined to do so). Specifically, the physicians wanted the court to "determine that the surgery would be legal and in the twins' best interest to complete one [of] the following: (a) carry out such operative procedures not amounting to separation upon (Jodie and/or Mary); (b) perform an emergency separation procedure upon (Jodie and/or Mary); or (c) perform an elective separation procedure upon (Jodie and Mary)." Hewitt, *supra* note 52, at 210 (citing *In re A(Children)*, 2001 Fam. 147).

[160] *See* Annas, *The Limits of Law*, *supra* note 152, at 1283 ("The trial judge concluded that separation was in the best interests of both children, and that separation was not a case of killing Mary but one of passive euthanasia in which her food and hydration was being withdrawn (by clamping off her blood supply from Jodie).").

[161] *In re A(Children)*, 2001 Fam. at 176. The grounds for the appeal were: "[T]he judge erred in holding (i) that the operation was in Mary's best interest, (ii) that it was in Jodie's best interest and (iii) that in any event it would be legal." *Id.*

[162] *See* In re A(Children) (Conjoined Twins: Surgical Separation), 2001 Fam. 147 (2000).

Although the Supreme Court acknowledged the fundamental principle that "every person's body is inviolate,"[163] the Court dismissed the Attard's appeal, finding the surgery to separate the twins necessary because its ultimate purpose was to preserve Jodie's life rather than cause Mary's death.[164] While the Court acknowledged and respected the right of parents in their parental responsibility to make medical decisions for their children, the Court also emphasized that parental rights are limited in favor of the child's welfare.[165] Although the

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[163] *In re A(Children)*, 2001 Fam. at 176. The Court recognized the importance of this principle:

> There is no doubt that a person of full age and capacity cannot be ordered to undergo a blood test against his will . . . . The real reason is that English law goes to great lengths to protect a person of full age and capacity from interference with his personal liberty. We have too often seen freedom disappear in other countries not only by coups d'etat but by gradual erosion: and often it is the first step that counts. So it would be unwise to make even minor concessions.

Id.

[164] *Id.* at 148 (holding that "notwithstanding the conflict of duties the doctors owed to each twin in respect of her right to life and the impossibility of undertaking any relevant surgery on one without affecting the other, the proposed operation was an act of necessity to avoid inevitable and irreparable evil"). The Court expressly ruled that the scales of justice fall heavily in favor of Jodie. *Id.* at 197. The Court stated:

> The best interests of the twins is to give the chance of life to the child whose actual bodily condition is capable of accepting the chance to her advantage even if that has to be at the cost of the sacrifice of the life which is so unnaturally supported . . . . [t]he least detrimental choice, balancing the interests of Mary against Jodie and Jodie against Mary, is to permit the operation to be performed.

Id.

[165] *Id.* at 193. The High Court Justice Ward explained:

> Parenthood, in most civilized societies, is generally conceived of as conferring upon parents the exclusive privilege of ordering, within the family, the upbringing of children of tender age, with all that that entails. That is a privilege which, if interfered with without authority, would be protected by the courts, but it is a privilege circumscribed by many limitations imposed both by the general law and, where the circumstances demand, by the courts or by the authorities upon whom the legislature has imposed the duty of supervising the welfare of children and young persons.

Id. In addition, the court emphasized:

> I would for my part accept without reservation that the decision of a devoted and responsible parent should be treated with respect. It should certainly not be disregarded or lightly set aside. But the role of the court is to exercise an independent and objective judgment. If that judgment is in accord with that of the devoted and responsible parent, well and good. If it is not, then it is the duty of the court, after giving due weight to the view of the devoted and responsible parent, to give effect to its own judgment.

Id. at 194 (internal quotations omitted). Relying on the Children's Act of 1989, Lord Justice Ward, the senior judge, emphasized, "It is . . . well-established that under the landmark Children Act 1989, English courts may properly override a parent's decision to consent or refuse consent to her child's medical treatment." *English Law, supra* note 154, at 1803 (citing Children's Act, 1989, § 1 (Eng.)).

Court sympathized with the Attard's situation, the Court balanced the interest of both girls against each other and explained:

> Mary may have a right to life, but she has little right to be alive. She is alive because and only because, to put it bluntly, but none the less accurately, she sucks the lifeblood of Jodie and she sucks the lifeblood out of Jodie. She will survive only so long as Jodie survives. Jodie will not survive long because constitutionally she will not be able to cope. Mary's parasitic living will be the cause of Jodie's ceasing to live. If Jodie could speak, she would surely protest, 'Stop it, Mary, you're killing me.' Mary would have no answer to that. Into [the court's] scales of fairness and justice between the children goes the fact that nobody but the doctors can help Jodie. Mary is beyond help.[166]

Thus, the Court emphasized that "parents who are placed on the horns of such a terrible dilemma simply have to choose the lesser of their inevitable loss," which means choosing one over the other.[167] In the end, Jodie's life was favored over Mary's.[168]

Six weeks after the Supreme Court issued its opinion, Jodie's and Mary's separation took place.[169] In a sign of respect for Mary's life, the two lead surgeons said, "[W]hen the final blood vessels that connected the twins were

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[166] *In re A(Children)*, 2001 Fam. at 197. The Court acknowledged the cruel decision imposed upon the Attards and sympathized with the parents, stating, "It gives me no satisfaction to have disagreed with their views . . . . It may be no great comfort to them to know that in fact my heart bleeds for them." *Id.* at 196.

[167] *Id.* at 259. Honoring the physicians' request to surgically separate the twins, the Court declared:

> In this case the purpose of the operation would be to separate the twins and so give Jodie a reasonably good prospect of a long and reasonably normal life. Mary's death would not be the purpose of the operation, although it would be its inevitable consequence. The operation would give her, even in death, bodily integrity as a human being. She would die, not because she was intentionally killed, but because her own body cannot sustain her life.

Id.

[168] *See* Appel, *supra* note 149, at 313. The Court unanimously ordered the separation of the twins, a separation that would kill one girl to improve her sister's chances of survival. *Id.* Although the Supreme Court implicitly terminated parental rights to decide on treatment, they expressly clarified that their ruling was limited to the unique circumstances of the case. *In re A(Children)*, 2001 Fam. at 205. In other words, there must be no possibility of the preservation of life. *Id.* The court explained that Jodie's and Mary's case was unique and, as such, the authority of this case must be limited to the following situation:

> [I]t must be impossible to preserve the life of X without bringing about the death of Y, that Y by his or her very continued existence will inevitably bring about the death of X within a short period of time, and that X is capable of living an independent life but Y is incapable under any circumstances, including all forms of medical intervention, of viable independent existence.

Id.

[169] *See* Annas, *The Limits of Law*, *supra* note 152, at 1287.

cut . . . they cut the blood vessels together, in silence and with 'great respect'."[170] Today, Jodie lives with her parents in their native island of Gozo off the coast of Malta and is doing well, expected to lead a normal life, and eventually have children of her own.[171] Her sister, Mary, whose death was determined by the coroner to be a result of the court ordered surgery,[172] is buried on the island.[173] For Jodie and Mary, their bond was forever severed.

C. The State as Parens Patriae

Traditionally, parents are the primary authority for determining whether or not to withhold medical treatment from their children. However, as U.S. case law[174] and British law[175] demonstrate, the right of parents to make decisions on behalf of their children is becoming increasingly limited. Through the doctrine of *parens patriae*,[176] states can limit parental rights in making medical decisions for their children[177] and can intervene to protect a child when a

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[170] *Id.*

[171] Boseley, *Law Decreed Fate of Jodie and Mary*, *supra* note 149, at 3. Although Jodie will endure many years of corrective surgery, "doctors are confident that her chances of a bright future are good." *Parents of Separated Twins Speak Out for the First Time*, CYBERCAST NEWS SERV., Dec. 7, 2000, *available at* http://www.prolifeinfo. org/news071.html. Jodie's parents are encouraged by her progress. Specifically, Mrs. Attard explains, "[Jodie] likes to try to talk with us and she smiles at people and at us. It makes us encouraged for the future. She is going to be a real fighter." Steven Morris, *Separated Twin May Soon Leave Hospital*, THE GUARDIAN (London), Jan. 8, 2001, *available at* http://www.Guardian.co.uk/Print/0,3858,4113720,00.html.

[172] On December 15, 2000, Loenard Gorodkin, the coroner, decided against holding an inquest into Mary's death. *Siamese Twin Inquest Verdict*, BBC News Online (Dec. 15, 2000) *at* http://news.bbc. co.uk/1/hi/health/1072031.stm (last visited Oct. 30, 2002). Rather, the coroner recorded the following: "Mary died following surgery separating her from her conjoined twin, which surgery was permitted by an order of the High Court, confirmed by the Court of Appeal." *Id.*

[173] Boseley, *supra* note 149, at 3.

[174] *See generally* Guevara, *supra* note 76. Although courts have recently been limiting the right of parents to make these medical decisions, it is important to note that, originally, most of these decisions were directed at parents who demonstrated extreme behavior. *See e.g.*, Jehovah's Witnesses v. King's County Hosp., 278 F. Supp. 488 (W.D. Wa. 1967) (ruling that parents who were Jehovah's Witnesses could not refuse permission for lifesaving blood transfusions for their children). *But see* Section III.B.1, *supra.*

[175] *See* In re A(Children) (Conjoined Twins: Surgical Separation), 2001 Fam. 147 (2000).

[176] Literally, "*parens patriae*" means "parent of the country." BLACK'S LAW DICTIONARY 465 (Pocket ed. 1996). "*Parens patriae* refers to the power of the state to act as a parent for those individuals suffering under legal disability." *See* Daniel B. Griffith, *The Best Interests Standard: A Comparison of the State's Parens Patriae Authority and Judicial Oversight in Best Interests Determinations for Children and Incompetent Patients*, 7 ISSUES L. & MED. 283, 313-17 (1991).

[177] *See* Guevara, *supra* note 76, at 252-53 (detailing by example that when parents choose to withhold medical treatment from their children, the states can "take an active role in

parent's medical decision threatens the child's right to life.[178] The state, however, must demonstrate, by clear and convincing evidence, parental wrongdoing.[179]

Certainly, there are times when it is necessary for the state to intervene. One United States court delineated the nature of the state's responsibility:

> The child is a citizen of the State. While he "belongs" to his parents[,] he belongs also to his State. Their rights in him entail many duties. Likewise the fact the child belongs to the State imposes upon the State many duties. Chief among them is the duty to protect his right to live and to grow up with a sound mind in a sound body, and to brook no interference with that right by any person or organization.[180]

Vested with the authority to act in a child's best interest, the state invokes its power under *parens patriae* "seek[ing] to protect family autonomy and the parents' right to the companionship, care, custody, and management of their children."[181] In a few cases, the United States Supreme Court determined that the state may limit parental authority.[182] Although these cases emphasized the presumption that parents will act in the best interest of their children, the principle that "the state may intrude on parental authority for a sufficiently important state interest,"[183] remains certain. For example, in *Prince v. Massachusetts*,[184] the Court upheld a parent's conviction for permitting a child

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protecting children on grounds that the preservation of life is one of the most compelling state interests"); *see also* Knepper, *supra* note 96, at 1. Knepper briefly explains the doctrine of *parens patriae*:

> [T]he state may intervene in its role as *parens patriae* to protect children who are threatened with physical or sexual abuse, who are being seriously neglected or whose welfare is otherwise imperiled because of the inability or unwillingness of their parents or other care givers to provide them a safe and secure environment.

Id. at 1.

[178] Guevara, *supra* note 76, at 253 (explaining that there is a compelling state interest to ensure that the right to life of all citizens is protected). Parents cannot act contrary to their child's welfare. *See Developments in the Law--Medical Technology and the Law*, *supra* note 98, at 1596-97. One example is that health care providers are required to report suspected child abuse, which includes medical neglect, to a child protective agency. Duggan, *supra* note 82, at 370-71.

[179] *See* Guevara, *supra* note 76, at 254.

[180] In re Clark, 185 N.E.2d 128, 132 (Ohio C.P. 1962).

[181] Griffith, *supra* note 176, at 289 (footnote omitted).

[182] Bellotti v. Baird, 443 U.S. 622 (1979) (limiting the requirement of parental consent to authorize a minor child's abortion); Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding the conviction of a mother who violated Massachusetts' Child Labor laws by permitting her daughter to distribute and sell Jehovah's Witnesses religious pamphlets).

[183] Fitzgerald, *supra* note 11, at 838-39.

[184] 321 U.S. 158 (1944).

to sell religious pamphlets, in violation of the state's child labor law.[185] While the court made clear that the responsibility of childrearing belongs to parents, the Court nevertheless explained, "[p]arents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."[186] Nonetheless, like most authority, the state's *parens patriae* power is limited.[187] This limitation ensures that "the state's power is consistent with the premise that a child's interest is best served when the child is placed in the custody of his parents."[188]

In matters relating to the medical treatment of children, the state invokes several interests.[189] Primarily, "the state has a strong interest in the preservation of human life."[190] In addition, the state "has an important interest in protecting innocent parties who are unable to protect themselves."[191] Included in this protected group are "all incompetent individuals, the mentally infirm, and minors."[192] Because children, through inexperience, lack the ability to protect themselves from harm, situations arise when those who are responsible for their care compromise their well-being.[193] One scholar explained that one of the state's interests is to ensure "that necessary medical care is not withheld from children beyond the neonatal period because of parental refusal to give consent to specific medical procedures necessary to attain or maintain a minimal level of care."[194] Another state interest is in "upholding the value of life, a basic, integral concept in society's moral structure."[195] As guardian for the health and welfare of society, the state also has an interest "of ensuring that

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[185] *Id.*

[186] *Id.* at 170. The court emphasized:

> Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways . . . . . The right to practice religion freely does not include liberty to expose . . . the child . . . to ill health or death. The catalogue need not be lengthened . . . . [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare.

Id. at 166-67 (footnotes omitted) (citation omitted).

[187] Griffith, *supra* note 176, at 299-300 (explaining that states are limited from interfering with a family relationship).

[188] Guevara, *supra* note 76, at 255.

[189] *See generally* Feigenbaum, *supra* note 62, at 855.

[190] *Id.* (describing, as examples, statutes that permit the state to intervene to "protect its compelling interest in the sanctity of human life").

[191] *Id.* at 856.

[192] *Id.*

[193] *Id.*

[194] Wadlington, *supra* note 64, at 312.

[195] Maciejczyk, *supra* note 46, at 229.

society will continue to be productive and self-perpetuating."[196] As stated by one commentator, "[a] viable and functioning economy . . . is a permissible goal for the state to pursue because it preserves the interests of the entire society."[197] Moreover, when parents make medical decisions for their children, the state's interest arises "in the need to protect the ethical integrity of the medical profession."[198] For example, "[w]hen parents make or refuse to make treatment decisions that contravene the established ethical principles of the medical profession, the state can take steps to insure that those values are not jeopardized."[199]

Effectively, the doctrine of *parens patriae* requires the state to assume a parental role in situations when a child's well-being is jeopardized.[200] Although strongest when the child is young and immature, the state's *parens patriae* authority dissipates as the child gets older, and eventually disappears when a child becomes an adult.[201] As one commentator noted, state intervention for the well-being of a minor "should not be the state's prerogative; it should be the state's duty."[202]

The best-interest-of-the-child standard is the primary standard applied by courts to terminate parental rights with respect to the care and custody of a child.[203] One commentator explains that "the legal 'best interest [of a child] encompasses medical, emotional and all other welfare issues.'"[204] While originally treating children like property, this standard evolved into a flexible standard, essentially focusing on the child's needs.[205] This flexibility affords

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[196] Feigenbaum, *supra* note 62, at 857 ("A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.").

[197] *Id.*

[198] *Id.*

[199] *Id.* at 858. In preserving the integrity of the medical profession, Feigenbaum explains:

> The success of the medical profession depends on maintaining the public's confidence that physicians will conduct themselves pursuant to those established principles. Allowing parents to abridge these professional interests could destroy the crucial trust inherent in the patient-physician relationship and, as a result, undermine the functioning of the profession. Because the physician plays a critical role in preserving society's health and welfare, the state has an important interest in protecting the integrity of that role.

Id.

[200] *See* George B. Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 DEPAUL L. REV. 895 (1976).

[201] Wadlington, *supra* note 64, at 330.

[202] Feigenbaum, *supra* note 62, at 857.

[203] Griffith, *supra* note 176, at 283.

[204] Hewitt, *supra* note 52, at 211-12.

[205] Griffith, *supra* note 176, at 292.

courts broad discretion when determining the best interest of the child.[206] When there is a conflict between the state's *parens patriae* power and parental autonomy, courts usually resolve these differences by balancing the interests of the child, parent, and state.[207] Hence, the "state carries a heavy burden when seeking to override a parental decision regarding the proper course of treatment for their child."[208] In a medical setting, providing medical treatment is considered to be in the best interest of a child, especially if it means life or death.[209] Unfortunately, when the medical condition of disabled children is involved, "courts have been less willing to order treatment."[210] Physicians, however, often urge treatment even if a child is handicapped.

D. Physicians' Duties and Interests

Physicians play a vital role in our lives. Despite the intent of medical professionals to eliminate themselves from the privacy of family decisions, physicians often serve as confidantes, consultants, and sometimes, decision-makers. Traditionally, physicians were the ultimate decision-makers and authorities regarding medical treatment. Recently, however, the balance of power in health care decision-making shifted from the physician towards patient autonomy.[211] Consequently, "[a] power struggle is developing at the bedside, in which the importance of physician assessment of medical benefit is being undermined."[212]

Historically, physicians have honored parents' wishes regarding medical treatment for children.[213] By explaining the medical situation to parents and providing them with treatment options, doctors implicitly adopt the presumption that parents will act for the well-being of their child.[214] But should doctors always honor the wishes of parents? A growing field of scholars believe that when conflicts between parents and physicians arise, "[t]he bulk of the power

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[206] *Id.*

[207] Duggan, *supra* note 82, at 369 (citing Prince v. Massachusetts, 321 U.S. 158 (1944)).

[208] *Id.*

[209] Guevara, *supra* note 76, at 254-55.

[210] Duggan, *supra* note 82, at 369-70.

[211] *See* Koch et al., *Analysis of Power in Medical Decision-Making: An Argument for Physician Autonomy*, 20:4 LAW, MED. & HEALTH CARE, 320, 322 (1992) (attributing much of this imbalance to the various medical possibilities that resulted from the "rapid expansion of medical technology since World War II").

[212] *Id.* (explaining that, as a result of this power struggle, a physiologic futility debate persists, with "public concern that such medical judgments are value judgments").

[213] Annas, *The Limits of Law*, *supra* note 152, at 1282; *see also* Hewitt, *supra* note 52, at 311 ("[T]he performance of a medical operation upon a person without his or her consent is unlawful, as constituting both the crime of battery and the tort of trespass to the person.").

[214] *See* Duggan, *supra* note 82, at 370.

structure underlying medical decisions should lie with the physician's professional authority."[215] This belief, however, is not widely shared. Today, patients experience a heightened recognition of autonomy and self-determination.[216] For example, the enactment of the Patient Self-Determination Act (PSDA)[217] supports and legitimizes the role of patient autonomy. By documenting treatment preferences, patients control their medical treatment.[218] With infants, however, self-determination and autonomy are difficult to

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[215] Koch et al., *supra* note 211, at 324 ("[W]ith full respect for the authority and relation of the family, all decisions must ultimately rest on the medical facts of the situation.").

[216] The United States Supreme Court, in *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 285, n.11 (1990), highlighted the importance of honoring an incompetent patient's desires regarding the use of life sustaining treatment if such wishes can be proven by clear and convincing evidence. Although *Cruzan* involved an incompetent adult, the Court's analysis and reasoning is instructive. The *Cruzan* Court explained the importance of requiring clear and convincing evidence:

> The clear and convincing standard of proof has been variously defined . . . as "proof sufficient to persuade the trier of fact that the patient held a firm and settled commitment to the termination of life supports under the circumstances like those presented," . . . and as evidence which "produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable [the factfinder] to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue."

Id. (citing a series of cases that reaffirm the importance of requiring clear and convincing evidence). Clear and convincing evidence of Nancy Cruzan's wishes, however, could not be ascertained. *Id.* at 285.

[217] 42 U.S.C. § 1395cc (2002). In an effort to avoid a situation like that experienced in *Cruzan*, Congress enacted the PSDA. The PSDA applies to all health care facilities that receive Medicare or Medicaid funds and provides in relevant part:

> [Health care facilities must] (A) . . . provide written information to each individual concerning--(i) an individual's rights under State law (whether statutory or as recognized by the courts of the State) to make decisions concerning such medical care, including the right to accept or refuse medical or surgical treatment and the right to formulate advance directives . . . and (ii) . . . [provide] the written policies of the provider or organization respecting the implementation of such rights; (B) . . . document in a prominent part of the individual's current medical record whether or not the individual has executed an advance directive; . . . [and] (E) provide (individually or with others) for education for staff and the community on issues concerning advance directives.

42 U.S.C. §§ 1395cc(f)(1)(A), (B), and (E).

[218] Such documentation can be evidenced by advance directives. An advance directive is another name for a living will. Generally, "an advance directive is a written and signed document which expresses acts or actions a person wants taken in the event the individual becomes incapacitated or is unable to express his or her wishes or take action on his or her own." *What is an Advance Directive, at* http://www.wvdhhr.org/obhs/adv_direct2.htm (last visited Oct. 30, 2002). Moreover, "[a]n advance directive expresses the current competency of the individual, describes the condition(s) which must occur for the advance directive to be implemented, and outlines the act(s) or action(s) which may be taken by the person or persons authorized to act on behalf of the individual." *Id.*

ascertain. Therefore, although some scholars argue for a more heightened level of physician autonomy, it remains clear that physicians have a duty "to preserve human life, to alleviate pain and suffering, and to preserve the autonomy of patients."[219]

Parents, physicians, and the state all have an inherent interest in the well-being of children. Their interests in conjoined twins are no different. Consequently, tension exists when these interests conflict. Whose interest controls when one party urges the separation of conjoined twins contrary to the wishes of another, especially when it means one twin will die in order to save the other? Moreover, who decides?

IV. CONJOINED TWINS AND SEPARATION: WHO DECIDES?

Although a majority of United States courts identify the rights of parents to determine the course of medical treatment for their children, parental autonomy regarding authorization to separate conjoined twins remains unclear. With no established precedent, and in light of *In re A(Children)*,[220] despite its lack of authority on U.S. law,[221] the uncertainty in parental autonomy will be severely tested when confronted with the seemingly difficult and insurmountable task of deciding whether or not to separate conjoined twins, especially when it means "killing one to save the other."[222] Consequently, a well-recognized authority must be established to guide courts in responding to situations involving the separation of conjoined twins.

A. A Careful Balancing for a Just Result

A court's careful balancing of interests ensures a just result. First, the court should examine the value of the parents' decision regarding the proposed treatment, within the context of the child's best interests. Specifically, the court must recognize the general presumption that parents act in their child's best interest as well as acknowledge that the values and beliefs of some parents do not involve caring for a disabled child. Consequently, these interests must be balanced against a child's best interest. Next, the court should decide whether the state, acting in its role as *parens patriae*, should override the parents' decision. The court must recognize that the state's interest is preserving human life and ensuring that a child's welfare is not compromised

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[219] *Developments in the Law--Medical Technology and the Law, supra* note 98, at 1598 (explaining that nurses also have an equivalent obligation of care like that of physicians).

[220] 2001 Fam. 147 (2000).

[221] *See supra* note 141 for a discussion regarding the importance of recognizing the British Court's decision in *In re A(Children)*.

[222] ANNAS, *supra* note 7, at 239.

by a parent's action. Lastly, the court should acknowledge the decisions of medical professionals, especially regarding modern medical technology, with respect to the quality of life for the child. In particular, the court must identify that physicians provide clear medical opinions detailing the risks and benefits of proposed treatments. Moreover, the court should also defer to hospital ethics commissions that evaluate treatment decisions. Additionally, the court must acknowledge modern medical technology and its effect on the quality of human life.

Each situation confronting conjoined twins is different.[223] Accordingly, there can be no fixed standard when it comes to determining whether or not the separation of conjoined twins should occur and who should make that determination.[224] As the court in *In re A(Children)* noted:

> At one end of the spectrum is the case of two fully grown, fully equipped bodies with a minor connection which is easy to remove, leaving two complete individuals who could survive into old age. At the other end is one complete body with a small number of extra parts which could be removed to leave just one complete individual. Between these two extremes are a range of gradations including two fairly complete bodies which are so heavily fused that they cannot be separated; two bodies which can be separated but at a substantial risk; and two which can be separated with the inevitable consequence that one of them will die.[225]

Thus, as illustrated by the British Supreme Court, each situation presents a different, and difficult, solution. A careful balancing of the interests of the children, parents, state, and physicians involved, therefore, offers the best solution to this heart-wrenching decision.[226] Lacking precedent, courts will struggle to make a determination in these situations. Only through this balancing can a common ground be established.

In all situations involving conjoined twins, increased judicial oversight must occur to address the interests of all parties. Once born, a child is a person, with certain constitutional rights, including the right to life.[227] However, if a

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[223] Michael Day, *Terrible Choice of Tina and Dennis*, THE EXPRESS (London), Feb. 5, 2002, *available at* LEXIS, Nexis Library, News File ("Where and how the twins are joined, the number of organs shared or joined and the health of the children at birth varies widely from case to case.").

[224] *Id.*

[225] *In re A(Children)*, 2001 Fam. at 207-08.

[226] The balancing would involve a heightened level of judicial supervision in cases involving conjoined twins. This would require weighing the interest of the parties (parents, state, and physician) against the right to life of each twin, and considering the advantages and disadvantages of modern medical technology. *See infra* Section IV.

[227] *But cf.* Ferguson v. City of Charleston, 532 U.S. 67 (2001) (implicitly finding that unborn babies of drug addicted mothers are not considered children).

child is born with birth defects, medical decisions made for this child may seriously violate his or her recognized constitutional rights.[228] Thus, courts must take active steps ensuring that America's cry "to terminate the lives of other people—deemed physically or mentally defective," is not the determining factor in their medical treatment.[229] To that end, the various interests must be balanced against the right to life of each child, as applied by the U.S. Supreme Court in *Cruzan v. Missouri Department of Health*.[230]

Although *Cruzan* involved an incompetent adult,[231] the Court's balancing of the interests involved deserves recognition. In considering a parents' petition seeking an order for the withdrawal of food and water from their adult daughter who was in a vegetative state, the United States Supreme Court, rather than deferring to parental discretion, performed a balancing test of the interests of the parties involved.[232] The Court determined that, while the choice between life and death is a personal decision, it is not a decision that a family must make alone.[233] Rather, the state's interest must also be given due consideration.[234] As explained by the *Cruzan* Court:

> An erroneous decision not to terminate results in a maintenance of the status quo; the possibility of subsequent developments such as advancements in medical science, . . . changes in the law, or simply the unexpected death of the patient despite the administration of life-sustaining treatment at least create the potential that a wrong decision will eventually be corrected or its impact mitigated. An erroneous decision to withdraw life-sustaining treatment, however, is not susceptible of correction.[235]

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[228] *See* Guevara, *supra* note 76, at 259; *see also* Maciejczyk, *supra* note 46, at n.46 (explaining that it is the court's function to secure every opportunity for "life, liberty, and the pursuit of happiness").

[229] Guevara, *supra* note 76, at 259.

[230] 497 U.S. 261 (1990) (applying a balancing test of all interests involved).

[231] As a result of injuries sustained in a car accident, Nancy Cruzan was left in a vegetative state. *Id.* at 266. Thereafter, Mr. and Mrs. Cruzan, Nancy's parents, petitioned the court, seeking an order for the withdrawal of food and water after it was apparent that Nancy would not recover. *Id.* at 265. Although the lower court granted the parents' request, the Missouri Supreme Court reversed. Cruzan v. Harmon, 760 S.W.2d 408, 420 (Mo. 1988) (noting that, "[the] state's interest is not in quality of life [but] in life [itself]; that interest is unqualified"). The Missouri Supreme Court's decision was subsequently affirmed by the United States Supreme Court. *See* Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261 (1990).

[232] *Cruzan*, 497 U.S. at 280-83.

[233] *Id.* at 286.

[234] *Id.* at 281-82 ("[A] State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual.").

[235] *Id.* at 283.

After a careful balancing, the Court determined that "evidence of the incompetent's wishes as to the withdrawal of treatment [must] be proved by clear and convincing evidence," a burden which Mr. and Mrs. Cruzan were unable to meet.[236] Effectually, there is a heightened duty to defer to outside authority with respect to infants because clear and convincing evidence of a newborn child's wishes regarding medical treatment is difficult to establish.

First, because parents will face the ultimate burden of caring for and raising the conjoined twins, parents' interests should be given primary consideration. Initially, the court must recognize the general presumption that parents will act in their children's best interests.[237] The court, however, must identify the parents' values and beliefs and determine the role they play in the decisions made. For some parents, giving birth to a severely disabled or "abnormal" child and continuing such a life constitutes cruelty.[238] As a result, these parents choose to withdraw any life-saving treatment. Moreover, "well-intentioned and able parents [may be] ill-equipped to make wise or rational treatment decisions regarding an impaired infant because their grief and guilt may cloud their decision making capacity."[239] While many medical and legal commentators "argue that parents should be able to decline treatment for their

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[236] *Id.* at 284 (upholding Missouri's requirement of clear and convincing evidence because of the state's legitimate interest in the protection and preservation of human life); *see also* John A. Robertson, Cruzan *and the Constitutional Status of Nontreatment Decisions for Incompetent Patients*, 25 GA. L. REV. 1139, 1155-56 (1991) ("Missouri law did not allow medical treatment to be terminated when there is no clear evidence that the patient had issued a directive against treatment when competent because of its policy to protect all human life, regardless of its quality or functional ability.").

