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FOREWORD

ARTICLES: *TAHOE-SIERRA PRESERVATION COUNCIL, INC. V. TAHOE REGIONAL PLANNING AGENCY*

RECENT DEVELOPMENTS

CASENOTES

25 Volumes of a Quality Law Review

Jon M. Van Dyke*

The students that formed the first classes of the University of Hawai'i Law School after it opened in 1973 resisted creating a law review because they argued that it would promote "elitism" and serve to divide the student body. In those heady days when the nation's President was being forced to resign, students across the country were challenging received traditions regarding race relations, gender roles, and imperialism, and a powerful environmental ethic was emerging, the eclectic collection of law students in our early classes (with substantial faculty support) sought to create a new and different law school that would challenge the tired practices and customs of the law. Even the names of the first-year courses were changed to emphasize the school's cross-cutting interdisciplinary approach, and we offered courses called "Fundamentals of Factual Enquiry and Advocacy" and "Social Decision-Making," rather than the more traditional "Torts" and "Contracts." The students in those early classes were unusual in their energy and visions, and many have become innovative leaders in Hawaii and around the Pacific. But before too many years had passed, both students and faculty realized that a very-small, brand-new, and under-financed law school thousands of miles away from the next nearest law school would not be able to produce or promote dramatic and radical changes in either the tradition-bound legal profession or in legal education, and that the best way it could contribute to transformation was to strive to provide a new generation of lawyers with the analytical, critical-thinking, and writing skills needed to act as effective agents of change. With some reluctance, our law school became more like other law schools. We kept some of our distinctiveness, however, by retaining mandatory small writing classes taught by the full-time faculty for both first and second year students and by continuing to offer a diverse and dynamic curriculum.

Pressure to create a law review came not only from Hawai'i's judiciary, which wanted criticism and analysis of its decisions, but also from the Hawai'i bar, which wanted guidance on the many challenging issues facing our young state. The faculty agreed that it was logical and appropriate for the school to be providing these services to the community, but simultaneously realized that these goals would not be achieved unless the law review was of the highest quality beginning with its first issue. Because our student body was small, the law review staff would inevitably be smaller than at other schools, and it would lack the tradition of hard work and attention to detail that becomes

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passed on by students from one class to the next. Once the decision was made to begin publishing a law review, the individuals who staffed the first editorial boards would play a vital role in determining whether it would succeed or fail.

From a faculty perspective, it was wonderful to see the students chosen to lead the law review rise to the occasion and apply their talents and perseverance toward the production of quality issues. Enormous problems had to be overcome to locate quality articles, produce student notes, and ensure proper documentation of every assertion. It frequently fell on the shoulders of the early editors-in-chief to finish issues by themselves after the rest of the staff had graduated and had headed off to their jobs.

Many of these early editors-in-chief have gone onto hold important positions of trust and responsibility. Although any such list risks leaving out other worthy individuals, mention must be made of Bambi Weil (Volume 2, 1980-81), now Judge Eden Elizabeth Hifo of Hawai'i's First Circuit Court (in Honolulu), who came to law school after a distinguished career as a television journalist and drew upon her journalistic skills to ensure the quality of the law review; Sabrina Shizue McKenna (Volume 4, 1982), who went on to teach at our law school and is now also a judge on the First Circuit Court; Randall K. Schmitt (Volume 6, 1984), now a prominent member of the Honolulu bar, Joyce E. McCarty (Volume 8, 1986), now a distinguished lawyer in Washington, D.C.; and John Y. Gotanda (Volume 9, 1987), who currently teaches at Villanova Law School. Those who served in important support positions also went on to leadership positions, including Larry C. Foster (Articles Editor, Volume 3, 1981), who is now completing his tour as Dean of our law school.

We now take these things for granted, but it is worth mentioning, as a historical note, that the prominent role played by women as editors-in-chief during the early years of our law review was significant in erasing any doubt that anyone might have had about the ability of women to do everything in the legal profession that men can do. In the 1970s, women were still on the outside of the legal profession trying to break in, but five out of the first eight editors-in-chief were women and their successes in this position made it impossible to deny that they were just as capable as their male counterparts.

In Volume 18 (1996), our law review started a new tradition of having two co-editors-in-chief, and that early experiment has become firmly established as the norm. The first board that adopted this approach was trying to accommodate busy schedules and to recognize the chemistry that seemed to work for two individuals who wanted to become co-editors (Jacqueline D. Fernandez and Robert W. Wachter). But after that first experimental year, *all* subsequent boards have been run by two co-editors-in-chief, and this system has now produced many successful volumes. Although in other contexts two co-leaders might have led to jealousy and tension, in Hawai'i's supportive

environment, it has enabled the work to get done with a minimum of tension and hassle.

And, to some extent, the selection of "co-editors-in-chief" has provided an answer to the early concerns about "elitism." Having two editors-in-chief sends an important message to everyone that producing the law review is a cooperative venture that requires sharing and equal contributions.

Elitism has also been reduced by having an extensive "write-on" program, whereby about half the members of the law review are selected based on their ability to write in a competitive environment rather than on their grades. Elitism has further been reduced by the emergence of a second legal periodical at our school—the Asia-Pacific Law and Policy Journal—which has also been putting out quality volumes during the past few years. All students who want to be part of a publication now have the opportunity to do so, and those students who become members of these journals do so because of their commitment to the writing and publication process rather than for the prestige that it brings.

But we do want to honor and thank those who put hard work into our law review, because it has met the goals of not only analyzing Hawai'i's cases and controversies but also of examining issues affecting the state, the region, and the nation. Anyone who has worked on a legal periodical knows that it involves a lot of tedium and frustration. But when a careful, accurate, incisive, and intriguing volume emerges, it stands as a wonderful accomplishment and assists the entire legal community.

I am sure I speak for Hawai'i's judiciary, its bar, and most especially, the faculty of the William S. Richardson School of Law when I express heartfelt thanks to all the students past and present who have made our law review a success, and say to the future students who will take on the task of producing future issues—keep up the good work!!

Moratoria and Musings on Regulatory Takings: *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*

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I. INTRODUCTION

In April of this year, the U.S. Supreme Court handed landowners their first defeat in over a decade by holding that a thirty-two-month development moratorium imposed on certain land surrounding Lake Tahoe was not, on its face, a per se regulatory taking of property. But the opinion, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[1] exists in something of a vacuum. That is so because *Tahoe-Sierra* is not a natural extension of the Court's recent jurisprudence, but the Court neither reversed nor significantly contracted existing precedent. The opinion simply stands by itself, adding little and leaving largely intact the law on total regulatory takings after *Lucas v. South Carolina Coastal Council*.[2] Furthermore, *Tahoe-Sierra* has no affect on the application of either *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[3] which held that compensation is the proper remedy for a regulatory taking, or the recent decision of *Palazzolo v. Rhode Island*,[4] which disposed entirely of the notice issue, at least with respect to categorical takings. Indeed, the Court was at pains to make clear that the Tahoe landowners made "only a facial attack" (as opposed to an as-applied challenge) on the moratoria ordinance and resolutions, and, therefore, faced "an uphill battle" that was made "especially steep by their desire for a categorical rule requiring compensation whenever the government impose[d] such a moratorium on development."[5] In short, the Court held that *Tahoe Sierra*

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[1] 122 S. Ct. 1465 (2002). For a thorough review of the facts and judicial history of the case, see J. David Breemer, *Temporary Insanity: The Long Tale of* Tahoe-Sierra Preservation Council *and Its Quiet Ending in the United States Supreme Court*, 71 FORDHAM L. REV. 1 (2002).

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

[3] 526 U.S. 687 (1999).

[4] 533 U.S. 606 (2001).

[5] *Tahoe-Sierra*, 122 S. Ct. at 1477.

presented a very narrow question of law and that the plaintiffs argued it in a most difficult manner.

In response to this narrow question, the Court held that the mere enactment of a temporary moratorium does not *always* effect a categorical taking of property.[6] The Court, however, clearly rejected the argument that moratoria never do so.[7] According to the Court, the outcome will depend upon the facts of the case. Consequently, the Court concluded that the appropriate challenge is as-applied, and the proper analytical framework is likely that set out in *Penn Central Transportation Co. v. City of New York*.[8] Under that rubric, the factors to be weighed and balanced are (1) the rationale for the moratorium land and its length (the "morphed" interpretation of the "character of the governmental action"); and (2) its economic impact on the landowner, in particular the interference with her distinct (some would have it "reasonable"), investment-backed expectations.[9]

Whether or not this is unfortunate depends, of course, on one's point of view, but it is certainly not calamitous. Clearly, the majority that gave us not only *Lucas*, but also *Nollan v. California Coastal Commission*,[10] *Dolan v. City of Tigard*,[11] and *Palazzolo* had already showed signs of strain when two members of the *Palazzolo* majority split over the application of the notice rule to partial takings. Justice Scalia would never consider a landowner's notice of existing regulations, arguing that the land use restriction should be as constitutional to the first owner as it is to the last.[12] Justice O'Connor, however, would consider what the landowner knew or should have known when she acquired the property, arguing it would be unfair to do otherwise.[13] Observed from this perspective, the Court's narrow decision in *Tahoe-Sierra* merely confirms the Court's aversion to categorical rules and its preference for the balancing approach that has characterized most regulatory takings

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[6] *See id.* at 1478, 1489.

[7] *Id.* at 1478 n.16, 1486. The courts that rely on *Tahoe-Sierra* for something more are simply mistaken. *See, e.g.*, Manke Lumber Co., Inc. v. Cent. Puget Sound Growth Mgmt. Hearings Bd., No. 26580-0-II, 2002 Wash. App. Lexis 1161, at *24-25 (Wash. Ct. App. May 17, 2002) (noting that Tahoe-Sierra held that a "32-Month loan on development [was] not a regulatory taking because it [was] only temporary, not permanent."); Mays v. Bd. of Trs. of Miami Township, C.A. Case. No. 18997, 2002 Ohio App. Lexis 3347, at *8-9 (Ohio Ct. App. June 23, 2002) ("In order to constitute a 'regulatory' taking, the measure involved must be permanent in nature and of such a character and effect that the owner is deprived of all or substantially all economic use of his land that is feasible.").

[8] 438 U.S. 104 (1978).

[9] *Id.* at 124; *see also Tahoe-Sierra*, 122 S. Ct. at 1489.

[10] 483 U.S. 825 (1987).

[11] 512 U.S. 374 (1994).

[12] Palazzolo v. Rhode Island, 533 U.S. 606, 637 (2001) (Scalia, J., concurring).

[13] *Id.* at 633-34 (O'Connor, J., concurring).

jurisprudence since *Pennsylvania Coal Co. v. Mahon.*[14] Indeed, the *Lucas* Court acknowledged that its per se rule would apply only in the "relatively rare" situation where "the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle."[15] Even *First English Evangelical Lutheran Church v. County of Los Angeles*[16] provided for takings-free delays, when such delays are part of the normal land development process.[17] But the question of whether that exception applied to moratoria as well was an issue virtually from the time *First English* was decided. After *Tahoe-Sierra*, that question has been answered somewhat in the affirmative.

Thirty-two months is, of course, a long "normal" delay. Indeed, the actual delay was far longer, but the Court chose not to deal with that. So, are we to assume that any moratorium of thirty-two months or less passes constitutional muster? No, and it would be irresponsible to do so. The facts and legal posture of *Tahoe-Sierra* were critical to the outcome. The Court had before it a moratorium imposed by a bi-state agency for the purpose of fulfilling its duty to preserve the clarity of Lake Tahoe, a nationally-recognized treasure of unusual and striking beauty.[18] The Court was clearly impressed by the planning and rationale for the moratoria, and, therefore, was not about to strike it down on principle, that is, on a facial attack. It is difficult to believe, however, that the Court would blithely accept, for example, a moratorium of the same period imposed by a local government while amending its comprehensive plan. Reading more into the case from a planning perspective is like looking into a crystal ball, and the proverbial "ground glass" warning applies.

That is really all *Tahoe-Sierra* did. What then can we glean from the sometimes sweeping dicta and other nuances? Several things, none of which the least bit surprising, and none at all certain to command a majority should a case arise in which any one is the principal issue before the Court. First, Justice Stevens does not like categorical rules in the takings context, and he will do his best to eliminate them. Thus, his attack on *Lucas*, from which he vigorously dissented, and his transparent attempt to convert the "all economically viable use" standard into a "no economic value" rule, which would essentially eviscerate *Lucas*, came as no surprise. Second, sensible land use planning is good, and we should all support it. That is, of course, obvious and something *even* Chief Justice Rehnquist agrees with. In *First English*, for

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[14] 260 U.S. 393 (1922).

[15] Lucas v. S. Carolina Coastal Council, 505 U.S. 1003, 1018-19 (1992).

[16] 482 U.S. 304 (1987).

[17] *Id.* at 321-22.

[18] *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plann'g Agency, 122 S. Ct. 1465, 1470-73 (2002).

example, the Chief Justice acknowledged the importance of planning and sympathetically recognized that the Court's decision would "lessen to some extent the freedom and flexibility of land-use planners and governing bodies."[19] The difference is that the Chief Justice did not believe the need for good planning curtailed the Court's mandate to protect constitutional rights.[20] Nor, for that matter, did Justice Brennan when some twenty years ago he quipped, "After all, a policeman must know the Constitution, then why not a planner?"[21] The point is simple: the Constitution, not ever-evolving policy considerations, should inform the Court's opinions. Finally, segmentation, also called the denominator or relevant parcel issue, continues to divide the Court. Therefore, the war of footnotes and dicta commenced in *Lucas* and resumed in *Palazzolo* is likely to continue until the Court finally takes a case and resolves it.

II. CATEGORICAL RULES AND THE QUEST FOR CERTAINTY

The basic thrust of the plaintiffs' argument in *Tahoe-Sierra* was that development moratoria by definition leave most vacant land without any discernible economic use, and, therefore, moratoria are squarely within the *Lucas* categorical rule.[22] The *Lucas* rule provides that when a regulation deprives land of all economically viable use, the Fifth Amendment requires compensation.[23] The rule is, of course, subject to two narrow exceptions,[24] but neither exception was present under the *Tahoe-Sierra* facts. Thus, the landowners argued, the case was easy and they should win. Indeed, the only way to avoid such a result was for the Court to find some basis for taking the case beyond the application of the categorical rule.