[237] *Developments in the Law--Medical Technology and the Law, supra* note 98, at 1595 ("The right of parents to make a broad range of decisions regarding the care and education of their children is established under both common and constitutional law."); *see also* Parham v. J.R., 442 U.S. 584, 602-03 (1979) ("[P]arents generally do act in the child's best interests.").

[238] Jellinek, *supra* note 1, at 375.

[239] Knepper, *supra* note 96, at 31. Robyn S. Shapiro and Richard Barthel explained, "Parents' distress at the birth of an impaired infant potentially distorts their expectations and beliefs, hinders their thinking, and may even encourage them to abrogate decision-making." Shapiro & Barthel, *supra* note 89, at 835. Other factors that impair parental decisions include: (1) the shock at having an incapacitated child; (2) the lack of information about their child's prognosis; and (3) the parents' personal biases. Knepper, *supra* note 96, at 32.

Some commentators argue that deferring to parental decisions in the medical treatment of their children fails to recognize the social factors that define present day families, factors "that limit the capacity of many biological parents to make wise and reasoned decisions on behalf of their children." Knepper, *supra* note 96, at 31 (explaining that family difficulties and the capacity of parents to make decisions assuring the best interest of their children are exacerbated by "[the] social trends of single parenthood, blended marriages, extra-marital cohabitation [combined with the] destructive forces of poverty, illiteracy, substance abuse, and violence").

handicapped newborn because of the child's expected quality of life,"[240] courts should not render a decision based solely on parental determination.[241]

Second, courts, therefore, should also give due consideration to the state's interest in protecting those most vulnerable. Through the doctrine of *parens patriae*, the state ensures that the child's welfare is not compromised or threatened by those charged with the responsibility to protect them, such as their parents.[242] Thus, consideration of the state's interest in preserving human life is critical with respect to the medical care of a child, and therefore, must be factored into the court's balancing. The state's interest, however, should not be afforded the greatest weight. The reason for this is that the state, itself, "lacks the medical expertise and administrative capacity to dictate treatment decisions."[243]

Third, some deference should also be given to medical expertise, particularly physicians, who are in the best position to provide a clear medical opinion of what the future holds for the twins. Physicians are the primary people that identify medical problems. Consequently, physicians present both the positive and negative effects of a medical situation, as well as the risks and benefits associated with various treatments.[244] Because "medical assessment of the infant's chances for developing an acceptable quality of life strongly influences the treatment decision,"[245] courts must afford some weight to the medical professional's opinion. Courts, however, must also recognize that medical judgments often come with biases. For example, some medical professionals "may have a bias toward 'normalcy' that predisposes them to recommend nontreatment for the handicapped," while other physicians "favor treatment for moral or religious reasons."[246]

Fourth, in addition, many hospitals have ethics committees or infant care review committees[247] that provide assistance in assessing the medical situation

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[240] Duggan, *supra* note 82, at 367 (citing numerous articles that address the quality of life criteria).

[241] Interview with James Pietsch, Professor of Law at the William S. Richardson School of Law, Honolulu, Haw. (Mar. 12, 2002) (on file with author). Courts must recognize that alternative arrangements for the support and care of "disabled" newborns exist. For example, the state may assume the parental role when parents believe they cannot provide adequate care for their child. More important, however, other families may be willing and more able to provide the additional care and attention that "disabled" children need. As a result, adoptions may provide an alternative for parents who wish to decline treatment for their child.

[242] *See supra* Section III.C; *see also* Feigenbaum, *supra* note 62, at 856.

[243] *Developments in the Law--Medical Technology and the Law*, *supra* note 98, at 1609.

[244] *See generally* Koch et al., *supra* note 211, at 324.

[245] *Developments in the Law--Medical Technology and the Law*, *supra* note 98, at 1608.

[246] *Id.* at 1608-09 (explaining the conflict that exists within the medical community).

[247] 50 Fed. Reg. 14,893 (1985). In the original *"Baby Doe"* regulations issued under section 504 of the Rehabilitation Act of 1973, the Department of Health and Human Services recommended the establishment of Infant Care Review Committees to advise treatment

at issue. Many commentators conclude that these committees are "the best forum available for evaluating treatment decisions; [and] therefore, the opinions of these committees should be given significant weight by courts when parents refuse to consent to suggested treatment."[248] As a result, the opinions of physicians, as well as the hospital ethics committees, should be considered and weighed in the court's balancing.

Fifth, moreover, courts should acknowledge and give full consideration to modern medical technology and procedures. Specifically, "improvements in medical technology have made it possible to keep many critically ill patients alive almost indefinitely."[249] Thus, experts, provided primarily by hospitals,[250] must discuss the applicable technology in relation to the type of conjoined twin and specify the likely outcomes for each procedure. Additionally, courts should recognize the potential for future medical procedures. From this discussion, courts gain a better understanding of the extent of the problem facing each conjoined twin, especially if separation is warranted. With more assurance that lives will be saved, medical technology must be a factor in the balancing test.

Therefore, when confronted with a situation involving conjoined twins, courts should adopt and strictly apply the proposed balancing test, as set forth above. Courts must align the interests involved and then perform a balancing, weighing the interests of parents, the state, and physicians against the value of a child's life. Although courts refrain from interfering with the family unit, when conjoined twins are involved, courts should intervene and take active steps to ensure the protection of each child's interests.

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decision. *See* 45 C.F.R. § 84.55(a) (1989). Because the adoption of Infant Care Review Committees was optional, this provision was not affected by *Bowen v. American Hospital Ass'n*, 476 U.S. 610 (1986). *See* Child Abuse Amendments of 1984, Pub. L. No. 98-457, 98 Stat. 1749 (1984) (codified at 42 U.S.C. §§ 5101-5115 (1982 & Supp. III 1985)) (amending the Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-5115 (1982)).

[248] Duggan, *supra* note 82, at 367.

[249] Knepper, *supra* note 96, at 20 ("Nowhere are the results of these technological advances felt more intensely than in neonatal nurseries, where treatment is often experimental and where the prognosis for recovery and the long term quality of life that an affected infant can be expected to experience are uncertain."). Knepper uses, as an example, a premature infant with underdeveloped lungs who can be resuscitated and maintained for long periods of time with extra oxygen and artificial ventilation. *Id.*

[250] *Id.* The hospitals are primarily responsible for providing the expert testimony to attest to the technology that may or could be used in the particular situation. Other interested parties, however, can provide their own experts to explain their understanding of the medical technology.

B. Natasha and Courtney: Not Yet Born and Already Fated for Death

As previously told, the story of Natasha and Courtney serves as a platform for advocating heightened judicial review. Through an application of the proposed balancing test, the best outcome dictates leaving Natasha and Courtney conjoined. Prior to their birth, the future of these tiny twin girls was already determined; Courtney would be killed to keep Natasha alive. Natasha's and Courtney's parents already decided to separate them. Doctors, however, did not agree with the parents' course of action. Through a careful balancing of the proposed factors addressed above, Natasha's and Courtney's projected separation can be analyzed, reasoned, and decided.

Should Natasha's and Courtney's parents have had the ultimate authority to determine the fate of their daughters? While not saying it is the "correct" answer, the proffered resolution addresses the interests of all parties and weighs them against the girls' rights, specifically the right to the integrity of their "body." The right to bodily integrity must not be invaded.[251] For Natasha and Courtney, it was their body, and the integrity of their body, although conjoined, should have been respected and protected. If the girls did not pass away prematurely, the solution not to separate them offered each girl the life they had a right to, even if only for a short period of time.

Tina May and Dennis Smith, Natasha's and Courtney's parents, determined that they would surgically separate the girls, giving Natasha the shared heart and sacrificing Courtney in an effort to save Natasha.[252] Despite acknowledging that the decision to separate Natasha and Courtney was "the most horrific choice for any parent,"[253] Natasha's and Courtney's parents decided that the

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[251] Archbishop of Westminster, *The Conjoint Twins I: Submission to the Court of Appeal*, CATH. MED. Q., Nov. 2000, *available at* http://www.catholicdoctors.org.uk/CMQ/Nov%202000/conjoined_twinsI.htm (explaining that "[h]uman life is sacred, that is inviolable, so that one should never aim to cause an innocent person's death by act or omission"). Expressing the importance of bodily integrity with respect to the separation of conjoined twins, the Archbishop of Westminster explained:

> Though the duty to preserve life is a serious duty, no such duty exists when the only available means of preserving life involves a grave injustice. In this case, if what is envisaged is the killing of, or a deliberate lethal assault on, one of the twins, 'Mary,' in order to save the other, 'Jodie,' there is a grave injustice involved. The good end would not justify the means. It would set a very dangerous precedent to enshrine in English case law that it was ever lawful to kill, or to commit a deliberate lethal assault on, an innocent person that good may come of it, even to preserve the life of another.

Id.

[252] Lister & Lea, *supra* note 6.

[253] Nick Drainey, *Court Battle Fears Over Twins' Separation*, THE SCOTSMAN (London), Feb. 5, 2002, *available at* LEXIS, Nexis Library, News File. Ms. May often wonders if she made the right decision. She explained, "Each time I [felt] them kick, the agony of what [lay] ahead really hit me but I [knew] we had to do it for Natasha's sake. Whenever one of them

separation must occur to save Natasha, proclaiming that if one had a chance to live, they were going to take it.[254] The parents, however, exhibited apprehension towards the separation in spite of their decision authorizing the surgery, stating, "[we] still cling to the desperate hope that a miracle may save both tots . . . . We're constantly hoping the day of the operation won't happen and it's all just some terrible dream."[255] Although the decision of Natasha's and Courtney's parents should be given primary consideration in the court's balancing, the value of their decision does not "tip the scale." Particularly, by allowing Courtney to die, the parents failed to consider the integrity of Courtney's body; the integrity that she was afforded a right to. Moreover, Tina May and Dennis Smith struggled with the separation surgery, often hoping that both Natasha and Courtney would be saved. This apprehension, coupled with the disregard for a person's bodily integrity, fails to outweigh Natasha's and Courtney's best interest.

The state's interest in protecting and preserving human life is afforded some deference. Specifically, under the doctrine of *parens patriae*, the state would be concerned with protecting Courtney's life as a result of her parents' decision to separate her from Natasha knowing that she would die.[256] Consequently, the state's interest in making sure that the girls' welfare, especially Courtney's, was not compromised would remain significant in the court's balancing.

The court should also consider the physicians' recommendations. Doctors explained that although Natasha and Courtney shared a heart and a liver, their lives were not destined for death if left conjoined.[257] Rather, the doctors

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[stuck] out their little foot and I [touched] it, tears [welled] up in my eyes because I [knew] it could have been the daughter we [would] lose." Kathryn Lister & Michael Lea, *When I Feel One of Them Kick Tears Well Up . . . It Could Be The Girl We Lose*, THE SUN, Apr. 3, 2002, *available at* LEXIS, Nexis Library, News File [hereinafter *When I Feel One of Them Kick*] (exclusive interview with Tina May). Dennis Smith echoed Ms. May's sentiments: "[t]he worst part [would] be having to let Courtney go having built a bond with her. We [would] inevitably [have gotten] to know her and her personality as we [sat] by their cot and [held] their little hands." *Id.*

[254] *See* Lister & Lea, *When I Feel One of Them Kick*, *supra* note 253.

[255] *Id.* ("Whenever I feel them kicking I feel like they are letting me know they're there."). In clinging to the hope, every time the parents go for a scan to check on the progress of the babies, they hope doctors will find another heart. *Id.*

[256] Knepper, *supra* note 96, at 1.

[257] On April 17, 2002, Tina May suffered a devastating setback when it was discovered, during a routine medical exam, that there were complications with the girls' heart. *See Siamese Twins Girls May Die*, THE EXPRESS (London), Apr. 17, 2002, *available at* LEXIS, Nexis Library, News File; *see also* Kathryn Lister & Michael Lea, *Twins Mum May Lose Both Girls*, THE SUN (London), Apr. 17, 2002, *available at* LEXIS, Nexis Library, News File. Now, doctors say that Natasha and Courtney are unlikely to survive for more than a year if the operation is not carried out. *Id.*

emphasized that many conjoined twins "[were] able to live into adulthood despite their deformities," and this would likely be the case for Natasha and Courtney.[258] Despite their assertions, however, the doctors emphasized that the full extent of Natasha's and Courtney's medical condition would not have been known until their birth, but that tests showed that "the dominant twin, Natasha, [had] most of the heart and [stood] the best chance of survival."[259] Notwithstanding, the doctors acknowledged that both Natasha and Courtney would be born alive.[260] In addition, the point of connection for Natasha and Courtney was not life-threatening and therefore, although not necessary, separation was an option, but would result in Courtney's death.[261] If separation were ordered, however, the doctors proclaimed that modern technology would have resulted in a better chance that both lives would be saved.[262] Specifically, since Courtney shared less of the heart, a heart transplant may have been possible to save her.[263] The feasibility of a heart transplant, though, was unknown.[264] For Natasha and Courtney, the doctors offered a realistic picture of the twins' future, if left conjoined. Their medical advice, including the effect of modern medical technology, opined that Natasha and Courtney could survive even if left conjoined. Specifically, without surgery, both Natasha and Courtney would have been able to endure life, together. Acknowledging the doctors' opinion and balancing it against the girls' quality of life supports keeping both girls alive.

In the case involving Natasha and Courtney, the court should have intervened. Instead of primarily deferring to the parents' wishes and ignoring the value of life both Natasha and Courtney possessed, the best possible solution dictated a careful balancing under the proposed guidelines. Although Ms. May and Mr. Smith acknowledged that separation would be difficult to accept, they expressly emphasized that the operation would move forward as

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[258] Andy Drought, *Legal Threat to Siamese Twin's Sacrifice*, THE HERALD (Glasgow), Feb. 5, 2002, *available at* LEXIS, Nexis Library, News File.

[259] *Siamese Twins to be Sacrificed*, *supra* note 5.

[260] Drainey, *supra* note 253.

[261] *Siamese Twins Share Heart*, *at* http://news.bbc.co.uk/hi/english/health/newsid_1799000/1799609.stm (last visited Oct. 30, 2002).

[262] Day, *supra* note 223.

[263] *See id.* Doctors may learn from Italy's handling of a similar case. An operation to separate conjoined twins in Italy was being planned "with the intention of giving both babies a chance of life and, for the weaker twin, a heart-lung transplant is envisaged." Drought, *supra* note 258, at 9.

[264] A heart transplant is a delicate and expensive procedure. According to statistics, the average cost of a heart transplant is $148,000, which does not include the length of the hospital stay or rejection episodes. *Transplant*, *at* http://www.chfpatients.com/tx/ transplant.htm (last visited Oct. 30, 2002). Most private health insurance programs pay for the transplants. *Id.* However, if the heart transplant is covered by the state, the federal government will try to provide funds on a matching basis. *Id.*

long as "one of [the girls] had a chance to survive."[265] In effect, the parents dismissed Courtney's value of life—the right to life that she possessed upon birth. Contrary to the parents' decision, the state evidences support in preserving both lives. Moreover, the physicians assured that both twins could lead normal lives, even though conjoined.[266] In addition, advances in surgical methods and medical technology offered alternative treatments and enhanced Natasha's and Courtney's survival rate.[267] Upon birth, each girl had a right to bodily integrity. Hence, they were two people who should be treated as two individual lives. Given the likelihood of survival without separation, the evolving medical technology that would offer both girls longevity, and the state's general interest in preserving one's right to live, balancing favors Natasha's and Courtney's right to life despite their parents' desire to separate them. While valid arguments exist on all sides of this dilemma, the balancing falls in favor of keeping both Natasha and Courtney alive.[268] Therefore, had Natasha and Courtney survived childbirth, the best option would have been to respect the right to life and bodily integrity of each child, leaving them conjoined.

While traditional deference to parents has played a key role in U.S. law, the proposed balancing test should be followed in situations involving conjoined twins. When courts take a more active approach by balancing the interests of all parties against the right to life of each child, a uniform standard exists, ensuring the recognition and respect of the value of a child's life and the person that they are and will become. The respect owed to the right to life and bodily integrity of these innocent lives should not be dismissed.

C. Overall Recommendation

One of the biggest moral dilemmas parents of conjoined twins encounter is when they must decide whether to separate their babies, especially if it means sacrificing one to save the other.[269] Sometimes, however, there are no good

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[265] Lister & Lea, *We Will Hold Little Courtney's Hand but Then Have to Tell Her Goodbye*, *supra* note 6.

[266] *See generally* Drought, *supra* note 258 ("In the case of the May twins, it is not obvious they would die if left conjoined. Some Siamese twins are able to live into adulthood despite their deformities.").

[267] Fitzgerald, *supra* note 11, at 847 (describing how technologies today can, for example, reconstruct organs).

[268] While not a complete balancing test, the law in England decides similarly. Under English law, once a case is placed before a judge, the judge decides what the best interest of the child is through "an independent and objective judgment," considering, if only to a small degree, the wishes of the parents. Annas, *The Limits of Law*, *supra* note 152, at 1282-83.

[269] Opinions remain split as to whether or not sacrificing one child to save the other is intentional killing or justified homicide. *See generally* Charles I. Lugosi, *Playing God: Mary*

options. A uniform standard, like the one presented, applied by courts who take a more proactive approach in ensuring the right to life of every child, is the answer. Through the proposed guidelines, the interests of all parties will be assessed and then balanced, reaching the best possible outcome for the particular situation. This model, as set forth earlier, recommends a balanced approach to resolving the difficult choice of separating conjoined twins. This model helps alleviate the apprehension associated with making such a decision.

V. CONCLUSION

The birth of conjoined twins places parents in an unenviable position where differing ethical opinions regarding the separation of such twins collide. Parents of conjoined twins are confronted with the reality that separation, while attempting to create a "normal" life for their children, could result in death of one or even both of their children. Such life and death choices invoke deep emotions "flowing from established parent-child relationships."[270] While courts have resolved to let parents speak for their children,[271] an increase in conflicts of interests requires that courts take an active approach in these situations. By performing a balancing test in each unique situation of conjoined twins, we can ensure that the lives of those who do not yet have a voice will be heard.

It is important to remember that being conjoined does not necessarily mean a life of hardship and pain. While it is true that carrying on daily activities with someone attached to you is burdensome, stories like that of Eng and Chang Bunker illustrate that conjoined twins can lead happy and productive lives. In fact, most conjoined twins are emphatic that they would not have life any other way.[272] If Natasha and Courtney could speak, people can only imagine what they would say. However, people can be certain that Courtney would not say, "please kill me." As one scholar has noted, "[w]hen we conclude as a society . . . that children unable to survive childhood are not worth saving or their lives worth living, we devalue childhood itself, and all

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Must Die So Jodie May Live Longer, 17 ISSUES L. & MED. 123, 158-64 (2001) (arguing that the killing of Mary was murder, but explaining that there are many who believed that Mary's killing was justified or necessary).

[270] Jellinek, *supra* note 1, 385.

[271] *See* Parham v. J.R., 442 U.S. 584 (1979).

[272] Wallis, *supra* note 13.

children with it."[273] This devaluation should not lead to severing the bond of life.

Shellie K. Park[274]

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[273] Fitzgerald, *supra* note 11, at 846.

[274] Class of 2002, University of Hawai'i, William S. Richardson School of Law. Many thanks to Professor Eric Yamamoto, Professor Chris Iijima, and Hokulei Lindsey for their valuable guidance, assistance and inspiration. My special thanks to Professor James Pietch for encouraging me to write on this fascinating topic. I would also like to thank my family and friends for their constant support. Most important, I would like to thank James Hoapili for his unconditional patience and support throughout this process, for being my strength when I felt like giving up, and for always encouraging me.

"Urban Type Residential Communities in the Guise of Agricultural Subdivisions:"[1] Addressing an Impermissible Use of Hawai'i's Agricultural District

I. INTRODUCTION

There is a practice in the state of Hawai'i of permitting urban type residential communities—guised as agricultural subdivisions—in the State Land Use Agricultural District ("agricultural district").[2] A recent example is the Keopuka Lands project ("Keopuka") proposed on the South Kona coast of Hawai'i.[3] Virtually all of the proposed project's 660 acres lay within the agricultural district.[4] Despite its agricultural designation,[5] the County of Hawai'i approved this land for a development that involved 125 house lots, an 18-hole golf course, a clubhouse, a 100-unit members' lodge, and related facilities.[6] The proposed development was billed as an "agricultural and recreational community."[7] Only seventy five acres of the 660-acre project, however, involved any agricultural production.[8] In fact, the developer conceded that agricultural activity undertaken would be of a modest scale[9]—

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[1] H.R. CONF. COMM. REP. NO. 6, 8th Leg., Reg. Sess. (Haw. 1976), *reprinted in* 1976 HAW. HOUSE J. 1095; SEN. CONF. COMM. REP. NO. 2-76, 8th Leg., Reg. Sess. (Haw. 1976), *reprinted in* 1976 HAW. SEN. J. 836.

[2] *See* In re Sierra Club & David Kimo Frankel, No. DR00-23 (Haw. Land Use Comm'n Sept. 7, 2000) (testimony and attached exhibits 1-7 of the Hawai'i State Office of Planning) [hereinafter *Office of Planning Testimony*]; In re Petition for Rulemaking to Protect the Integrity of Agricultural Land, No. AR&R01-15 (Haw. Land Use Comm'n May 7, 2001) (petition and attached exhibit of David Kimo Frankel) [hereinafter *Petition for Rulemaking*]. This practice occurs most notably in Hawai'i County. *See Office of Planning Testimony* at Exhibits 1-7; *Petition for Rulemaking*, Exhibit. The state of Hawai'i is divided into four counties: the City and County of Honolulu (Oahu), the County of Kaua'i (Kaua'i), the County of Maui (which includes Maui, Molokai and Lana'i) and the County of Hawai'i (the island of Hawai'i).

[3] *See* In re Sierra Club & David Kimo Frankel, No. DR00-23, (Haw. Land Use Comm'n Sept. 7, 2000) (declaratory order at 7) [hereinafter *In re Sierra Club*].

[4] *Id.* at 7, 9.

[5] Agricultural lands within the site are University of Hawai'i Land Study Bureau ("LSB") classes C, D, and E, and are described as being moderate to very poorly suited for agricultural use. *Office of Planning Testimony*, *supra* note 2, at 3. Portions of the parcel are believed suitable for pasture, macadamia nuts, papaya and citrus fruits. *In re Sierra Club*, *supra* note 3, at 8.

[6] *In re Sierra Club*, *supra* note 3, at 9. Keopuka Lands was approved in July of 2000.

[7] *Id.* at 9.

[8] *Id.* at 9-10.

[9] *Id.* at 19.

so modest it was anticipated that other components of the project would need to subsidize the agricultural activity to keep it viable.[10] This situation begs the question: how is a project tantamount to a luxury resort community—with only a modest level of agricultural production—framed as an "agricultural community" and permitted on agricultural land?

Hawai'i is a state committed to conserving and protecting agricultural lands and fostering agriculture as an integral part of its livelihood.[11] This commitment is embodied in the state constitution[12] and is codified in state law.[13] It is questionable, then, how the uses proposed by a development like Keopuka promote Hawai'i's commitment to conserve and protect agricultural land.[14] The propriety of development like Keopuka is even more dubious

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[10] *See id.* at 9-10.

[11] *See* HAW. CONST. art. XI, § 3. "The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands." *Id.*; *see also* HAW. REV. STAT. § 205 (2001). "The purpose of [H.R.S. chapter 205] is to preserve and protect land best suited for cultivation, forestry and other agricultural purposes . . . ." SEN. STAND. COMM. REP. NO. 580, 1st Leg., Gen. Sess. (Haw. 1961), *reprinted in* 1961 HAW. SEN. J. 883.

Hawai'i's commitment to agriculture is also expressed in H.R.S. chapter 226, the Hawai'i State Plan ("state plan"). The state plan is a comprehensive statewide land use policy designed as a long-term guide to development in Hawai'i. *See* Act of 1975, No. 189, 8th Leg., Reg. Sess. (1975), *reprinted in* 1975 Haw. Sess. Laws 431 (codified at HAW. REV. STAT. § 226 (2001)); H.R. CONF. COM. REP. NO. 24, 8th Leg., Reg. Sess. (1975), *reprinted in* 1975 HAW. HOUSE J. 891. Agricultural policies and objectives expressed in the state plan are meant to govern all state and county agency decisions affecting agricultural land. *See* HAW. REV. STAT. §§ 226-1 & 226-7; HAW. REV. STAT. § 205-16. However, the effectiveness of the state plan as a guiding doctrine is questionable. Authorities characterize the plan's policy content as highly generalized and compliance with its requirements as fairly easy. *See* Daniel R. Mandelker & Annette B. Kolis, *Whither Hawai'i? Land Use Management in an Island State*, 1 U. HAW. L. REV. 48 (1979); David L. Callies, *The Quiet Revolution Revisited: A Quarter Century Of Progress*, 26 URB. LAW. 197, 200-201 (1994). Therefore, this comment will not focus on the state plan as a source of compelling agricultural doctrine for Hawai'i.

[12] HAW. CONST. art. XI, § 3. *See infra* Section II.A for discussion of HAW. CONST. art. XI, § 3.

[13] HAW. REV. STAT. § 205 (2001). *See infra* Section II.B for discussion of H.R.S. chapter 205.

[14] The State Land Use Commission ("LUC") – the administrative body for H.R.S. chapter 205 and the state land use districts – decided the merits of the project at Keopuka in a declaratory order in *In re Sierra Club*. *See infra* Section IV.A for discussion. In its declaratory order, the LUC put the uses proposed by Keopuka into perspective:

> Judging [the] project as a whole, [it] has all the characteristics . . . normally consider[ed] urban: it is a 600+/- acre luxury residential resort whose essential features are framed around a golf course and other amenities, rather than on farming or agricultural activities. We do not find it credible that houses along the cliff area to be marketed at one to 3 million dollars per lot are part of any true agricultural enterprise.

In re Sierra Club, *supra* note 3, at 18-19.

considering an observation made by the 1976 Hawai'i State Legislature in response to comparable development: "Inasmuch as the purpose of the agricultural district classification is to restrict the uses of the land to agricultural purposes, the purpose could be frustrated in the development of urban type residential communities in the guise of agricultural subdivisions."[15]

As this quote might indicate, the misuse of Hawai'i's agricultural land is not merely a contemporary issue.[16] Indeed, Hawai'i Revised Statutes chapter 205 ("H.R.S. chapter 205"), Hawai'i's Land Use Law, was passed forty years ago in direct response to inappropriate urban development occurring on agricultural land.[17] The legislature has since amended H.R.S. chapter 205 several times in response to issues raised by the management of agricultural land.[18] These amendments have not, however, quieted the continuing debate over how to better administer agricultural land, especially with respect to agricultural subdivisions like Keopuka.[19]

The controversy surrounding developments like Keopuka results, in part, from H.R.S. chapter 205's silence on what scope of review to apply to

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[15] H.R. CONF. COMM. REP. NO. 6, 8th Leg., Reg. Sess. (Haw. 1976), *reprinted in* 1976 HAW. HOUSE J. 1095; SEN. CONF. COMM. REP. NO. 2-76, 8th Leg., Reg. Sess. (Haw. 1976), *reprinted in* 1976 HAW. SEN. J. 836.

[16] *See generally* THOMAS H. CREIGHTON, THE LANDS OF HAWAI'I: THEIR USE AND MISUSE (1978); Myrl L. Duncan, *Agriculture as a Resource: Statewide Land Use Programs for the Preservation of Farmland*, 14 ECOLOGY L.Q. 401, 420-22 (1987).

[17] *See* Act 187, § 1, 1st Leg., Reg. Sess. (1961), *reprinted in* 1961 Haw. Sess. Laws. 299 (codified at HAW. REV. STAT. § 205 (1961)). Act 187, § 1 provides:

> Inadequate controls have caused many of Hawai'i's limited and valuable lands to be used for purposes that may have a short-term gain to a few but result in a long-term loss to the income and growth potential of our economy . . . . Scattered subdivisions with expensive, yet reduced, public services; the shifting of prime agricultural lands into nonrevenue producing residential uses when other lands are available that could serve adequately the urban needs; . . . these are evidences of the need for public concern and action.
>
> Therefore, the Legislature finds that in order to preserve, protect and encourage the development of the lands in the State for those uses to which they are best suited for the public welfare . . . the power to zone should be exercised by the State . . . .

Id.

[18] *See, e.g.*, Act 193, 8th Leg., Reg. Sess. (1975), *reprinted in* 1975 Haw. Sess. Laws 441 (reconstituting the LUC as a quasi-judicial body, governed by the Hawai'i Administrative Procedures Act, HAW. REV. STAT. § 91); Act 199, 8th Leg., Reg. Sess. (1976), *reprinted in* 1976 Haw. Sess. Laws 369 (enumerating permissible uses on class A and B agricultural lands); Act 230, 13th Leg., Reg. Sess. (1985), *reprinted in* 1985 Haw. Sess. Laws 417 (dividing authority to hear and process boundary amendments between the state and the counties based on a fifteen acre threshold); Act 221, 10th Leg., Reg. Sess. (1979), *reprinted in* 1979 Haw. Sess. Laws 724 (dividing authority to hear and process special permits between the state and the counties based on a fifteen acre threshold).

[19] Better administration of agricultural land was one topic addressed by Hawai'i's leading 2002 gubernatorial candidates at a recent debate. *See* http://www.hi.sierraclub.org/debate.htm, at question 5.

agricultural subdivisions submitted to the counties. This comment argues that luxury agricultural subdivisions like Keopuka constitute a significant non-agricultural use within the agricultural district, are an impermissible use of agricultural land, and must be reviewed comprehensively by the state and the public under a boundary amendment proceeding[20] before the State Land Use Commission ("LUC"); as opposed to the current practice of piecemeal county review.[21] Further, this comment suggests an amendment to H.R.S. chapter 205 designed to curtail "urban type residential communities" in the agricultural district by presenting a more distinct course of action for the counties and the state to follow.[22] Keopuka serves as a focal point of this discussion, given the

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[20] To gain a higher density designation for development purposes, agricultural land can be reclassified to either rural or urban under Hawai'i's land use system. *See infra* Section II.B.2 for discussion of boundary amendments. However, developers have customarily sought the higher density urban designation because it requires as much time and effort as seeking a rural designation and has the advantage of allowing the most development options under the land use system. Interview with Tony Ching, Executive Officer, Hawai'i State Land Use Commission, in Honolulu, Haw. (Feb. 25, 2002). Caution should be exercised, however, in advocating that a development like Keopuka require an urban boundary amendment per se, as opposed to a rural one (which might be more appropriate), because of the precedent it can set for future boundary amendments in the region. Thereafter, it becomes hard to deny adjacent landowners the same opportunity to reclassify their agricultural land to urban. *Id.* This is the type of sprawl H.R.S. chapter 205 contemplates preventing.

[21] For comparable argument, see *Petition for Rulemaking*, *supra* note 2; Plaintiff Kaholokai's Memorandum in Opposition to Defendant Chalon International of Hawai'i, Inc.'s Motion for Summary Judgment, Citizens for the Protection of the N. Kohala Coastline v. Haw. County Planning Comm'n (Apr. 18, 1995) (3d Cir. Ct., Haw.) (No. 93-417); and *Office of Planning Testimony*, *supra* note 2.

[22] This comment focuses on preservation of agricultural land, without passing judgment on the suitability of agricultural land or the future of agricultural production in Hawai'i – issues unto themselves.

With respect to suitability of agricultural land, a movement is afoot to determine which agricultural land is in fact important to Hawai'i and which is not. Interview with Tony Ching, *supra* note 20. This movement is spurned by a constitutional mandate, expressed in Article XI, section 3 of the Hawai'i State Constitution, for the state legislature to identify important agricultural lands. *Id.* Commentators feel the current agricultural land classification system embodied in H.R.S. chapter 205, the LSB system, does not accomplish this mandate. *Id.* Furthermore, it is not definitive. Some "marginal" class C lands only require irrigation to elevate them to class B, or "prime" agricultural land. 1985 HAW. SEN. J. 698.

Another land classification system, one viewed as more compliant with the constitutional mandate, is the Agricultural Lands of Importance to the State of Hawai'i system ("ALISH"). Telephone Interview 2 with Chris Yuen, Planning Director, County of Hawai'i (Apr. 13, 2002). It classifies agricultural land as "prime," "unique" or "other important." *Id.* On Hawai'i, some lots in the coffee belt of South Kona are designated "other important" under ALISH, but merit only a class D designation under the indoctrinated LSB system. *Id.* The ALISH "other important" designation would afford preferential treatment to much more land in West Hawai'i than the current LSB system. *Id.*

With respect to the future of agricultural production in Hawai'i, the state has seen a major

recent treatment afforded it by the LUC[23] and by the Third Circuit Court,[24] as well as the relatively high incidence of such developments in Hawai'i County.[25]

Section II of this comment illustrates Hawai'i's commitment to preserving agricultural land as embodied by state law. This section further illustrates the state/county split in authority to administer agricultural land. Section III demonstrates how H.R.S. chapter 205's lack of instruction allows Keopuka-like development to occur on agricultural land, while highlighting the competing perspectives on the propriety of such development. Section IV surveys LUC, Third Circuit Court, and Hawai'i Supreme Court decisions favoring a comprehensive approach to reviewing agricultural subdivisions. Section V proposes to amend H.R.S. chapter 205 to curtail luxury agricultural subdivisions like Keopuka and demonstrates the benefits of such an amendment. Section VI concludes that the amendment is both consonant with Hawai'i's commitment to preserving agricultural land and necessary.

II. HAWAI'I'S COMMITMENT TO PRESERVING AGRICULTURAL LAND

Hawai'i's land use practice has evolved over the centuries. Prior to Western contact, Hawai'i's land was regarded as a shared, communal resource by its indigenous people.[26] They lived as stewards of the land, mindful that future generations needed to share in its wealth.[27] Then, with the arrival of Western settlers, notions of private property emerged and were incorporated.[28]

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shift in its economic base in the last twenty years. David Blane, Executive Director, Hawai'i State Office of Planning, *Hawai'i - The Nation's Smart Growth Laboratory* at 2 (2001), *available at* http://www. hawaii.gov/dbedt/op/index.html. The visitor industry has supplanted agriculture and all other industries, including the military, as the primary source of state revenue. *Id.*

[23] *See generally In re Sierra Club*, *supra* note 3.

[24] *See generally* Pac. Star, L.L.C. v. Sierra Club, Civ. No. 00-1-0209K, Findings of Fact, Conclusions of Law, Order (July 2, 2001) (3rd Cir. Ct., Haw.).

[25] *See Office of Planning Testimony*, *supra* note 2, at Exhibits 1-7. In its testimony arguing that Keopuka Lands was an inappropriate use of agricultural land, the Office of Planning referred to six other developments that the County of Hawaii permitted in the agricultural district. The Office of Planning previously voiced its objection to these six developments through letters to the Hawai'i Planning Commission. These letters are the substance of the exhibit and provide extensive detail of the proposed developments.

[26] Tom Dinell, *Land Use Zoning in a Developing State: A Brief Critique of Hawaii's State Land Use Law*, 2 THIRD WORLD PLANNING REV. 195 (1980). *See* LILIKALÃ KAME'ELEIHIWA, NATIVE LANDS AND FOREIGN DESIRES: HOW SHALL WE LIVE IN HARMONY? (1992), for a discussion of Native Hawaiians' relationship to their lands from a Native Hawaiian perspective.

[27] Dinell, *supra* note 26, at 195.

[28] Duncan, *supra* note 16, at 414; Dinell, *supra* note 26, at 195; PHYLLIS MYERS, ZONING HAWAII: AN ANALYSIS OF THE PASSAGE AND IMPLEMENTATION OF HAWAII'S LAND

Thereafter, land became viewed as a commodity one owned rather than a resource one shared.[29] Over time, Westerners and their offspring consolidated ownership of much of Hawai'i's land.[30] Where a native monarchy once reigned, Westerners supplanted it with an empire of large-scale agriculture—based on sugar and pineapple—that dictated Hawai'i's economy and politics.[31] By the 1950s, Hawai'i became characterized by concentrated landownership that possessed strong ties to the territory's centralized government.[32]

The next formative change in Hawai'i's land use practice began in the years prior to 1960. In response to impending statehood and a surging local population, land speculators[33] began buying land on the sparsely populated outer islands.[34] With only a rudimentary four-county structure in place,[35] local government was ill-equipped to restrain the speculators and the unorganized development they threatened.[36] When the Democratic party took control of the territorial government in 1955, it ushered in an era of innovation, much of

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CLASSIFICATION LAW 17 (1976). MYERS noted that:

> [F]or the first time land was bought and sold, stolen, married into, and bequeathed. The spoils went to the adventurers who married Hawaiian princesses, to the crafty who advised the kings, to the dreamers who craved the barren, unpeopled, seemingly useless lands. By 1890, when the monarchy was overthrown, a small number of Westerners owned over half of all the private lands in Hawai'i and leased or controlled even more.

MYERS, *supra*, at 17.

[29] Dinell, *supra* note 26, at 195.

[30] 30 MYERS, *supra* note 28, at 18-19. Myers explains the breakdown of landownership at the time:

> By the end of the 1950s, seventy-two major land-holders (owners of more than 1,000 acres) held title to 47 percent of the land. Seven landholders owned nearly one-third of the land. The state owned 38 percent of the land, and the federal government, by lease or ownership, controlled 10 percent (including 25 percent of the island of Oahu). Only 5 percent of the island's acreage was in holdings of under 1,000 acres.

Id. at 19.

[31] *Id.* at 17-18.

[32] *Id.* at 19. Government and commerce at the time was concentrated on O'ahu.

[33] Land speculation involves buying property at a low price in the hopes that capital improvements and/or market forces will increase its value so that significant profits are realized by future sale. Interview with Tony Ching, *supra* note 20. *See infra* note 41 for an example of land speculation as described by Leslie Hornick, a delegate to the 1978 Constitutional Convention of Hawai'i ("1978 Con Con").

[34] MYERS, *supra* note 28, at 19. The "outer islands" referred to by Myers are those outside O'ahu, namely Hawai'i, Maui and Kaua'i.

[35] Hawai'i is divided into four political counties: Kaua'i, O'ahu, Maui (encompassing Lana'i and Moloka'i) and Hawai'i.

[36] MYERS, *supra* note 28, at 19. "[O]nly O'ahu had even minimal subdivision regulations. [The outer] islands[had] no county plans, virtually no planning staff, and no requirements for [infrastructure]. County officials were often suspected of bribery and nepotism." *Id.*

which focused on changing Hawai'i's land use policy.[37] In particular, the new government promulgated policies and laws to preserve and protect agricultural land from unimpeded development.[38]

A. Article XI, Section 3 of the Hawai'i State Constitution: The Agricultural Amendment

In 1978, the people of Hawai'i ratified a constitutional amendment—Article 11, section 3—that explicitly mandates the state to, among other things, "conserve and protect agricultural lands."[39] Article 11, section 3 was intended as reinforcement of the commitment to preserve agricultural land embodied in H.R.S. chapter 205.[40] The delegates to the 1978 Constitutional Convention noted that the prime objective of H.R.S. chapter 205—the preservation of agricultural land—was frustrated by the reclassification of significant amounts of agricultural land to urban during that time period.[41] They designed Article 11, section 3 to protect agricultural land from incessant urban pressures.[42] To

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

[38] *See* HAW. CONST. art. XI, § 3; HAW. REV. STAT. § 205 (2001).

[39] HAW. CONST. art. XI, § 3. This article mandates:

> The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands. The legislature shall provide standards and criteria to accomplish the foregoing. Lands identified by the State as important agricultural lands needed to fulfill the purposes above shall not be reclassified by the State or rezoned by its political subdivisions without meeting the standards and criteria established by the legislature and approved by a two-thirds vote of the body responsible for the reclassification or rezoning action.

Id.

[40] *See infra* note 46 for a discussion of H.R.S. chapter 205's intent.

[41] PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, Volume 1, at 440 (1978) [hereinafter *Con-Con Proceedings*]. The LUC was openly chastised by the 1978 Con Con for its propensity to reclassify prime agricultural land that had in turn inspired land speculation. *Id.* at 440-43. *See also* Duncan, *supra* note 16, at 419-422 (examining LUC approvals and denials of petitions for boundary amendments during the period from 1964-1974).

Delegate Leslie Hornick of the 1978 Con-Con described land speculation occurring at the time. She noted a practice whereby landowners would represent to the LUC that agriculture was no longer economically feasible for them, petition for an urban reclassification conditioned on providing needed low- and moderate-income housing, and ultimately fall through on performance.

> A 1963 petition by Oceanic Properties for central O'ahu is a case in point. Despite the fact that the proposed project violated LUC criteria and was on prime agricultural land, the LUC approved the petition because the developers claimed they would provide housing at between $15,000 and $20,000 and conceded that there was no necessity for urban lands for housing in excess of $25,000. However, in actuality less than 6 percent of the more than 1,200 units sold could have been defined as low-cost.

Con-Con Proceedings at 442.

[42] *Con-Con Proceedings, supra* note 41, at 440.

this end, Article 11, section 3 requires the state to accomplish four goals: (1) conserve and protect agricultural lands; (2) promote diversified agriculture; (3) increase agricultural self-sufficiency; and (4) assure the availability of agriculturally suitable lands.[43]

B. Hawai'i Revised Statutes Chapter 205: Hawai'i's Land Use Law

The 1961 Hawai'i State Legislature witnessed local misuses of Hawai'i's finite land resources.[44] In response, it devised a system of statewide land classification calculated to lend public guidance to private land use.[45] With the implementation of this new land use system, codified as H.R.S. chapter 205,[46] Hawai'i became the first state to establish land use management on a statewide basis.[47] The purpose of H.R.S. chapter 205 is to "preserve and protect land best suited for . . . agricultural purposes and to facilitate sound and economical urban development;"[48] in short, to preserve agricultural land and to prevent urban sprawl.[49] To carry out its intent, H.R.S. section 205-1 created the LUC

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[43] Memorandum from Wendell Kimura, Acting Director, Legislative Reference Bureau, to Representative Ezra Kanoho, Hawai'i State Legislature, Strategy to Implement Article XI, section 3 of the Hawai'i Constitution to Preserve and Protect Agricultural Lands 1 (July 12, 2001) (on file with author).

[44] MYERS, *supra* note 28, at 20.

[45] *Id.*

[46] Act of 1961, No. 187, 1st Leg., Reg. Sess. (1961), *reprinted in* Haw. Sess. Laws. 299 (codified at HAW. REV. STAT. § 205 (1961)).

[47] CREIGHTON, *supra* note 16, at 68.

[48] SEN. STAND. COMM. REP. NO. 580, 1st Leg., Gen. Sess. (1961), *reprinted in* 1961 HAW. SEN. J. 883. This committee report provides:

> The purpose of this bill is to preserve and protect land best suited for cultivation, forestry and other agricultural purposes and to facilitate sound and economical urban development in order to promote the economy and general welfare of the state . . . .
>
> The state must protect its valuable land resources. There is a special need to protect productive agricultural lands from urban encroachment, to prevent scattered and premature development, to limit land speculation or urban areas, and to protect the unique natural assets of the state.
>
> The state's highly productive agricultural lands are jeopardized by normal economic laws which encourage land owners to place their own particular pieces to the most profitable current use for which they can find a market . . . . If exclusive agricultural zones are not established to preserve and protect prime agricultural land from infringement by non-agricultural uses, the possibility of land speculation through inflated or artificial land prices may jeopardize the existence of major agricultural companies or activities. The most effective protection for prime agricultural lands, preservation of open space and direction for urban growth, is through state zoning.

Id.

[49] Interview with David Callies, Professor of Law, William S. Richardson School of Law, in Honolulu, Haw. (Feb. 28, 2002).

and vested it with primary zoning authority over land in Hawai'i.[50] In the legislature's estimation, "[t]he most effective protection for prime agricultural lands, preservation of open space and direction for urban growth, is through state zoning."[51]

At the same time H.R.S. chapter 205 vested the state with primary zoning authority, it reserved the counties' power to zone locally within the state land use district boundaries.[52] Over time the counties gained further authority under H.R.S. chapter 205 to administer state land.[53] This division in authority to

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[50] HAW. REV. STAT. § 205-1 (2001). The commission is comprised of nine government appointed members that hold no other public office. One member is appointed from each of the four main counties, while five commissioners serve on an at-large basis. The members receive no compensation for their services other than actual expenses incurred incidental to their duties. *Id.*

Soon after its inception, the LUC delineated four state land use district boundaries: urban, rural, agriculture and conservation. SEN. STAND. COMM. REP. NO. 580, 1st Leg., Gen. Sess. (Haw. 1961), *reprinted in* 1961 HAW. SEN. J. 883. The division of land among the four districts is roughly five percent urban, forty-seven percent agriculture, forty-seven percent conservation, and one percent rural. DAVID CALLIES, REGULATING PARADISE: LAND USE CONTROLS IN HAWAI'I 7 (1984). The entire state of Hawai'i consists of roughly four million acres divided among these four land classifications. Interview with Tony Ching, *supra* note 20.

The urban district is "characterized by 'city-like' concentrations of people, structures and services." LAND USE COMM'N RULES § 15-15-18(1) (1999). "Urban is defined as land that tolerates the highest degree of development . . . ." Kelly v. 1250 Oceanside Partners, Civ. No. 00-1-0192K, Order Granting in Part and Denying in Part Plaintiff's Motion for Partial Summary Judgment at 9 (Oct. 12, 2001) (3d Cir. Ct., Haw.) (citing to Life of the Land v. Land Use Comm'n, 63 Haw. 166, 170 n.3, 623 P.2d 431, 437 n.3 (1981)).

The rural district accommodates small farms and limited, low density residential development. Pearl Ridge Estates Cmty. Ass'n v. Lear Siegler, 65 Haw. 133, 138 n.2, 648 P.2d 702 n.2, 705 (1982) (Nakamura, J., concurring); DANIEL R. MANDELKER, ENVIRONMENTAL AND LAND CONTROLS LEGISLATION 272 (1976).

The agricultural district is based on soil type, topography, rainfall, and crop use data provided by the University of Hawai'i Land Study Bureau. MYERS, *supra* note 28, at 20, 24. H.R.S. chapter 205 differentiates between "prime," LSB class A and B agricultural lands, and "marginal," LSB class C, D, E or U agricultural lands. HAW. REV. STAT. §§ 205-2, 205-4.5 (2001).

The conservation district includes private and state lands that lie in watershed and forest reserve areas. MYERS, *supra* note 28, at 24.

[51] *See* SEN. STAND. COMM. REP. NO. 580, 1st Leg., Gen. Sess. (Haw. 1961), *reprinted in* 1961 HAW. SEN. J. 883, ¶3.

[52] Act of 1961, No. 187, § 2, 1st Leg., Reg. Sess. (1961), *reprinted in* 1961 Haw. Sess. Laws. 299, 300 (codified at HAW. REV. STAT. § 205 (1961)).

[53] *See, e.g.*, Act of 1976, No. 199, 8th Leg., Reg. Sess. (1976), *reprinted in* 1976 Haw. Sess. Laws 369 (enumerating permissible uses on class A and B agricultural lands); Act of 1985, No. 230, 13th Leg., Reg. Sess. (1985), *reprinted in* 1985 Haw. Sess. Laws 417 (dividing authority to hear and process boundary amendments between the state and the counties based upon a fifteen acre threshold); Act of 1979, No. 221, 10th Leg., Reg. Sess. (1979), *reprinted in* 1979 Haw. Sess. Laws 724 (dividing authority to hear and process special permits between the state

administer state land is central to the problem of Keopuka-like developments. Such developments are permitted pursuant to county authority.

1. H.R.S. section 205-5: Zoning Powers

The split in authority between the state and counties under H.R.S. chapter 205 is based in part on zoning powers. H.R.S. section 205-5(b) gives the LUC the power to determine "uses compatible to the activities described in section 205-2."[54] Further, such uses "shall be permitted" within the agricultural district.[55] H.R.S. section 205-5(b) then provides that "accessory agricultural uses and services described in sections 205-2 and 205-4.5 may be further defined by each county by zoning ordinance."[56] Pursuant to their authority to "further define," the counties may permit golf courses, tennis courts, clubhouses and other project components on agricultural land.[57]

H.R.S. section 205-5(b) further provides that each county may determine the minimum lot size in the agricultural district, by zoning or subdivision

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and the counties based upon a fifteen acre threshold).

[54] HAW. REV. STAT. § 205-5(b) (2001). This section provides, in part, that "[w]ithin agricultural districts, uses compatible to the activities described in section 205-2 as determined by the commission shall be permitted; provided that accessory agricultural uses and services described in sections 205-2 and 205-4.5 may be further defined by each county by zoning ordinance." *Id.*

The accessory agricultural uses and services described in H.R.S. section 205-2 involve, among other things: cultivation of crops; farming activities; aquaculture; bona fide agricultural services such as farm dwellings; wind machines; agricultural parks; and open area recreational facilities such as golf courses, provided they are not located on LSB class A or B agricultural land. *Id.*

[55] HAW. REV. STAT. § 205-5(b) (2001).

[56] HAW. REV. STAT. § 205-5(b) (2001). The uses permitted in the agricultural district by the counties need to be consistent with the broad parameters of H.R.S. chapter 205. *In re Sierra Club*, *supra* note 3, at 21.

LSB class A or B agricultural lands "are restricted to the uses described in HRS § 205-4.5, while permissible uses on [LSB class] C, D, E or U [agricultural land] are set forth in HRS § 205-2." Neighborhood Bd. v. State Land Use Comm'n, 64 Haw. 265, 269 n.7, 639 P.2d 1097, 1101 n.7 (1982). *Accord* LAND USE COMM'N RULES § 15-15-25.

As stated in *Neighborhood Board*, H.R.S. section 205-4.5(a) limits "prime" A and B agricultural lands to certain restricted uses. These uses include: cultivation of crops; game and fish propagation; raising of livestock; farm dwellings; public and private open area recreational uses like camps and parks, but not including golf courses or country clubs; solid waste transfer stations; roadside stands for selling agricultural products; agricultural parks; and wind energy facilities.

[57] *See Office of Planning Testimony*, *supra* note 2, at Exhibits 1-7 for more examples of project components permitted pursuant to this authority.

ordinance, provided that it is not less than one acre.[58] Pursuant to this authority, the counties have discretion over agricultural subdivisions.[59]

2. H.R.S. sections 205-3.1 and 205-4: Amendments to District Boundaries

H.R.S. chapter 205 also divides authority between the state and county based on changes made to district boundaries.[60] Counties have authority to process boundary amendments involving fifteen acres or less.[61] The LUC has authority to process boundary amendments involving more than fifteen acres of land.[62] The legislature designed the fifteen acre split in authority to lend greater efficiency to the land use regulatory system by consolidating review of smaller parcels under one proceeding before the counties rather than

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[58] H.R.S. section 205-5(b) provides: "The minimum lot size in agricultural districts shall be determined by each county by zoning ordinance, subdivision ordinance, or other lawful means; provided that the minimum lot size for any agricultural use shall not be less than one acre, except as provided herein." HAW. REV. STAT. § 205-5(b) (2001). There are exceptions that allow the lot size to be zoned smaller than one acre. *Id.*

[59] *Id. See infra* Section III.A for discussion of the Hawai'i County zoning amendment proceeding.

Under H.R.S. § 205-5, counties may zone agricultural land as small as one acre lots. This provision has engendered much discussion. Critics believe that extensive one-acre agricultural subdivisions clearly violate the intent of H.R.S. chapter 205 by encouraging urban development instead of fostering agriculture. Duncan, *supra* note 16, at 428. It is further contended that agricultural production is not economically feasible on a one-acre parcel. *Id.*; *see also* MANDELKER, *supra* note 50, at 281; Telephone Interview 2 with Chris Yuen, *supra* note 22.

[60] HAW. REV. STAT. § 205-3.1, § 205-4 (2001). H.R.S. chapter 205 contains provisions to modify the original boundaries drawn by the LUC. One such provision, the boundary amendment, is provided "to afford landowners relief from the statutory requirements for agricultural districts." Neighborhood Bd. v. State Land Use Comm'n, 64 Haw. 265, 269, 639 P.2d 1097, 1101 (1982). So, for example, a parcel of agricultural land could be reclassified to urban, rural or conservation, and vice versa. A petition for boundary reclassification must contain information describing the proposed use and demonstrate how such reclassification is consistent with the provisions of H.R.S. chapter 205 as well as the rules promulgated by the LUC. LAND USE COMM'N RULES § 15-15-50 (1999); *see also* KANESHIGE, KUDO & LUI-KWAN, MAJOR LAND USE LAWS IN HAWAI'I 8 (1990).

State land use districts can also be reclassified by comprehensive periodic review. HAW. REV. STAT. § 205-18. The periodic boundary review is to occur every five years and involves a statewide assessment, unlike a boundary amendment proceeding, which is parcel specific. The last review conducted by the Office of Planning pursuant to H.R.S. section 205-18 was in 1992 and published in 1994. Presently, the Office of Planning lacks sufficient funding and manpower to conduct further statewide reviews. Its staff has dwindled from sixty to less than thirty in the last decade. Interview with Abe Mitsuda, Office of Planning, in Honolulu, Haw. (Feb. 5, 2002).

[61] HAW. REV. STAT. § 205-3.1(c) (2001).

[62] HAW. REV. STAT. § 205-4 (2001).

requiring duplicative LUC review.[63] Pursuant to its authority to hear petitions for boundary amendments, the county is able to allow isolated urban uses such as a hotel or lodge within the agricultural district.[64]

3. *H.R.S. section 205-6: Special Permit*

H.R.S. chapter 205 also divides control of the agricultural district between the LUC and the counties based on the special permit provision. Where a boundary amendment is not appropriate for a non-permitted or uncharacteristic use of agricultural land, H.R.S. chapter 205 allows for such uses by special permit.[65] A special permit sanctions certain "unusual and reasonable" uses, other than those for which the district is classified, that would nonetheless "promote the effectiveness and objectives" of the chapter.[66] All special permit applications are heard by the counties, while those involving land in excess of fifteen acres require additional approval by the LUC.[67] H.R.S. chapter 205

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[63] Sen. Conf. Comm. Rep. No. 27, 13th Leg., Reg. Sess. (1985), *reprinted in* 1985 HAW. SEN. J. 861; H.R. CONF. COM. REP. NO. 31, 13th Leg., Reg. Sess. (1985), *reprinted in* 1985 HAW. HOUSE J. 900. Originally, the LUC heard all boundary amendments. In a move to lend efficiency to land use management, Act 230 was passed in 1985 "to consolidate . . . boundary change petitions [involving fifteen or less acres] with the . . . proceedings of the respective county and not . . . require [they be heard as] a separate proceeding [before the LUC] pursuant to Section 205-4." *Id.*

[64] *See, e.g., Office of Planning Testimony*, *supra* note 2, at exhibits 1-7; *see also* In re Petition for Rulemaking to Protect the Integrity of Agricultural Land, No. AR&R01-15 (Haw. Land Use Comm'n May 7, 2001) (testimony of the Hawai'i State Office of Planning at 3) ("Special permits and State Boundary Amendments involving land areas fifteen acres or less . . . have been used to establish components for larger projects such as resort-like golf course communities with small hotels or lodges, essentially bypassing State Land Use Commission review.").

[65] HAW. REV. STAT. § 205-6 (2001). "The special permit procedures in agricultural districts can allow variation from the dominant agricultural land use pattern without creating land use instabilities by introducing isolated urban districts within the agricultural zones." MANDELKER, *supra* note 50, at 281.

[66] *Id.*; *see also* Duncan, *supra* note 16, at 418-19; KANESHIGE, ET AL., *supra* note 60, at 12. Such an "unusual and reasonable" use might be a lodge or a golf club house on agricultural land. *See Office of Planning Testimony*, *supra* note 2, at Exhibits 1-7.

[67] HAW. REV. STAT. § 205-6(e) (2001). LUC Rules section 15-15-95(b) provides state and county guidelines for determining what is "unusual and reasonable" for purposes of a special permit:

(1) The use shall not be contrary to the objectives sought to be accomplished by chapters 205 and 205A, H.R.S., and the rules of the commission;

(2) The desired use would not adversely affect surrounding property;

(3) The use would not unreasonably burden public agencies to provide roads and streets, sewers, water drainage and school improvements, and police and fire protection;

(4) Unusual conditions, trends, and needs have arisen since the district boundaries and rules were established; and

gives the counties sole authority to hear and process special permits for fifteen or less acres to better "streamline the land use regulatory system."[68] This authority granted to the counties "enable[s] the [LUC] to focus its efforts on those special permits which would have larger impacts of a statewide nature."[69] Similar to the sub fifteen-acre boundary amendment, the county can allow urban uses such as hotels, lodges, private recreation centers or country clubs in the agricultural district by means of a special permit.[70]

4. H.R.S. section 205-12: Enforcement

H.R.S. section 205-12 qualifies the grants of county authority by requiring counties to enforce the use restrictions within the agricultural district and to report all violations to the LUC.[71] The counties were assigned enforcement duties to help curtail "urban type residential communities" from being

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(5) The land upon which the proposed use is sought is unsuited for the uses permitted within the district.

LAND USE COMM'N RULES § 15-15-95(b) (1999).

[68] H.R. CONF. COM. REP. NO. 47, 10th Leg., Reg. Sess. (Haw. 1979), *reprinted in* 1979 HAW. HOUSE J. 1108. The committee report explains why the special permit process was streamlined:

> At present, the [LUC] is responsible for reviewing all special permits within the States. However, approximately 75 percent of those permits involve uses which have only local impacts. This bill would service to streamline the land use regulatory system by requiring the [LUC] to review only those permits involving land areas of more than fifteen acres. All other special permits would be subject to approval by the appropriate county planning commission. This would thus enable the [LUC] to focus its efforts on those special permits which would have larger impacts of a statewide nature.

Id. In *Neighborhood Bd. v. City & County of Honolulu*, 64 Haw. 265, 639 P.2d 1097 (1982), the court recognized that "the legislature intended by this amendment to streamline the land use regulatory process by requiring the state commission's approval of such permits only where the use desired would be of such scale as to impact the state as a whole." *Id.* at 267 n.4, 639 P.2d at 1100 n.4.

[69] H.R. CONF. COMM. REP. NO. 47, 10th Leg., Reg. Sess. (1979), *reprinted in* 1979 HAW. HOUSE J. 1108, 1108.

[70] *See Office of Planning Testimony, supra* note 2. Authorities are critical of allowing hotels on agricultural land by special permits. In reference to the 100-unit hotel allowed by special permit in Keopuka, the Office of Planning pointed out that H.R.S. chapter 205 "does not allow a 100-unit member's hale or hotel within the State Agricultural District." *Office of Planning Testimony, supra* note 2, at 6.