One way to move the applicable regulatory takings doctrine from the *Lucas* per se rule to the *Penn Central* balancing test is to identify those characteristics in *Lucas* that require abandoning the categorical analysis. This the *Tahoe-Sierra* Court did by defining the relevant parcel to include more than the challenged moratorium period. A second way is to emphasize that factors, like governmental planning, need to be considered in any decision, and that cannot

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[19] *See First English*, 482 U.S. at 317, 321-22.

[20] *Id.* at 321.

[21] San Diego Gas & Elec. v. City of San Diego, 450 U.S. 621, 661 n.26 (1981) (Brennan, J., dissenting).

[22] *See* Brief for Petitioners, 2000 U.S. Briefs 1167, 32-39, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plann'g Agency, 122 S. Ct. 1465 (2002) (No. 00-1167).

[23] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029-30 (1992).

[24] *Id.* The so-called *Lucas* exceptions, "nuisance and background principles of a state's law of property," are discussed at length by D. Callies and D. Breemer in *Background Principles*, *in* TAKING SIDES ON TAKING ISSUES (T. Roberts ed., 2002).

be done in a per se or categorical analysis. This, too, the majority did and did with some enthusiasm. Finally, a third way is to attack the per se rule itself, and Justice Stevens did so at every turn.

The majority began by undermining part of the rationale for the categorical rule by making it very clear that physical takings jurisprudence is, in its view, totally inapposite to regulatory takings. Writing for the majority, Justice Stevens stated:

> The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property. Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of per se rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by "essentially ad hoc, factual inquiries" designed to allow "careful examination and weighing of all the relevant circumstances." . . . This long-standing distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa.[25]

Thus, the Court rejected the clear analogy between physical appropriations and regulations that deny landowners all economically beneficial or productive use of their property, even though the Court in *Lucas*, as well as other takings cases, repeatedly emphasized the similarities between the two.[26]

The Court next took on the categorical rule itself. The majority first isolated *Lucas* by reiterating that "[i]n the decades following [*Pennsylvania Coal*] we have 'generally eschewed' any set formula for determining how far is too far,

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[25] *Tahoe-Sierra*, 122 S. Ct. at 1478-79 (citations omitted).

[26] *See Lucas*, 505 U.S. at 1017, 1028-29; San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting) ("Police power regulations . . . can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property."); Armstrong v. United States, 364 U.S. 40, 48 (1960) ("The total destruction by the Government of all value of these liens . . . has every possible element of a Fifth Amendment 'taking.'"); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922) ("[Rendering a legal use] commercially impracticable . . . has very nearly the same effect for constitutional purposes as appropriating or destroying it."); *see also* Calvert G. Chipchase, Comment, Lucas *Takings: Why Investment-Backed Expectations are Irrelevant when Applying the Categorical Rule*, 24 U. HAW. L. REV. 147, 166-69 (2001) (discussing the justifications and precedent for the categorical rule).

choosing instead to engage in 'essentially ad hoc, factual inquiries.'"[27] It then began to chip away at the "all economically beneficial use" standard—the cornerstone of the categorical rule. The majority did so by attempting to substitute the term "*value*" for the term "*use*." For example, Justice Stevens stated that the lots at issue in *Lucas* were rendered "valueless" by the regulation, and that the compensation award represented "the value of the fee simple estate."[28] That is plainly not true. Even with the restrictions, Lucas's lots were extremely valuable, just not very useful. Nevertheless, the majority continued and even expressly reframed the appropriate rule as providing that "the permanent 'obliteration of the value' of a fee simple estate constitutes a categorical taking."[29] The majority tied its revision of the per se rule to footnote eight of the *Lucas* opinion, in which the *Lucas* Court acknowledged that the categorical rule did not apply to situations where there was anything less than a "total loss."[30] The *Tahoe-Sierra* Court, however, failed to disclose that footnote eight was penned as a response to one of the many blistering attacks leveled by Justice Stevens, then in the minority, not a fundamental tenet of the opinion. Nor did it reveal that the distinction drawn in that footnote between a diminution in value of 95% and one of 100% was a quotation taken from Justice Stevens' dissent, not something at all attributable to the *Lucas* majority.[31] The *Lucas* Court, both in analysis and in effect, focused on what use David Lucas could make of his property, not how much the land was worth. Neither judicial sleight of hand, nor the efforts of some commentators, can make it otherwise.

This blatant mischaracterization is unsurprising given that Justice Stevens so vigorously dissented from the application of a per se rule at all. In *Lucas*, he lamented the Court's "illogical expansion of the concept of 'regulatory takings'" in general,[32] and his objection to the categorical rule in particular was even more pronounced. According to Justice Stevens, the categorical rule recognized in *Lucas* was "unsupported by prior decisions, arbitrary and unsound in practice, and theoretically unjustified."[33] Instead, Justice Stevens argued that a takings case necessarily "entails inquiry into [several factors,]" the most important of which being the character of the governmental action.[34] That is so, Justice Stevens reasoned, because a regulation "that targets one or two parcels of land and a regulation that enforces a statewide policy" are

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[27] *Tahoe-Sierra*, 122 S. Ct. at 1481.

[28] *Id.* at 1482.

[29] *Id.* at 1483.

[30] *Id.*

[31] *Compare Lucas*, 505 U.S. at 1019, n.8, *with id.* at 1064 (Stevens, J., dissenting).

[32] *Id.* at 1061 (Stevens, J., dissenting).

[33] *Id.* at 1067.

[34] *Id.* at 1071 (brackets in original).

simply different and must be analyzed distinctly.[35] Furthermore, Justice Stevens added, the purposes of the restriction must inform the examination of its economic impact and the claimant's investment-backed expectations.[36] Because of his preference for a flexible examination of several factors, weighed according to the individual predilections of those on the Court, Justice Stevens is fundamentally at odds with an objective rule that asks only whether the regulation has wholly deprived the owner of the right to make "economically beneficial use" of her land.[37] Accordingly, he made full use of his first opportunity to convert the test from one of use to one of value.

Changing of the *Lucas* rule from the "elimination of economically beneficial use" to the "complete obliteration of all value" would render the per se rule a nullity. Land always has value, regardless of the degree of restriction—particularly in places like the Lake Tahoe region or coastal South Carolina. One cannot help but conclude that the *Tahoe-Sierra* majority, or at least Justice Stevens, is after just such a result. *Lucas*, however, with its clear language and analogy to physical takings, remains a formidable barrier to that goal. In 2001, *Palazzolo* affirmed *Lucas* in both scope and application. *Tahoe-Sierra* neither overruled, nor expressly limited, either opinion. Thus, both continue as the law of the land. Notwithstanding those realities, Justice Stevens may have given courts sharing his aversion to the objective limitations inherent in the *Lucas* rule enough ammunition to engage in their own subtle revisionism. Indeed, relying on *Tahoe-Sierra*, the Kansas State Supreme Court recently held that "[i]f the *entire value* of the property is not destroyed, then the analysis under *Penn Central* is appropriate."[38] In Kansas, it seems, the categorical rule is now little more than a truism.

As for merely limiting per se rules, the *Lucas* dissent has found an increasingly kindred spirit in Justice O'Connor. To be sure, Justice O'Connor was a part of the *Lucas* majority, and she has not attempted to rewrite the categorical rule. But she has made clear that her "polestar remains the principles set forth in *Penn Central*," where the several factors remain entirely relevant inquiries.[39] For example, Justice O'Connor joined fully in the *Palazzolo* majority opinion, wherein the Court held that a preacquisition

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[35] *Id.* at 1073.

[36] *Id.* at 1075.

[37] Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992).

[38] *See* McPherson Landfill, Inc. v. Bd. of County Comm'rs of Shawnee County, 49 P.3d 522, 539 (2002) (emphasis added) (citations omitted); *see also* Vellequette v. Town of Woodside, A091682, 2002 Cal. App. Unpub. Lexis 6690, at *33 (Cal. Ct. App. July 23, 2002) ("A total loss of all economic value is required to establish a categorical taking."). *But see* Mays v. Bd. of Trs. of Miami Township, C.A. Case No. 18997, 2002 Ohio 3303, at *8 (Ohio Ct. App. June 28, 2002) (holding, even after *Tahoe-Sierra*, that a taking "may be accomplished through a regulation that prohibits" all *economically feasible use* of land).

[39] Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001).

regulation, other than a background principle of a state's law of property, is irrelevant in a *Lucas* claim and not dispositive in a *Penn Central* claim.[40] Justice O'Connor, however, wrote separately to explain her understanding of what that holding meant to regulatory takings jurisprudence. With respect to *Penn Central* claims, Justice O'Connor argued that the Rhode Island Supreme Court erred only in holding that "the preacquisition enactment of the use restriction *ipso facto* defeats any takings claim based on that use restriction."[41] The proper analysis, Justice O'Connor concluded, is to view a preacquisition regulation as something that shapes and defines the claimant's investment-backed expectations, which are in turn but one of three factors to be weighed when determining whether a partial taking has occurred.[42] Indeed, she vigorously objected to Justice Scalia's argument that a claimant's "investment-backed expectations" should not "include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional."[43] Thus, although Justice O'Connor has not abandoned the categorical rule, her preference clearly rests with ad hoc evaluations.

In sum, the *Tahoe-Sierra* majority inveighed against the expansion of categorical rules for regulatory takings and did its best to undercut the application of *Lucas* by substituting "value" for "economically beneficial use." This approach leaves an enormous amount of discretion to judges and removes what certainty comes with clear bright-line rules. The approach also tilts the field steeply in favor of government regulation. Reviewing the opinions of Justice Stevens, it becomes apparent that this is no accident. His opinions reflect profound discomfort with the application of Fifth Amendment takings jurisprudence to property regulations, preferring instead declaratory relief under the Fourteenth Amendment.[44] For example, in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*,[45] Justice Stevens argued, "[T]here is nothing in the Constitution that prevents the government from electing to abandon the permanent-harm-causing regulation" without paying compensation.[46] Indeed, Justice Stevens, dissenting from the holding in *Dolan*, revealed his disdain for regulatory takings in general when

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[40] For a detailed summary of the facts and holding of *Palazzolo*, see David L. Callies & Calvert G. Chipchase, Palazzolo v. Rhode Island: *Ripeness and 'Notice' Rule Clarified and Statutory 'Background Principles' Narrowed*, 33 URB. LAW. 907 (2001).

[41] *Palazzolo*, 533 U.S. at 632 (O'Connor, J., concurring).

[42] *Id.* at 633-34.

[43] *Id.* at 637 (Scalia, J., concurring).

[44] *See* Dolan v. City of Tigard, 512 U.S. 374, 406-08 (1994) (Stevens, J., dissenting); MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 351-53 (1986); Williamson County Reg'l Plann'g Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 202-06 (1985) (Stevens, J., concurring).

[45] 473 U.S. 172 (1985).

[46] *Id.* at 203-03 (Stevens, J., concurring).

he argued that a claimant had "no right to be compensated for a taking unless the city acquire[d] the property interests that she has refused to surrender."[47] Thus, Justice Stevens would shield the government from its obligation to pay compensation, no matter how extreme the regulation or how long it had been in effect. He may have lost that battle, but Justice Stevens' clear preference for a flexible, ad hoc balancing test is wholly consistent with his bias against regulatory takings, and helps to explain the fact that he has so rarely found any land use restriction that "went too far." This confidence in government at the expense of private landowners is misplaced, as any survey of cases, administrative actions, and written regulations from places as diverse as California, New England, and Hawaii clearly demonstrates.

III. THE PROCESS OF PLANNING

The Court has for many years recognized and supported the importance of land development planning at the state and local government level.[48] Indeed, the Chief Justice has been one of the strongest advocates for planning and local land use controls,[49] coming as he did from a local government background not shared by other members of the Court. Thus, it is not particularly surprising to see the Court use the importance of planning as a basis for supporting moratoria in general. In addition, two facts, specific to the moratoria at issue in *Tahoe-Sierra*, made it particularly likely that the Court would rely on generalities about the importance of planning to deny the landowners compensation.

First, the Tahoe Regional Planning Agency ("TRPA") justified its moratoria as necessary to facilitate the development of a regional water quality plan and a regional environmental threshold carrying capacity plan, all in accordance

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[47] *Dolan*, 512 U.S. at 408.

[48] *See generally Dolan*, 512 U.S. at 384-85 (recognizing "the authority of state and local governments to engage in land use planning"); First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321-22 (1987) (discussing the need for proper planning); Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) (upholding the constitutionality of the city's Landmarks Preservation Law against a facial and as-applied takings challenge); Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding the constitutionality of zoning against a substantive due process challenge); Penn. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922) ("Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.").

[49] *See Dolan*, 512 U.S. at 384-85; *First English*, 482 U.S. at 321-22; *Penn Central*, 438 U.S. at 148 n.11 (Rehnquist, J., dissenting) ("It is true that the police power embraces regulations designed to promote public convenience or the general welfare, and not merely those in the interest of public health, safety and morals.") (quoting Nashville Chattanooga & St. Louis Ry. v. Walters, 294 U.S. 405, 429-30 (1935)).

with an extensive amendment, in order to preserve the clarity of beautiful Lake Tahoe.[50] The history of the amendment, the extra time it took to formulate the plan, that California successfully sued to enjoin its implementation, and the revised plan, all of which took approximately eight years, are well documented in the Court's summary of facts.

Second, much planning law literature supports interim development controls as an essential tool in the planning process. A frequently asserted justification, relied upon by the *Tahoe-Sierra* Court, is the need to avoid a race to obtain land development approvals and rezonings in advance of planning processes that might inhibit such private land development projects.[51] Indeed, the Court noted that "moratoria . . . are used widely among land-use planners to preserve the status quo while formulating a more permanent development strategy."[52] The Court then goes on to list several cases in which federal and state courts sustained moratoria ranging from ten to eighteen months without compensation.[53]

The Court, however, was wrong on several points. To begin with, many of the cases upholding moratoria—including several that the Court cited in footnotes—dealt with development restrictions applied only to a single zoning district or a single stretch of land. The TRPA moratoria were (and are) far more extensive, in both scope and sweep. Indeed, none of the moratoria cases cited by the *Tahoe-Sierra* majority lasted even half as long as the TRPA moratoria—most less than a third as long.