[71] HAW. REV. STAT. § 205-12 (2001). This section provides:

> The appropriate officer or agency charged with the administration of county zoning laws shall enforce within each county the use classification districts adopted by the land use commission and the restriction on use and the condition relating to agricultural districts under section 205-4.5 and shall report to the commission all violations.

Id.

approved on agricultural land.[72] Pursuant to these enforcement duties, counties must take a preventative approach to the misuse of agricultural land.[73] When it appears that a proposed agricultural subdivision will "not be used for agricultural purposes and may be an attempted circumvention of the [boundary amendment process], the county should disapprove the subdivision application."[74] Arguably, the counties fail this enforcement duty when they permit "urban type" developments like Keopuka instead of deferring them to the LUC for its assessment.[75]

III. URBAN TYPE RESIDENTIAL COMMUNITIES ARE AN IMPERMISSIBLE USE OF AGRICULTURAL LAND

Framed as agricultural subdivisions, developments like Keopuka are reviewed entirely at the county level and are not afforded state oversight. This contravenes the spirit and intent of H.R.S. chapter 205.[76] Under current practice, counties allow Keopuka-like developments to be parsed into a cocktail of discreet segments[77] and submitted piecemeal for county approval[78]

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[72] Act of 1976, No. 199, 8th Leg., Reg. Sess., *reprinted in* 1976 Haw. Sess. Laws 369.

[73] Haw. Op. Att'y Gen. No. 75-8 (1975). This opinion provides:

> Pursuant to their enforcement duties under § 205-12, the counties must take before-the-fact measures to insure the preservation of prime agricultural land, and when investigation shows that a proposed subdivision in an agricultural district will in all likelihood not be used for agricultural purposes and may be an attempted circumvention of the land use district amendment procedure and controls provided in this chapter, the county should disapprove the subdivision application.

Id.

[74] *Id.*

[75] Deferral to the LUC could happen in one of two ways: (1) the county could informally defer a proposal to the LUC; or (2) it could make a formal determination, during a hearing, that a proposed development merits LUC review. Telephone Interview with Tony Ching, Executive Director, Hawai'i State Land Use Commission (Oct. 16, 2002).

[76] *See generally, Office of Planning Testimony, supra* note 2, at Exhibits 1-7 (demonstrating the Office of Planning's continued objection to the permitting of Keopuka-like developments entirely through the counties, based on the belief that such practice contravenes the spirit and intent of H.R.S. chapter 205); *see also* Kelly v. 1250 Oceanside Partners, Civ. No. 00-1-0192K, Order Granting in Part and Denying in Part Plaintiff's Motion for Partial Summary Judgment at 3-4 (Oct. 12, 2001) (3d Cir. Ct., Haw.).

[77] *See, e.g., 1250 Oceanside* at 3-4 for an example of a project divided into segments; *see also Office of Planning Testimony, supra* note 2, at Exhibits 1-7 for more examples. *See* HAWAI'I COUNTY, HAW., COUNTY CODE §§ 25-2-40 – 25-2-44 for a description of the county zoning amendment process. *See supra* sections II.B.2 and II.B.3 for descriptions of the county boundary amendment and special permit processes, respectively.

[78] For example, Hokulia, 1,540 acres strong, was permitted entirely by the County of Hawai'i in three discreet parts. *1250 Oceanside* at 3-5. Its 730-lot agricultural subdivision received approval from the county pursuant to its H.R.S. section 205-5 enumerated zoning

— despite the fact that they involve hundreds, if not thousands of acres,[79] and urban components.[80] At present, H.R.S. chapter 205 does not specifically require that counties treat agricultural subdivisions as a sum of their components and defer them to the LUC when merited. Currently, the LUC has explicit jurisdiction over, for example, a 15.1 acre agricultural parcel being reclassified to urban;[81] but it has *no* discretion over a 1,540 acre resort community on agricultural land if the development is devised in such a way that no component triggers a boundary amendment or special permit proceeding before the LUC, or if the county fails to defer it to the LUC.[82] The state has direct input on the propriety of such a project only when a party requests a declaratory ruling[83] from the LUC on the applicability of the LUC's administrative rules to the project, as with Keopuka.[84]

A. Critique Of Hawai'i County's Permit Process That Allows Urban Type Residential Communities On Agricultural Land

In Hawai'i County, agricultural subdivisions are reviewed during a hearing for zoning amendment pursuant to the Hawai'i County Code.[85] This procedure is the administrative threshold for approving an agricultural subdivision.[86] Under this procedure, a landowner might seek to have land rezoned from forty-acre agricultural lots to one to three-acre agricultural lots.[87] Once an agricultural parcel is rezoned during this hearing, permits for uses such as farm dwellings become somewhat ministerial.[88] Thereafter, the county cannot pass judgment that, for example, a subdivision of million dollar homes on one-acre

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powers. *See Id.* Its golf course involved non-prime agricultural land, so was approvable by the county pursuant to H.R.S. section 205-2. *See Id.* Finally, the members' lodge, lying on exactly 14.854 acres, received a boundary amendment through the county pursuant to H.R.S. section 205-3.1. *See Id.* For more examples, see *Office of Planning Testimony*, *supra* note 2, at Exhibits 1-7.

[79] *See Office of Planning Testimony*, *supra* note 2. For example, Hokulia, in West Hawai'i, involves 1,540 acres. *1250 Oceanside* at 3. Keopuka, also in West Hawai'i and a few miles north of Hokulia, involves 660 acres. *In re Sierra Club*, *supra* note 3, at 9.

[80] *In re Sierra Club*, *supra* note 3, at 18-19.

[81] *See supra* note 62 and accompanying text.

[82] *See supra* Sections II.B.1-4.

[83] *See infra* note 128 for a discussion on declaratory rulings by an administrative agency such as the LUC.

[84] *See, e.g., In re Sierra Club*, *supra* note 3; In re John Godfrey, No. DR94-17 (Haw. Land Use Comm'n Dec. 6, 1994) (declaratory order).

[85] HAW. COUNTY CODE §§ 25-2-40 – 25-2-44 (1999).

[86] Telephone Interview 2 with Chris Yuen, *supra* note 22.

[87] *Id.*

[88] Telephone Interview 1 with Chris Yuen, Planning Director, County of Hawai'i (Mar. 28, 2002).

lots is an improper use of agricultural land.[89] The threshold nature of the zoning amendment hearings process focuses attention on the degree of review it affords agricultural subdivisions.

To its credit, a county change of zone application requires discussion of many of the same criteria that a state boundary amendment application does.[90] The counties' quasi-legislative zoning amendment proceeding, however, "is informal and no specific findings of fact are necessary."[91] This contrasts strongly with the extensive fact-finding of the LUC's quasi-judicial process.[92] Also, as a political matter, the state, not the county, is better equipped to implement an effective program of land use controls.[93] "[L]ocal county governments are always subject to extreme pressure for actions that produce economic development" at the expense of land and natural resources.[94] To this end, it bears noting that elected officials have final discretion over county zoning amendment proceedings,[95] while, in comparison, LUC commissioners are term-appointed, hold no other public office, and make all substantive deliberations in a public forum.[96]

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[89] *Id.*

[90] *Compare* the requirements of the Background and County Environmental Report attached to a County of Hawai'i Change of Zone Application *with* LAND USE COMM'N RULES § 15-15-50 (1999).

The requirements of the county Environmental Report were revised in June 2001. Therefore, it is uncertain whether they were as comprehensive in the 1980s and 1990s, when many of the subject agricultural subdivisions were approved, as they are now. *See Office of Planning Testimony, supra* note 2, at Exhibits 1-7 for various subdivision approval dates.

[91] Mandelker & Kolis, *supra* note 11, at 54.

[92] *Id.* at 68. *See generally* Town v. Land Use Comm'n, 55 Haw. 538, 524 P.2d 84 (1974). *Town* held that LUC boundary amendment proceedings are quasi-judicial and must conform to the contested case hearing requirements of the Hawai'i Administrative Procedures Act ("HAPA"), H.R.S. chapter 91. *Id.* at 545, 524 P.2d at 89. Spurred by this mandate and by the high incidence of urban reclassification of agricultural land at the time, the 1975 Hawai'i State Legislature amended H.R.S. chapter 205 to require that LUC proceedings follow a quasi-judicial format. H.R. STAND. COMM. REP. NO. 199, 8th Leg., Reg. Sess. (Haw. 1975), *reprinted in* 1975 HAW. HOUSE J. 1029; MYERS, *supra* note 28, at 41. "The purpose of [the amendment is] to: (1) more effectively achieve the purposes of Hawaii's Land Use Law; and (2) provide for more effective participation in the land use decision-making process." 1975 HAW. HOUSE J. 1029. By requiring the LUC to make "quasi judicial decisions in accordance with [HAPA]," parties gain "the right to confront and cross-examine witnesses and no ex-parte communications [are] permitted unless notice is given to all parties to participate." *Id.* at 1030.

[93] Allan F. Smith, *Uniquely Hawai'i: A Property Professor Looks At Hawaii's Land Law*, 7 U. HAW. L. REV. 1, 10 (1985).

[94] *Id.* at 10.

[95] *See* HAWAI'I COUNTY, HAW., COUNTY CODE § 25-2-43(b)(4) (1999) (giving the city council authority to approve, deny or modify zoning amendments).

[96] HAW. REV. STAT. § 205-1 (2001); *see supra* note 92 for discussion of the LUC's quasi-judicial process.

B. What Scope of Review Should Apply to Agricultural Subdivisions?: County Rule Versus State Rule

H.R.S. chapter 205 is silent as to whether components of an urban type agricultural subdivision like Keopuka should be reviewed as a whole or piecemeal.[97] The arguments on how urban type agricultural subdivisions should be reviewed polarize into two schools of thought: one that asserts piecemeal review under county jurisdiction,[98] and another that asserts comprehensive review under state jurisdiction.[99]

1. County Rule

Advocates of county "home rule"[100] believe the counties are acting within the letter of H.R.S. chapter 205 when permitting developments like Keopuka on agricultural land.[101] Further, they argue that H.R.S. chapter 205 does not sanction LUC inquiry into the merits of a development proposed on agricultural land.[102] As well, advocates submit that H.R.S. chapter 205 does not establish requisite levels of agricultural activity for agricultural land,[103] by

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[97] See HAW. REV. STAT. § 205.

[98] *See generally* testimony on H.B. 2662, H.D. 1, submitted to Senate Committee on Finance, Hawai'i State Legislature (Feb. 22, 2002). Among the proponents of county jurisdiction under H.R.S. chapter 205 are the Land Use Research Foundation, Hawai'i Leeward Planning Conference, the University of Hawai'i at Manoa College of Tropical Agriculture and Human Resources, and Law Professor David Callies.

[99] Among the proponents of state jurisdiction are the Land Use Commission, the Office of Planning, and the Hawai'i Chapter of the Sierra Club. *See generally* testimony on H.B. 2662, H.D. 1, submitted to Senate Committee on Finance, Hawai'i State Legislature (Feb. 22, 2002).

[100] "Home rule" is the idea that county decision-making should be shown deference by the state, given the counties' enumerated powers under H.R.S. chapter 205 and their familiarity with local issues. Interview with Tony Ching, *supra* note 20.

[101] Interview with David Callies, *supra* note 49.

[102] *Id.*; *see also In re Sierra Club*, *supra* note 3, at 13. In that case, the developer and the County of Hawai'i both argued that "the [LUC] lacks subject matter jurisdiction over a petition for a declaratory ruling [with respect to agricultural land] because [H.R.S. section 205-12] provides the counties with the discretionary power to determine and enforce land use violations." *Id.* The LUC was not persuaded by this argument. "First, neither [party] referred to any legal authority indicating that enforcement authority is exclusively with the counties, as opposed to shared between the counties and the state." *Id.* Moreover, the LUC's order was "not an enforcement order assessing penalties or imposing injunctive relief," but was only "a declaratory ruling whether certain proposed uses [were] permitted on agricultural lands." *Id.* *See infra* note 129 for discussion on the significance of a declaratory ruling.

[103] Interview with David Callies, *supra* note 49. One commentator notes that under H.R.S. chapter 205, "[r]esidential dwellings are allowed in agricultural districts provided some minimal farming activity is associated with the residence, which in Hawaii may mean only the growing

what means farming revenue is to be obtained,[104] or whether farming revenue needs to be a principle source of income for individuals occupying a farm dwelling on agricultural land.[105] While parties may disagree with the propriety of agricultural development like Keopuka, H.R.S. chapter 205 nonetheless grants the counties ultimate discretion over agricultural land.[106]

2. State Rule

The other school of thought emphasizes state control of the agricultural district. Advocates of state rule believe that "prime agricultural lands are statewide resources which are not adequately managed by local governments."[107] In their mind, "state authority is less subject to the political forces that surround local city councils."[108] To this end, advocates argue that county "land development control is insufficiently sensitive to the . . . consequences" of its land use decisions.[109]

More specifically, advocates of state rule feel that "the [LUC] has the authority and duty to scrutinize all major development projects proposed within the State Agricultural District."[110] Advocates view the counties' authority under H.R.S. chapter 205 to "further define" uses and services accessory to agriculture is limited by the requirement that such further definition nevertheless be consistent with the intent and provisions of H.R.S. chapter 205.[111] Advocates argue that affording Keopuka-like developments only county assessment and permitting them in the agricultural district contradicts the "intent and spirit" of the land use law.[112] Moreover, under

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of fruit trees." MANDELKER, *supra* note 50, at 281.

[104] Interview with David Callies, *supra* note 49. The collectivized agricultural systems associated with some of these developments, where income from agricultural production on one or more parcels is pooled and shared, are thought to be perfectly legal under a strict reading of H.R.S. chapter 205. *Id.*

[105] *Id.*

[106] *Id.*

[107] G. Kem Lowry, Jr., *Evaluating State Land Use Control: Perspectives and Hawaii Case Study*, 18 URB. L. ANN. 85, 86 (1980).

[108] *Id.* at 87.

[109] *Id.* at 85-86.

[110] In re Petition for Rulemaking to Protect the Integrity of Agricultural Land, No.AR&R01-15 (Haw. Land Use Cmm'n May 7, 2001) (testimony of the Hawai'i State Office of Planning at 3).

[111] *In re Sierra Club*, *supra* note 3, at 20-22. "The phrase 'further define' [in H.R.S. section 205-5(b)] implies a limited authority granted to the counties to specify additional permissible accessory agricultural uses by way of a zoning ordinance consistent with the broad parameters otherwise set forth by [H.R.S. chapter 205]." *Id.* at 21.

[112] *See Office of Planning Testimony*, *supra* note 2, at 5-6.

H.R.S. section 205-12, counties arguably have an affirmative duty to disapprove of inappropriate agricultural subdivisions.[113]

While the debate between these two schools of thought continues, a body of LUC and Third Circuit Court decisions exists on point. Hawai'i Supreme Court decisions favoring comprehensive review of development by a reviewing agency reinforce the conclusions reached by the LUC and the Third Circuit Court. The following discussion addresses each in turn and extracts principles on which to base amendment to H.R.S. chapter 205.

IV. HAWAI'I ADMINISTRATIVE AND JUDICIAL DECISIONS FAVOR COMPREHENSIVE REVIEW OF DEVELOPMENT

Citizens for the Protection of the North Kohala Coastline v. County of Hawai'i[114] recently presented the Hawai'i Supreme Court with a luxury agricultural subdivision similar to Keopuka. The development in *Citizens for North Kohala* involved "a hotel, residential subdivision, 18-hole golf course, tennis facilities, and other related site improvements and infrastructure."[115] The project was situated on 490 acres of agricultural land.[116] Of this land, only 14.5 acres were reclassified, by the County of Hawai'i, to urban for the 240-unit hotel.[117] The plaintiffs in *Citizens for North Kohala* alleged, in part, that: (1) the County of Hawai'i wrongfully failed to allow for proper review of the project by the LUC as required by H.R.S. section 205; and (2) that the County

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[113] *See* HAW. REV. STAT. § 205-12 (2001); Haw. Op. Att'y Gen. No. 75-8, *supra* note 73; Kelly v. 1250 Oceanside Partners, Civ. No. 00-1-0192K, Order Granting in Part and Denying in Part Plaintiff's Motion for Partial Summary Judgment at 8 (Oct. 12, 2001) (3d Cir. Ct., Haw.); *Office of Planning Testimony*, *supra* note 2.

[114] 91 Hawai'i 94, 979 P.2d 1120 (1999). The development was permitted entirely through the County of Hawai'i. *Id.* at 96, 979 P.2d at 1122; *Office of Planning Testimony*, *supra* note 2, at Exhibit 4. It was permitted even though the County of Hawai'i General Plan called for open space in that region and a concentration of resort development at already established resort nodes, like Waikoloa and Mauna Lani. *See Office of Planning Testimony*, *supra* note 2, at Exhibit 4. The Office of Planning and State Senator A. Leiomalama Solomon voiced strong concern that the development was an inappropriate use of agricultural land. *Id.*

[115] *Citizens for N. Kohala*, 91 Hawai'i at 96, 979 P.2d at 1122. The 490 acre project involved a 240-unit hotel, an agricultural subdivision with 125-150 lots, an 18-hole golf course, tennis facilities and related site improvements and infrastructure; almost entirely in the state agricultural district. *Office of Planning Testimony*, *supra* note 2, at Exhibit 4. Of the 490 acres, only 14.5 acres were reclassified from agricultural to urban—through Hawai'i County—with the rest of the acreage remaining in the agricultural district. *Citizens for N. Kohala*, 91 Hawai'i at 107, 979 P.2d at 1133; *Office of Planning Testimony*, *supra* note 2, at Exhibit 4.

[116] *See Office of Planning Testimony*, *supra* note 2, at Exhibit 4.

[117] *Id.* at Exhibit 4.

acted *ultra vires*[118] in granting a 14.5 acre urban boundary amendment given the overall scope of the project.[119] The Third Circuit Court granted a motion for summary judgment in favor of the county and the developer, and plaintiffs appealed.[120]

On appeal, plaintiff-appellants asked the Hawai'i Supreme Court to decide only the second issue raised at the trial court level; namely, whether "the circuit court erred in concluding, as a matter of law, that the Hawai'i County Council properly processed [the developer's] boundary amendment because the land area to be redistricted was fifteen acres or less."[121] Narrowed in this manner, the court viewed the issue as one of strict statutory construction,[122] holding that "inasmuch as H.R.S. § 205-3.1 requires county review of [the developer's] 14.5+- acre change of zone request, the circuit court did not err in concluding that the Hawai'i County Council properly approved [the developer's] Boundary Amendment."[123]

Citizens for North Kohala did not address the paramount issue of whether Hawai'i County should have deferred the project's assessment to the LUC. The supreme court's silence underscores the need for a definitive rule on what perspective—comprehensive or piecemeal — to apply to agricultural subdivisions. A body of LUC and circuit court decisions speak directly to this issue, while Hawai'i Supreme Court decisions support their conclusions.

A. Land Use Commission Decisions

In re Sierra Club[124] gave the LUC the opportunity to address an urban-type residential community proposed on agricultural land. In that case, petitioners sought a declaratory order[125] that Keopuka merited review by the LUC under

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[118] *Ultra vires* means "in excess of power; that which is beyond the power authorized by law for an entity." STEVEN H. GIFIS, BARRON'S LAW DICTIONARY 529 (4th ed. 1996).

[119] *Citizens for N. Kohala*, 91 Hawai'i at 96-97, 107, 979 P.2d at 1122-23, 1133.

[120] *Id.* at 97-98, 979 P.2d at 1123-24.

[121] *Id.* at 107, 979 P.2d at 1133. On appeal, plaintiff-appellants did not ask the Hawai'i Supreme Court, as it had the trial court, to rule on whether the County of Hawai'i wrongfully failed to allow for proper review of the project by the LUC as required by H.R.S. chapter 205. E-mail from Carl C. Christensen, Attorney, Native Hawaiian Legal Corp. (Sept. 18, 2002) (on file with author).

[122] "Because our sole duty is to give effect to a statute's plain and obvious meaning, . . . we are not at liberty to circumvent H.R.S. chapter 205's express mandate." *Citizens for N. Kohala*, 91 Hawai'i at 107, 979 P.2d at 1133 (citations omitted).

[123] *Id.* at 107, 979 P.2d at 1133.

[124] *In re Sierra Club*, *supra* note 3.

[125] "Any interested person may petition an agency for a declaratory order as to the applicability of any statutory provision or of any rule or order of the agency. . . . Orders disposing of petitions in such cases shall have the same status as other agency orders." HAW. REV. STAT. § 91-8 (2001).

a boundary amendment proceeding pursuant to H.R.S. chapter 205. In its declaratory ruling, the LUC concluded, among other things, that a project's components need to be "assessed as a whole, not piecemeal."[126] Viewing the components of Keopuka in their entirety, the LUC reasoned that the project "has all the characteristics we normally consider urban: it is a 600+/- acre luxury resident resort whose essential features are framed around a golf course and other amenities, rather than on farming or agricultural activities."[127] Given the project's overall urban nature, the LUC determined it an impermissible use of agricultural land that would require an urban boundary amendment—through the state—to proceed.[128]

B. Third Circuit Court Decisions

The Third Circuit Court upheld the LUC's *In re Sierra Club* declaratory order in *Pacific Star, L.L.C. v. The Sierra Club*.[129] The court did not "find that the LUC misread the State's land use laws when it adopted a comprehensive view and declined to adopt Pacific Star's component-by-component narrow analytical thesis or segmented approach for assessing its Keopuka Lands project against [H.R.S. section 205's] provisions."[130] The court noted that "[n]o reported decision or statute precludes the comprehensive approach the LUC took, or requires the LUC to assess the project by its segments or individual elements, notwithstanding the project's master-planned basis."[131]

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[126] *In re Sierra Club*, *supra* note 3, at 18. The LUC explained:

> Developer would have us examine each component of the project, *e.g.*, the single-family residences, the golf course, the large-sized [upslope] lots, and conclude that because each component as a stand alone development might be permitted, the entire development would also be permitted. We decline to adopt this narrow analytical thesis . . . . The project must be assessed as a whole, not piecemeal.

Id. (internal quotes omitted).

[127] *Id.* at 18-19.

[128] *Id.* at 17-18.

[129] Civ. No. 00-1-0208K, Findings of Fact, Conclusions of Law, Order (July 2, 2001) (3rd Cir. Ct., Haw.). It bears noting that a declaratory order is not an enforcement order assessing penalties or imposing injunctive relief. *In re Sierra Club*, *supra* note 3, at 13. Its "findings and conclusions can have no preclusive effect until [an affected party] has been given the opportunity to fairly and fully litigate the statute's applicability to [their] property." *Pac. Star* at 16. "Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced." HAW. REV. STAT. § 91-14(g) (2001). "An order issued after a de novo hearing will be binding on [the affected party]." *Pac. Star* at 16. The developer of Keopuka Lands has since withdrawn its proposal and is looking into other options for the property.

[130] *Pac. Star* at 19 (internal quotes and brackets omitted).

[131] *Id.*

Further, the court noted that the Hawai'i Supreme Court similarly interprets the land use law to favor a "broad view" of land and resource management.[132]

The Third Circuit Court's holding in *Kelly v. 1250 Oceanside Partners*[133] further affirms the decision it reached in *Pacific Star*. *1250 Oceanside* presented the court with the question of whether the Hokulia development in South Kona, an agricultural subdivision similar to Keopuka,[134] was a permissible use of agricultural land.[135] On a motion for summary judgment, the court addressed, among other things, the propriety of an isolated urban boundary amendment granted by Hawai'i County for 14.854 acres within the agricultural district.[136] The court held that such a solitary urban-use was "not in accord with the general plan," was inconsistent with the surrounding agricultural district, and was therefore invalid spot zoning.[137]

More importantly, the court criticized Hawai'i County's failure to take a preventive approach to curbing an improper agricultural development pursuant to its enforcement duties under H.R.S. section 205-12.[138] It chastised the county for "parcel[ing] out and rezon[ing] from agricultural to urban" the 14.854-acre parcel when it had notice of the entire 1,540 acre development.[139] Instead, "[t]he county should have considered the project as a whole[,] including the surrounding agricultural district boundaries within the comprehensive general plan."[140] The court advised that the county should disprove of a proposed subdivision that does not appear related to agriculture and that seems to be an attempt to circumvent the LUC boundary amendment proceedings.[141]

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[132] *Id.*

[133] Kelly v. 1250 Oceanside Partners, Civ. No. 00-1-0192K, Order Granting In Part And Denying In Part Plaintiff's Motion For Partial Summary Judgment (3rd Cir. Ct., Haw.) (Oct. 12, 2001).

[134] *See supra* note 79 for a description of the Hokulia project.

[135] *See generally 1250 Oceanside.*

[136] *Id.* at 2.

[137] *Id.* at 10. "Spot zoning is 'an arbitrary zoning action by which a small area within a large area is singled out and specially zoned for a use classification different from and inconsistent with the classification of the surrounding area and not in accord with [a] comprehensive plan.'" *Id.* (citing Lum Yip Kee v. City and County of Honolulu, 70 Haw. 179, 187, 767 P.2d 815, 820 (1989)).

[138] *1250 Oceanside* at 8; *see* Haw. Op. Att'y Gen. No. 75-8, *supra* note 73.

[139] *1250 Oceanside* at 9.

[140] *Id.*

[141] *Id.* at 8.

C. Hawai'i Supreme Court Decisions

Several Hawai'i Supreme Court decisions support a comprehensive review of large-scale developments.[142] Indeed, the Hawai'i Supreme Court is guided by the precept that "the overarching purpose of [H.R.S. chapter 205] is to protect and conserve natural resources and foster intelligent, effective, and orderly land allocation and development."[143]

The Hawai'i Supreme Court disfavors the permitting of large urban development in the agricultural district by special permit when a boundary amendment for the development is instead appropriate.[144] In *Neighborhood Board No. 24 v. State Land Use Commission*,[145] plaintiffs challenged a special permit, granted by the Honolulu Planning Commission and approved by the LUC, for "a major amusement park" on 103 acres in the agricultural district.[146]

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[142] As discussed above, the Hawai'i Supreme Court was once presented with a proposed development similar to Keopuka in *Citizens for the Protection of the N. Kohala Coastline v. County of Hawai'i*, 91 Hawai'i 94, 979 P.2d 1120 (1999), though it did not decide the merits of the entire proposed development as the LUC did in *In re Sierra Club*. *See supra* notes 114-23 and accompanying text for discussion of *Citizens for North Kohala*.

[143] Curtis v. Zoning Bd. of Appeals, 90 Haw. 384, 396, 978 P.2d 822, 834 (1999) (internal quotes omitted). The court noted:

> The stated purpose of the [land use] law is, *inter alia*:
>
> > to *protect and conserve* through zoning the urban, agricultural and conservation lands within all the counties. A coordinated, balanced approach not only within each county but an overall balance of statewide land needs for economic growth is essential to:
> >
> > (1) *Utilize the land resources in an intelligent, effective manner* based upon the capabilities and characteristics of the soil and the needs of the economy;
> >
> > (2) *Conserve* forests, water resources and land, particularly to *preserve* the prime agricultural lands from unnecessary urbanization;
> >
> > (3) *State the allocation of land for development in an orderly plan* to meet actual needs and minimize costs of providing utilities and other public services . . . .

Id. (citing H.R. STAND. COMM. REP. NO. 395, 1st Leg., Gen. Sess. (Haw. 1961), *reprinted in* 1961 HAW. HOUSE J. 855, 855-56) (emphasis in original).

Similarly, the court in *Neighborhood Bd. v. State Land Use Comm'n*, 64 Haw. 265, 639 P.2d 1097 (1982), recognized that H.R.S. 205 intends to "stage the allocation of land for development in an orderly" fashion, and to redress the problem of "inadequate [land use] controls which . . . caused many of Hawaii's limited and valuable lands" to succumb to development that lacked long-term benefit. *Neighborhood Bd.*, 64 Haw. at 272-73, 639 P.2d at 1103 (internal citations omitted).

[144] *Neighborhood Bd.*, 64 Haw. at 272-73, 639 P.2d at 1103.

[145] *Id.*

[146] *Id.* at 266, 639 P.2d at 1099. "As proposed, the park was to consist of cultural theme rides, restaurants, fast food shops, retail stores, exhibits, theaters, an amphitheater, a bank, nurseries, twelve acres of parking, a sewage treatment plant, and other related support services." *Id.* at 266, 639 P.2d at 1099. The park was designed to attract 1.5 million people annually to the Waianae Coast of West O'ahu. *Id.* at 272, 639 P.2d at 1103. *See supra* section II.B.3 for

Applying special permit criteria to the proposed park left the court with "a definite and firm conviction that the [proposed park] fail[ed] to comply with the first and critical requirement that the proposed use . . . promote the effectiveness and objectives of [H.R.S. chapter 205]."[147] The court thereafter invalidated the special permit, saying that an urban boundary amendment under H.R.S. chapter 205 was the appropriate course of action for such a development.[148]

In reaching its decision, the *Neighborhood Board* court discussed at length the merits of a special permit vis-à-vis a district boundary amendment.[149] Notably, the court stated that "circumventing . . . boundary amendment procedures to allow the ad hoc infusion of major urban uses into agricultural districts" is against the legislative intent of H.R.S. chapter 205.[150] Arguably, this condemned practice is precisely what developers employed in *In re Sierra Club, 1250 Oceanside* and *Citizens for North Kohala*, when they sought a boundary amendment for only a fraction of their entire project. Further, the "extensive procedural protections of the boundary amendment" proceeding are in place specifically to guard against "piecemeal changes to the zoning scheme."[151] The court's rationale speaks directly against the piecemeal changes to the zoning scheme that occurred in *In re Sierra Club, 1250 Oceanside* and *Citizens for North Kohala*, when the County of Hawai'i granted boundary amendments in the agricultural district for solitary, sub fifteen-acre parcels that were integral parts of much larger projects.[152]

The Hawai'i Supreme Court has spoken directly on how to assess a project in the context of an environmental assessment ("EA") under H.R.S. chapter 343, the Hawai'i Environmental Protection Act ("HEPA").[153] *Kahana Sunset*

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discussion of the special permit process. The subject special permit application in this case was for a parcel larger than fifteen acres; therefore it required final approval from the LUC.