Furthermore, the literature cited by the Court refers to interim development controls generally, but the Court wrongly equated that with moratoria specifically.[54] Not all interim development controls are equal. A moratorium is an extreme form of such controls, because it absolutely stops all development. On the other hand, interim zoning and similar measures are more selective in implementing temporary controls while formulating and passing long-term plans. Thus, moratoria should logically be used less often, more selectively, and for shorter periods. Also troubling is that the *Tahoe-Sierra* Court blithely assumed that successful development automatically follows such land use control measures.[55] They may aid the process of planning, but the connection with successful development is weak.

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[50] *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plann'g Agency, 122 S. Ct. 1465, 1470-73 (2002).

[51] *See id.* 1487 n.33.

[52] *Id.* at 1487.

[53] *Id.* at 1487 n.32.

[54] *See id.* at 1487 ("In fact, the consensus in the planning community appears to be that moratoria, or 'interim development controls' as they are often called, are an essential tool of successful development.").

[55] *See id.*

In addition, the Court seems unable to distinguish between a normal delay in the land development process and the radical interim development control that a moratorium represents. This is a shocking misunderstanding of the land development process, penned by the Justice who also so misunderstood the variance process that an unworkable ripeness test was foisted upon the land development community.[56] The normal delays the *First English* Court spoke of concerned the time needed to carefully review applications to assure that the applications were complete and comported with the applicable land development standards.[57] Only in the most egregious circumstances would the delay for a particular permit take anywhere near the thirty-two months (and counting) set out in this case.

Lastly, the Court's uninformed ramblings about reciprocity of advantage as a basis for general moratoria,[58] rather than selective permit delays, are misplaced. The theory of reciprocity of advantage was never meant to apply to land use regulations, but rather the practice of leaving coal in place in mines to avoid cave-ins for all concerned.[59] The *Tahoe-Sierra* Court had it all backwards. It is those landowners who have relatively immediate plans to develop that need the protection, not the landowning community generally. As for the extra pressure on planners, the "deliberate pace" of local government decision-making should be faster, as commentators have observed for decades.[60]

IV. RELEVANT PARCEL IN AN ABSTRACT CONTEXT

We are now left with the question of what parcel or interest is relevant to the takings inquiry. The Ninth Circuit Court of Appeals and the Supreme Court refused to accept on a facial challenge that a moratorium, even one that lasts thirty-two months, effects a categorical taking. The constant refrain from both Courts was that in regulatory taking claims, the focus must be on "the parcel

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[56] *See generally* MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986); Williamson County Reg'l Plann'g Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985).

[57] *See* First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 321 (1987) ("We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us.").

[58] *See Tahoe-Sierra*, 122 S. Ct. at 1489.

[59] *See* Penn. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[60] *See, e.g.*, F. Bosselman, et. al., THE PERMIT EXPLOSION: COORDINATION OF THE PROLIFERATION (1976).

as a whole."[61] Indeed, the Supreme Court began its analysis of the appropriate interest by quoting a familiar statement:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole . . . .[62]

After stating the general rule, the majority cited the usual cast of cases that amalgamate, rather than separate, property interests for the purpose of takings analysis—*Andrus v. Allard*,[63] *Keystone Bituminous Coal Association v. DeBenedictis*,[64] and, of course, *Penn Central*.

To be sure, those cases—as flawed as they are—support the proposition that courts must analyze the *physical* elements of a particular parcel as a single unit. But the Court was on shaky ground when it attempted to explain why the *temporal* characteristics of real property should be similarly amalgamated, and, in particular, why *First English*—which the Court took great pains to make clear was not in any way qualified by its opinion—did not control the outcome of the case.

The *Tahoe-Sierra* Court began by quoting Justice Brennan's famous dissent in *San Diego Gas & Electric Co. v. City of San Diego*.[65] In that dissent, Justice Brennan proposed a constitutional rule that "the government entity must pay just compensation for the period commencing on the date the regulation first effected the 'taking,' and ending on the date the government entity *chooses* to rescind or otherwise amend the regulation."[66] As the majority accurately noted in *Tahoe-Sierra*, the Court fully endorsed Justice Brennan's rule in *First English*.[67]

Although this alone would seem enough to dispel the notion that every moment of the potentially infinite life of a fee simple estate must be considered

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[61] *Compare Tahoe-Sierra*, 122 S. Ct. at 1481 ("Justice Brennan's opinion for the Court in *Penn Central* did, however, make it clear that even though multiple factors are relevant in the analysis of regulatory takings claims, in such cases we must focus on the 'parcel as a whole' . . . .") (emphasis in original), *with* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plann'g Agency, 216 F.3d 764, 775 (9th Cir. 2000) ("In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in *the parcel as a whole* . . . .") (citing Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 117-18 (1978) (emphasis in original)).

[62] *Tahoe-Sierra*, 122 S. Ct. at 1481 (quoting *Penn Central*, 438 U.S. at 130-31).

[63] 444 U.S. 51 (1979).

[64] 480 U.S. 470 (1987).

[65] 450 U.S. 621 (1981).

[66] *Tahoe-Sierra*, 122 S. Ct. at 1482 (quoting San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 658 (1981) (Brennan, J., dissenting)) (emphasis added).

[67] *See id.* at 1482.

together when evaluating a regulatory taking claim, the majority nevertheless embraced that very idea. The Court rejected the dissent's argument that *First English* settled the temporal segmentation debate in favor of the landowners[68] on the ground that the language in both *San Diego Gas* and *First English* as to the need for compensation, even when the taking is temporary, was preceded by the requirement that there be a taking in the first place.[69] That is true to a certain extent. But the legal principle the majority takes from that factual reality is rebutted repeatedly by the very cases it relied upon. For example, Justice Brennan in *San Diego Gas* noted that "[t]he fact that a regulatory 'taking' may be temporary, by virtue of the government's power to rescind or amend the regulation, does not make it any less of a constitutional 'taking.'"[70] Similarly, the Court in *First English* held that "'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[71] It follows that if temporary takings "are not different in kind from permanent takings," when the government has done something to effect a taking, such as prohibit all economically beneficial use on a particular parcel of property, compensation is required. It is difficult to fathom how much more "total" a taking can be when it deprives a landowner of all use options on vacant land—save the "salvage" uses rejected by *Lucas*, such as walking and camping—by way of a moratorium extending for at least thirty-two months. The *Tahoe-Sierra* majority rejected both logic and precedent in holding otherwise.

Finally, the majority accused the Tahoe landowners of circular reasoning by asking the Court to "sever a 32-month segment from the remainder of each landowner's fee simple estate,"[72] but failed to see the circularity in its own analysis. As the majority indicated, a total taking of a fee simple estate may well call for compensation as if the parcel were condemned, but that does not mean that government should be relieved from paying something akin to an option price for requiring a landowner to leave land unused for nearly three years and beyond. In the interests of "justice and fairness," the Court essentially conflated the issue of what compensation is due for a temporary taking with the issue of whether a moratorium effects a taking at all. Hopefully, that error was unintentional and can be corrected in the future. But the negative, and entirely plausible, view of the *Tahoe-Sierra* dissenters is that

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[68] *See id.* at 1496-97 (Thomas, J., dissenting).

[69] *See id.*

[70] *See San Diego Gas*, 450 U.S. at 657 (Brennan, J., dissenting).

[71] *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 318 (1987). For further criticisms of the *Tahoe-Sierra* majority's reading of *First English*, see Breemer, *supra* note 1.

[72] *Tahoe-Sierra*, 122 S. Ct. at 1483.

although the majority only rejected the application of a per se rule to the enactment of all moratoria—and affirmed the possibility that under *Penn Central* a moratorium could result in a taking, it is difficult to see when the majority would ever hold a moratorium to be a taking, given that the "parcel as a whole" is likely to be the infinite duration of a fee simple absolute. Therefore, the "denominator" is now by definition enormous, regardless of the size of the numerator, that is, the duration of the moratorium.

V. CONCLUSION

It is easy to be irritated by the countless mistakes, misinterpretations, and mischaracterizations in the *Tahoe-Sierra* opinion, regardless of whether one is sympathetic to the interests of government or the rights of landowners. But it is important to remember the context of the issue before the Court. The broad dicta notwithstanding, the Court simply rejected the argument that the mere enactment of a moratorium "imposed during the process of devising a comprehensive land-use plan" always effects a categorical taking. *Tahoe-Sierra* did not empower government to restrict development without compensation, and landowners are not stripped of their constitutional protections merely because the latest tool to limit beneficial or productive uses of land is called a moratorium. In the end, and perhaps despite Justice Stevens' best efforts, *Tahoe-Sierra* adds little to and takes almost nothing away from takings jurisprudence.

VI. APPENDIX OF CASES CITING *TAHOE-SIERRA*

1. Brown v. Legal Fund, 123 S. Ct. 1406 (2003)
2. Cooley v. United States, No. 01-5071, 2003 U.S. App. Lexis 6286 (Fed. Cir. April 1, 2003)
3. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 322 F.3d 1064 (9th Cir. 2003)
4. Phillip Morris, Inc. v. Reilly, No. 00-2425, 312 F.3d 24 (1st Cir. 2002)
5. Espalanade Props. v. City of Seattle, 307 F.3d 978 (9th Cir. 2002)
6. Walcek v. United States, 303 F.3d 1349 (Fed. Cir. 2002)
7. Boise Cascade Corp. v. United States, 296 F.3d 1339 (Fed. Cir. 2002)
8. Brubaker Asmus. Co. v. United States, 304 F.3d 1349 (Fed. Cir. 2002)
9. Barefoot v. City of Wilmington, 306 F.3d 113 (4th Cir. 2002)
10. Ken Leahy Constr. v. City of Gladstone, Nos. 00-35473, 00-35487, 00-35752, 2002 U.S. App. Lexis 25484 (9th Cir. June 4, 2002)
11. Conti v. United States, 291 F.2d 1334 (Fed. Cir. 2002)
12. North Pacific, LLC v. City of Pacifica, 234 F. Supp. 2d 1053 (N.D. Cal. 2002)

13. Swartz v. Beach, 229 F. Supp. 2d 1239 (D. Wyo. 2002)
14. Holman v. City of Warrenton, 242 F. Supp. 2d 791 (D. Ore. 2002)
15. W.J.F. Realty Corp. v. Town of Southampton, 220 F. Supp. 2d 140 (E.D.N.Y. 2002)
16. Recreation Devs. fo Pheonix v. City of Pheonix, 220 F. Supp. 2d 1054 (D. Ariz. 2002)
17. Holy Land Found. for Relief & Dev. v. Ashcroft, 219 F. Supp. 2d 57 (D.D.C. 2002)
18. Heir v. Delaware River Port Auth., 218 F. Supp. 2d 627 (D.N.J. 2002)
19. Currier Builders, Inc. v. Town of York, No. 01-68-P-C, 2002 U.S. Dist. Lexis 9942 (D. Maine July 8, 2002)
20. Rose Acre Farms, Inc. v. United States, No. 92-710C, 2003 U.S. Claims Lexis 71 (Fed. Cl. March 20, 2003)
21. American Pelagic Fishing Co., L.P. v. United States, 55 Fed. Cl. 575 (2003)
22. Appolo Fuels, Inc. v. United States, 54 Fed. Cl. 717 (2002)
23. Reeves v. United States, 54 Fed. Cl. 652 (2002)
24. Bass Enters. Prod. Co. v. United States, 54 Fed. Cl. 400 (2002)
25. Cane Tenn., Inc. v. United States, 54 Fed. Cl. 100 (2002)
26. Seiber v. United States, 53 Fed. Cl. 570 (2002)
27. Arctic King Fisheries v. United States, No. 99-49C, 2002 U.S. Claims Lexis 280 (July 19, 2002)
28. Lost Tree Village Corp. v. City of Vero Beach, 838 So. 2d 561 (Fla. Ct. App. 2002)
29. Covington v. Jefferson County, 53 P.3d 828 (Ida. 2002)
30. McPherson Landfill, Inc. v. Board of County Comm'rs, 49 P.3d 522 (Kan. 2002)
31. W.R. Grace & Co.-Conn v. Cambridge City Council, 779 N.E.2d 141 (Conn. 2002)
32. Haberman v. City of Long Beach, 298 A.D.2d 497 (Sup. Ct. NY. App. Div. 2002)
33. State ex rel. R.T.G., Inc. v. Ohio, 780 N.E.2d 998 (Ohio 2002)
34. Ohio ex rel. Shem v. City of Mayfield Heights, 775 N.E.2d 493 (Ohio 2002)
35. Hasman v. Genesis Outdoor, Inc., 2003 Ohio 923 (Ohio Ct. App. 2003)
36. Mays v. Board of Trs. of Miami Township, 2002 Ohio 3303 (Ohio Ct. App. 2002)
37. Boise Cascade Corp. v. Board of Forestry, 63 P.3d 598 (Ore. Ct. App. 2003)
38. Machipango Land & Coal Co. v. Department of Evtl. Protec., 799 A.2d 751 (Penn. 2002)

39. SDDS, Inc. v. South Dakota, 650 N.W.2d 1 (S.D. 2002)
40. Eggleston v. Pierce County, 64 P.3d 618 (Wash. 2003)
41. Berst v. Snohomish County, 57 P.3d 273 (Wash. Ct. App. 2003)
42. Woodland Manor, III Assocs. v. Reisma, C.A. No. PC89-2247, 2003 R.I. Super Lexis 35 (Feb. 24, 2003)
43. Vellequette v. Town of Woodside, AO91682, 2002 Cal. App. Unpub. Lexis 6690 (July 23, 2002)

Tahoe Sierra: Much Ado About—What?

Michael M. Berger*

I. INTRODUCTION

When all was said and done, not much happened in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency.*[1] Was this an important decision? I doubt it.[2] It *would* have been an important decision if the Court had ruled in favor of the landowners. In that case, moratoria could have been challenged on their faces and immediately upon adoption. No lot-by-lot evaluation would have been needed for liability to attach. In other words, adoption of a moratorium would be the equivalent of adoption of a declaration of taking in a direct condemnation case. Liability would be established and the only issue would be the amount of compensation due.[3] From the standpoint of the hundreds of Tahoe area landowners who have been victimized by a decades long freeze on their ability to use their land, the result was unfortunate. They looked to the courts for relief and found themselves tossed from pillar to post in a litigational journey that lasted for seventeen years, including four trips to the U.S. Court of Appeals for the Ninth Circuit,[4]

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[1] 535 U.S. 302 (2002), 122 S. Ct. 1465 (2002).