[147] *Neighborhood Bd.*, 64 Haw. at 270, 639 P.2d at 1101. *See supra* note 67 for the enumerated special permit criteria.

[148] *Id.* at 273, 639 P.2d at 1103.

[149] *Id.* at 269-73, 639 P.2d at 1101-03. The court noted:

> Unlike a district boundary amendment, which is analogous to a rezoning in its effect of reclassifying land, . . . a special permit allows the owner to put his land to a use expressly permitted by ordinance or statute on proof that certain facts and conditions exist, without altering the underlying zoning classification [the way a boundary amendment does]. Its essential purpose . . . is to provide landowners relief in exceptional situations where the use desired would not change the essential character of the district nor be inconsistent therewith.

Id. at 270-71, 639 P.2d at 1102 (citations omitted).

[150] *Id.* at 273, 639 P.2d at 1103.

[151] *Id.* at 272, 639 P.2d at 1102-03.

[152] The court in *Neighborhood Bd.* held that a boundary amendment was required for the *entire* 105 acre development, not part of it. *Id.* at 272-73, 639 P.2d at 1103.

[153] Kahana Sunset Owners v. County of Maui, 86 Hawai'i 66, 947 P.2d 378 (1997).

Owners Association v. County of Maui[154] asked the supreme court to determine, among other things, whether an EA triggered by a proposed project's drainage system[155] needed to consider only the drainage system or the entire project.[156] The court held that when a component of a proposed development triggers HEPA and therefore requires an EA, the EA must consider the entire proposed development and not just the component.[157] The court observed that the applicable legal standard, Hawai'i Administrative Rules section 11-200-7, provides that "'[a] group of actions proposed by an agency or an applicant shall be treated as a single action when: (1) The component actions are phases or increments of a larger total undertaking; or (2) An individual project is a necessary precedent for a larger project.'"[158] Applying this standard, the court determined that the proposed drainage system was "a necessary precedent for the development," had "no independent utility," and "would not be constructed except as part of the larger development."[159] In the court's view, "[i]solating only that particular component of the development for environmental assessment would be improper segmentation of the project."[160]

The decision in *Kahana Sunset*, that an entire project must be considered by an EA when an individual component triggers HEPA, was followed by *Citizens for North Kohala*.[161] In *Citizens for North Kohala*, the Hawai'i Supreme Court spoke directly on what perspective to apply to an agricultural subdivision in the context of an environmental assessment.[162] The relevant

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[154] *Id.*

[155] The drainage system was to lie beneath a public roadway, thus constituting "use of state or county lands, which is within the class of actions that triggers HEPA." *Kahana Sunset*, 86 Haw. at 71, 947 P.2d at 383 (internal quotes and citation omitted).

[156] *Id.* at 74, 947 P.2d at 386.

[157] *Id.*

[158] *Id.* (citing to HAW. ADMIN. RULES § 11-200-7 (1996)). HAW. ADMIN. RULES section 11-200-7 provides:

> A group of actions proposed by an agency or an applicant shall be treated as a single action when:
>
> (1) The component actions are phases or increments of a larger total undertaking;
>
> (2) An individual project is a necessary precedent for a larger project;
>
> (3) An individual project represents a commitment to a larger project; or
>
> (4) The actions in question are essentially identical and a single statement will adequately address the impacts of each individual action and those of the group of actions as a whole.

Id.

[159] *Kahana Sunset*, 86 Hawai'i at 74, 947 P.2d at 386 (internal quotes omitted).

[160] *Id.*

[161] Citizens for the Protection of the N. Kohala Coastline v. County of Hawai'i, 91 Hawai'i 94, 979 P.2d 1120 (1999).

[162] Recall that the project in *Citizens for N. Kohala* was analogous to Keopuka and it took place almost entirely on agricultural land. *See supra* notes 116-118 and accompanying

issue in this case was whether two underpasses below a public highway triggered an EA; and if so, whether an EA was timely.[163] Citing to *Kahana Sunset*, the court found it "clear that construction of two underpasses under a state highway constitutes use of state lands for purposes of [HEPA]."[164] Still, the developer argued that because the underpasses were only in the development stage, the earliest practicable time for an EA would be when it submitted detailed plans for their approval.[165] The court considered that "in its numerous permit applications and reports, [the developer] has consistently proposed the two underpasses as integral parts of the development project."[166] Therefore, the court held that the action for purposes of an EA under HEPA was the *entire* proposed agricultural subdivision.[167]

The Hawai'i Supreme Court likewise favors wholesale review of a project's impacts for purposes of securing a special management area ("SMA") permit under Hawai'i's Coastal Zone Management Act, H.R.S. chapter 205A.[168] *Hawaii's Thousand Friends v. City and County of Honolulu* presented the issue of whether the proposed demolition of several structures at a beach park, as part of a plan to transform the park into an ocean recreation center, required an SMA permit.[169] The supreme court held that because the proposed demolition of the structures was "part of a larger project, the cumulative impact of which may have a significant environmental or ecological effect on the special management area," the proposed demolition was a "development" that required a SMA permit.[170]

The logic employed by the Hawai'i Supreme Court in *Kahana Sunset*, *Citizens for North Kohala* and *Hawaii's Thousand Friends* lends itself readily to defining an approach to Keopuka-like developments. Each case holds that the counties cannot treat the integral components of a project in isolation when properly considering the project's aggregate impact.[171] In light of this precedent, the current practice of segmenting the integral components of an agricultural subdivision for separate and discreet consideration is irreconcilable.

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discussion.

[163] *Citizens for N. Kohala*, 91 Hawai'i at 103, 979 P.2d at 1129.

[164] *Id.*

[165] *Id.*

[166] *Id.* at 104, 979 P.2d at 1130.

[167] *Id.*

[168] Hawaii's Thousand Friends v. City and County of Honolulu, 75 Haw. 237, 245-49, 858 P.2d 726, 731-33 (1993).

[169] *Id.* at 238-39, 858 P.2d at 728.

[170] *Hawaii's Thousand Friends*, 75 Haw. at 246-47, 858 P.2d at 731 (citing to HONOLULU, HAW., LAND USE ORDINANCE § 25-1.3(3) (1990)).

[171] *See supra* notes 157, 167, 170 and accompanying text for holdings.

Hawai'i Supreme Court decisions advocating comprehensive assessment of a proposed development reinforce the "as a whole, not piecemeal" approach applied by the LUC in *In re Sierra Club*[172] and affirmed by the Third Circuit Court in *Pacific Star*.[173] They also confirm the observation made by the Third Circuit Court in *Pacific Star* that "the [Hawai'i] Supreme Court [believes that] the State's land use laws encourage [a] 'broad view'" of land and resource management.[174] This body of administrative and judicial decisions provides a sound basis[175] for proposing an amendment to H.R.S. chapter 205 that will address the problem of "urban type residential communities in the guise of agricultural subdivisions."

V. H.R.S. CHAPTER 205 MUST EXPLICITLY REQUIRE THAT AGRICULTURAL SUBDIVISIONS BE VIEWED AS A SUM OF THEIR COMPONENTS

The current subterfuge of H.R.S. chapter 205 accomplished by Keopuka-like developments must stop. An amendment to H.R.S. chapter 205 is necessary to address the lack of comprehensive state review being applied to urban-type residential developments in the agricultural district.[176] In current form, H.R.S. chapter 205 does not explicitly require the counties to submit to the LUC a development that merits a state boundary amendment proceeding.[177] Although the counties have duties to enforce the restrictions and conditions of the agricultural district, and to report to the LUC all violations,[178] the requisite scope of review to apply to a project—which is intrinsic to determining violations and appropriate enforcement measures—is currently unsettled.[179]

As it stands, the LUC has no direct vehicle to enforce its authority to determine whether uses permitted by the counties are ultimately compatible with the agricultural district.[180] The state can only request[181] appropriate assessment of urban-type projects in the agricultural district, hoping the counties will respond in light of their duties.[182] Under the present system, a

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[172] *In re Sierra Club*, *supra* note 3, at 18.

[173] Pac. Star, L.L.C. v. Sierra Club, Civ. No. 00-1-0208K, Findings of Fact, Conclusion of Law, Order at 19 (July 2, 2001) (3d Cir. Ct., Haw.).

[174] *Pac. Star* at 19 (referring to Curtis v. Zoning Bd. of Appeals, 90 Hawai'i 384, 396, 978 P.2d 822, 834 (1999)).

[175] There is no contrary precedent in Hawai'i.

[176] This proposed amendment proceeds on the assumption that developers will continue to avoid merited LUC review.

[177] *See generally* HAW. REV. STAT. § 205 (2001).

[178] HAW. REV. STAT. § 205-12 (2001).

[179] *See supra* section III.B for discussion of opposing viewpoints.

[180] *In re Sierra Club*, *supra* note 3, at 12.

[181] *See Office of Planning Testimony*, *supra* note 2, at Exhibits 1-7.

[182] *See* HAW. REV. STAT. § 205-12 (2001); Haw. Op. Att'y Gen. No. 75-8, *supra* note 73.

declaratory order, like that issued in *In re Sierra Club*, appears to be the State's and the public's only relief to ensure that a large-scale development like Keopuka is appropriately reviewed.[183] In light of this, and the vagaries surrounding H.R.S. section 205-12's enforcement provisions, amending H.R.S. chapter 205 is necessary to trigger comprehensive review and assure state input when merited.[184]

A. Proposed Language To Amend H.R.S. Chapter 205

A new provision should be added to H.R.S. chapter 205 that requires comprehensive assessment of the components of an agricultural subdivision – as performed by the LUC in *In re Sierra Club*,[185] as approved of by the Third Circuit Court in *Pacific Star*,[186] and as advised by the Hawai'i Supreme Court decisions discussed earlier in this comment.[187] Such language would be in accordance with the state's firm commitment to "conserve and protect agricultural lands"[188] and to provide state oversight to large parcels of agricultural land.[189] An amendment would also be in accordance with the counties' existing obligation to enforce the restrictions and conditions that apply to agricultural districts and to "report to the commission all violations."[190]

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[183] *See* HAW. ADMIN. RULES § 91-8 (2001).

[184] There might be concern of overburdening the LUC. The reality is, in recent years, only one agricultural subdivision received approval on the island of Hawai'i, of a "modest" twenty-seven acres in size. Most large landowners that might wish to undertake a large scale development are impeded by financial and infrastructure considerations. Telephone Interview 1 with Chris Yuen, *supra* note 87.

[185] *In re Sierra Club*, *supra* note 3, at 18.

[186] Pac. Star, L.L.C. v. Sierra Club, Civ. No. 00-1-0208K, Findings of Fact, Conclusion of Law, Order at 19 (July 2, 2001) (3d Cir. Ct., Haw.).

[187] *See supra* notes 157, 167, 170 and accompanying text for holdings.

The LUC was recently presented with a petition for rulemaking that proposed an amendment to HAR § 15-15-25. *See Petition for Rulemaking*, *supra* note 2. The proposed rule provided, in part:

> In assessing whether a project is agricultural or not, a project shall be examined as a whole, not piecemeal. A group of proposed actions shall be treated as a single action. Multiple components of a project shall not be created or divided at the inception of a project so as to evade the requirements of this chapter.

Id. at 3. Although the LUC denied the petition on evidentiary grounds, the commission acknowledged that "the petition raises issues that are worthy of consideration." In re Petition for Rulemaking to Protect the Integrity of Agricultural Land, No. AR&R01-15 (Haw. Land Use Comm'n May 7, 2001) (decision and order at 2).

[188] *See* HAW. CONST. art. XI, § 3; HAW. REV. STAT. § 205 (2001).

[189] *See* SEN. STAND. COMM. REP. NO. 580, 1st Leg., Gen. Sess. (1961), *reprinted in* 1961 HAW. SEN. J. 883.

[190] HAW. REV. STAT. § 205-12 (2001).

The LUC's "as a whole"[191] review of the Keopuka project's components set a precedent that should apply to all agricultural subdivisions that exceed 15 acres.[192] This principle should be incorporated into H.R.S. chapter 205 by amendment to better serve the state's commitment to protect agricultural land. An amendment to H.R.S. chapter 205 could read as follows:

> H.R.S. section 205-__. **Scope of Review Applied to Agricultural Subdivisions.**
>
> A project proposed in the agricultural district shall, at the earliest practicable time, be addressed as a sum of its components to determine if, as a whole, it is a permissible use of agricultural land. A project in the agricultural district shall not be segmented in such a manner that the project evades the provisions of this chapter. For purposes of this section, an individual component is considered part of a larger project if it is a necessary precedent for the project; if it has no independent utility; and/or if it would not be constructed except as part of the larger project. If, when considered as a whole, a project is an inappropriate use of agricultural land under this chapter, the county, per its enforcement duties set forth in section 205-12, shall notify the land use commission of such project and shall defer the project to the commission for its assessment.
>
> The land use commission shall have the authority to hear a petition for a declaratory ruling on a county land use decision involving lands in the agricultural district, as to the consistency of the action with the policies and standards of this chapter and the rules adopted by the commission pursuant to this chapter. Any interested person may petition the land use commission for a declaratory ruling under the rules established by the commission. Notwithstanding any other law to the contrary, the commission shall conduct a hearing on the petition. The commission's final action on a petition filed under this subsection shall be subject to judicial review pursuant to section 91-14.[193]

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[191] *In re Sierra Club*, *supra* note 3, at 18.

[192] "'[J]udicial deference to agency expertise is a guiding precept where the interpretation and application of broad and ambiguous statutory language by an administrative tribunal are the subject of review.'" Kelly v. 1250 Oceanside Partners, Civ. No. 00-1-0192K, Order Granting in Part and Denying in Part Plaintiff's Motion for Partial Summary Judgment at 8 (Oct. 12, 2001) (3d Cir. Ct., Haw.) (citing In re Water Use Permit Applications, 94 Hawai'i 97, 145, 9 P.3d 409, 457 (2000)).

[193] The above proposed amendment is drawn from the following sources: *In re Sierra Club*, *supra* note 3, at 18; *Pac. Star* at 19; *1250 Oceanside* at 9; Kahana Sunset Owners Ass'n v. County of Maui, 86 Hawai'i 66, 74, 947 P.2d 378, 386; HAW. REV. STAT. § 205-12 (2001); *Petition for Rulemaking*, *supra* notes 3, 180; H.R. 2662, H.D. 1, § 7, 21st Leg., Reg. Sess. (2002); *see supra* section II.B discussing intent of H.R.S. chapter 205. A remaining consideration is devising criteria upon which to base decisions made pursuant to this section. For an idea of what such criteria might look like, see *In re Petition For Rulemaking*, *supra* note 2, at 3.

This new section provides the county and the state with a more distinct course of action when presented with a development that might be inappropriate in the agricultural district. The counties would be required, in more certain terms, to defer agricultural projects to the LUC that are more appropriate for state review. Also, the new section sets out how interested parties can challenge county land use decisions affecting agricultural land under the law.

B. Benefits of H.R.S. Chapter 205 Amendment

The foremost benefit of requiring comprehensive assessment of agricultural subdivisions under an amendment to H.R.S. chapter 205 is ensuring that the intent and purpose of chapter 205[194] and Article 11, section 3[195] are served. Arguably, their dual aims are frustrated when a development like Keopuka is permitted on agricultural land. Another benefit of an amendment is to afford luxury agricultural subdivisions comprehensive state and public review under the LUC's quasi-judicial boundary amendment proceeding, as opposed to the county's quasi-legislative zoning amendment proceeding.[196] The state's quasi-judicial proceeding affords broader exercise of due process rights to community members, imparts statewide perspective to a project, creates an appealable record, and allows for principled decision making by term-appointed commissioners.[197] A final benefit of such an amendment would be the promotion of administrative and judicial efficiency.[198]

VI. CONCLUSION

Hawai'i is a state committed to conserving and protecting agricultural land. This commitment is embodied in Article 11, section 3 of the Hawai'i State Constitution and H.R.S. chapter 205, Hawai'i's land use law. In spite of this commitment, urban type residential communities are permitted piecemeal on agricultural land by county government. This practice is possible because H.R.S. chapter 205 does not explicitly require that development be reviewed comprehensively and deferred to the LUC when appropriate. This practice is

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[194] Recall that the intent of H.R.S. chapter 205 is to preserve agricultural land and prevent urban sprawl. *See supra* section II.B and accompanying text.

[195] *See supra* section II.A and accompanying text.

[196] *See supra* note 92 and accompanying text for discussion of quasi-judicial proceedings.

[197] *Id.*

[198] Indeed, H.R.S. chapter 205 was revised several times in interests of administrative efficiency. *See supra* notes 59, 65, 66 and accompanying text. In addition, the Hawai'i Supreme Court "recognize[s] the importance of the efficient use of judicial resources." Moss v. Am. Int'l Adjustment Co., 86 Hawai'i 59, 65, 947 P.2d 371, 377 (1997).

untenable under the spirit and intent of Article 11, section 3 of the Hawai'i State Constitution and H.R.S. chapter 205. An amendment to H.R.S. chapter 205 requiring comprehensive review of a project's components, and deferral to the LUC when appropriate, is necessary to prevent further incidence of this type of inappropriate agricultural development. Such an amendment would be consonant with Article 11, section 3, H.R.S. chapter 205, LUC decisions, circuit court decisions and Hawai'i Supreme Court precedent.

Nathan Pohākea Roehrig[199]

[199] Class of 2003, William S. Richardson School of Law, University of Hawai'i. A big mahalo to all the individuals who answered my questions on this subject; to my editor, Shirley Garcia; and to Joseph Kotowski, whose direction helped a "good paper" become a "great paper."

Latchum v. United States: The Ninth Circuit's Four-Factor Approach to the *Feres* Doctrine

I. INTRODUCTION

On Wednesday, June 3, 1998, John R. Latchum, 33, was shot and killed while vacationing with his family in a rented beachfront cabin.[1] Latchum was investigating a disturbance outside in the parking lot when a group of eight youths confronted him.[2] One member of the group, a 17-year-old male, shot and killed Latchum with a .22 caliber pistol as he stood on the porch of his cabin.[3] Latchum left behind a wife and two children.[4]

Several months later, the investigation revealed that the landowner failed to provide adequate security for the cabin where Latchum and his family were staying.[5] Latchum's widow and children cannot sue, however, because the landowner was the federal government and John Latchum was a service member[6] on leave from his job as a UH-60 helicopter pilot in the U.S. Army.[7]

The Federal Tort Claims Act of 1946 ("FTCA") and judicial interpretation of the Act's purpose in *Feres v. United States*[8] have come under intense scrutiny in recent decades.[9] As tragic accidents continue to occur on government property, injured service members still have no remedy.[10] Because of the *Feres* doctrine, a service member cannot sue the federal government when the injury arises from activity incident to military service.[11]

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[1] Mary Adamski & Harold Morse, *17-year-old Charged in Waianae Murder*, HONOLULU STAR BULLETIN, June 10, 1998, http://starbulletin.com/98/06/10/news/story2.html.

[2] *Id. See also* Latchum v. United States, 183 F. Supp. 2d 1220 (D. Haw. 2001).

[3] Adamski & Morse, *supra* note 1.

[4] *Id.*

[5] *Latchum*, 183 F. Supp. 2d at 1222. Because the case was dismissed for lack of subject matter jurisdiction, the allegation of negligence was never resolved on the merits of the case. *Id.*

[6] A "service member" refers to any person on active or reserve duty in the Army, Navy, Marine Corps, Air Force or Coast Guard. John R. Latchum was a Chief Warrant Officer 2 on active duty in the U.S. Army. *Latchum*, 183 F. Supp. 2d at 1222.

[7] Adamski & Morse, *supra* note 1.

[8] 340 U.S. 135 (1950).

[9] William S. Myers, Comment, *The Feres Doctrine: Has it Created Remediless Wrongs for Relatives of Servicemen?*, 44 U. PITT. L. REV. 929 (1983).

[10] Although families receive no compensation from suit against the government, monies may be provided for the family through the Veteran's Benefits Act. *See generally* 38 U.S.C. § 1141 (2002) (discussing basic entitlement to compensation).

[11] *Feres*, 340 U.S. at 146.

This paper argues that the district court wrongfully applied the Ninth Circuit Court's four-factor test in *Latchum v. United States* by incorrectly concluding that the *Feres* bar applied.[12] Further, the four-factor test is an inadequate measure of the *Feres* doctrine's incident-to-service test because it does not correlate to the legislative intent of the FTCA or the three *Feres* rationales.[13] Consequently, the four-factor test has resulted in an inconsistent and exponential application of the *Feres* bar.

Part II delineates the history of the FTCA, evolution of the *Feres* doctrine, and relevant Ninth Circuit cases. Part III details the facts of the *Latchum* case and describes the holding and rationale for the court's decision. Part IV analyzes the application of the four-factor test in *Latchum*, exposes the resulting inconsistencies among cases, and demonstrates why the four-factor test cannot be reconciled with the legislative intent of the FTCA or the *Feres* rationales. Part V concludes that an alternative compensation system for the families of deceased service members will only result if the Supreme Court redefines the *Feres* doctrine. By allowing service members to sue the government, the Court will create an incentive for Congress to amend the FTCA.

II. BACKGROUND

A. The Feres Doctrine

The *Feres* doctrine states that no service member can sue the federal government for negligence if the injuries resulted from activity that arose or occurred "incident to service."[14] The doctrine was established in response to the enactment of the Federal Tort Claims Act of 1946.[15] Before enactment of the FTCA, recovery was unavailable to persons injured by employees of the federal government under the doctrine of sovereign immunity.[16] Recovery was only possible if the government consented to suit.[17] The FTCA was an attempt

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[12] *See* discussion *infra* Part IV.A.

[13] *See* discussion *infra* Part IV.B.

[14] *Feres*, 340 U.S. at 146.

[15] *Id.* at 138.

[16] *See, e.g.*, Hill v. United States, 50 U.S. (9 How.) 386, 389 (1850); *see also* John Postl, *Wrongful Death Action Against the United States Barred by the Sovereign Immunity Doctrine*, Koohi v. United States, 976 F.2d 1328 (9th Cir. 1992), 17 SUFFOLK TRANSNAT'L L. REV. 620 (1994).

[17] United States v. Sherwood, 312 U.S. 584, 587-88 (1941); *see also* Note, *Government Tort Liability*, 111 HARV. L. REV. 2009 (1998).

to waive the federal government's immunity from suit,[18] while reserving thirteen specified governmental activities where immunity is not automatically waived.[19]

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[18] 28 U.S.C. § 1346(b) (2002). Section (b)(1) provides:

Subject to the provisions of chapter 171 of this title, the district courts, . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Id.

[19] 28 U.S.C. § 2680 (2000). The exceptions include:

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs of excise or any other law enforcement officer, except that the provisions of this chapter and section 1346(b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer

. . . .

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States

. . . .

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: . . . .

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

Id.

Despite these exceptions, the Act is a broad waiver of sovereign immunity in the military context, that waives only those activities that arise out of combatant activities during time of war.[20] Strictly construed, this provision allows recovery for injuries arising out of non-combatant and peacetime military activities.[21] In 1950, however, the Supreme Court decided *Feres v. United States*, eliminating the potential benefits the FTCA conferred upon service members.[22] The *Feres* doctrine requires a court to determine if the service member's injuries arose out of or occurred in the course of activity "incident to [military] service."[23] If so, the court must dismiss the case for lack of subject matter jurisdiction.[24] The *Feres* decision effectively replaced the FTCA's express restrictions of "combatant" and "during time of war" with "incident-to-service," expanding what should have been a narrow exception to the FTCA's general waiver of immunity.[25]

Feres consolidated three cases involving active duty service members who were injured due to the negligence of the government.[26] The first case, *Feres v. United States*,[27] involved a soldier who burned to death in his barracks bed when a faulty heating plant caused the building to catch fire.[28] The second case, *Jefferson v. United States*,[29] involved a soldier who underwent an abdominal operation performed by Army surgeons.[30] During a subsequent operation, surgeons removed a "U.S. Army" towel eighteen inches wide by thirty inches long from his stomach.[31] In the third case, *Griggs v. United States*, another Army soldier died on the operating table at the hands of Army

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[20] *Id.*

[21] *Id.*

[22] Feres v. United States, 340 U.S. 135, 138 (1950).

[23] *Id.* at 146.

[24] Latchum v. United States, 183 F. Supp. 2d 1220, 1234 (D. Haw. 2001).

[25] *Feres*, 340 U.S. at 138.

[26] *Id.* at 136-37.

[27] Feres v. United States, 177 F.2d 535 (2d Cir. 1949).

[28] *Id.* The executrix of the estate alleged that the government negligently quartered Feres in barracks that were known to be unsafe and for negligent failure to maintain an adequate fire watch. *Id.* at 536. The Second Circuit affirmed the lower court's dismissal of the action and concluded that the FTCA did not assign liability to the United States in these types of cases. *Id.* at 538.

[29] Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949).

[30] *Id.* The second surgery occurred eight months later, after Jefferson had been discharged from active duty. *Id.* at 519. Jefferson alleged negligent failure to remove the towel and negligent medical treatment by the Army. *Id.* After finding negligence as a fact, the court reexamined the FTCA and determined that the United States had no liability under the Act. *Id.* The Fourth Circuit affirmed. *Id.* at 520.

[31] Feres v. United States, 340 U.S. 135, 137 (1950).

surgeons.[32] Consolidated as *Feres v. United States*,[33] the Supreme Court ruled against recovery for all three plaintiffs and established the Feres doctrine.[34]

In *Feres*, the Supreme Court addressed three rationales for barring the service members' claims against the government.[35] The first rationale relates to the "distinctly federal" character of the relationship between service members and the Government.[36] According to the Court, the relation between the armed forces and the government derives from federal sources and is governed by federal authority.[37] The statutory language of the FTCA holds the United States liable "in the same manner and to the same extent as a private individual under like circumstances."[38] The Court concluded that no federal law exists that recognizes a recovery under the facts of the *Feres* cases and therefore, the claimants were not entitled to relief under the FTCA.[39]

The first rationale was later rejected because no private individual has the power to raise an army or levy taxes similar to the federal government, thereby eliminating several of the Act's exceptions.[40] In *Stencel Aero Engineering Corporation v. United States*, the Supreme Court stated, "it makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to a serviceman."[41] The Court explained further, "We do not think that Congress, in drafting [the FTCA], created a new cause of action dependent on local law for service-connected injuries or death due to negligence."[42]

This rationale has lost vigor primarily for the reasons set forth in the dissent by Justice Scalia in *United States v. Johnson*.[43] Essentially, Justice Scalia argued that uniform non-recovery is as unjust as non-uniform recovery[44] and, although the Court has stressed the military's need for uniformity in its

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[32] Griggs v. United States, 178 F.2d 1 (10th Cir. 1949). The executrix of Griggs' estate alleged that unskilled and negligent surgeons caused her husband's death. *Id.* at 2. The Tenth Circuit allowed the suit, concluding that the FTCA applied to claims of active duty military personnel. *Id.* at 6.

[33] *Feres*, 340 U.S. at 143-45.

[34] *Id.*

[35] *Id.* at 145.

[36] *Id.* at 143.

[37] *Id.* at 144.

[38] 28 U.S.C. § 2674.

[39] *Feres*, 340 U.S. at 144.

[40] United States v. Johnson, 481 U.S. 681, 694 (1987) (Scalia, J., dissenting). *See also* Rayonier, Inc. v. United States, 352 U.S. 315, 319 (1957); Indian Towing Co. v. United States, 350 U.S. 61, 66-69 (1955).

[41] 431 U.S. 666, 672 (1977).

[42] *Feres*, 340 U.S. at 146.

[43] 481 U.S. at 692-703 (Scalia, J., dissenting).

[44] *Id.* at 696.

governing standards,[45] the Court has allowed civilians to recover for injuries caused by military negligence.[46] Additionally, the need for uniformity cannot apply only to the military and not to other federal government functions, such as the federal prison system.[47]

The second rationale addressed in *Feres* is that the Veteran's Benefits Act ("VBA") provides the sole remedy for the death and disability of service members.[48] The Court deferred to the statutory construction of the FTCA, stating that Congress did not intend service members to recover twice—under both the FTCA and the VBA.[49] Because no adjustment scheme or offset provision was included in or subsequently added to the FTCA, Congress could not have contemplated service member recovery under the FTCA.[50]

The VBA provides monies to disabled and deceased service members based on two criteria. First, the injury must have resulted from either a wartime or peacetime service-connected activity.[51] Second, the soldier's injury must not have resulted from his own willful misconduct or abuse of alcohol or drugs.[52] If the deceased soldier qualified for VBA compensation, his family is entitled to Dependency Indemnity Compensation,[53] life insurance,[54] and funeral expenses.[55] Although the VBA enumerates an elaborate payment scheme, judicial decisions do not evaluate entitlement amounts. Courts merely emphasize that the VBA is a no-fault compensation system, provides an upper limit of recovery for service-connected injuries, and is designed to avoid broad

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[45] *See, e.g., Stencel*, 431 U.S. at 672.

[46] *Johnson*, 481 U.S. at 696 (Scalia, J., dissenting); *see also* Indian Towing Co. v. United States, 350 U.S. 61 (1955).