[2] For those who ascribe this thought to sour grapes because I argued the losing side of the case, I should reiterate that when the Court decided *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999), in which I represented the prevailing party, I also concluded that the decision added little to the body of Fifth Amendment jurisprudence, although it turned out to be an important Seventh Amendment case. It would only have been important to takings law if the Court had ruled the other way. The same is true here.

[3] As I told the Court, although such a rule would make all moratoria takings, economics would prevent most short-term, rational moratoria from ever being challenged judicially. The extent of the injury (and, consequently, the amount of the potential recovery) would be too small to provoke landowners to litigation or to attract counsel to prosecute such *de minimis* cases.

[4] The Ninth Circuit opinions all bear the same name, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, and appear at: 911 F.2d 1331 (9th Cir. 1990), *cert denied* 499 U.S. 943 (1991) [hereinafter "*TSPC I*"]; 938 F.2d 153 (9th Cir. 1991) [hereinafter "*TSPC II*"]; 34 F.3d 753 (9th Cir. 1994), *cert denied* 514 U.S. 1036 (1995) [hereinafter "*TSPC III*"]; and 216

and culminating with a date at the Supreme Court on a cold, blustery day in January, 2002. To put it in scriptural terms, they asked for bread, but the courts gave them stone.

How it all came about, and what it means for the rest of us, is the subject of this commentary.

II. THE ESSENTIAL BACKGROUND[5]

The Petitioners—some 400 owners of individual, lawfully subdivided single-family residential lots around Lake Tahoe—are mostly married couples who bought their lots years ago for individual retirement, vacation, or permanent homes for themselves and their families.[6] The lots were all located in partially developed residential neighborhoods with paved roads and utility service. Homes had been built on many of the neighboring lots. All of the landowners bought their lots many years before the challenged regulations were even being considered. Their expectation to use their land was the same as their neighbors and was thus as real as it was reasonable.[7]

However, for the past two decades the Tahoe Regional Planning Commission ("TRPA") prevented the Petitioners from building their homes (or anything else) by a series of rolling prohibitions. There were four formal prohibitions, interspersed with informal ones in order to bridge some gaps, the upshot of which has been a total prohibition of any use of the Petitioners' lots since 1981.

Lake Tahoe is a unique treasure. That, as the District Court observed, is why people want to build homes near it.[8] However, in the 1950s and 1960s, its trademark clarity began to lose its luster. Construction of infrastructure (e.g., roads and general grading) for local development was increasing the

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F.3d 764 (9th Cir. 2000) [hereinafter "*TSPC IV*"].

[5] This factual statement may go beyond what appears in the Supreme Court's opinion. So be it. For reasons known only internally, the Supreme Court chose to truncate its review of this case, declining the Petitioners' request for a full consideration of their dispute with the regulatory agency. As this examination is presented in a scholarly journal, however, a more complete exposition seems called for. For an analysis of the *Tahoe-Sierra* case by this author before the Supreme Court's decision, see Michael M. Berger, *What's "Normal" About Planning Delay?*, TAKING SIDES ON TAKINGS ISSUES (Thomas E. Roberts ed., 2002); *see also* a symposium of short pieces written immediately after the decision in the 54-6 LAND USE LAW & ZONING DIGEST (2002), including contributions by three of the authors in this volume.

[6] The 700 original plaintiffs have seen their numbers eroded by the passage of time in this Dickensian litigation. Fifty-five have died. Others simply became exhausted.

[7] *Cf.* Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992) (taking occurred when new regulations prevented the buyer of last two undeveloped lots in a subdivision from building).

[8] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1230 (D. Nev. 1999).

runoff of dirt and nutrients into the lake, thus increasing the growth of algae and clouding the water.[9] The solution, curbing development, was obvious and in 1969, California and Nevada (with the concurrence of Congress and the President) created TRPA to unify land use planning and control in the 501 square mile, bi-state, Lake Tahoe Basin.[10] The problem, which catalyzed this case, was not the regulatory ends, but rather the means employed by TRPA to achieve its goal.

TRPA's early planning divided the land into different zones, depending on among other things, steepness, geology, and water absorption. Four zones, zones one through three and SEZ (stream environment zone), were classed as "high hazard" areas, or areas hazardous to the continued clarity of the lake. Development in these areas was restricted, although not prohibited.

During the 1970s, as the clarity of the lake continued to deteriorate, California and Nevada had different views on how to govern the area. After much heated negotiation, the legislatures and governors of California and Nevada, as well as the Congress and President of the United States, agreed on amendments to the interstate compact that created TRPA.[11]

The tripartite legislative negotiation that resulted in the new Tahoe Compact (effective December 19, 1980) called for a slowdown of development, but not a halt, while TRPA was required to spend the next eighteen months devising environmental threshold carrying capacities for the region and then another year amending its plan to maintain those capacities.[12] Although the Compact recites the necessity "to halt temporarily works of development in the region which might otherwise absorb the entire capacity of the region for further development or direct it out of harmony with the ultimate plan"[13] during that planning period, it only imposed a cap on the number of residential permits that could be issued, not an outright ban on development. Furthermore, the restriction hammered out in these legislative negotiations was quite specific. For 1980, 1981, and 1982, the Compact limited building permits in each of the cities and counties in the region to the number of building permits each of those entities had issued in 1978, and it listed the precise number allotted to each—a total of 1608 new residential building permits per year in the Tahoe basin.[14]

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[9] *Id.* at 1231.

[10] *Id.* at 1232.

[11] The Compact appears at CAL. GOV'T. CODE § 66800 (2003).

[12] In simpler terms, TRPA was to determine the kind and intensity of development that could be tolerated consistent with maintaining the region's significant scenic, recreational, and natural resource values.

[13] CAL. GOV'T. CODE § 66801 (2003).

[14] CAL. GOV'T. CODE § 66801 (2003). The Court quotes this necessary to halt language out of context by not recognizing that halt—to the drafters of the Compact—meant a limit of 1608

However, TRPA's first acts in early 1981 went beyond the legislatively negotiated building slowdown. Way beyond. Rather than implement the slowdown, TRPA commanded a total freeze. In Ordinance 81-5 (i.e., the fifth ordinance adopted in 1981, and one of the first matters actually considered) TRPA, under the guise of amending its Water Quality Plan, precluded virtually all development in zones one, two, three, and SEZ (i.e., the land involved in this case). At the same time, TRPA candidly asked Congress and the legislatures of California and Nevada to appropriate funds to buy the affected land to alleviate the "hardship" it knew it was inflicting on landowners like those involved in the litigation, whose properties were thus *de facto* taken.[15]

Ordinance 81-5 was not a "planning" or "time out" moratorium of the kind sometimes used by planning agencies to provide needed breathing space.[16] Although dubbed "temporary," it was nothing of the sort; it was actually a substantive regulation, rather than a procedural, planning device. It made a dramatic change in TRPA's land use plan. Where that plan originally viewed the land development zones in bulk (concluding, for example, that land coverage in zone one *throughout the basin* should total one percent), Ordinance 81-5 transferred that limitation to each lot in the area, prohibiting development of more than *one percent of any individual lot* in zones one and two, with five percent in zone three and zero in SEZ,[17] rendering the lots unusable. One percent coverage on a typical 10,000 square foot lot in these subdivisions would yield only 100 square feet for development, equal to perhaps a large doghouse, but surely not a home.

Thus, in reality, Ordinance 81-5 was the first in an unremitting series of consecutive, back-to-back prohibitions. Ostensibly, that initial moratorium was to remain in effect until TRPA adopted amendments to the Regional Plan. A year later, on August 26, 1982, TRPA established environmental threshold carrying capacities which would determine the maximum capacity for development of each lot in the area. The Compact required TRPA to complete its work on the Regional Plan within one year of that date. As time passed,

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new residential building permits per year. Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, ___, 122 S. Ct. 1465, 1488 (2002).

[15] TRPA Resolution 81-5 (May 28, 1981).

[16] The American Planning Association has identified two bases for planning moratoria. The first is to aid the preparation of a comprehensive plan by precluding developers from obtaining permits that conflict with the plan being drafted. The other is to provide time to construct needed infrastructure. THE GROWING SMART LEGISLATIVE GUIDEBOOK (2001) (reproduced in A.B.A. INST. ON LAND USE 133 (2001). Neither describes what happened here. As a recent text explains: "The proper role of a moratorium is as a stop-gap, temporary, emergency measure .... Moratoria measures, whatever the type, should not be used as growth control tools or regulatory measures in and of themselves." MICHAEL A. ZIZKA, STATE & LOCAL GOVERNMENT LAND USE LIABILITY § 4:4, 4-3 (2001).

[17] TRPA Ordinance 81-5.

TRPA recognized it would not meet that goal, and so, a year later, on August 26, 1983, it adopted a resolution (a 90-day temporary moratorium) suspending all permitting activities pending completion of the new Regional Plan.[18]

However, that additional 90-day moratorium was not enough, and TRPA informally allowed it to keep rolling from November 26, 1983 until April 26, 1984, when it finally adopted a new Regional Plan.[19] The 1984 Plan[20] made no change in the use prohibition inflicted on these landowners. As the trial court put it, "[w]ith respect to Class 1-3 and SEZ properties . . . nothing much changed. The 1984 Plan provided, at least temporarily, that no projects proposing *any* land coverage at all in Class 1-3 and SEZ would be considered."[21] Thus, whatever development it appeared to permit *elsewhere* in the Tahoe Basin, all of the homesites in this litigation remained untouchable.

The State of California (TRPA's staunch ally and defender in this case) sued TRPA when the 1984 Plan was adopted because it felt the parts of the new plan dealing with *other landowners* did not comply with the restrictive/protective demands of the Compact. Shortly thereafter, Judge Garcia of the Eastern District of California enjoined TRPA from approving any building projects.[22] That injunction remained in force until TRPA promulgated another revised Regional Plan in 1987.[23]

Yet, the only effect of Judge Garcia's injunction was to prevent TRPA from allowing those *other* landowners—*not these Petitioners*—to develop their properties. Had there been no such injunction, the 1984 Plan would have precluded all development on Class one, two, three, and SEZ lands anyway.

For the *Tahoe-Sierra* landowners, the impact of the 1987 Plan was simply to extend what had gone before. The use prohibitions that had previously been labeled "temporary" in Ordinance 81-5 and then became permanent in the

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[18] TRPA Resolution 83-21 (August 26, 1983).

[19] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1235-36 (D. Nev. 1999). The informal extension came about when TRPA's staff realized that the formal moratorium would expire before the new regional plan was completed. Staff told the TRPA Board that it would simply not process any applications unless the Board directed it to do otherwise. The Board never responded, and thus an unauthorized moratorium bridged the gap and continued the ban on all use.

[20] TRPA Ordinance 84-1; *Tahoe-Sierra*, 34 F. Supp. 2d at 1236.

[21] *Tahoe-Sierra*, 34 F. Supp. 2d at 1236. As the 1984 Plan put it: "Development within land capability district 1-3 is not consistent with the goals to manage high hazard lands for their natural qualities and shall generally be prohibited." (Petitioner's Appellate Brief at 173, No-_____.) "SEZ lands shall be protected and managed for their natural values." (Petitioner's Appellate Brief, at 174 No_____.)

[22] *See* People *ex rel* Van de Kamp v. Tahoe Reg'l. Planning Agency, 766 F.2d 1308 (9th Cir. 1985) (affirming the injunction).

[23] *Tahoe-Sierra*, 34 F. Supp. 2d at 1236.

1984 Plan were slightly revised but remained permanent in the 1987 Plan. *Thus, under none of the various ordinances, resolutions, informal moratoria, or formal plans TRPA issued beginning in 1981, was there anything economically beneficial or productive that these landowners could do with any of their individual homesites.* TRPA thus effectively blocked all construction for the past two decades. The only options left for the landowners were to continue holding bare legal title to something that could not be productively used, suffer foreclosure, or sell it at bargain basement prices to public buyout entities established by the two states and the federal government for a salvage operation. In the meantime, property taxes and all other burdens of property ownership continued.[24]

Procedurally, this case was a nightmare for the landowners. They were in litigation for the better part of two decades and have nothing to show for it but the Ninth Circuit's "thinly disguised contempt" for their constitutional rights,[25] and the Supreme Court's refusal to consider the totality of the impact of TRPA's acts on them.

They have been to the Ninth Circuit four times and before the District Court on countless occasions.[26] In all those hearings, the lower courts refused to acknowledge the unified nature of TRPA's course of action that resulted in a continuous prohibition of all use from 1981 through the present. Thus, as shown by the table prepared by the Ninth Circuit,[27] the lower courts sliced and diced TRPA's actions into four pieces and analyzed each piece as though the others did not exist. Slicing TRPA's use prohibitions like so much bologna, the District Court refused to consider the bulk of the time period during which all use was prohibited (1984 through the present)[28]—and then the Ninth Circuit eliminated the earlier three years.[29]

After a ten day trial in late 1998, the District Court found liability for a temporary taking for 1981 through 1984, relying on the Supreme Court's

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[24] Because of the impact of TRPA's rolling use prohibitions, the majority of the landowners succumbed and were forced to sell their parcels for a fraction of their fair market value to one of these scavenging agencies which paid only the bare residual value of unusable land. The Petitioners sought the difference so they would have been made constitutionally whole, a result similar to the one upheld in *City of Monterey v. Del Monte Dunes*, 526 U.S. 687 (1999).

[25] *TSPC I*, 911 F.2d at 1346 (Kozinski, J., dissenting in part).

[26] This began as two separate suits, one filed in California and one in Nevada, pursuant to the venue provisions of the Compact. After separate District Court rulings resulted in separate Ninth Circuit opinions (*TSPC I* and *TSPC II*), the matters were consolidated in the Nevada District Court.

[27] *TSPC IV*, 216 F.3d at 769.

[28] *Tahoe-Sierra*, 34 F. Supp. 2d at 1245-48; Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 992 F. Supp. 1218 (D. Nev. 1998).