[47] *Johnson*, 481 U.S. at 696 (Scalia, J., dissenting); *see also* United States v. Muniz, 374 U.S. 150, 162 (1963).

[48] Feres v. United States, 340 U.S. 135, 144 (1950).

[49] *Id.*

[50] *Id.*

[51] 38 U.S.C. §§ 1122, 1141 (2002). VBA also provides benefits to veterans of certain wars who were injured during non-service connected activities. *See* 38 U.S.C. § 1504 (2002).

[52] 38 U.S.C. § 1131 (2002).

[53] The amount of Dependency Indemnity Compensation (DIC) was previously based on the rank of the deceased service member but was amended to a flat rate for all ranks, unless the service member held a particular position during service. 38 U.S.C. § 1311(a)(1)-(a)(3) (2002). The current amount, $935, was the amount formerly given to the lowest ranking service member. *Id.*

[54] 38 U.S.C. § 1967(a) (2002). Serviceman's Group Life Insurance (SGLI) is automatically provided for active duty service members in the amount of $250,000.00, unless the soldier specifically elects to take a lesser amount. *Id.* SGLI also provides $100,000.00 coverage for a spouse and $10,000.00 for each dependent child. Service members pay reasonable premiums for their coverage. *Id.*

[55] 38 U.S.C. §§ 2302-07 (2002). The service member must be a veteran to receive funeral expenses and the maximum amount available is $300. *Id.*

government liability for tort claims.[56] Despite the reliance on VBA as the sole remedy, the Supreme Court has sporadically allowed service members to recover under FTCA even though they were previously compensated under VBA.[57] The dual recovery rationale is "no longer controlling" because nothing in the FTCA provides for the exclusiveness of the remedy.[58]

The final reason the *Feres* court explicated to bar a service members' suit against the government was the military discipline rationale.[59] In *United States v. Brown*, the Supreme Court clearly explained that a suit must be barred by the *Feres* doctrine when the decisions of the military are called into question.[60] The Court reasoned:

> The peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led [this] Court to read that Act as excluding claims of that character.[61]

In *Stencel*, the Court again relied on the military discipline rationale to conclude that service member suits against the government adversely affect the special relationship between soldiers and superiors.[62] This rationale for approaching the *Feres* doctrine has become the focus of recent court decisions because the test aids in determining when activity is incident-to-service.[63] The military discipline rationale can bar any claim solely on the fact that the suit may jeopardize military discipline or "duty and loyalty to one's service and to one's country."[64] In certain cases, service member suits would adversely affect discipline, but the *Feres* doctrine only requires that a case might result in negative effects.[65] The military discipline rationale could be a strong argument for a *Feres* bar, except that the FTCA does not preclude civilians from suing the federal government for injuries, even when the same inquiry into military decision-making would result.[66]

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[56] Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 673 (1977).

[57] United States v. Johnson, 481 U.S. 681, 697 (1987) (Scalia, J., dissenting); *see also* Brooks v. United States, 337 U.S. 49, 53-54 (1949); United States v. Brown, 348 U.S. 110, 111 (1954).

[58] United States v. Shearer, 473 U.S. 52, 58 n.4 (1985).

[59] Feres v. United States, 340 U.S. 135, 141-43 (1950).

[60] *Brown*, 348 U.S. at 112.

[61] *Id.*

[62] Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 672 (1977).

[63] *Id.*; *Shearer*, 473 U.S. at 57; United States v. Muniz, 374 U.S. 150, 162 (1963).

[64] United States v. Johnson, 481 U.S. 681, 699 (1987) (Scalia, J., dissenting).

[65] *Id.* at 691.

[66] Indian Towing Co. v. United States, 350 U.S. 61, 69 (1955).

Conversely, appellate courts have interpreted the *Feres* doctrine differently.[67] Some jurisdictions apply the three original policy rationales from the *Feres* case,[68] while others employ a "but for" test where the relevant question is whether the injury would have occurred but for the individual's status as a service member.[69] Additionally, the Ninth Circuit promotes a four-factor test that, rather than an analysis of the *Feres* rationales, considers the service member's location, duty status, benefits received and type of activity at the time of injury.[70]

Regardless of the test applied, appellate courts admit that a fact sensitive analysis results in an inconsistent application of the Feres bar across jurisdictions.[71] For example, *Feres*, in the Second Circuit, involved a soldier who burned to death in his sleep when a defective heating plant caused his barracks to catch fire.[72] Feres's family could not recover in tort for his injuries.[73] In a similar Mississippi case, *Hall v. United States*,[74] a service member died from carbon monoxide poisoning while asleep in government housing.[75] Hall's family, however, was able to recover for his injuries because he was off duty for the weekend when the incident occurred and therefore, the injuries were not deemed incident-to-service.[76] Although factors such as duty status and the day of the week are not enough to distinguish cases in some jurisdictions,[77] the Supreme Court has used duty status as a criterion.[78] In deciding *Feres*, the Court distinguished the case from *Brooks v. United States*,[79] where two service members recovered for their injuries after an Army truck negligently struck their privately owned vehicle while driving on a

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[67] *See* Zoula v. United States, 217 F.2d 81 (5th Cir. 1954); Chambers v. United States, 357 F.2d 224 (8th Cir. 1966). In *Zoula*, students on military duty who were injured by the driver of an ambulance while on a military base could not recover under the FTCA. *Zoula*, 217 F.2d at 84. In *Chambers*, a service member was barred from recovery under the FTCA for injuries sustained while swimming in a military pool. *Chambers*, 357 F.2d at 229.

[68] The *Feres* case implemented the federal relationship, dual recovery, and military discipline rationales. Feres v. United States, 340 U.S. 135 (1950).

[69] Hass v. United States, 518 F.2d 1138 (4th Cir. 1975).

[70] Costo v. United States, 248 F.3d 863, 867 (9th Cir. 2001); *see also* discussion *infra* Part IV.A.

[71] *Costo*, 248 F.3d at 867.

[72] *Feres*, 340 U.S. at 136-37.

[73] *Id.* at 146.

[74] 130 F. Supp. 2d. 825 (S.D. Miss. 2000).

[75] *Id.* at 826.

[76] *Id.* at 829.

[77] *See* Bon v. United States, 802 F.2d 1092, 1095 (9th Cir. 1986).

[78] Brooks v. United States, 337 U.S. 49, 52 (1949).

[79] *Id.*

public highway.[80] The distinction between the cases was that the soldiers in *Feres* were not on furlough and Brooks was.[81]

Application of the *Feres* doctrine has been inconsistent because courts interpret the incident-to-service test differently. The variety of tests developed to determine when activities are incident-to-service and the inconsistent application of the bar has created overwhelming criticism of the Feres doctrine.[82]

B. Relevant Ninth Circuit Decisions

Rather than using the three rationales of the Feres case, the Ninth Circuit Court of Appeals applies a four-factor test to determine when a service member's activity is incident-to-service.[83] The four-factors of the test are:

(1) the place where the negligent act occurred;
(2) the duty status of the plaintiff when the negligent act occurred;
(3) the benefits accruing to the plaintiff because of his status as a service member; and
(4) the nature of the plaintiff's activities at the time the negligent act occurred.[84]

In *Uptegrove v. United States*,[85] the Ninth Circuit denied relief even though the soldier was on authorized leave and voluntarily on a transport plane, because he was subject to military discipline when the plane crashed.[86] Even though the Federal Aviation Administration air traffic controllers were negligent, the *Uptegrove* court avoided addressing that issue by claiming that the "Supreme Court never indicated that Feres should be limited only to situations in which interference with military discipline is threatened."[87]

Similarly, in *Bon v. United States*,[88] the Ninth Circuit applied the four-factor test to bar a claim arising out of an injury sustained when a soldier's rented canoe collided with a motor boat operated by another service member.[89] Bon was on active duty at the time of the incident, but neither she nor the other

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[80] *Id.*

[81] Feres v. United States, 340 U.S. 135, 138 (1950).

[82] Kelly L. Dill, Comment, *The Feres Bar: The Right Ruling for the Wrong Reason*, 24 CAMPBELL L. REV. 71 (2001); Note, *supra* note 17; Postl, *supra* note 16.

[83] Costo v. United States, 248 F.3d 863, 867 (9th Cir. 2001).

[84] *Costo*, 248 F.3d at 867; *see also* Dreier v. United States, 106 F.3d 844 (9th Cir. 1996).

[85] 600 F.2d 1248 (9th Cir. 1979).

[86] *Id.* at 1250.

[87] *Id.*

[88] Bon v. United States, 802 F.2d 1092 (9th Cir. 1986).

[89] *Id.* at 1095.

service member was engaged in official duties at the time of the incident.[90] The Special Services Center ("SSC") where Bon rented the canoe was part of the Morale, Welfare and Recreation ("MWR") program.[91]

The *Feres* doctrine prevented another service member's claim in *Millang v. United States* when an off-duty soldier, while attending a picnic on a military base, was hit by a military police patrol vehicle.[92] Rather than using the four-factor test, the court analyzed the totality of the circumstances to determine that the suit might question military decisions.[93] The court concluded that cases challenging the conduct of an on-duty service member while in the scope of his employment are the exact type of cases that *Feres* intended to bar.[94]

Alternatively, the Ninth Circuit allowed suit in *Dreier v. United States*[95] when a service member fell into a wastewater drainage channel and died.[96] Dreier was off-duty hiking on a part of the military installation where civilians had access.[97] Although the court stated this was "a close case," *Dreier* was distinguishable from both *Bon* and *Millang* because the area where the incident occurred was open to the public.[98] Dreier's claim was no different than if a civilian hiker had fallen into the drainage channel and died.[99]

In *Costo v. United States*, the Ninth Circuit applied the *Feres* doctrine to bar the claims of two deceased service members who were on liberty[100] and rafting on a trip sponsored by the Navy's MWR program.[101] Civilians directly ran the rafting trip and the incident occurred off base.[102] After applying its four-factor test, the court concluded that the injury occurred incident-to-service because Costo was eligible for MWR benefits based on his active duty status and because military personnel supervised the decisions regarding the operation of MWR facilities.[103] The court did not analyze the nature of the plaintiff's activity at the time of the injury, but merely stated "military-sponsored

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[90] *Id.*

[91] *Id.*

[92] Millang v. United States, 817 F.2d 533, 535 (9th Cir. 1987).

[93] *Id.*

[94] *Id.*

[95] 106 F.3d 844 (9th Cir. 1996).

[96] *Id.* at 853.

[97] *Id.*

[98] *Id.* at 846.

[99] *Id.* at 853.

[100] "Liberty" refers to the time after release from duty on any given day, to include weekends and holidays when soldiers have not requested authorized leave. Costo v. United States, 248 F.3d 863, 864 n.1 (9th Cir. 2001). "Authorized leave" days are equivalent to a civilian's paid vacation. Latchum v. United States, 183 F. Supp. 2d 1220, 1226 n.4 (D. Haw. 2001).

[101] *Costo*, 248 F.3d at 863.

[102] *Id.* at 864-65.

[103] *Id.* at 867.

activities fall within the *Feres* doctrine, regardless of whether they are related to military duties."[104]

These cases illustrate how the Ninth Circuit Court's four-factor test results in an inconsistent application of the *Feres* bar. As a result of this test, service members are left with an irreconcilable uncertainty in the law.

III. LATCHUM V. UNITED STATES

A. Factual Background

Chief Warrant Officer 2 ("CW2") John R. Latchum was fatally shot while on vacation with his wife and two children at the Waianae Army Recreational Facility ("WARC") in Waianae, Hawaii.[105] Latchum was on active duty and had rented a cabin at WARC for eleven days, the period of his authorized leave, when the shooting occurred.[106] Latchum was killed by "unlawful trespassers" on the WARC property.[107] Latchum's wife, two children, and estate collectively brought suit against the federal government, alleging that the government's negligent supervision and security of the WARC facility contributed to Latchum's death.[108]

The Department of the Army's Morale, Welfare and Recreation program owns and operates the WARC facility.[109] MWR programs provide recreational, community, family and soldier activities and services to benefit active duty service members, retirees, reservists, and federal employees.[110] Although civilians are prohibited from renting cabins, individuals may walk across the property to access the beach.[111]

Generally, civilians manage daily MWR activities, while military personnel supervise the financing and overall operation of the MWR program.[112] In this case, WARC operations were the responsibility of Colonel Beverly Cardinal, Director of Community Activities, United States Army Garrison, Hawaii.[113]

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[104] *Id.* at 868.

[105] Latchum v. United States, 183 F. Supp. 2d 1220, 1222 (D. Haw. 2001).

[106] *Id.*

[107] *Id.* The plaintiffs, Latchum's estate, wife and two children, allege that the Government negligently failed to provide adequate security on the property or failed to remove the unlawful trespassers from the premises, directly resulting in the shooting death of CW2 Latchum. *Id.*

[108] *Id.*

[109] *Id.* at 1223.

[110] *Id.*

[111] *Id.*

[112] *Id.* at 1224.

[113] *Id.* at 1223 n.1. Military Police are responsible for law enforcement on the WARC facility, which is supervised by the Provost Marshal's office. *Id.* at 1224 n.3. The Director of Community Activities (DCA) is a separate agency that has little control over WARC security.

WARC is a non-appropriated fund instrumentality ("NAFI").[114] All monetary distributions for a NAFI, including the WARC facility, are approved by the military chain of command.[115]

B. The District Court's Ruling

The United States District Court for the District of Hawaii granted the Government's motion to dismiss plaintiffs' case for lack of subject matter jurisdiction according to Federal Rule of Civil Procedure 12(b)(1), relying on the Feres doctrine and precedent to bar the claim.[116] The district court applied the Ninth Circuit Court's test one factor at a time by conducting a detailed factual comparison with several cases.[117]

The court concluded that the situs of the negligence was sufficiently similar to *Costo* to favor a bar because both cases involved MWR activities.[118] The second factor was dismissed by the court as "less important" when duty status is unclear.[119] The court used *Jackson* to justify this position.[120] The court compared the third factor to both *Costo* and *Bon*, stating that the MWR benefits accruing to Latchum by virtue of his service supported a *Feres* bar.[121] Finally, the court concluded that the fourth factor supported the bar because Latchum, like Bon, was subject to military rules when he was killed.[122] In sum, the facts of *Latchum* were sufficiently similar to previous cases where the *Feres* bar was applied.[123]

Id.

[114] *Id.* at 1223.

[115] *Id.* at 1224. While NAFI programs do not receive any money from the Army budget, the Department of Defense recognizes that MWR programs are vital to mission accomplishment and form an integral part of the non-pay compensation system. *Id.* (citing DOD Directive No. 1015.2, P 4.2).

[116] *Id.*at 1231.

[117] *Id.* at 1226-29.

[118] *Id.* at 1232.

[119] *Id.*

[120] *Id.* at 1232 (citing Jackson v. United States, 110 F.3d 1484, 1488 (9th Cir. 1997)).

[121] *Id.* at 1232.

[122] *Id.* at 1233.

[123] *Id.* at 1226-29; *cf.* Green v. Hall, 8 F.3d 695 (9th Cir. 1993)(A service member sued the estate of another service member for injuries sustained as a result of a motor vehicle accident that occurred off-base. The court concluded that the soldier's act was "distinctly nonmilitary" and allowed recovery.); Mills v. Tucker, 499 F.2d 866 (9th Cir. 1974)(Mills was a Navy officer who died after a car hit his motorcycle while he was riding on a public road maintained by the military. His family sued the government for negligent maintenance of the roadway. Mills was on furlough at the time of the incident.); Johnson v. United States, 704 F.2d 1431 (9th Cir. 1983)(Johnson was killed in an off-base automobile accident when his car collided with another service member's car. Johnson was driving home from his job as a bartender at the non-

The court also distinguished *Dreier*, the plaintiffs' primary case, by stating, "many, if not all of the employees directly overseeing the water treatment plant were civilians."[124] Additionally, in *Dreier*, the location where the injury occurred was accessible to civilians,[125] whereas in *Latchum*, "[t]he permissible area clearly did not include Latchum's cabin."[126] Based on the four-factor test, the court concluded that Latchum's activity was sufficiently incident to his military service and therefore was barred by the *Feres* doctrine.[127]

IV. ANALYSIS

The district court incorrectly applied the Ninth Circuit's four-factor test to the *Latchum* case by engaging in a factor specific analysis of precedent.[128] Instead, the *Latchum* court should have evaluated the factors in the totality of the circumstances to reconcile the inconsistencies of prior Ninth Circuit decisions. While the district court correctly pointed out that Ninth Circuit cases dealing with the *Feres* doctrine are irreconcilable, a detailed factual analysis only creates more confusion in precedent.[129] Even if applied correctly, the four-factor test is a poor measure for determining when an activity is incident to military service. The test addresses neither the FTCA's intent nor the *Feres* rationales; consequently, the test produces inconsistent and incorrect results.

A. Application of the Four-Factor test

Recent decisions using the four-factor test have produced inconsistent results.[130] These inconsistencies allow the courts to selectively compare and contrast previous cases to *Latchum*.[131] The most appropriate way to resolve the *Feres* question is not to engage in a detailed factual analysis.[132] Rather than applying a strict four-factor test, courts should implement the rationales

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commissioned officers' club located on the military base. The court allowed Johnson to recover because he stood in the same position as a civilian employee at a private nightclub.).

[124] *Latchum*, 183 F. Supp. 2d at 1232 (citing Dreier v. United States, 106 F.3d 844, 853 (9th Cir. 1996)).

[125] *Dreier*, 106 F.3d at 853.

[126] *Latchum*, 183 F. Supp. 2d at 1233.

[127] *Id.* at 1234.

[128] *Id.* at 1231-34.

[129] *Id.* at 1226.

[130] Bon v. United States, 802 F.2d 1092, 1093 (9th Cir. 1986); *Dreier*, 106 F.3d at 855 (9th Cir. 1996).

[131] *Latchum*, 183 F. Supp. 2d at 1232-34.

[132] *Id.*

outlined in *Feres* to eliminate inconsistent results and achieve the intent of the FTCA.

1. The situs of the negligence

Evaluating the situs of the negligence is not necessary to determine when activity occurs incident-to-service. The government's liability rests upon whom the negligent actor is rather than where the negligence occurs. When a variable amount of weight is given to this factor, it allows courts to perpetuate further inconsistencies as precedent.

In *Costo*, the court concluded that the negligent act occurred in the decision-making and supervision of the MWR program.[133] There the situs of the negligence weighed in favor of the *Feres* bar, even though the injury occurred off base.[134] This factor should have weighed in favor of the bar because Latchum was on government property when he was killed.[135]

Instead, the *Latchum* court relied on *Costo*, where the negligence occurred in the military's decision-making and supervision of the MWR program.[136] Similarly, the negligence in *Latchum* occurred in the administration of WARC security.[137] The *Latchum* court did not address whether the security plan itself was negligent, or if the incident resulted from sloppy enforcement of an otherwise legitimate plan.[138] The determination of the negligent actor lies at the heart of this factor, yet the court failed to address it. According to the court, MWR programs, including the WARC facility, automatically invoke the *Feres* bar because of military supervision.[139] Had the military discipline rationale in *Feres* applied, questioning military decisions regarding WARC security may have invoked a legitimate bar. However, by limiting the analysis to the four-factor test, the court failed to address the issue.

The district court also equated the facts in *Latchum* to *Bon*.[140] In *Bon*, the court reasoned that the location of the incident, whether on or off base, weighed in favor of the bar because Bon would have been in violation of the rules governing the use of SSC equipment.[141] The plaintiff's comparative negligence was not an issue in determining whether a *Feres* bar applies. The *Bon* court automatically assumed that negligence occurring on an installation

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[133] Costo v. United States, 248 F.3d 863, 868 (9th Cir. 2001).

[134] *Id.*

[135] *Latchum*, 183 F. Supp. 2d at 1222.

[136] *Id.* at 1232.

[137] *Id.*

[138] *Id.*

[139] *Id.* at 1227.

[140] *Id.*

[141] Bon v. United States, 802 F.2d 1092, 1095 n.3 (9th Cir. 1986).

is controlled by the military.[142] The *Bon* court failed to address how the location of the injury affects this factor. Furthermore, the *Latchum* court imported this flaw into their reasoning by relying on *Bon* to conclude that this factor weighed in favor of the *Feres* bar.[143]

Finally, the *Latchum* court distinguished *Dreier* by determining that, although the incident occurred on a military installation, the situs of the negligence factor weighed against the *Feres* bar.[144] In *Dreier*, the area where the injury occurred was accessible to the public.[145] There, the court failed to mention that most military installations are open to the public.[146] Although the court noted that access was limited to those with a permit, it conceded that trespassers frequently used the area.[147]

In *Latchum*, the evidence showed that the public had access to the WARC facility and that "civilians have, in the past, entered WARC property to commit crimes."[148] Based on this evidence, the court should have equated the *Latchum* facts to *Dreier* and concluded that the location of the negligent act weighed against the *Feres* bar. By avoiding the obvious conclusions that this factor suggests, the court consequently eroded the validity of its own test.

2. *Plaintiff's duty status*

The Ninth Circuit Court's sporadic application of duty status as a factor has contributed to producing inconsistent decisions. For example, the *Latchum* court cited a series of irreconcilable cases to reach the conclusion that "Latchum's duty status when he was killed does not clearly weigh in favor of or against a Feres bar."[149]

To justify this conclusion, the *Latchum* court first cites *Jackson v. United States*,[150] where the Ninth Circuit held that duty status is less important when the injured service member's status falls "somewhere between active duty and discharge."[151] According to *Jackson*, Latchum's duty status would weigh

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[142] *Id.* at 1095.

[143] *Latchum*, 183 F. Supp. 2d at 1228.

[144] Dreier v. United States, 106 F.3d 844, 852 (9th Cir. 1996).

[145] *Id.*

[146] *Id.* This has substantially changed since September 11, 2001. Most installations now require, at a minimum, verification of identification and a valid driver's license.

[147] *Id.* at 852.

[148] *Latchum*, 183 F. Supp. 2d at 1225.

[149] *Id.* at 1232.

[150] 110 F.3d 1484 (9th Cir. 1997). Jackson was a Naval Reservist on weekend drill training when he lacerated his hand. *Id.* at 1486. On Monday morning, when Jackson received allegedly negligent medical care he was no longer on duty. *Id.*

[151] *Id.* at 1488.

against the *Feres* bar.[152] Alternatively, in *Persons*, the Ninth Circuit determined that the relevant distinction in a duty status inquiry is between active duty and discharge or furlough.[153] The *Latchum* court, however, failed to reconcile its decision with *Persons*.[154] In a footnote, the *Latchum* court noted that in *Mills v. Tucker*,[155] the Ninth Circuit found that the *Feres* doctrine did not apply to a plaintiff on furlough, but later, in *Uptegrove*, the same court barred the claim of a service member who was on leave.[156] Without distinguishing the facts from *Latchum*, these cases do nothing to support the conclusions of the district court.[157]

Both cases the court considered, namely *Costo* and *Bon*, are factually analogous to *Latchum* because they involved service members who were on liberty, not authorized leave.[158] However, the court did not address either case, leaving the distinction between leave and liberty unresolved.[159] Further, the court did not distinguish the facts of *Dreier*.[160] Instead of concluding that Latchum's leave status weighed against the bar, the court stated that *Dreier* was mere dicta and not central to the holding of the case.[161] Had the court afforded duty status any weight, Latchum's leave status would have weighed against the *Feres* bar. Therefore, the difficulty in using duty status as a factor in the incident-to-service analysis arises because it is unrelated to any rationale for applying a *Feres* bar.

3. Service member benefits

Including the service member benefits factor effectively limits the government's liability for activities clearly not incident-to-service and is the

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[152] *Id.* (citing Persons v. United States, 925 F.2d 292, 295 n.6 (9th Cir. 1991)). Persons went to the emergency room of a military hospital with deep slash marks across both wrists, clearly indicative of a suicide attempt. *Persons*, 925 F.2d at 294. Persons' wrists were bandaged and he was released on his own recognizance after a couple hours. *Id.* He received no counseling or treatment for his severely depressed condition. *Id.* Three months later, Kelly Persons committed suicide. *Id.*

[153] Furlough is equivalent to authorized leave. Latchum v. United States, 183 F. Supp. 2d 1220, 1226 n.4. (D. Haw. 2001). *See supra* note 100.

[154] *Id.* at 1233; *see Persons*, 925 F.2d at 296 n.6.

[155] 499 F.2d 866 (9th Cir. 1974).

[156] *Latchum*, 183 F. Supp. 2d at 1232 n.7; *Mills*, 499 F.2d at 867-68; Uptegrove v. United States, 600 F.2d 1248, 1249-50 (9th Cir. 1979).

[157] *Latchum*, 183 F. Supp. 2d at 1232.

[158] Costo v. United States, 248 F.3d 863, 864 (9th Cir. 2001); Bon v. United States, 802 F.2d 1092, 1093 (9th Cir. 1986).

[159] *Latchum*, 183 F. Supp. 2d at 1232.

[160] *Id.*

[161] Jackson v. United States, 110 F.3d 1484, 1488 (9th Cir. 1997).

main reason why many service member suits fail.[162] The intent of the FTCA and the *Feres* doctrine was to eliminate liability for injuries that were foreseeable to the service member at the time they entered the service, not injuries from recreational activities.[163]

The district court concluded that *Latchum* was similar to *Costo* and *Bon* because in all cases, the service members could use the MWR facilities and equipment solely based on their military status.[164] Latchum asserted that *Dreier* controlled because both DOD civilians and federal employees are allowed to rent cabins at WARC, and the public has access to the WARC facility.[165] The *Dreier* court was concerned with potential, not actual civilian access.[166]

To escape this similarity, the *Latchum* court determined that civilians did not rent cabins frequently and, at the time of the Latchum shooting, DOD civilians occupied only one cabin.[167] The *Latchum* court stated that, "as a practical matter, very few civilians are able to use WARC cabins."[168] Not only did the court fail to address how civilian status affects the application of the *Feres* bar, but the court also ignored the potential for a civilian plaintiff. Thus, including the benefits of service as a factor in the incident-to-service test allows the court to apply a *Feres* bar without recourse, because nearly any activity can be attributed to a service member's military status.

4. Nature of the plaintiff's activities

The nature of the plaintiff's activities is a rewording of "incident-to-service" and therefore, does not add any quantifiable method for determining when activity occurs incident-to-service. Frequently, when this factor would not bar a claim, the addition of the other three factors and precedent produces a contrary result. Primarily, when the injury occurs during recreation, a service member's activity is unrelated to service, but by adding the third factor, benefits of service, the *Feres* bar still applies.

The *Latchum* court weighed this factor in favor of the *Feres* bar because Latchum was subject to military orders, discipline, and rules governing the use of WARC facilities.[169] The court equated these facts with *Bon*, where the

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[162] *Latchum*, 183 F. Supp. 2d at 1233; *Costo*, 248 F.3d at 867; *Bon*, 802 F.2d at 1095; *Jackson*, 110 F.3d at 1488; Persons v. United States, 925 F.2d 292, 296 (9th Cir. 1991).

[163] *See* 28 U.S.C. § 2680(j) (2002).

[164] *Latchum*, 183 F. Supp. 2d at 1233; *Bon*, 802 F.2d at 1092; *Costo*, 248 F.3d at 863.

[165] *Latchum*, 183 F. Supp. 2d at 1233.

[166] *See* Dreier v. United States, 106 F.3d 844, 853 (9th Cir. 1996).

[167] *Latchum*, 183 F. Supp. 2d at 1233.

[168] *Id.*

[169] *Id.*

plaintiff was subject to SSC rules governing the use of facilities and equipment.[170] The *Latchum* court failed to address the fact that service members are always subject to military orders and discipline, regardless of the nature of their activities.[171] Instead, the *Latchum* court deferred to the ruling in *Costo*, where the court reiterated that, "it has long been recognized . . . that military-sponsored activities fall within the *Feres* doctrine, regardless of whether they are related to military duties."[172] This statement directly conflicts with the original intent of the *Feres* doctrine, which says that the Government is not liable under the FTCA for injuries that occur in the course of activity incident-to-service.[173] Although this factor is a legitimate attempt at determining incident-to-service activities, the analysis is no less complex. By including three other factors that do not carry out the intent of the *Feres* doctrine, the Ninth Circuit Court's attempt to clarify the *Feres* test has resulted in precedent that frequently bars service member claims against the government. Applying the four-factor test sporadically and analyzing each factor individually necessarily produces inconsistent results.

B. Effectiveness of the Four-Factor Test

The Ninth Circuit Court's four-factor test does not correlate to the intent of the FTCA or properly evaluate the three critical rationales outlined in the *Feres* case.[174] Regardless of how the test is applied, the goal of the *Feres* doctrine was to limit government liability for injuries that result from foreseeable negligent conduct that occurs in the service member's scope of employment.[175] Preserving military discipline is the only legitimate rationale that remains from the discussion in *Feres*. Because none of the factors address this rationale, the four-factor test does not properly determine when military discipline would be adversely affected.

First, no factor equates to the legislature's intent in enacting the FTCA. The Act states, in pertinent part:

> [D]istrict courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person,

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[170] *Id.*

[171] *Id. See* 27-10 Army Regulation (A.R.) § 3-8 (1989).

[172] Costo v. United States, 248 F.3d 863, 868 (9th Cir. 2001).

[173] Feres v. United States, 340 U.S. 135, 146 (1950).

[174] *Id.* at 143-46.

[175] 28 U.S.C. § 2680(j).

would be liable to the claimant in accordance with the law of the place where the act or omission occurred.[176]

The Supreme Court has rejected the parallel private liability argument because no private individual has the authority of the federal government to create an army.[177] The parallel liability rationale would bar every service member's claim if interpreted literally.[178] This approach invalidates several exceptions of the FTCA, indicating that the legislature's intent was not to ban all service member claims.[179] The proper parallel liability comparison is not the employment relationship, but the relationship between the injured person and the negligent actor at the time of the injury.