[29] *TSPC IV*, 216 F.3d at 769.

holdings in *Lucas v. South Carolina Coastal Council*,[30] for the proposition that a regulation that deprives a landowner of all economically beneficial or productive use is a compensable taking, and *First English Evangelical Lutheran Church v. County of Los Angeles*,[31] for the proposition that a temporary taking during a planning moratorium requires compensation the same as a permanent taking. The District Court denied any compensation for the impact of the 1984 Plan, asserting that it was Judge Garcia's injunction that prevented permits from being issued, not TRPA's 1984 Plan.[32] Finally, the District Court denied any relief from the 1987 continuation of the use prohibitions on the ground that the statute of limitations had run by the time the landowners returned from their first two Ninth Circuit appeals and amended their complaints to seek compensation for the effects of the 1987 event.[33]

The Ninth Circuit affirmed insofar as the District Court *denied* relief, and reversed the limited relief the District Court had *granted*. The Ninth Circuit simply refused to believe that a temporary planning moratorium could ever be a taking (albeit a temporary one) that requires compensation for the period when use is forbidden.[34] Although both *First English* and *Tahoe-Sierra* involved temporary planning moratoria in effect for a finite period of years, the Ninth Circuit asserted it was "flatly incorrect" that *First English* had any impact here.[35] Viewing each period separately, the court held that each of the properties retained substantial value (because the life of property is theoretically infinite and could be used at the end of the moratorium) and therefore there could be no taking, even "assum[ing] *arguendo* [in light of the

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[30] 505 U.S. 1003 (1992).

[31] 482 U.S. 304 (1987).

[32] *TSPC III*, 34 F. Supp. 2d at 1245-48.

[33] The court's analysis can hold true only if the 1987 Plan is viewed as an entirely separate "event," rather than a continuation of the use prohibition that TRPA had enforced since 1981. It also required the lower courts to conclude that the landowners had a duty to file new suits against TRPA after each extension of the moratorium, at the very time they were fighting for their litigational lives pursuing two Ninth Circuit appeals in an effort to reinstate their initial suits, i.e., their right to be in court at all. Allowing amendment of the complaints—and then trial on the merits—once those suits were finally remanded in 1990 and 1991 would have been proper under the circumstances, and under *U.S. v. Dickinson*, 341 U.S. 745 (1947) (when a taking occurs through continuous government action, aggrieved landowners are not required to resort to piecemeal litigation, and are not barred by limitations when they sue on the basis of the last, not first, damaging act). But the lower courts turned a deaf ear to their pleas, and the Supreme Court chose not to review the issue.

[34] The Ninth Circuit's holding also conflicts with its own earlier decisions in *TSPC I* and *TSPC II*, holding that such a temporary taking *could* be found.

[35] *TSPC IV*, 216 F.3d at 777. For a comparative analysis of *First English* and *Tahoe-Sierra*, see Berger, *supra* note 6, at 280-83.

District Court's findings] that the moratorium prevented all development in the period during which it was in effect."[36]

III. The Ninth Circuit's Skewed View of the Economic World

Do not be fooled by the fact that the Supreme Court "affirmed" the Ninth Circuit. The high Court did not adopt the Ninth Circuit's extremist rationale. Not by a long shot. Thus, before examining what the Supreme Court decided, it seems appropriate to sketch out the nature of the opinion it reviewed.

The Ninth Circuit panel did not like this case. It concluded that this case could not proceed and should never have gotten this far. That being so, one could have wished it had said so sooner. Remember that the Ninth Circuit had seen this case several times before. Indeed, it had reversed trial court dismissals and ordered the case tried, on the theory that it was legally possible for the landowners to recover compensation for a taking.[37]

Rather than a simple question of constitutional enforcement of the Fifth Amendment's prohibition against taking private property for public use without compensation, the appellate panel saw it as a mythic battle between the forces of good and evil. The panel saw TRPA's planners as the defenders of a lyrically beautiful environmental jewel, and the plaintiff-landowners as selfish individuals out to cripple the public interest.

The fundamental problem with the Ninth Circuit's exposition was that it was a goal in search of a rationale. The opinion made no bones about its determination to protect government planning agencies from having to pay for the harm they cause. Calling land use planning in general "necessarily a complex, time-consuming undertaking," and the specific tool of a moratorium on development "crucial" to the process, the court announced that it (and all its judicial brothers and sisters) should be "exceedingly reluctant" to rule in ways that would "threaten [the moratorium's] survival."[38] Private property owners, whose ability to use their land is totally stultified by such moratoria, were viewed by the court as some sort of ingrates who would turn the constitutional promise that private property will not be taken for public use

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[36] *TSPC IV*, 216 F.3d at 779-80 n.20.

[37] *See TSPC I, TSPC II,* and *TSPC III.* Apart from the substantive infirmities of this litigation, the courts deserve severe criticism for thus subjecting the landowners to what, in retrospect, is nothing short of harassment by making them try this case over and over again, only to assert in the end that the facts were not in dispute and only an issue of law was presented. As the Supreme Court put it, "The relevant facts are undisputed." *Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1471. They always were. "Moreover, because petitioners brought only a facial challenge, the narrow inquiry before the Court of Appeals was whether the mere enactment of the regulations constituted a taking." *Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1476.

[38] *TSPC IV*, 216 F.3d at 777.

without just compensation "into a weapon to be used indiscriminately to penalize local communities for attempting to protect the public interest."[39]

That policy pronouncement represents a fundamental distortion of the purpose of the Bill of Rights and of the Fifth Amendment's just compensation clause, the role of governmental regulators in serving the public interest, and the role of the courts in enforcing the constitution. It was the job of these regulators to protect Lake Tahoe. The litigation did not question their right to do so. If there were something intrinsically wrong with the regulations or with the concept of regulating at all, then the government's action would have been subject to challenge as *ultra vires* and void. In other words, a taking can be effected by a valid regulation.[40] All the property owners said was that, to the extent that valid regulations prevent the use of private land, the Constitution mandates payment. There is nothing startling in that concept. As the Supreme Judicial Court of Massachusetts put it a generation ago:

> In this conflict between the ecological and the constitutional, it is plain that neither is to be consumed by the other. It is the duty of the department of conservation to look after the interests of the former, and it is the duty of the courts to stand guard over constitutional rights.[41]

The Ninth Circuit evidently viewed itself as the defender of the regulators rather than of the Bill of Rights. It placed the overall interest of the community on one side of the scale and the interest of individuals on the other. Balancing them, the court found that the overall interest of the community was weightier. In the current vernacular, "Duh!" Under that "test," the community will always win against the interest of an individual. Why bother having trials? Or, for that matter, courts?

Warming to its task, the court decided that the most efficient way to protect moratoria was to define temporary takings in such a way as to exclude moratoria. The court concluded that the *only* way for government to make itself liable for a temporary taking in general was to enact a regulation *intended to be permanent* and then have a court invalidate the regulation. The interim period between enactment and invalidation would then become a temporary taking. Purporting to apply the analysis of *First English*, the Ninth Circuit concluded:

> What is "temporary," according to the Court's definition, is not the regulation; rather, what is "temporary" is the taking, which is *rendered temporary only* when an ordinance that effects a taking is struck down by a court. In other words, a

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[39] *Id.* at 782.

[40] *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979); *see also infra* note 106 and accompanying text.

[41] *Comm'r of Natural Res. v. S. Volpe & Co.*, 206 N.E.2d 666, 671 (Mass. 1965).

> *permanent* regulation leads to a "*temporary*" taking when a court invalidates the ordinance after the taking.[42]

Under this analysis, a moratorium—by definition, intended to be temporary—could *never* result in a taking that would require compensation. The appellate court reinforced that idea a few pages later, in an apparently self-conscious recognition that a its extreme formulation might not sit well on review:

> Of course, were a temporary moratorium designed to be in force *so long as to eliminate all present value of a property's future use, we might* be compelled to conclude that a categorical taking had occurred. *We doubt*, however, that a true temporary moratorium would ever be designed to last for so long a period.[43]

If you wanted a clearer insight into the court's mindset, it would be hard to invent one more pointed than that. If a "temporary" regulation was designed to be in effect for such an extended period that it would "eliminate *all* present value" of the property, then "we *might* be compelled" to acknowledge a taking.[44] Maybe, yet oh so reluctantly. Furthermore, only in a context that could never arise for a designedly temporary moratorium.[45]

What of the impact of moratoria on the value and utility of the affected property? Not to worry, said the court; because the moratorium was only temporary, it "preserved the bulk of the future developmental use of the property. This future use had a substantial present value."[46] Thus, because the moratorium would end, and there would be light at the end of the proverbial tunnel, no one would be hurt.

The Ninth Circuit's conclusion ignored both human and economic reality. While "the life of the land" may be infinite, as the opinion posits, the lives of its mortal human owners are not, and the Constitution deals with people, not tracts of land.[47] Using that approach simply stripped the human owners of the property of the hard-earned fruits of their labor. The ugly fact is that fifty-five of the original plaintiffs died while waiting for the litigation to end. They died while they watched TRPA enact one after another of its series of rolling land use prohibitions that sequentially prevented them from making any use of their land.

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[42] *TSPC IV*, 216 F.3d at 778 (first emphasis added).

[43] *Id.* at 781 (emphasis added). Bear in mind that the court knew this moratorium lasted for more than twenty years and yet refused to adjudicate it. *See id.*

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

[45] *Id.* at 780, n.21 (stating that a "temporary moratorium" is redundant because all moratoria are by definition only temporary). None would last long enough to cross the hypothetical threshold to "eliminat[ing] all present value." *Id.* at 781.

[46] *Id.* at 781.

[47] Boston Chamber of Commerce v. Boston, 217 U.S. 189, 195 (1910).

Moreover, do not overlook how the court minimized the impact of TRPA's actions by blinding itself to the fact that the freeze on land use did not end in 1984. Had the court been willing to examine either the impact of the 1984 ordinance, or the impact of the 1987 ordinance (still in effect today), it could not have been so cavalier with its assessment of the assertedly *de minimis* impact.

Keep these things firmly in view when considering the underlying fairness of the *Tahoe-Sierra* result. The plan adopted in 1984 (to replace the "moratoria") made no change in what these landowners could do. It maintained the use freeze. The courts decided that these landowners could not sue for the impact of that plan because its operation had been enjoined by a federal district court.[48] However, that injunction had no effect on the *Tahoe-Sierra* plaintiffs. Had there been no such injunction, they would still have been caught like prehistoric flies in amber. The same is true for the 1987 plan. Its deleterious effects were described by the Supreme Court several years ago in the *Suitum v. Tahoe Regional Planning Agency*.[49] The only reason *Suitum* was not considered in this suit is that, while the plaintiffs were conducting their first two appeals to the Ninth Circuit, fighting for the right to sue TRPA for *anything*, the courts later held that the statute of limitations ran on the 1987 plan.[50]

There may someday be light at the end of the tunnel for someone, but not for the original plaintiffs in this suit.

Thus, the rule that emerged from the Ninth Circuit was one that wholly immunized local government agencies from the impact of their moratoria on affected landowners, regardless of the scope and quality of that impact. If the regulation was designed to be temporary, and then it *could not*—as a matter of law—result in a temporary taking that constitutionally required compensation.[51]

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[48] *TSPC IV*, 216 F.3d at 784; *But see* with Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449 (1990).

[49] 520 U.S. 725 (1997).

[50] *TSPC IV*, 216 F.3d at 789.

[51] The entire Ninth Circuit did not agree with this concept. Five of its Judges dissented when the court refused to reconsider the matter *en banc*. *Id.* They believed that the Supreme Court meant what it said in *First English* and castigated their colleagues for adopting Justice Stevens' dissent in that case. *Id.* Justice Stevens, of course, got the last laugh. As the senior Justice in the majority, he got to choose the author of the opinion and he chose himself. He was thus able to explain how the new decision in *Tahoe-Sierra* could be squared with *First English*. *See* discussion *infra*, Part VIII.

IV. QUIRKS IN THE CERTIORARI PROCESS

The petition for *certiorari* asked the Court to address this question: "[I]s it permissible for the Ninth Circuit Court of Appeals to hold—as a matter of law—that a temporary moratorium can *never* require constitutional compensation?"[52]

In light of the Supreme Court's conclusion, that question should have provoked a reversal. For the Supreme Court plainly disagreed with the Ninth Circuit's categorical elimination of liability for all moratoria: "In our view the answer to the abstract question whether a temporary moratorium effects a taking is neither 'yes, always' nor 'no, never'; the answer depends upon the particular circumstances of the case."[53]

As the Ninth Circuit answered the question "no, never," its conclusion was plainly erroneous and warranted reversal.

What, then, happened to lead the Supreme Court to affirm a decision so plainly at odds with its own views? The Court, in granting certiorari, had changed the question. Instead of the one decided below and presented in the Petition, the Court's order granting certiorari asked the parties to address this question: "Whether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution?"[54]

The question, in other words, was flipped. Notwithstanding the Ninth Circuit's absolutist negative analysis that moratoria are not takings, no matter how long they last, the Petitioners were tasked with arguing the absolutist opposite, for example, that *all* moratoria are *per se* takings, no matter how short.[55] As the Supreme Court concluded that the answer was neither "always" nor "never" but "maybe sometimes," the Ninth Circuit's result, though not its reasoning was affirmed.

Another question posed in the Petition for Certiorari dealt with the way that the lower courts had sliced the case, like so much bologna, into bite-sized pieces and then concluded that the individual pieces—analyzed

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[52] 216 F.3d 764 (9th Cir. 2000), *cert. granted*, 533 U.S. 948 2001).

[53] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, ___, 122 S. Ct. 1465, 1478 (2002) (citations omitted).

[54] Tahoe-Sierra Pres. Council v. Tahoe-Sierra Reg'l Planning Agency, 216 F.3d 764 (9th Cir. 2000), *cert granted*, 533 U.S. 948 (U.S. 2001).

[55] As the Court would later explain, this formulation was necessitated by the fact that "petitioners brought only a facial challenge, [and thus] the narrow inquiry before the Court of Appeals was whether the mere enactment of the regulations constituted a taking." Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, ___, 122 S. Ct. 1465, 1476 (2002).

individually—were either of little consequence or were unavailable for review for some other legal reason. The landowners, by contrast, sought review of TRPA's overall program, which had left them in a state of ruin for two decades. The question was this:

> Can a land use regulatory agency escape its constitutional duty to pay for land taken for public use by the expedient of enacting a series of rolling, back-to-back 'temporary' moratoria/prohibitions extending over a period of 20 years, and then claiming that each of the individual prohibitions on *all* use must be viewed in isolation from the others and, when so viewed, none was severe enough by itself to cross the constitutional taking threshold?
>
> In similar fashion, can such an agency escape the constitutional obligation of compensation because a court injunction issued in a *different* case barred issuing permits to *other* landowners, while the agency's own regulations precluded all use of the Petitioners' land?[56]

For reasons known only internally, the Court declined to grant certiorari on these questions. How that affected the result will be discussed later.[57]

V. THE SUPREME COURT'S NARROW DECISION

The Supreme Court made clear its intention to issue a narrow ruling right up front. Noting that "the question we decide relates only to that 32-month period,"[58] the Court emphasized the point by saying it would flesh out its factual discussion, but only in order to "clarify the narrow scope of our holding."[59] One is tempted to conclude that this was an example of a judicial syndrome known to appellate lawyers as "have opinion, need case."