Some appellate courts have applied the parallel liability rationale to allow a service member to file suit.[180] In *Dreier*, the Ninth Circuit Court concluded that a privately operated wastewater treatment facility would be liable for injuries sustained from a private organization's comparable negligence,[181] yet the *Latchum* court avoided addressing this point altogether.[182] Because Latchum was not acting in his capacity as a service member at the time of the injury, the government's parallel private liability argument did not apply.[183] However, the *Latchum* court could have equated the WARC facility to a private business and concluded that the parallel duty of an innkeeper to a guest invokes liability for failing to provide adequate security for guests.

The Supreme Court has stated that, although the government would be liable had they been a private organization, the *Feres* bar still applies when more compelling issues are at stake.[184] This directly conflicts with the congressional intent expressed in the FTCA. In drafting the Act, the legislature clearly contemplated claims brought by service members, as evidenced by the specific

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[176] 28 U.S.C. § 1346(b).

[177] Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 672 (1977).

[178] *See, e.g.*, Latchum v. United States, 183 F. Supp. 2d 1220, 1222 (D. Haw. 2001) (where court "agrees with Plaintiffs . . . [but] compelled by governing precedent"); Persons v. United States, 925 F.2d 292, 299 (9th Cir. 1991) ("Seemingly manacled by precedent, this Court has repeatedly expressed its strong reservations" about the *Feres* doctrine); Atkinson v. United States, 825 F.2d 202, 206 (9th Cir. 1987)(court "compelled to affirm the decision of the district court").

[179] United States v. Johnson, 481 U.S. 681, 702 (1987) (citing Rayonier, Inc. v. United States, 352 U.S. 315, 320 (1957)).

[180] Dreier v. United States, 106 F.3d 844, 854 (9th Cir. 1996).

[181] *Id.*

[182] *Latchum*, 183 F. Supp. 2d at 1233.

[183] *Id.* at 1222.

[184] *Johnson*, 481 U.S. at 695 (government not liable for deceased Coast Guard helicopter pilot who received negligent instruction from a Federal Aviation Administration employee); *see also Rayonier, Inc.*, 352 U.S. at 319; Indian Towing Co. v. United States, 350 U.S. 61, 66-69 (1955).

limitation imposed on claims arising from combatant activities during times of war.[185]

The four-factor test also fails to address the double recovery problem addressed in *Feres*, where service members recovered under both the VBA and the FTCA.[186] In *Stencel*, the Supreme Court delineated two purposes for the VBA: (1) to provide swift and generous compensation to injured soldiers; and (2) to provide a limitation on liability for the Government.[187] The Court concluded that allowing FTCA recovery where VBA benefits have already compensated an injured service member frustrates an essential feature of the VBA.[188]

By contrast, Justice Scalia's dissent in *United States v. Johnson* convincingly countered this rationale by pointing out that the FTCA does not state or imply exclusivity.[189] Additionally, the exceptions to the FTCA's waiver of immunity support the conclusion that the Act was not intended to be an upper limit on the Government's liability.[190]

The four-factor test is not effective as an evaluation of the military discipline rationale. In *Latchum*, the court stated that none of the four factors alone were dispositive and the essential inquiry was whether the suit required the court to second-guess military decisions.[191] Although the most important inquiry is the nature of the plaintiff's activity at the time of the government's tortious action,[192] the court automatically assumed that evaluating a service member's activity will always require the court to second-guess military decisions.[193] Certainly, some decisions would involve questioning military decisions that should not be subject to judicial review, but these types of claims fall within the FTCA's exclusivity provisions.[194] The Court should not infer that claims arising from circumstances not specifically addressed by the legislature are included, especially when those circumstances are contrary to the express language of the statute.[195]

The Supreme Court has historically based its decisions applying the *Feres* bar on Congress's failure to amend the FTCA.[196] Congress, however, has no incentive to amend the FTCA when the courts already prohibit recovery for

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[185] 28 U.S.C. § 2680(j).

[186] Feres v. United States, 340 U.S. 135, 144 (1950).

[187] Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 673 (1977).

[188] *Id.*

[189] *Johnson*, 481 U.S. at 698 (Scalia, J., dissenting).

[190] 28 U.S.C. §§ 2672, 2676, 2679.

[191] Latchum v. United States, 183 F. Supp. 2d 1220, 1226 (D. Haw. 2001).

[192] *Id.*

[193] *Id.* at 1226, 1233; Bon v. United States, 802 F.2d 1092, 1095 (9th Cir. 1986).

[194] 28 U.S.C. § 2680. *See supra* note 19.

[195] United States v. Johnson, 481 U.S. 681, 699-700 (1987) (Scalia, J., dissenting).

[196] *Id.* at 690; Feres v. United States, 340 U.S. 135, 144 (1950).

virtually all service member claims. By taking a more aggressive approach to the *Feres* doctrine and promoting a new test that allows service members to sue the government, the court could force Congress to amend the FTCA, specifically addressing the problems created by *Feres* and its progeny.
Military discipline is the only viable reason to deny recovery to service members whose injuries did not arise incident-to-service. The Ninth Circuit Court's attempt to establish a simplified test to determine the appropriate application of the *Feres* bar has only created more confusion and inconsistent results than the original test. Because the four-factor test does not effectively evaluate when an activity is incident-to-service, cases stray farther from the original intent of the *Feres* doctrine. The Court should have used the *Feres* rationales to justify legitimate applications of the bar without binding future decisions to the four-factor test. Instead of simplifying the *Feres* doctrine, the court struggles to avoid using its own test, thereby eroding the legitimacy of each factor along the way.

A new test would eliminate the interpretation difficulties that have resulted from the problematic language found in the *Feres* doctrine. The Supreme Court should outline a test that parallels the language of the FTCA, allowing service members to sue the government unless the injury occurred during an activity directly related to military duties. Additionally, the new test should bar recovery for employment-related injuries foreseeable at the time of the service member's enlistment. Under this test, service members may recover for injuries resulting from recreational activities, but not for employment-related injuries arising from supervisory decisions or training exercises that legitimately invoke the military discipline rationale.

V. CONCLUSION

The district court incorrectly applied the Ninth Circuit's four-factor test to the *Latchum* case by comparing each factor individually to different precedent. A piecemeal application of the four-factor test aggravates the problems inherent in the test and a detailed factual analysis only creates confusion in precedent. Additionally, by failing to address the FTCA's purpose and the *Feres* rationales, the Ninth Circuit Court's four-factor test fails to determine whether a particular activity is incident-to-service.

A closer look at the *Feres* doctrine reveals that the Supreme Court needs to articulate a new, more specific test for incident-to-service to promote consistent, yet infrequent, application of the bar. By doing so, Congress will have no choice but to revise and clarify the FTCA and its exceptions. Hopefully, Congress will recognize that an alternative compensation scheme is necessary to provide service members additional recovery beyond the

Veteran's Benefits Act. The difficult, yet appropriate solution is to remedy this bad precedent, not allow it to erode a well-intentioned principle.

Jennifer L. Carpenter[197]

[197] J.D. Candidate, William S. Richardson School of Law, University of Hawaii at Manoa. Thanks to all those who helped me write this paper, especially Libby Paek, who read every draft.

Political Interest Convergence: African American Reparations and the Image of American Democracy

"[W]ith firmness in the right . . . let us strive on to finish the work we are in, to bind up the nation's wounds . . . to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations." Abraham Lincoln, 1865.[1]

I. INTRODUCTION

A 1998 census report revealed that the living conditions of African Americans fell far below that of most Americans.[2] The report revealed that 26 percent of African Americans live in poverty, 14.7 percent hold four-year college degrees, and that African Americans are more likely to be imprisoned than any other race.[3] More importantly, the net worth of the average African American family in 1999 was $7,000, whereas the net worth of the average white family was $84,400.[4] These statistics undeniably capture America's failure to improve the living conditions of African Americans.[5] To address these conditions, Deadria Farmer-Paellmann filed a reparations lawsuit in a New York District Court against corporations whose histories are entangled with slavery.[6] Farmer-Paellmann alleges that statistics reflecting inferior conditions suffered by African Americans are directly attributable to slavery, and therefore the named defendant corporations are liable.[7]

The Farmer-Paellmann lawsuit faces a number of political and procedural challenges. First, the complaint arises in the context of post-9/11 events and Bush Administration policies that tend to disregard reparations and even

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[1] PHILIP A. KLINKNER & ROGERS M. SMITH, THE UNSTEADY MARCH: THE RISE AND DECLINE OF RACIAL EQUALITY IN AMERICA 351 (1999).

[2] Plaintiff's Complaint at 6, Farmer-Paellmann v. Fleetboston Financial Corp. Inc., (E.D.N.Y. Mar. 26, 2002) (No. CV-02-1862), *available at* http://www.nyed.uscourts.gov/coi/cases_of_interest.html (last visited Nov. 14, 2002).

[3] *Id.*

[4] Salim Muwakkil, *The Color of New Activism*, (May 30, 2000) http://www.alternet.org/story.html?StoryID=9225.

[5] Reparations proponents argue that the effects of slavery are pervasive and manifest in modern conditions of social and economic deprivation, institutionalized racism, and frequent acts of intentional discrimination. Alex P. Kellogg, *Talking Reparations with Charles Ogletree*, *at* http://www.Africana.com/DailyArticles/index_20010828_1.htm (last visited Jul. 17, 2002). Consequently, reparations proponents hold culpable modern day inheritors of the political economy of the slave system. *Id.*

[6] *See* discussion *infra* Part II.D.

[7] Plaintiff's Complaint at 6-7, *Farmer-Paellmann.*

abridge civil rights.[8] Secondly, courts traditionally adhere to the values of timeliness and predictability, and are thus hostile to reparations claims requiring retroactive redress.[9] These political and procedural challenges lead many to portend that the Farmer-Paellmann complaint will likely fail.[10]

Nevertheless, the role that the Farmer-Paellmann suit plays in the larger political reparations movement and how the movement can continue its momentum in the context of post-9/11 deserves greater attention. This article examines reparations in this legal and political context and asserts that reparations proponents should frame their interests in concrete terms that converge with the interests of U.S. decision makers. Specifically, Part II traces the history of African American reparations and briefly discusses the Farmer-Paellmann complaint and Professor Derrick Bell's interest convergence theory in civil rights. Part III examines the interest convergence analysis as applied to the politics of the 1950's and 1960's civil rights movement. This section then argues that the interest convergence theory similarly provides a way to critique and effectively strategize for African American reparations. Part IV concludes that the interest convergence theory suggests that reparations

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[8] Peter Grier, *Which Civil Liberties—and Whose—Can be Abridged to Create a Safer America?*, THE CHRISTIAN SCIENCE MONITOR, *available at* http://www.csmonitor.com/2001/1213/p1s2-usju.html (Dec. 13, 2001). After September 11, 2001, the FBI rounded up and arrested over a thousand men of Middle Eastern origin. *Id.* In October, rules were created to suspend attorney-client confidentiality privileges for certain categories of detainees. *Id.* These rules are a part of a "multipiece package of legal changes which, taken together, represent a profound increase in federal policing powers." *Id.* Justifying these actions, the Bush Administration reasoned, "We're battling an enemy committed to an absolute unconditional destruction of our society." According to the Administration, terrorists prefer to attack "ordinary Americans, in their homes and places of work. That's a new threat, and guarding against it may require a new kind of domestic police work." *Id. See also* Bill Straub, *Are Civil Liberties the Real Victim of Terrorism?*, SCRIPPS HOWARD NEWS SERVICE, *at* http://www.capitolhillblue.com/artman /publish/printer_48.shtml (Jul. 11, 2002) (the U.S. Patriot Act and the Bush administration support secret subpoenas, secretive arrests, secret trials and secret deportations).

[9] *See* discussion *infra* Part II.C.

[10] Jeff Jacoby, *The Slavery Reparations Hustle*, THE BOSTON GLOBE OP. ED. A-19 (Apr. 11, 2002), 2002 WL 4121389 (reparations opponents argue that imposing liability upon modern day parties is fundamentally unfair and that such claims lie outside of what is cognizable and compensible through law); David Horowitz, *Ten Reasons Why Reparations for Blacks is a Bad Idea For Blacks—and Racist Too*, (Jan. 3, 2001) http://www.frontpagemag.com/Articles/ReadArticle.asp?ID=1153 (some opponents even argue that reparations is racist and encourages victim mentality among African Americans). *See also* Eugene Kane, *Reparations Don't Have to Cost a Dime*, MILWAUKEE JOURNAL SENTINEL, (May 21, 2002) *available at* http://www.ushistory.org/presidentshouse/news/mjs 052102.htm (stating that "the day will never come when a check is made out to each and every black person who can prove to be a direct descendant of slaves").

proponents can best advance their interests by concretely promoting reparations as an affirmation of America's commitment to democracy. This commitment to democracy in fact bolsters America's moral authority for military action against terrorist groups and international oppressors who disregard civil rights.

II. BACKGROUND

The last fourteen years of history chronicle a domestic and international trend in race apologies and reparations for historical injustices.[11] Despite this clear trend, century-old demands for African American reparations have stalled in both Congress and in the courts, as each branch volleys the responsibility for reparations back to the other.[12] Professor Derrick Bell's interest convergence theory is a useful tool for devising a more effective strategy for the slave reparations movement and critiquing the role of the Farmer-Paellmann lawsuit within it.

A. Worldwide Trend in Reparations

In 1988, the United States started an international trend for reparations when it formally apologized and gave monetary reparations to wrongfully interned Japanese Americans.[13] Reparations helped to acknowledge the wrongs suffered by Japanese American internees at the hands of the United States government.[14] Although reparations come in many forms,[15] the essence of the

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[11] "Since the United States' 1988 apology to and monetary reparations for Japanese Americans wrongfully interned during World War II, America has experienced a spate of race-related apologies. . . . [R]ace apologies in the United States are part of a worldwide phenomenon." Eric K. Yamamoto, *Race Apologies*, 1 J. GENDER RACE & JUST. 47, 47-48 (1997) [hereinafter *Race Apologies*].

[12] *See* discussion *infra* Parts II.B, II.C.

[13] *Race Apologies*, *supra* note 11.

[14] Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 478 (1998) [hereinafter *Racial Reparations*].

[15] *Race Apologies*, *supra* note 11. Professor Yamamoto provides a sampling of race-related apologies:

> [A]pologies range from Congress' apology to indigenous Hawaiians in 1993 for the illegal United States-aided overthrow of the sovereign Hawaiian nation, to the Southern Baptists' apology to African American church members for the denomination's endorsement of slavery, to the Florida legislature's $2 million reparations to black survivors of government-backed murder and mayhem in the black town of Rosewood, to Ice Cube's apology to Korean American merchants for his rap "Black Korea" that threatened the burning of Korean stores, to Rutgers University President's apology for indicating that blacks lacked the "genetic background" to perform well on standardized tests, to Senator D'Amato's pseudo-apology for his linguistic mocking of Judge Lance

concept extends from its root, "repair."[16] "Reparation" is defined as "the act or process of making amends," typically by "giving compensation to satisfy one who has suffered injury, loss, or wrong at the hands of another."[17] According to Professor Eric Yamamoto, reparations "can help change material conditions of group life and send political messages about societal commitment to principles of equality."[18] Because of its recognized ameliorative potential, race-related apologies and reparations have multiplied in the United States and worldwide since 1988.[19]

According to Professor Jon Van Dyke, the following types of reparations have been given:

> * In 1992, after more than 2,000 human rights abuses were documented by a Chilean commission, the Chilean Legislature enacted a law providing a wide range of economic benefits for the victims and their families.
> * The Japanese-American interne[es] in World War II received $20,000 each, and those persons of Japanese ancestry brought to camps in the United States from Latin America have received $5,000 each.
> * Canada has provided a reparations package for the First Nation children who were taken from their families and transferred to boarding schools where they were denied access to their culture and frequently physically mistreated.
> * New Zealand established a process to address the wrongs committed by the British against the Maori people in the late 1800's and has returned lands and transferred factories, fishing vessels, and fishing rights to the Maori groups to compensate them for their losses.
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> . . . .
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> * In 1994, Florida Governor Lawton Chiles signed into law a bill providing for the payment of $2.1 million in reparations to the descendants of black victims of the Rosewood massacre, in which white lynch mobs killed six blacks and drove others from their homes to destroy a prosperous black community.
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> . . . .
>
> * The German government has funded various compensation programs to pay victims of the World War II Holocaust, and to make payments directly to the State of Israel as well. More recently, lawsuits were filed in U.S. courts by the victims of slave . . . labor during World War II against the German banks and companies that profited from such abuses. [20]

Ito's Japanese ancestry.

Id.

[16] AMERICAN HERITAGE DICTIONARY 1102 (4th ed. 1973).

[17] *Id.*

[18] *Racial Reparations*, *supra* note 14, at 494.

[19] *Id.*

[20] Jon M. Van Dyke, *The Fundamental Human Right to Prosecution and Compensation*, 29 DENV. J. INT'L L. & POL'Y 77, 90-91 (2001). For a complete catalogue of domestic and international reparations, *see Race Apologies*, *supra* note 11, at 68-88.

Despite this worldwide trend, and despite its tremendous potential for closing America's racial divide, African American slave reparations have historically been marginalized.[21]

B. Legislative Attempts at African American Reparations

Although the legislative branch is the most appropriate forum for slave reparations, reparations bills historically languished in the legislature and to this day continue to receive little attention or support.[22] The idea of African American reparations is not novel; rather, it has been a long-standing issue since the end of the Civil War.[23]

Early reparations attempts were legislative bills designed to help African Americans make the transition from slavery to freedom.[24] The Confiscation Acts of 1861 and 1862 tried to facilitate that transition by authorizing seizure and redistribution of plantation property.[25] Southern voters, however, opposed the Confiscation Acts, and President Abraham Lincoln limited their application because he was concerned about ameliorating North-South tensions.[26]

A second attempt at reparations was made in 1865, but fell short of being a complete remedy. The Freedman's Bureau Act, effective for just one year, attempted to lease land to African Americans.[27] However, when an extension

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[21] *See generally* Rhonda V. Magee, Note, *The Master's Tools, From the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863 (1993).

[22] Chris K. Iijima, *Reparations and the "Model Minority" Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation*, 40 B.C. L. REV. 385, 388-89 (1998) [hereinafter *Model Minority Ideology*].

[23] *See* Magee, *supra* note 21, at 885-900; *see also* Vincene Verdun, *If the Shoe Fits, Wear it: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597, 600-07 (1993).

[24] The actions and statements of military and governmental officials suggested that each freedmen would be compensated forty acres and a mule. General William Tecumseh Sherman, ORDER BY THE COMMANDER OF THE MILITARY DIVISION OF THE MISSISSIPPI, SPECIAL ORDER NO. 15 (Jan. 16, 1865), *reprinted in* FREEDOM: A DOCUMENTARY HISTORY OF EMANCIPATION 1861-1867, SERIES I. VOL. III, THE WARTIME GENESIS OF FREE LABOR: THE LOWER SOUTH, 339 (1990). Under the terms of the order issued by General Sherman on January 16, 1865, "each family shall have a plot of not more than (40) forty acres of tillable ground . . . [and i]n order to carry out this system of settlement, a general officer will . . . furnish personally to each head of a family, subject to the approval of the President of the United States, a possessory title in writing." *Id.*

[25] Tuneen E. Chisolm, Comment, *Sweep Around Your Own Front Door: Examining the Argument for Legislative African American Reparations*, 147 U. PA. L. REV. 677, 685-86 (1999).

[26] *Id.*

[27] *Id.* at 685.

of the Act was passed in 1866, President Johnson vetoed the bill and limited the Act to assisting white refugees, but not newly freed black slaves.[28] The Senate and the House failed to garner sufficient votes to override President Johnson's veto.[29]

Following these legislative efforts, claims for reparations necessarily took a back seat to the struggle against racial terrorism and the fight to secure the basic dignities denied to African Americans through *de jure* segregation.[30] Not until 1989 did a modern reparations bill emerge in the form of House Resolution 40 ("H.R. 40"). Every year since 1989, Michigan Congressman John Conyers annually reintroduced H.R. 40 to study the effects of slavery and the suitability of reparations.[31]

House Resolution 40 proposes four acts by Congress: (1) an acknowledgment of the fundamental injustice of slavery; (2) establishment of a commission studying slavery and its subsequent racial and economic discrimination; (3) a study of the impact of those forces upon contemporary African Americans; and (4) a recommendation by the commission for appropriate remedies and redress.[32] Despite H.R. 40's annual reintroduction, Congress continues to ignore the bill.[33]

C. Judicial Attempts for African American Reparations

Because Congress has historically failed to respond to reparations legislation attempts, reparations proponents have resorted to seeking court-

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[28] *Id.*

[29] *Id.*

[30] Even after emancipation, African Americans faced two and a half centuries of *de jure* segregation, which is legalized social, economic and political oppression. *Id.* at 691. Southern whites sought to ensure that African Americans remained a source of inexpensive labor and enacted Black Codes. *Id.* at 692. Black Codes limited the areas in which blacks could live, imposed heavy penalties forcing African Americans to work, and white employers exercised the same controls over blacks as past slaveholders. *Id.* In addition, "[b]lacks who quit their jobs could be arrested and imprisoned for breach of contract. They were not allowed to testify in court except in cases involving members of their race. Numerous fines were imposed for seditious speeches, insulting gestures or acts, absence from work, violating curfew, and possession of firearms. There was, of course, no enfranchisement of blacks and no indication that in the future they could look forward to full citizenship and full participation in a democracy." *Id.* at 692-93.

[31] *See, e.g.*, H.R. 40, 105th Cong. (1997).

[32] *Id.*

[33] *See* John Conyers, Jr., *The Commission to Study Reparations Proposals for African American Act*, *available at* http://www.house.gov /conyers/news_reparations.htm (last visited Aug. 23, 2002).

awarded remedies, but the judiciary has also proven utterly unavailing.[34] A brief overview of African Americans' struggle for court access and consideration of the record of their treatment once in the courtroom demonstrates that courts are inhospitable toward reparations claims.[35] Indeed, courts have routinely dismissed reparations suits for lack of jurisdiction and governmental sovereign immunity issues.[36]

The first claim asserting reparations was brought to the California District Court in 1994.[37] The *Johnson v. United States* court, in a brief opinion, stated that it lacked jurisdiction over a reparations claim for damages.[38] The *Johnson* court stated, "[p]laintiffs do not allege that their claims arise under the Constitution or laws of the United States. . . . [T]o the contrary, a central aspect of plaintiffs' allegations is that the wrongs [brought by slavery] complained of were actually sanctioned by the Constitution and laws of the United States."[39] In addition to lacking jurisdiction because slavery was once constitutional, the court also held that claims against the government were barred by sovereign immunity.[40]

Similarly, a Maryland court in 1994 sidestepped the issue of reparations in *Scott v. Comptroller of the Treasury*.[41] The court stated:

> Whatever underlying merit, *if any*, [that] there may be in respect to the reparations issue, appellant has only alleged that the *federal* government should pay reparations. . . . As [the] appellant has completely failed to allege that the State of Maryland owes her any reparations, her claim that the federal government does[,] provides her absolutely no basis for her failure to comply with *Maryland*'s tax laws.[42]

By highlighting the plaintiff's failure to comply with established tax laws, the court deftly undermined the underlying reparations claim and dismissed the complaint.[43]

In addition to evading substantive reparations issues, courts confronted with reparations claims also declare judicial helplessness. The Ninth Circuit in

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[34] *See* Note, *Bridging the Color Line: The Power of African-American Reparations to Redirect America's Future*, 115 HARV. L. REV. 1689, 1691-1704 (2002).

[35] *See* discussion *infra* Part II.C.

[36] *See* Order of Dismissal, Johnson v. United States, 1994 WL 225179 (N.D. Cal. 1994); Scott v. Comptroller of the Treasury, 659 A.2d 341 (1994); Cato v. United States of America, 70 F.3d 1103 (9th Cir. 1995); Obadele v. United States of America, 53 Fed. Cl. 432 (2002).

[37] *Johnson*, 1994 WL 225179.

[38] *Id.* at 2.

[39] *Id.*

[40] *Id.*

[41] 659 A.2d 341, 347-48 (Md. App. 1994).

[42] *Id.* at 347.

[43] *Id.*

Cato v. United States stated that "[w]hile [the] plaintiff may be justified in seeking redress for past and present injustices, it is not within the jurisdiction of this court to grant the requested relief. The legislature, rather than the judiciary, is the appropriate forum for plaintiff's grievances."[44] The *Cato* court dismissed the case for familiar reasons: dismissal was proper due to jurisdictional and government sovereign immunity issues.[45]

Recently, the U.S. Court of Federal Claims in *Obadele v. United States* also dismissed a slave reparations complaint, but on different grounds.[46] The court held that the African American plaintiffs were not appropriate supplicants under a federal statute designed to compensate Japanese American internees.[47] The court noted that the plaintiffs "have made a powerful case for redress" and, citing H.R. 40, the court suggested that African American redress "may well be the subject of future legislation providing for reparations for slavery."[48]

Despite its expressed sympathy toward reparations, the Court of Federal Claims makes clear that courts are not the proper forum for reparations proponents to avail themselves.[49] According to one legal commentator, slave reparations litigation is problematic because it "transcends the traditional [common law] paradigm, which is most capable of addressing wrongs perpetuated by an identifiable wrongdoer against a directly harmed individual."[50] The common law paradigm does not recognize historical group-based injury claims by slave descendants more than a hundred years after slavery was outlawed.[51] Rather, a proper claim for reparations under that paradigm must contain the following elements: malicious intent by contemporary Americans, sufficient standing, strong causation relationships linking slavery to present day injuries, and finally, the claim must overcome government sovereign immunity issues.[52]

One further difficulty, the commentator notes, is that as the wrong of slavery and Jim Crow discrimination recedes into historical memory, and as the wrong of societal discrimination diffuses, the relationship between possible plaintiffs and defendants grow imprecise.[53] The imprecision that has increased since

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[44] Cato v. United States, 70 F.3d 1103, 1105 (9th Cir. 1995).

[45] *Id.*

[46] Obadele v. United States, 53 Fed. Cl. 432, 432 (2002).

[47] *Id.* "One of the threshold criteria of the [1988 Civil Liberties Act providing a formal apology and redress payments of $20,000 to each claimant] requires that *an individual be of Japanese ancestry*, or the spouse or parent of an individual of Japanese ancestry." *Id.* at 435.

[48] *Id.* at 442.

[49] *Id.*

[50] Note, *supra* note 34, at 1691.

[51] *Id.*

[52] *Id.* at 1692.

[53] *Id.* at 1691.

emancipation renders the common law paradigm incapable of providing adequate slave reparations.[54]

The limits of the common law paradigm permit courts to deny reparations. The line of cases leading up to the Farmer-Paellmann complaint illustrates how courts have routinely dismissed cases for lack of jurisdiction and sovereign immunity.

D. The Farmer-Paellmann Complaint

Aware of the legal weaknesses in past reparations lawsuits, the Farmer-Paellmann complaint filed in 2002 uniquely tackles the issue of government sovereign immunity by naming corporate defendants whose histories are entangled in slavery.[55] Farmer-Paellmann also seeks to establish jurisdiction by giving a socio-economic account of slavery's continuing harm and concretely establishing New York as the place of injury.[56] The plain facts presented by Farmer-Paellmann are powerful: slavery and discrimination are not fossilized wrongs particular to the colonial period.[57] Despite its formal abolition in 1865, unofficial slavery took the form of state-sanctioned Jim Crow segregation and the legacy of socio-economic oppression that continues today.[58]

According to Farmer-Paellmann, the prima facie case for ascribing responsibility to Fleetboston Corporation, Aetna Insurance and CSX[59] is that defendants conspired to participate in and support slave institutions.[60] As a

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[54] *Id.*

[55] Plaintiff's Complaint at 8-9, Farmer-Paellmann v. Fleetboston Financial Corp. Inc., (E.D.N.Y. Mar. 26, 2002) (No. CV-02-1862), *available at* http://www.nyed.uscourts.gov/coi/cases_of_interest.html (last visited Nov. 14, 2002).

[56] *Id.* at 2-4. Farmer-Paellmann argued that the cruelty of slavery was not isolated to southern states, but rather, the abuses and benefits derived from slavery were pervasive. *Id.* Northern universities, New York streets and city infrastructures were built using slave labor. *Id.*

[57] *Id.* at 5-6.

[58] *Id.* According to Farmer-Paellmann, the lives of African Americans "remained locked up in quasi-servitude, due to legal, economic and psychic restraints that effectively blocked their economic, political and social advancement." *Id.* at 5. Farmer-Paellmann alleges that present harms as evidenced in contemporary statistics on poverty, educational achievement, infant mortality, incarceration, and death penalty verdicts that reflect deeply racialized conditions, are directly attributable to slavery. *Id.* at 5-6.

[59] CSX is a successor-in-interest to railroad lines constructed or run by slave labor. *Id.* at 9.