The Court then further emphasized the point by repeatedly stressing its limited grant of certiorari, noting first that the constitutionality of the 1984 Plan and of the 1987 Plan was "not encompassed within our limited grant of certiorari."[60] The majority took the Chief Justice to task for suggesting a broader examination of issues by noting that "we were only interested in the narrow question decided today,"[61] and emphasized before beginning its legal discussion that "we granted certiorari limited to the question stated at the beginning of this opinion."[62]

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[56] Tahoe-Sierra Pres. Council, Inc. v. Tahoe-Sierra Reg'l Planning Agency, 216 F.3d 764 (9th Cir. 2000), *petition for cert. filed*, 533 U.S. 948 (2001).

[57] *See infra*, notes 74, 146-48 and accompanying text.

[58] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, ___, 122 S. Ct. 1465, 1470 (2002).

[59] *Id.* at 307.

[60] *Id.* at 313.

[61] *Id.* at 314 n.8.

[62] *Id.* at 320.

Particularly maddening to the landowners in this regard is the discussion toward the end of the opinion that purports to be a discussion of "fairness and justice."[63] There, the Court listed seven theories by which the case might be decided in the landowners' favor, including the claim that TRPA's actions were simply a series of rolling moratoria that were the equivalent of a permanent taking (i.e., the other question presented for review that was quoted earlier). Having raised hopes, however, the Court concluded that, "[a]s the case comes to us . . . none of the last four theories is available. The 'rolling moratoria' theory was presented in the petition for certiorari, but our order granting review did not encompass that issue."[64] Thus, acting under a self-imposed and self-created "disability," the Court sidestepped the issue that was of most concern to the actual litigants: the legal and economic impact of the totality of TRPA's actions.

One obviously important issue behind the scenes was the continued vitality of *First English*. Remember that Justice Stevens, who dissented in *First English*, would decide who wrote the opinion in *Tahoe-Sierra* if he could hold together a majority of the votes. From the questioning, and the Court's ultimate narrow holding, it is apparent that the opinion needed to attest to the vitality of *First English* if it were to attract a majority of the votes. First, recall the eventual holding: "the answer . . . is neither 'yes, always' nor 'no, never';"[65] an answer plainly at odds with the Ninth Circuit's absolute position that the answer—for any regulation designed to be temporary—was "no, never." Second, Justice Kennedy ased John Roberts, counsel for TRPA, the following question: "If the court of appeals' opinion is just simply affirmed just as is, weren't we wasting our time in First English? . . . You're saying that First English could not have been a taking, so we were just wasting our time up here."[66] Although Roberts sought to assure the Court that it had not wasted its time in *First English*, because it established that compensation is the constitutionally mandated remedy for a taking, the continued vitality of *First English* was plainly on the Justices' minds. Third, Justice Kennedy's concern with *First English*, coupled with Justice O'Connor's evident dedication to *Penn Central*[67] meant that five votes could be had for Justice Stevens' view

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[63] *Id.* at 333; *see infra* notes 87-122 and accompanying text for further discussion of this series of issues.

[64] 535 U.S. at 334.

[65] *Id.* at 321.

[66] United States Supreme Court Official Transcript of 1/7/02 at 42-43, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 122 S. Ct. 1465 (2002) (No. 00-1167).

[67] *See, e.g.*, 535 U.S. at 321, 327 n. 23, 335, 342, where the Tahoe-Sierra Court repeatedly quotes Justice O'Connor's concurring opinion in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), to the effect that there should be no absolute rules in regulatory takings cases, but *ad hoc* factual examinations on a case-by-case basis—just like *Penn Central* said.

only if he narrowed the holding to "neither 'yes, always' nor 'no, never'"[68] for Justice O'Connor and preserved *First English* for Justice Kennedy. The first, as we have seen, he did. The second, he did also: "*First English* was certainly a significant decision, and nothing that we say today qualifies its holding."[69]

That the Court declined to adopt the Ninth Circuit's rigid "no, never" point of view will significantly lessen the possible impact of this opinion. Under the Ninth Circuit's opinion, all planning agencies were free to enact temporary moratoria (of virtually any "temporary" length) and face no constitutional liability for any adverse impacts on affected property owners. In addition, this would be true *as a matter of law*, because only regulations *designed to be permanent* could have resulted in such liability. A *First English* temporary taking would result *only* if such a permanent regulation were struck down.

Under the Supreme Court's formulation, however, it is not even clear that temporary moratoria the same length as litigated in *Tahoe-Sierra* would pass muster the next time around; "the answer depends upon the particular circumstances of the case."[70] Emphasizing its rejection of the Ninth Circuit's view that no designedly temporary regulation could ever result in a taking, the Court said: "In rejecting petitioners *per se* rule, we do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other."[71]

Rejecting reliance on the temporary nature of the regulation, the Court opted, instead, for a *Penn Central* analysis which, it concluded, "directs the inquiry to the proper considerations—only one of which is the length of the delay."[72] Tantalizingly, the Court warned that "[i]t may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism,"[73] and even that, "if petitioners had challenged the application of the moratoria to their individual parcels, instead of making a facial challenge, some of them might have prevailed under a *Penn Central* analysis."[74]

So, when all was said and done, the Court merely noted that good planning is a good idea, preserving national treasures like Lake Tahoe is another good idea, and whether any particular moratorium passes constitutional muster will depend on the specific facts of the particular case. Professor Thomas Roberts has referred to the decision as a "blockbuster and a triumph for planning,"[75]

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[68] 535 U.S. at 321.

[69] *Id.* at 328.

[70] *Id.* at 321.

[71] *Id.* at 337.

[72] *Id.* at 338 n.34.

[73] *Id.* at 341.

[74] *Id.* at 334.

[75] Thomas E. Roberts, *A Takings Blockbuster and a Triumph for Planning*, 54-6 LAND USE L. & ZONING DIG. 4 (2002).

and it wouldn't surprise me if he says so again in this symposium. I obviously demur. It was no blockbuster; it's hardly a triumph; and it's not much of a landmark. As restricted as its author made it, it couldn't be. Those on the planning/governmental/environmental side of these suits are excited because it's the first case they've won on the merits in the U.S. Supreme Court in more than a decade. That may make it "historic" in a sense but little else.

VI. THE MYSTERY OF *PENN CENTRAL*

At some point, one has to ask why. Why has the Court chosen to make *Penn Central* its case for all seasons? Why the sudden renaissance of that decision? Why indeed.

Legally, it wasn't much of a decision, and it has come in for increasing criticism of late (from quarters outside the Supreme Court's chambers).[76] Indeed, in a recent Harvard Law Review commentary on *Tahoe-Sierra*, the authors began their analysis by politely noting that "[t]he Court has saved the Penn Central edifice, though it is unclear that this structure is worth preserving."[77]

Parties filing amicus briefs on both sides in *Tahoe-Sierra* urged the Court to dump the *Penn Central* decision. (They did so even though the viability of *Penn Central* was not an issue in the case. Perhaps they foresaw the handwriting on the courthouse wall.) The brief filed by the Institute for Justice in support of the landowners put it bluntly:

> *Penn Central* is not only wrongly decided, we believe, but it also stands, as the Ninth Circuit rightly perceived, in mortal tension with both *First English* and such earlier cases as *Causby* and *Kimball Laundry*. The most glaring anomaly in the law of takings generally is why this Court should treat the tiniest physical occupation as a categorical taking generating a well-nigh per se obligation to compensate . . . while land use restrictions that devastate the value of property are judged by a far less restrictive standard. It cannot be unraveled by overturning (the *per se* rule in physical takings), for then the Takings Clause becomes a dead letter. But the anomaly can be extirpated by overturning *Penn*

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[76] For a discussion of some of *Penn Central*'s legal shortcomings, see Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 URB. LAW. 307, 309-10 n.8, 314 n.27, 317 n.37, 325, 357 n.189 (1998). For an economic critique by a distinguished land economist, see William W. Wade, *Penn Central's Economic Failings Confounded Takings Jurisprudence*, 31 URB. LAW. 277 (1999).

[77] *Leading Cases, Constitutional Law, H. Takings Clause*, 116 HARV. L. REV. 321, 322 (2002).

> *Central*, so that the greater the government intrusion, be it by taking or regulation, the greater the presumptive obligation to pay.[78]

The brief filed by parties with a diametrically opposite policy view (the National Audubon Society, the Natural Resources Defense Council, and the Sierra Club) in support of TRPA agreed: "There is [n]o [s]eparate, [c]oherent *Penn Central* Taking Test."[79] "Upon careful analysis, it is clear that the *Penn Central* multi-factor analysis has little, if any, contemporary relevance."[80]

The environmentalists' analysis of Penn Central got raised to a pragmatic point and took the Court to task for inventing a "test" that apparently cannot be satisfied:

> [I]ndeed, *no* litigant before the Court has *ever* successfully invoked the *Penn Central* test, except when some special feature (total economic loss, physical occupation) justified categorical treatment of the claim. . . . When a constitutional test supposedly exists, but is never used to support a finding of a constitutional infringement, decade after decade, the question naturally arises whether the test really does exist.[81]

The author of the environmental amicus brief, John D. Echeverria, an outspoken "police power hawk," had expressed the same thoughts somewhat earlier in a commentary whose title says it all: "Is the *Penn Central* Three-Factor Test Ready for History's Dustbin?"[82] When he finished laying out his analysis, he concluded that the "dustbin" was indeed the only proper receptacle for *Penn Central*.[83]

It is interesting that people of such divergent philosophies agree that the *Penn Central* formula is more trouble than it is worth.[84] And yet the High

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[78] Brief of Amici Curiae Institute for Justice at 18, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002).

[79] Brief of Amici Curiae National Audubon Society et al. at 19, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, S. Ct. 1465 (2002) (No. 00-1167) (typeface altered).

[80] *Id.* at 20 (emphasis added).

[81] *Id.* (emphasis added). I can do nothing but applaud this conclusion. I have opposed the Penn Central formula because it provides too much leeway to the government and too many ways for courts to rationalize their way to denying compensation, even on egregious facts. But the test of time is significant. If no one recovers under a supposedly settled mode of constitutional analysis, then something is wrong with that mode, and it ought to be jettisoned. The shenanigans that take place in planning departments are becoming too well documented—by people sympathetic with the planners—for the government to prevail in all cases. *See, e.g.*, Melville Branch, *The Sins of City Planners*, 42 PUB. AD. REV. 1 (1982); Orlando E. Delogu, *The Misuse of Local Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses*, 32 U. ME. L. REV. 29 (1980); Rodney Cobb, *Land Use Law: Marred By Public Agency Abuse*, 24 ZONING & PLAN. L. REP. 33.

[82] 52 LAND USE L. & ZONING DIGEST. 3 (2000).

[83] *Id.* at 11.

[84] Aside from all else, it has grown cumbersome. Starting out as a three-factor analysis of

Court clings to it. It embraced the test in *Palazzolo*,[85] when rebuffing the government, and then it did so again in *Tahoe-Sierra*, when rebuffing the landowners. Rather than lay down bright line rules that can be understood by laymen and lawmen alike, the Court repeatedly opts for vague *ad hocery*. That may have been understandable in 1978, when the Court was gingerly re-entering the takings field after a 50-year absence,[86] but it is inexcusable after the Court has had a quarter-century to ponder the matter since then, has examined numerous regulatory taking cases on their merits, and has dismissed countless more certiorari petitions, for it to be still cowering in fear of laying down reasonably clear rules in this field. On the other hand, it may be no more than an illustration of former California Chief Justice Roger Traynor's adage that "[f]amiliarity . . . breeds undeserved respect."[87]

VII. FAIRNESS AND JUSTICE?

"Considerations of 'fairness and justice' arguably could support the conclusion that TRPA's moratoria were takings of petitioners' property based on any of seven different theories."[88]

If ever a Justice penned a tantalizing opening for a paragraph, that was it. After slogging through seemingly endless pages of discussion of mind-bending notions like "conceptual severance" and the difference between physical and regulatory actions,[89] coupled with paeans to *Penn Central* (amid much hat-

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economic impact, investment-backed expectations, and governmental character, lower courts have expanded it. The California Supreme Court, for example, says it has isolated at least ten factors that must be examined in a *Penn Central* analysis, noting that even that list is "not a comprehensive enumeration of all the factors that might be relevant to a taking claim." Kavanau v. Santa Monica Rent Control Bd., 941 P.2d 851, 860 (Cal. 1997). Another such laundry list of ten (or perhaps more) factors was articulated in *East Cape May Assocs. v. N.J. Dept. of Envtl. Protection*, 693 A.2d 114, 128-29 (N.J. Sup. Ct. App. Div. 1997).

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

[86] The Court's decision in *Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978), making "ad hoc" factual determinations the order of the day marked the Court's re-entry into the field after Justice Holmes famously noted for the Court in 1922 that "if regulation goes too far it will be recognized as a taking."* Pennsylvania. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[87] Roger J. Traynor, *Badlands in an Appellate Judge's Realm of Reason*, 7 UTAH L. REV. 157, 161 (1960).

[88] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 533 U.S. 302, ___, 122 S. Ct. 1465, 1484 (2002).

[89] I continue to believe that there is—and should be—no conceptual difference between physical and regulatory takings. To argue otherwise is to confuse the ends and means. As the Supreme Court put it in *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945), the Fifth Amendment's protection extends beyond the merely physical attributes of property and extends to all rights, including the right to use it. Deprivation of the right of use is as protected

tipping to Justice O'Connor's concurrence in *Palazzolo*), one comes upon a new section of the opinion that begins with the suggestion that there are seven different theories based on concepts of "fairness and justice" that might yet carry the day.

Alas, all seven turned out to be straw creations,[90] set there only for the purpose of not adopting any of them. They're worth examining.

First, the Court suggested it could announce categorically that "compensation is required whenever government temporarily deprives an owner of all economically viable use of her property."[91] That, of course, is precisely the question that the Court insisted be briefed when it granted certiorari.

Having formulated the question, however, the Court seems not to have understood the landowners' response. Here's why the Court rejected this rule, even as a matter of fairness and justice: "A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decisionmaking."[92]

But that was a straw man. The rule suggested by the landowners did *not* call for "compensation for every delay."[93] It dealt with consciously adopted moratoria. All that the landowners sought was a rule tailored to moratoria, not "every delay in the use of property,"[94] something that the Court—which engages in narrow rule-making at every opportunity—should have been able to understand. Regardless of the breadth of the rule's coverage, it would still

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as a physical seizure. As Gertrude Stein would have put it (if only she had thought about it), a taking is a taking is a taking. *See* Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735, 783-85 (1988). And I am in pretty good company, with academics from both ends of the political spectrum in agreement. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 592 (2d ed. 1988); RICHARD. A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 94 (1985). Indeed, the Court itself mixes and matches physical and regulatory opinions in its analysis when it sees fit, in a manner that I believe demonstrates the interchangeability of these "two" lines of cases. *See, e.g.*, First English Evangelical Church of Glendale v. County of L.A., 482 U.S. 304 (1987); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 636 (1981) (Brennan, J., dissenting). Read the opinions and you will understand.

[90] In the law of eminent domain, the Court has given much lip service to "fairness and justice" but, when asked to apply it to property owners, has confessed that the law is "harsh," rather than "fair." *General Motors*, 323 U.S. at 382. It is another story, however, when the government appears before the Court seeking "fairness and justice." Then, *mirabile dictu*, it materializes, and the law is shaped accordingly. *See, e.g.*, United States v. Fuller, 409 U.S. 488, 490 (1973).

[91] *Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1484.

[92] *Id.* at ___, 122 S. Ct. at 1485.

[93] *Id.*

[94] *Id.*

not "require[] compensation for every delay."[95] There is a vast difference between a rule holding every consciously-adopted use prohibition to be a taking and one that compels compensation for everything that fits the description. Many moratoria—perhaps most—will be in effect for such short periods, or inflict so little harm, that they will not draw litigation.[96] And lawyers won't take cases where the anticipated recovery is *de minimis*. People won't waste their time, effort, and money seeking non-existent or *de minimis* damages. Nor would payment of compensation be any more automatic than it is today.[97] That is, no government agency would automatically cut a check at the instant it imposed a moratorium—none do so now, and human nature would not be expected to undergo such an abrupt change as to cause it to happen upon the adoption of a new rule. Finally, the Court has refused repeatedly to be swayed by governmental alarms that its workers will turn out shoddy work if the law subjects their agencies to financial liability for constitutional wrongdoing. This is typical: "[A]s an empirical matter, it is questionable whether the hazard of municipal loss will deter a public officer from the conscientious exercise of his duties; city officials routinely make decisions that either require a large expenditure of municipal funds or involve a substantial risk of depleting the public fisc."[98]

The Court simply said it preferred to stick with its familiar—if largely unworkable—*Penn Central* lot-by-lot, fact-by-fact method of adjudication, a system so fraught with uncertainty that landowners must often litigate to the highest court that will hear them out to determine whether they have even properly stated a claim on which relief can be granted. It may allow the Supreme Court to evade the burden of devising a set of coherent rules, but it's not much of a system of justice that should command the respect of the citizenry.

Second, said the Court, we might modify the absolute rule so that it would exclude "normal delays in the planning process" described in *First English* or *third*, we might set a safe period of, say, one year that regulators could use

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[95] *Id.*

[96] After all, a properly designed moratorium will exist for as short a time as necessary and will encourage reasonable interim property use. *See, e.g.*, Dwight H. Merriam & Gurdon H. Buck, *Smart Growth, Dumb Takings*, 29 ENVTL. L. REP. 10746, 10756 (1999).

[97] A useful insight is provided by *City of Los Angeles v. Ricards*, 515 P.2d 585 (Cal. 1973). There, the city destroyed access to the subject property (raw land) for a temporary period. This *was* deemed a temporary taking of access. But, since the landowner had no plans to develop her land during that time, she lost nothing and was held entitled only to nominal damages.

[98] Owen v. City of Independence, 445 U.S. 622, 656 (1980). For a more extensive discussion of the bankruptcy of the "risk to the fisc" argument, see Michael M. Berger & Gideon Kanner, *Thoughts On The White River Junction Manifesto: A Reply To The "Gang Of Five's" Views On Just Compensation For Regulatory Taking Of Property*, 19 LOY. L.A.L. REV. 685, 749-53 (1986).

without liability.[99] The Court rejected these alternatives because (1) they would still pose a serious financial threat to regulators, (2) the planning community needs to be able to impose moratoria, (3) they ignore the planners' good faith, (4) they are unrelated to the landowners' reasonable expectations, and (5) they are unrelated to the actual impact of the moratorium on property values.

The "financial threat" has just been discussed. It never was serious—just another in a steady stream of "Chicken Little" arguments municipalities traditionally make in cases like this,[100] even though they have been unsuccessful in other fields of the law.[101] If the definition is altered so as to provide even more leeway to the regulators by immunizing normal planning delays in general or a one year period in particular, then the threat will recede even further. As for takings being related to the "actual impact" of the moratorium, that is an issue for the *compensation* phase of litigation, not *liability*.[102] As noted above, the fact that a taking is found does not guarantee a boxcar verdict. If a landowner cannot convince a prospective lawyer that the damage is significant, there would not even be a suit. Finally, assuming that compensation is found to be due—because the impact of the regulation was economically significant—then the impact on the government has never deterred the Court in the past. Indeed, the Court has been quite blunt:

> It hardly seems unjust to require a municipal defendant which has violated a citizen's constitutional rights to compensate him for the injury suffered thereby. Indeed, Congress enacted § 1983 precisely to provide a remedy for such abuses of official power. Elemental notions of fairness dictate that one who cases a loss should bear the loss.

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[99] *Tahoe-Sierra*, 535 U.S. at __, 122 S. Ct. at 1486.

[100] The tactic is becoming hackneyed. The Court's files in *First English*, for example, enshrine a variety of such arguments. There, a large group of state amici said the church was seeking a "radical reformulation of takings jurisprudence" that would "cripple" regulators, [Brief of Amici Curiae California at 1-2, First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987)], risk "financial chaos," and have "a major chilling effect on the regulatory process." *Id.* at 3. The State and Local Legal Center predicted that a ruling adverse to the government would "paralyze" public health and safety regulation, "threatening bankruptcy" for municipalities. *Id.* at 3. However, when the Court ruled against the government, life continued, and there have been no reports of municipal paralysis or bankruptcy related to the opinion. For further discussion, see Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New Ground Rules for Land-Use Planning*, 20 URB. LAW. 735, 739-43 (1988).

[101] *E.g.*, Watson v. City of Memphis, 373 U.S. 526, 537 (1963).

[102] *See* Skip Kirchdorfer, Inc. v. United States, 6 F.3d 1573, 1583 (Fed. Cir. 1993) ("The limited duration of this taking is relevant to the issue of what compensation is just, and not to the issue of whether a taking has occurred."); Hendler v. United States, 952 F.2d 1364, 1376 (Fed. Cir. 1991) ("[T]he fact that [the government's] action was finite went to the determination of compensation rather than to the question of whether a taking had occurred").

> It has been argued, however, that revenue raised by taxation for public use should not be diverted to the benefit of a single or discrete group of taxpayers, particularly where the municipality has at all times acted in good faith. On the contrary, the accepted view is that stated in *Thayer v. Boston*—'that the city, in its corporate capacity, should be liable to make good the damage sustained by an [unlucky] individual, in consequence of the acts thus done.' After all, it is the public at large which enjoys the benefits of the government's activities, and it is the public at large which is ultimately responsible for its administration.[103]

This is *a fortiori* true in inverse condemnation cases where, in exchange for payment of compensation, the regulating entity acquires title to, or an interest in, property at its judicially determined fair market value, thus suffering no economic loss at all.

The "need" for moratoria is problematic. The real problem is that, relying on undue judicial deference to their handiwork, many land use regulators have grown lax and lazy about keeping their plans up to date and have lapsed into the unfortunate practice of using *ad hoc* moratoria as substitutes for municipal foresight and responsible planning. As Wendy and Marcella Larsen, two lawyer/land use consultants, put it in an American Planning Association publication, "moratoria should not be used as a crutch in place of long-term planning."[104] Building on that thought, a more recent text concluded:

> Moratoria are not an acceptable substitute for consistent advance long-term planning. Moratoria are enacted, in most cases, because comprehensive plans and land development regulations have not been prepared or kept current with changing conditions. If they were, development applications which are unwanted and the kind of 'emergency' planning studies which engender moratoria would be avoided.[105]

As for financial catastrophe if this tool is removed from the planners box, the Larsens' article concludes that if categorical moratoria are invoked properly (i.e., rarely and for limited times and reasons), "the instances where the Lucas categorical taking rule would come into play with moratoria should be relatively rare. Moratoria will even more rarely cause takings when communities are careful *not* to use them as substitutes for consistent long-term planning."[106]

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[103] Owen v. City of Independence, 445 U.S. 622, 654-55 (1980) (emphasis omitted)(citations omitted).

[104] Wendy U. Larsen & Marcella Larsen, *Moratoria as Takings Under Lucas*, 46-6 LAND USE L. & ZONING DIG. 3,3 (1994).

[105] MICHAEL A. ZIZKA, STATE & LOCAL GOVERNMENT LAND USE LIABILITY § 4:4 at 4-15 (2000).

[106] Larsen & Larsen, *supra* note 100, at 7.

"Good faith" is another red herring. It has no place in this type of constitutional litigation, as the Court itself has repeatedly acknowledged in the past. The question in these cases is only "did the government actions take private property for public use?"[107] If it was in bad faith, then some modicum of opprobrium may be appropriate, but it has nothing to do with liability.

The Fifth Amendment is not concerned with the propriety or virtue of the regulators' purpose in freezing the use of private property or the exigency of the situation that gave rise to the perceived need for it. Indeed, in the case of direct takings under eminent domain, that is a non-justiciable, forbidden subject,[108] and no reason appears why it should suddenly become important in the case of inverse takings. For a proper exercise of the police or eminent domain power, a public purpose must exist; otherwise the action is *ultra vires* and void. That much was plainly settled no later than 1922, when the Court examined a statute designed to stop land subsidence caused by underground coal mining and concluded that the prerequisites for exercise of both police power and eminent domain were present:

> We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and we assume that an exigency exists that would warrant the exercise of the power of eminent domain. But the question at bottom is upon whom the loss of the changes desired should fall.[109]

Pennsylvania Coal was merely one in a long line of decisions in which the Court—speaking from varied points on its ideological spectrum—patiently, and consistently, explained to regulatory agencies that the general legal propriety of their actions and the need to pay compensation under the Fifth Amendment present different questions, and the need for the latter is not obviated by the virtue of the former.[110] Emphasizing the point, the dissenting opinion in *Pennsylvania Coal* had argued the absolute position that a

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[107] *See Owen*, 445 U.S. at 649-50.

[108] *See generally* Rindge Co. v. County of L.A., 262 U.S. 700 (1923).

[109] Pa. Coal Co. v. Mahon, 260 U.S. 393, 416 (1922); *see also* Fla. Rock Indus., Inc. v. United States, 18 F.3d 1560, 1571 (Fed. Cir. 1994) ("It is necessary that the Government act in a good cause, but it is not sufficient. The takings clause already assumes the Government is acting in the public interest . . . .") More than that, it assumes that the Government is acting pursuant to lawful authority. If not, the action is *ultra vires* and void. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (voiding an unlawful wartime seizure). *Compare* Armstrong v. United States, 364 U.S. 40 (1960), *with* United States v. Peewee Coal Co., 341 U.S. 114 (1951) (requiring compensation after lawful wartime seizure).

[110] *E.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 425 (1982) (Marshall, J.); Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979) (Rehnquist, J.); Preseault v. I.C.C., 494 U.S. 1 (1990) (Brennan, J.), Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (Blackmun, J.); Dames & Moore v. Regan, 453 U.S. 654 (1981) (Rehnquist, J.); Reg'l Rail Reorganization Act Cases, 419 U.S. 102 (1974) (Brennan, J.); Nollan v. Cal. Coastal Comm'n., 483 U.S. 825, 841-42 (1987) (Scalia, J.).

"restriction imposed to protect the public health, safety or morals from dangers threatened [sic] is not a taking."[111] Eight Justices rejected that proposition, being of the view that it is the deprivation of private property that is decisive, not the motivation of the regulators.

Thus, for a taking to occur, it matters not whether the regulators acted in good or bad faith, or for good or bad reasons. What matters is the impact of their acts, not the purity *vel non* of their motives. Indeed, if their motives are benign, that only fortifies the need for compensation by confirming that the taking is indeed for a public use as required by the Just Compensation Clause of the Fifth Amendment.[112] Put still another way, the exercise of the power to govern—whether by eminent domain or by far-reaching regulations that *de facto* deprive the owners of their right to make productive use of their land—is not a tort.[113] Nor is it *per se* wrongful—unless the government refuses to pay the just compensation required by the Constitution. That regulators may not *want* to pay for the impact of their regulations is irrelevant. That eventuality is, as the Court put it when TRPA was last before it, "simply one of the risks of regulatory pioneering, and the pioneer here is the agency, not [the landowner]."[114]

Twice in its opinion the Court said that a substantial change in land use practice is a matter for a legislative body, not a court.[115] And the Court viewed a new rule making all those who invoke moratoria potentially liable to compensate property owners who are denied the use of their land for significant periods of time as such a substantial change. But legislatures have provided substantial guidance already. There is, for example, already legislative instruction on the proper amount of time it ought to take permitting bodies to act, as the Court was told.[116] Such expressions are found in so-called permit streamlining acts which appear in many states. Such statutes "deem" projects approved by operation of law if applications are not acted on within a specified period of time.[117] Such statutes were enacted to provide disincentives to governmental sloth.[118]

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[111] *Pa. Coal*, 260 U.S. at 417 (Brandeis, J., dissenting).