[60] *Id.* at 14-15. The complaint alleged that each defendant acted individually and in concert, and operated as a joint enterprise designed to maintain slavery. *Id.* For instance,

> [t]he shipping and railroad industry benefited and profited from the transportation of slaves. The railroad industry utilized slave labor in the construction of rail lines. These

result of this conspiracy, the defendants were unjustly enriched at the expense of the plaintiff class.[61] Thus defendants, as a matter of corrective justice, are obligated to disgorge and remedy the continuing effects of slavery.[62] According to attorney Roger S. Wareham, "[t]his is a case about wealth built on the back and from the sweat of African slaves. . . . We expect those companies that are targeted to stand up."[63]

In addition to unjust enrichment, the complaint also raises violations of international laws.[64] The complaint states, in pertinent part:

> [Count] 58. The Defendants participated into the activities of the institution of slavery and in so doing furthered the commission of crimes against humanity, crimes against peace, slavery and forced labor, torture, rape, starvation, physical and mental abuse, [and] summary execution. Specifically, the defendants profited from these wrongs.
> [Count] 59. Defendants knowingly benefited from a system that enslaved, tortured, starved and exploited human beings, so as to personally benefit from them. In the process, the Defendants directly or indirectly subjected the plaintiffs' ancestors to inhumane treatment, physical abuse, torture, starvation, execution and subjected the plaintiffs to the continued effects of the original acts, including but not limited to: race discrimination, unequal opportunity, poverty, substandard health care, substandard treatment, substandard housing, substandard education, unjust incarceration, racial profiling and inequitable pay.[65]

This compelling reparations complaint is the latest attempt to gain court-awarded reparations. In the past, however, courts have been utterly unavailing, and their historical rejection of reparations claims[66] suggest that the Farmer-Paellmann complaint will also fail at the pleading stage. Nonetheless, the Farmer-Paellmann complaint and H.R. 40 play valuable and unique roles in the reparations movement because they invite discussion and debate.

> transportation industries were dependent upon the manufacturing and raw materials industry to utilize the slaves they shipped. The cotton, tobacco, rice and sugar industries thrived on profits generated from their use of slave labor, and relied upon financial and insurance industries to finance and insure the slaves that they utilized and owned. All industries : raw market, retail, financial, insurance, and transportation, benefited from the reduced costs of slave-produced goods.

Id.

[61] *Id.* at 18.

[62] *Id.* at 19.

[63] *U.S. Firms Face Slave Reparations Suit*, (Mar. 27, 2002) BBC NEWS ONLINE *at* http://news.bbc.co.uk/2/low/business/1893321.stm.

[64] Plaintiff's Complaint at 16, *Farmer-Paellmann.*

[65] *Id.*

[66] *See* discussion *infra* Part II.C.

E. Interest Convergence Theory

In spite of legislative and judicial efforts by reparations proponents, claims for slave reparations have been greatly marginalized.[67] Professor Derrick Bell's political interest convergence theory helps to critique and explain the general trend of mainstream America marginalizing African American interests. In turn, Professor Bell's theory provides ways to critique and strategize for the slave reparations movement.

In 1980, Professor Bell proposed a provocative theory explaining the marginalization of African American civil rights interests. He stated that "[t]he interest of blacks in achieving racial equality will be accommodated only when it converges with the interests of whites."[68] Based on the premise that dominant culture constructs its social reality in ways that promote its own self-interests, Professor Bell's thesis suggests, "white elites will tolerate or encourage racial advances for blacks only when such advances also promote [their own] self-interests."[69] Simply put, African Americans win only if their goals overlap with the goals of decision makers who see benefits for themselves.

In his article, Professor Bell noted that although African Americans actively challenged racial segregation for almost a century, it was not until 1954 that the United States Supreme Court dramatically shifted away from the longstanding "separate but equal" doctrine toward desegregation.[70] Professor

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[67] Horowitz, *supra* note 10. David Horowitz printed an advertisement in a Brown University student newspaper claiming that African American reparations are racist for the following reasons:

> (1) Black Africans and Arabs were also responsible for slavery; (2) American blacks have nothing to claim since they "*on average* enjoy per capita incomes . . . twenty to *fifty* times that of blacks living in any of the African nations from which they were kidnapped"; (3) just a tiny minority of Americans owned slaves, therefore society at large should not be held responsible; (4) American immigrants arriving after slavery would be unduly made to pay although they did not participate in slavery; (5) reparations to blacks are racially discriminatory; (6) not all blacks are under economic duress; (7) reparations are demands for special treatment; (8) reparations have already been paid by welfare benefits and affirmative action programs that favor blacks; (9) if not for the "sacrifices of white soldiers and a white American president . . . blacks in America would *still* be slaves"; (10) a reparations claim is a separatist idea that assaults the very nation that granted freedom to blacks. *Id.*

[68] Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

[69] CRITICAL RACE THEORY: THE CUTTING EDGE, 2 (Richard Delgado & Jean Stefanic eds., Temple University Press 2d ed. 2000).

[70] Bell, *supra* note 68, at 524.

Bell argued that public school desegregation was a timely reassertion of the basic American principles of democracy.[71] He stated:

> [T]he decision in *Brown* to break with the Court's long-held position on these issues cannot be understood without some consideration of the decision's value to whites, not simply those concerned about the immorality of racial inequality, but also those whites in policymaking positions able to see the economic and political advances at home and abroad that would follow abandonment of segregation. First, the decision helped to provide immediate credibility to America's struggle with Communist countries to win the hearts and minds of emerging third world peoples . . . . Second, *Brown* offered much needed reassurance to American blacks that the precepts of equality and freedom so heralded during World War II might yet be given meaning at home.[72]

Thus, according to Professor Bell, civil rights victories during the 1950's and 1960's were not simply acts of American altruism.[73] Rather, civil rights developments were enabled because American democracy and prestige were being undermined by international criticism against domestic segregation, which put America's communist competitors in a more favorable light.[74]

In the current slave reparations movement, African American interests are once again at stake. Contrary to an international and domestic trend[75] of race apologies and reparations, the United States still continues to deny slave reparations.[76] Congress has largely ignored long-standing requests for reparations, and with no other recourse, reparations proponents have sought judicial remedy.[77] Courts, however, have routinely denied reparations, claiming jurisdictional and government sovereign immunity issues.[78] Courts have historically volleyed the responsibility of giving reparations back to a Congress that fails to respond.[79] The interest convergence theory helps to explain the context and forces that animate this pattern of denial and the role of the Farmer-Paellmann complaint and H.R. 40 within the reparations movement. This theory also suggests a strategy that more effectively advances African American reparations claims.[80]

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[71] *Id.* at 523-24.
[72] *Id.* at 524 (emphasis added).
[73] *Id.*
[74] *Id.*
[75] *See supra* text accompanying notes 15, 20.
[76] *See* discussion *supra* Part II.A.
[77] *See* discussion *supra* Parts II.B, II.C.
[78] *See* discussion *supra* Part II.C.
[79] *Id.*
[80] *Id.*

III. ANALYSIS

The interest convergence theory explains African American civil rights victories in terms of a coincidental overlap of interests between African Americans and mainstream, mainly white, decision makers.[81] Professor Mary Duziak's careful research on the civil rights movement affirms the interest convergence theory's relevance.[82] Thus, applying the interest convergence theory to the African American reparations movement helps to broadly assess the movement in its political context and the Farmer-Paellmann complaint and H.R. 40's role within it. Insight derived from such an application may be used to devise a strategy that more effectively advances African American interests in slave reparations.

A. Civil Rights and the Image of American Democracy

In her recent book entitled *Cold War Civil Rights : Race and the Image of American Democracy*,[83] Professor Dudziak concretely applied the interest

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[81] *See generally*, Bell, *supra* note 68.

[82] MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (Princeton University Press 2000).

[83] *Id.*; *compare Model Minority Ideology*, *supra* note 22, at 390-93. *See also* Magee *supra* note 21, at 908-09. Professor Iijima argued that monetary reparations to Japanese American internees in 1988 can be explained by the Reagan-Bush Administration's effort to bolster its own image among moderate voters:

> Support of reparations helped strengthen the appearance internationally that the United States, as a country, was committed to human rights. Finally, such support allowed the Republican Administration to point to a "model minority" group to defend its conservative racial policies . . . . Contemporaneous stories in the national and local popular press about how Asian Americans were a "model minority" were prevalent during the time of debate and passage of the redress bill. It is no accident that there is ample evidence in the record of allusions to the "model minority" image of Asian Americans, and particularly of Japanese Americans.

Model Minority Ideology, *supra* note 22, at 390-93. In giving reparations, Congress specifically celebrated the Japanese American 442nd Regimental Combat Team's military heroism and success despite internment and discrimination. *Id.* at 397-98. No mention was made of the Japanese American draft resistance movement. *Id.* at 398. Thus, argued Professor Iijima, reparations sent a clear message about what lessons Congress hoped the law would teach Japanese Americans and people of color in general, that blind obedience rather than resistance is the proper response to racial injustice. *Id.* at 399.

Magee argued that Japanese American internment reparations movement aptly illustrates Professor Bell's political interest convergence theory. Magee, *supra* note 21. Magee pointed out that compared with African Americans, Japanese American internees gained reparations because of their ties to Japan, with whom the United States was trying to establish economic alliances. *Id.* She argues:

> For Congress, lingering animosity over the ill-treatment of Japanese-Americans during

convergence theory and demonstrated that civil rights victories were a strategic concession directly linked to national concerns over America's image and prestige during the Cold War.[84]

Professor Dudziak found that during World War II,

> "the principle of democracy [necessarily] applied more explicitly to race . . . . Fascism and racism are based on a racial superiority dogma . . . and they came to power by means of racial persecution and oppression. In fighting facism and racism, America had to stand before the whole world in favor of racial tolerance and cooperation and of racial equality." Although America promised these essential freedoms to the world at large, it appeared incapable of making or keeping such promises when, evidently, domestic lynching and segregation persisted still.[85]

The international community not only noted this apparent contradiction between espoused ideology and actual domestic policy, but the Soviet Union also sensationalized America's race problems in their anti-American propaganda.[86] Soviet publications distributed in India claimed that "American imperialism destroyed the largest section of the native population of North America and doomed the survivors to a slow death . . . [t]he fate of Negroes [is] equally tragic . . . . America's soil is drenched in the blood and sweat of Negro toilers."[87] Throughout the decade, Soviet propaganda exploited problematic American race relations, but their campaign was given its greatest

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> World War II may have been viewed by some as a barrier to effective economic relations between Japan and the United States. The favorable Congressional response to the Japanese-American case for reparations unfolded contemporaneously with the pro-Japan trade policies of the Reagan Administration. To use Bell's analysis, the political context which favored trade relations between Japan and the United States provided the essential "major crisis, or tragic circumstances that conveyed the necessity or at least the clear advantages of adopting a reparations scheme."

Id. at 908-09.

[84] DUDZIAK, *supra* note 82. Professor Dudziak's monograph is a careful historical examination of original and unpublished documents that demonstrate how U.S. concerns about global relationships and the Cold War affected, and even dictated American civil rights reform. *See* Richard Delgado, *Explaining the Rise and Fall of African American Fortunes—Interest Convergence and Civil Rights Gains*, 37 HARV. C.R.-C.L. L. REV. 369, 373 (2002) (reviewing MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS : RACE AND THE IMAGE OF AMERICAN DEMOCRACY).

[85] DUDZIAK, *supra* note 82, at 8 (quoting GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY (1944)). Professor Dudziak discusses the inconsistencies between racially discriminatory domestic practices and the image of democracy America sought to create for an international audience. *Id.*

[86] *Id.* at 12, 15, 18, 27, 34, 37, 48-49, 183, 187, 250 (providing specific examples of the Soviet Union's anti-American propaganda).

[87] *Id.* at 34 (quoting American Embassy, New Delhi, "Survey of Communist Propaganda in India," vol. 2, no. 13 July 1-31, 1952).

fuel in 1963 when Birmingham police used fire hoses to repel unarmed civil rights marchers in Alabama.[88] The Soviet Union described in great detail American police violence toward the young marchers and devoted one-fifth of its radio broadcasts to covering the event.[89]

In response, President Harry Truman's Committee on Civil Rights issued a report identifying America's challenges:

> Our foreign policy is designed to make the United States an enormous, positive influence for peace and progress throughout the world. We have tried to let nothing, not even extreme political differences between ourselves and foreign nations, stand in the way of this goal. But our domestic civil rights shortcomings are a serious obstacle [to our foreign policy].[90]

The Committee Report also noted that to America's communist critics, "our civil rights record is only a convenient weapon with which to attack us."[91] The report emphatically stated, "*the United States is not so strong, the final triumph of the democratic ideal is not so inevitable that we can ignore what the world thinks of us or our record.*"[92]

To establish a favorable record, President Truman suggested to the Justice Department:

> "[I]f we wish to inspire the peoples of the world whose freedom is in jeopardy, if we wish to restore hope to those who have already lost their civil liberties, if we wish to fulfill the promise that is ours, we must correct the remaining imperfections in our practice of democracy."[93]

Consequently, the Justice Department under Truman submitted *amicus curiae* briefs stating that critical national interests were at stake in five desegregation cases before the United States Supreme Court.[94] For all practical purposes, the

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[88] *Id.* at 169-70.

[89] *Id.*

[90] *Id.* at 80.

[91] *Id.* at 81.

[92] *Id.* at 82 (quoting PRESIDENT'S COMMITTEE ON CIVIL RIGHTS, TO SECURE THESE RIGHTS, at 148 (U.S. Government Printing Office, 1947)).

[93] *Id.* at 82 (quoting Harry S. Truman, Special Message to the Congress on Civil Rights (Feb. 2, 1948), *in Public Papers of the Presidents of the United States: Harry S. Truman*, 1948, 1964 at 121-26).

[94] *Id.* at 90-92, 95-96. In *Shelley v. Kraemer*, white homeowners sold residential property to African Americans in violation of a covenant among landowners prohibiting sales to non-whites. Shelley v. Kraemer, 334 U.S. 1 (1948). The Missouri and Michigan State Supreme Courts ruled that the covenants were enforceable. *Id.* The U.S. Supreme Court held that racially restrictive covenants were a violation of the Fourteenth Amendment. *Id.*

Henderson v. United States involved railroad segregation and held great symbolic potential for overturning *Plessy v. Ferguson*. Henderson v. United States, 339 U.S. 816 (1950). The Department of Justice in its *amicus curiae* brief urged, and the Supreme Court agreed, that

Justice Department's *amicus curiae* briefs essentially instructed the Court that America's political posture would be enhanced by, and therefore *required*, a ruling in favor of racial equality.[95]

Professor Dudziak's research revealing communist propaganda spotlighting American race problems, and official response to such propaganda, provides strong evidence that a convergence in interests enabled civil rights victories.[96] Although African Americans wanted basic civil rights, American decision makers primarily wanted to represent to the international community that American democracy, and the racial equality that it facilitates, is a political model superior to communism.[97] Soviet propaganda reporting America's poor treatment of its own citizens, however, directly contradicted the very representation that American decision makers sought to project.[98] Thus, international criticism, particularly criticism from the Soviet Union, prompted American decision makers to support policies that finally granted civil rights to African Americans.[99]

By assessing international politics and their impact on domestic civil rights, Professor Dudziak suggests that Cold War pressures and an ongoing vigorous domestic civil rights movement coalesced to foster reform.[100] Professor Dudziak illustrates that the interest convergence theory aptly explains how civil rights victories materialized in the 1950's and 1960's.

B. African American Reparations and the Interest Convergence Theory

Applying the interest convergence theory to the reparations movement suggests that post-9/11 politics may also foster reparations if the international

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dining car segregation was a illegal under the Interstate Commerce Act and violated the Fourteenth Amendment. DUDZIAK, *supra* note 81, at 90-92.

The Justice Department also submitted *amicus curiae* briefs in *McLaurin v. Oklahoma* and *Sweatt v. Painter*, and in both cases, the U.S. Supreme Court held that segregation in education institutions unlawfully denied equal treatment to African Americans. McLaurin v. Oklahoma, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950).

And finally, in *Brown v. Board of Education*, the U.S. Supreme Court held that racial segregation in public schools violated the Fourteenth Amendment. Brown v. Board of Education, 347 U.S. 483 (1954).

[95] DUDZIAK, *supra* note 82, at 90-92, 95-96.

[96] *Id.*

[97] *Id.* at 203-48. Professor Dudziak concluded her book stating that to the extent that the Cold War imperative motivated America's efforts to achieve racial equality, the extent of that commitment to continued reform was diminished by the degree American motives were satisfied. *Id.* Accordingly, the decline of communism and the start of the Vietnam War eclipsed U.S. policy makers' concern over civil rights. *Id.*

[98] *See* discussion *supra* Part III.A.

[99] DUDZIAK, *supra* note 82, at 90-92.

[100] *Id.*

community begins to question America's authority to eliminate international oppressors when it notes that America continually refuses to make long-overdue reparations for its own abuses of human rights and civil rights.[101] Concurrently, reparations proponents may strongly frame reparations as an affirmation of America's commitment to civil rights.[102] Furthermore, granting reparations gives America the moral authority to punish terrorist groups that deny civil rights. By articulating a very specific vision of racial justice and reparations' concrete links to the American war against terrorism, reparations proponents are more likely to advance their claims.[103]

Almost immediately after 9/11, the Bush Administration authorized an invasion into Afghanistan under Operation Enduring Freedom.[104] To justify its actions, the Administration claimed that its purpose was not only to eliminate terrorist training, but also to "free" Afghanis from Taliban oppression.[105] The Bush Administration explicitly invoked American democracy as the model and instrument for liberation and greater equality.[106] In promoting Operation Enduring Freedom, the Administration spoke expansively of eliminating oppression and establishing necessary political frameworks for the prosperity, democracy, and liberation of marginalized Afghani women.[107] Secretary of State Colin Powell stated, "If we're going to defeat the terrorists, then we have to attack them from the highest moral plane. Human rights have to be protected."[108]

The Bush Administration's political rhetoric reflects an intent to inspire and promote democratic values. Moreover, such rhetoric implicitly positions the United States as an ideal candidate to eliminate oppression against marginalized Afghani women.[109] From an interest convergence standpoint, that rhetoric easily lends itself to presenting reparations as an essential first

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[101] *Id.*

[102] *Id.*

[103] *Id.*

[104] President George W. Bush, President's State of the Union Address (Jan. 29, 2002), http://www.whitehouse.gov/news/releases/2002/ 01/29-11.html (last visited Oct. 27, 2002).

[105] President George W. Bush stated, "[i]n four short months, our nation has . . . rallied a great coalition, captured, arrested, and rid the world of thousands of terrorists, destroyed Afghanistan's terrorist training camps, saved a people from starvation, and freed a country from brutal oppression." *Id.*

[106] *Id.*

[107] President George W. Bush, Address at the First U.S. Afghan Women's Council (Jul. 2, 2002), http://www.state.gov/g/wi/rls/ 11736.htm (last visited Sept. 11, 2002). President Bush noted that due to the work of the U.S.-Afghanistan Women's Council and U.S. military presence, Afghan women today "are enjoying new freedoms and opportunities . . . . We must work together to offer [the women] real support for a better future." *Id.*

[108] Bandar Seri Begawan, *U.S., Asian Nations Sign Terror Deal*, (Jul. 31, 2002) http://www.cbsnews.com/stories/2002/ 07/29/world/ main516653.shtml.

[109] *Id.*

step to substantiate American claims of candidacy and moral authority.[110] More specifically, reparations proponents can argue that to promote democracy and discourage terrorism, the United States must demonstrate that democracy corrects oppression whereas terrorism sponsors it.[111] Conversely, failing to provide reparations undermines the nation's moral authority for military action against independent states.[112]

In light of the Bush Administration's primary interest in eliminating terrorism and its justifications for military action, reparations proponents may frame the movement to suggest that ignoring reparations will work against American interests by undermining the nation's moral authority on this critical issue.[113]

1. Limitations of the interest convergence theory

Although the interest convergence theory can suggest an effective strategy for reparations proponents, application of the theory is subject two limitations. First, post-9/11 America is confronted with an entirely different set of circumstances: while post-World War II administrations encouraged international cooperation and heeded international opinion, the Bush Administration after 9/11 adopted a distinctly unilateralist approach to politics.[114] President Bush stated, "[w]hile the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right to self-defense by acting preemptively against such terrorists, to prevent them from doing harm against our people and our country."[115]

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[110] Interview with Chris K. Iijima, Associate Professor of Law, University of Hawai'i at Manoa, in Honolulu, Haw. (Oct. 20, 2002) [hereinafter Iijima Interview].

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] R.C. Longworth, *U.S. Unilateralism Helps Weaken Ties with Allies*, CHI. TRIB., *available at* http://chicagotribune.com/news/showcase/chi-207280293jul28,0,6824746.story?coll=newsspecials-hed, (Aug. 1, 2002). The author stated:

> [t]he Atlantic alliance between the United States and Europe, the most successful international bonding of all time, is breaking down admid starkly differing visions of a changing world and both sides' proper place in it. The alliance, a mesh of military, economic, cultural and historic ties, was born in the ashes of World War II, the coupling of a young superpower and old nation-states devastated by conflict. The alliance produced the Marshall Plan and NATO, fought and won the Cold War and created the most prosperous and peaceful assembly of democracies in history. Its dramatic erosion, which is not a priority in a Washington fixated on terrorism, has become an obsession in Europe.

Id.

[115] President George W. Bush, *President's National Security Strategy of the United States of America*, 1 (Sept. 2002).

President Bush also stated that no country will be allowed to challenge American military superiority.[116] In effect, the strong elements of cooperation and persuasion enabling civil rights victories during the Cold War are now replaced by independent military action that disregards international criticism.[117] The unilateralist impulse of the Bush Administration simply does not support a reparations movement in the same way that American strategies supported the civil rights movement during the Cold War.

Secondly, the interest convergence theory, when wrongly interpreted, seems to instruct passivity on the part of reparations proponents; namely, that proponents must simply await political conditions more favorable to reparations.[118] This understanding of interest convergence is incorrect and overlooks the power of a vigorous reparations movement that raises awareness of an otherwise marginalized vision of racial justice.[119]

The reparations movement should be understood by reparations proponents as an active challenge that educates and agitates national responses that in turn create political inertia.[120] Widespread dialogue and attention drawn to reparations and the persisting harms of slavery are, in fact, prerequisite conditions for interest convergence because they pull to the forefront issues that would otherwise be ignored or forgotten.[121]

Professor Yamamoto suggests that reparations claims, and "the rights discourse they engender in attempts to harness the power of the state, can and should be appreciated as intensely powerful and calculated political acts that challenge racial assumptions underlying past and present social arrangements."[122] As the situation currently stands, "[a] full and deep conversation on slavery and its legacy has never taken place in America; reparations litigation will show what slavery meant, how it was profitable and

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[116] *Id.* at 30. President Bush stated:

> [t]he United States must and will maintain the capability to defeat any attempt by an enemy--whether a state or non-state actor—to impose its will on the United States, our allies, or our friends. We will maintain the forces sufficient to support our obligations, and to defend freedom. Our forces will be strong enough to dissuade potential adversaries from pursuing a military build-up in hopes of surpassing, or equaling, the power of the United States.

Id.

[117] Grier, *supra* note 8.

[118] Iijima Interview, *supra* note 110.

[119] *Id.*; Charles Ogletree, *Litigating the Legacy of Slavery*, NEW YORK TIMES OP. ED. (Mar. 31, 2002), http://www.tribes.org/cpocket/tnyt reprintslavery0402.html (last visited Oct. 27, 2002).

[120] *Racial Reparations*, *supra* note 14, at 478.

[121] *Id.*; *see supra* Part II.C.

[122] *Racial Reparations*, *supra* note 14, at 479.

how it has continued to affect the opportunities of millions of black Americans." [123]

House Resolution 40 and the Farmer-Paellmann complaint can be viewed as attempts to engage the nation in an important dialogue about slavery and persisting racial divisions created by slavery. Both H.R. 40 and the Farmer-Paellmann lawsuit specifically and successfully draw national attention to these important issues.

2. Opening a reparations dialogue

The Farmer-Paellmann complaint seeking unspecified damages from corporate parties whose liability is based upon wealth created by its past participation in slavery faces considerable procedural impediments.[124] Despite the intuitive force of Farmer-Paellmann's arguments, for reasons discussed earlier, the New York District Court will likely dismiss the claim on technical grounds.

Nonetheless, the Farmer-Paellmann complaint is a remarkable advance for the African American reparations movement for two reasons. First, the claim marks a dramatic departure from past reparations lawsuits.[125] Farmer-Paellmann directly engages the court in a reparations dialogue right from the start, whereas prior suits, cluttered with other legal issues, tended to obscure the reparations claim.[126] Prior cases also claimed entitlement to monetary compensation with only a cursory description of slavery as the basis of that entitlement.[127] By contrast, the well-crafted Farmer-Paellmann complaint solely focused on the issue of reparations,[128] lays out in detail the history of slavery, and provides statistical links to contemporary race problems in America.[129]

Secondly, the Farmer-Paellmann complaint has managed to generate unprecedented attention and dialogue over the issue of reparations. According to a legal commentator, the Farmer-Paellmann reparations lawsuit aims to "provoke greater public debate and recognition of the history and pervasive

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[123] Ogletree, *supra* note 119; *see* Magee, *supra* note 21.

[124] *See* discussion *supra* Part II.D.

[125] *Id.*

[126] *See Scott v. Comptroller of the Treasury*, 659 A.2d 341, 347 (Md. App. 1994); *see also Cato v. United States*, 70 F.3d 1103 (9th Cir. 1995); *Johnson v. United States*, 1994 WL 225179 (N.D. Cal. 1994); *Obadele v. United States*, 53 Fed. Cl. 432 (2002).

[127] *See supra* note 126.

[128] *See* Plaintiff's Complaint at 1-7, Farmer-Paellmann v. Fleetboston Financial Corp. Inc., (E.D.N.Y. Mar. 26, 2002) (No. CV-02-1862), *available at* http://www.nyed.uscourts.gov/coi/cases_of_interest .html (last visited Nov. 14, 2002).

[129] *Id.* at 6.

effects of slavery on U.S. society in general, and black citizens in particular."[130]

This attention is due to the incisiveness of the complaint and the likelihood of actual reparations in light of a clear worldwide trend in giving reparations and apologies.[131] In addition, Count III of the complaint alleging human rights violations raises international laws that support reparations.[132] According to Professor Van Dyke, "[t]he right to bring a claim for a violation of internationally-recognized human rights is well established under international law."[133] Recently, the Ninth Circuit Court in *Doe I v. Unocal Corp.* explicitly recognized slavery as a violation of international laws protecting human rights.[134] Representative Bill Conyers also framed H.R. 40 in similar international human rights terms.[135] H.R. 40 seeks acknowledgement of "fundamental injustice, cruelty, brutality, and inhumanity of slavery [and] subsequently *de jure* and *de facto* racial and economic discrimination against African-Americans, and the impact of these forces on living African Americans."[136]

Together, H.R. 40 and the Farmer-Paellmann complaint generate the publicity necessary to bring reparations issues to the forefront for a national dialogue. This dialogue in turn can create pressure on Congress, making continued legislative inaction impossible. Congress is the most appropriate forum for reparations because legislators have the flexibility that courts do not have. Congress is empowered to create an independent fact finding commission, hold hearings, and balance equities to construct broad remedies. Congress, however, is unlikely to act without proper pressure, and the momentum and dialogue generated by H.R. 40 and the Farmer-Paellmann lawsuit creates such a pressure. To strengthen their position, reparations

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[130] Jim Lobe, *Rights—United States: Slavery Lawsuit Aims for Social Change*, http://www.oneworld.org/ips2/mar02/00_53_002.htm (Mar. 27, 2002) (quoting Salih Booker, director of Africa Action, an advocacy group in Washington: "All of these suits are going to create controversy . . . . The fact that they will encourage more discussion about slavery and its impact is as valuable as the cases themselves").

[131] *See generally*, *Race Apologies*, *supra* note 11. The article provides a full catalogue of national and international race apologies. *Id.* at 68-88. *See also*, *supra* text accompanying note 20.

[132] Plaintiff's Complaint at 16, *Farmer-Paellmann*.

[133] Van Dyke, *supra* note 20, at 81.

[134] 2002 WL 31063976 (9th Cir. 2002). The 9th Circuit held that individuals may be held liable under 28 U.S.C.A. § 1350 for forced labor, which is a variant of slave trading. *Id.* at 9-16. The court ruled that French and American oil companies were liable for injuries to Myanmar citizens. *Id.* at 35.

[135] *See* H.R. 40, 105th Cong. (1997).

[136] *Id.*

proponents should frame reparations as an enhancement of America's moral authority to persecute terrorists.

IV. CONCLUSION

By understanding that an interest convergence with decision makers enables African American civil rights victories, reparations proponents may frame the movement in concrete terms of how reparations will enhance America's authority to persecute terrorists. Despite its limitations, Professor Bell's interest convergence theory is instructive because it helps identify the forces that animate civil rights victories and enable a strategic incorporation of legislative and political action.

A preliminary assessment of the slave reparations movement suggests that reparations proponents have established a sound basis for reparations. Although the lawsuit will likely fail due to the limitations of the American court system, the Farmer-Paellmann complaint and H.R. 40 have successfully engaged the public in an important dialogue about slavery and its continuing effects. Only with this dialogue is it possible to educate Americans on the issue and pressure Congress to respond.

The next step for reparations proponents is to emphatically and concretely frame reparations as a powerful opportunity to bridge America's racial divide and bolster America's moral authority to act against international oppressors. Conversely, failure to give reparations will undermine the nation's moral authority for its unilateralist policies in eliminating international oppressors and terrorist groups.

Van B. Luong[137]

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[137] William S. Richardson School of Law, University of Hawai`i at Manoa, Class of 2003. I am deeply indebted Professor Eric K. Yamamoto, Professor Jon Van Dyke and especially Professor Chris K. Iijima, who not only created the intellectual space to explore reparations issues, but also generously provided sources and invaluable comments. I am also grateful to the University of Hawai`i Law Review and my editor Elizabeth Paek for her patience and faith.