[112] *See* Haw. Housing Auth. v. Midkiff, 467 U.S. 229, 240 (1984) ("The 'public use' requirement is thus coterminous with the scope of a overeign's police powers.").

[113] Tektronix, Inc. v. United States, 575 F.2d 832 (Ct. Cl. 1978).

[114] Suitum v. Tahoe Reg'l Planning Agency,, 520 U.S. 725, 742 (1997).

[115] *Tahoe-Sierra*, 535 U.S. at ___, ___, 122 S. Ct. at 1485, 1489.

[116] *See* Brief for Petitioners at 28 n.36, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465 (2001) (No. 00-1167).

[117] *See generally* 5 ARDEN H. RATHKOPF ET AL., THE LAW OF ZONING AND PLANNING § 66.04 (4th ed. 2001); 4 KENNETH H. YOUNG, ANDERSON'S AMERICAN LAW OF ZONING, SUBDIVISION CONTROLS § 25.16 (4th ed. 1996).

[118] *See generally* Jay M. Zitter, *Zoning: Construction and Effect of Statute Requiring That Zoning Application Be Treated As Approved If Not Acted On Within Specified Period Of Time*,

While California grants government agencies a leisurely year to review projects,[119] the norm elsewhere is thirty to sixty days.[120] It would seem appropriate to utilize such statutes as guidelines for what is "normal" in the planning process, as they contain the kind of legislative guidance the Court said was important, i.e., determinations about how long the planning approval process ought to take, and that there needs to be a remedy for aggrieved landowners.

The remaining "fairness and justice" alternatives were discarded for procedural reasons. The *fourth* was the rolling moratoria argument discussed earlier. The Court said it might have considered this issue but, sad to say, our order granting review did not encompass that issue.[121] Or, *fifth*, TRPA's actions may have been ill motivated. That avenue, however, was foreclosed by the trial court's finding that TRPA acted diligently.[122] Of course, if the Court were serious, it could have examined the question of good faith in a constitutionally appropriate way. After all, the Bill of Rights was adopted to protect individuals against even well meaning governmental actions. Thus, whether the delay was reasonable *from the government's viewpoint* should have been irrelevant. The proper question was on whom should the economic burden fall.[123] Accepting *arguendo* that it was proper for the government to take thirty two months to design a plan for the Tahoe basin, the real question was the reasonableness of that time period *from the individual lot owner's viewpoint.* But the Court seemed not to care about the latter. As a *sixth* alternative, the Court suggested that the moratoria might not have substantially advanced a legitimate state interest—an argument never made by anyone. The issue was solely who ought to pay for such action in the public interest. And *seventh*, the Court said "some" of the landowners might have been able to prevail on a *Penn Central* theory, if only they had pressed it.[124]

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66 A.L.R.4TH 1012, 1023 (1988).

[119] CAL. TIME PERIOD TO APPROVE OR DISAPPROVE PROJECT CODE § 65950 (2003).

[120] For discussion and application of representative statutes, see, for example, *Am. Tower, L.P. v. City of Grant*, 621 N.W.2d 37 Minn. Ct. App. 2001) (60 days); *Gunthner v. Planning Board*, 762 A.2d 710 (N.J. Super Ct. Law Div. 2000) (45 days); *Romesburg v. Fayette County Zoning Hearing Board*, 727 A.2d 150 (Pa. Commw. Ct. 1999) (45 days); *City of Birmingham Planning Commision v. Johnson Realty Company, Inc.*, 688 So. 2d 871 (Ala. Civ. App. 1997) (30 days); *Pope v. De Poala*, 574 N.Y.S.2d 869 (1991) (45 days); *Marandino v. Planning & Zoning Commission*, 573 A.2d 768 (Conn. App. Ct. 1990) (65 days).

[121] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465, 1485 (2002).

[122] *Id.*

[123] Arvo Van Alstyne, *Just Compensation of Intangible Detriment: Criteria for Legislative Modification in California*, 16 U.C.L.A. L. REV. 491, 543-44 (1969).

[124] *Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1485.

So, rather than choose a course that might provide some modicum of "fairness and justice," the Court opted for a continuation of *Penn Central*'s litigational anarchy. For a decision by the so-called liberal, or progressive, wing of the Court, which prides itself on its concern for individuals, the opinion is curiously devoid of any concern for individuals, opting instead to protect the bureaucracy. It is a bloodless, lifeless, soulless bureaucratic screed, callously nullifying cherished constitutional rights of individuals who have done nothing wrong.

And to make matters worse, on top of letting TRPA off the hook completely, the Court put the cost of saving Lake Tahoe in the wrong place. There were multiple answers that could have been made to the question of funding the preservation of a national treasure. (1) Have California and Nevada dip into their respective general funds. After all, if Lake Tahoe is a "crown jewel," as TRPA repeatedly referred to it, the task of protecting crown jewels rests with the Crown, not with randomly selected serfs. If the populace at large isn't willing to tax itself to fund the protection, then perhaps the regulators have no mandate for doing so. (2) Levy a special tax on those whose homes and businesses were already built around the lake or those whose lots were freed for development. The former, after all, were the ones whose home construction contributed to the problem in the first place. Shouldn't they be the ones to pay for the repair? Those people also stand to benefit substantially from the restriction on further development and from preservation of the lake, thus making their homes more scarce and more valuable. It doesn't take a rocket scientist or even a lawyer to figure it out: when the land available for home construction shrinks, the value of the remaining sites that can be developed rises. Those who got the benefit should also shoulder the burden.[125] (3) Stick it to the absentee owners of small, undeveloped lots. Politically, this was a whole lot easier. Most were powerless individuals, and some of them weren't even aware of what was happening. That TRPA chose the easy alternative is understandable, if reprehensible. That the highest court in this land went along with that program is distressing.

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[125] *See generally*, DONALD HAGMAN & DEAN MISCZYNSKI, WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION (1978).

VIII. SO WHAT HAS BECOME OF *FIRST ENGLISH*?

The majority was careful to say it wasn't undercutting *First English*: "*First English* was certainly a significant decision, and nothing that we say today qualifies its holding."[126]

Based on the questions at oral argument, it was necessary to keep at least Justice Kennedy in the fold,[127] possibly Justice O'Connor,[128] and possibly others.[129]

But is *First English* really intact? True, as the Court said, *First English* was a remedy case, deciding that the Fifth Amendment really meant what it said when it mandated compensation for all takings of private property for public use.[130] But if that were all there was to it, the Court could have spared us quite a few pages of legal analysis that it now suggests were unnecessary surplusage.[131]

In the course of its *First English* opinion, the Court explained a number of substantial takings law issues and quite plainly said that there was—jurisprudentially speaking—no real difference between physical and regulatory takings or between temporary and permanent takings. That is apparent from the way that *First English* interchangeably analyzed the remedy for a temporary regulatory taking by reference to cases involving physical takings.[132]

First English built on the more exhaustive analysis in Justice Brennan's *San Diego Gas* dissent, as the *Tahoe-Sierra* majority acknowledged.[133] In his opinion in *San Diego Gas*, Justice Brennan expounded what might be called a unified field theory of takings jurisprudence. His opinion drew upon all sorts

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[126] *Tahoe-Sierra*, 533 U.S. at ___, 122 S. Ct. at 1482.

[127] United States Supreme Court Official Transcript of 1/7/02 at 42-43, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 122 S. Ct. 1465 (2002) (No. 00-1167).

[128] Although she had dissented in *First English*, Justice O'Connor drafted a strong concurring opinion three years later that demonstrated her intent to hew to *First English* as being a correct and binding explanation of the law. *See* Preseault v. I.C.C., 494 U.S. 1, 23 (1990) (O'Connor, J., concurring).

[129] *See* United States Supreme Court Official Transcript of 1/7/02 at 53, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 122 S. Ct. 1465 (2002) (No. 00-1167) (Ginsburg, J.).

[130] *Tahoe-Sierra*, 535 U.S. at __, 122 S. Ct. at 1482.

[131] *Tahoe-Sierra* focuses on one sentence toward the end of the opinion: "We merely hold that where the government's activities *have already worked a taking* of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* at 1482 (quoting *First English*, 482 U.S. at 304, 321 (1987).

[132] *First English*, 482 U.S. at 314-19.

[133] *Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1482.

of takings without differentiation to demonstrate the common constitutional element uniting them all and stressed the "essential similarity of regulatory 'takings' and other 'takings.'"[134]

To illustrate the point, that analysis linked a permanent direct condemnation case[135] with flooding cases (both intended[136] and unintended[137]), a navigable servitude case,[138] an aircraft overflight case,[139] a mining regulation case,[140] and temporary direct condemnation cases,[141] among others.[142] Born of a bedrock belief in the Bill of Rights as the individual's shield against governmental overreaching,[143] Justice Brennan pragmatically viewed all these impositions on private property owners as requiring compensation, and the fact that some of them may have been for temporary periods of time merely affected the amount of compensation that would be due.[144] This analysis became the core of *First English.*

The context of *First English* is important to understand its holding, as the Court has long held.[145] And the context of both *First English* and *Tahoe-Sierra* was a planning moratorium placing a total freeze on land use for a period of less than three years.[146] Unless one reads the two opinions with blinders on, it is not possible to lay *First English* and *Tahoe-Sierra* side by side and find a comfortable match.[147] They don't mesh. Except that the highest court in the land has said that—as a matter of law—they do.[148]

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[134] San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 651 (1981).

[135] Berman v. Parker, 348 U.S. 26 (1954).

[136] United States v. Dickinson, 331 U.S. 745 (1947).

[137] Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1872).

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

[139] United States v. Causby, 328 U.S. 256 (1946).

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

[141] Kimball Laundry Co v. United States, 338 U.S. 1 (1949); United States v. Petty Motor Co., 327 U.S. 372 (1946); United States v. General Motors Corp., 323 U.S. 373 (1945).

[142] San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 651-53, 656-60 (1981).

[143] *See* CHARLES M. HAAR & JEROLD S. KAYDEN, LANDMARK JUSTICE 191 (1989).

[144] *San Diego Gas*, 450 U.S. at 658-60.

[145] *E.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-400 (1821).

[146] The majority erred in *Tahoe-Sierra* when it said the *First English* moratorium lasted for "more than six years." *Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1489 n.36. Such a moratorium would have been illegal under California law. CAL. GOV'T. CODE § 65858 (2002). It didn't happen.

[147] One of the first phone calls I received after certiorari was granted in *Tahoe-Sierra* was from a veteran newspaper reporter who had covered the Supreme Court for decades. His immediate reaction was, "I read the question the Court formulated. Isn't that the one they already decided in *First English*?" Yes, this is true except that six justices (two who dissented in *First English* and four who weren't there) now say it was not.

[148] For more detailed discussions of *First English*, see Michael M. Berger, *supra* note 6; J. David Breemer, *Temporary Insanity: The Long Tale Of Tahoe-Sierra Preservation Council*

That treatment of *First English* should give pause to those who hope to gain guidance for future conduct from reading Supreme Court opinions. It should also give pause to those who seek to draw broad lessons from *Tahoe-Sierra*.[149] What's important to the Court is the narrowest reading of the identifiable "holding." Perhaps that's the intended message of *Tahoe-Sierra*: the Court continues to have (and apparently, to want) no precise rules in this field, only *ad hocery*.[150] Pity. Those who have to live in it—landowners; planners; environmentalists; and lawyers on all sides city, county, and agency boards, along with trial judges—could use some real guidance. Justice Stevens said it fifteen years ago when he dissented in *Nollan*, but the words ring more true now than ever: "[E]ven the wisest of lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence."[151]

He had an opportunity to rectify this unfortunate situation but, sadly, he compounded it. Uncertainty reigns.

IX. EPILOGUE

After the opinion came down and, of course, far too late to be part of the official record of the case, a report surfaced explaining the results of the kind of "good planning" that the Court thought it was encouraging. Although the press coverage (and the planning/environmental spin on the decision) focuses on the pristine nature of Lake Tahoe and the need to preserve what TRPA refers to as "the crown jewel of the Sierras," the planning has been strange, to say the least. The "good" planning in this case prevented individual owners of small (quarter acre) lots in the hills from building anything. And some of those who were frozen out were literally next door (sometimes on both sides) to lots with homes on them.

Beyond that, the Los Angeles Times recently reported (and illustrated graphically with the kind of aerial photo whose existence the "good" planners like to ignore) that development on Tahoe's lakeshore—by those with wealth or political clout or both—continues apace. Thirty-million dollar homes "in excess of 10,000 square feet have continued to sprout on the shoreline.

And Its Quiet Ending In The United States Supreme Court, 71 FORDHAM L. REV. 1, 24-37 (2002).

[149] *E.g.*, Jerold S. Kayden, Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*: About More Than Moratoria*, 54-10 LAND USE L. & ZONING DIG., 3,3 (2002) (the optimistic title says it all); Timothy J. Dowling, *Happy Earth Day, Lake Tahoe!*, 54-6 LAND USE L. & ZONING DIG., 8,8 (2002) ("[I]t contains a broad analysis that will be helpful to planners and government lawyers for years to come.").

[150] *E.g.*, Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978); Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

[151] Nollan v. Cal. Coastal Comm'n., 483 U.S. 825, 866 (1987) (Stevens, J., dissenting).

Among the denizens are financier Michael Milken, Mike Love of the Beach Boys and heirs to the Singer sewing machine fortune.' And the same goes for commercial lakeshore development, as "a veritable alpine village of new hotels, restaurants and shops is rising."[152] "Good planning?" Tell it to the *Tahoe-Sierra* mom and pop plaintiffs who were shut out for the benefit of Michael Milken and his pals, and are now *de facto* subsidizing those huge homes and their private docks by having their land *de facto* stolen.

The general power to regulate land use was upheld by the Supreme Court in the landmark *Euclid* case.[153] Although dryly viewed today as an artifact of municipal law, it represented high socio-political drama at the time. Judge Westenhaver, the trial judge, commented vividly on how the true foundation of the regulation was class based and designed to segregate the population according to income or station in life. He predicted that if he did not strike down the ordinance, it would become a tool for the governing class to wall itself off from the rest of society.[154]

Judge Westenhaver would have understood the result around Lake Tahoe, where the rich get coddled and the less well off get wiped out. He would not have liked it, but he would have understood. Nor should anyone else feel smug about the result. To all those who believe this was a good decision, keep looking over your shoulder. The next one who gets caught by the planners' pet idea *du jour* could be you. For, as the liberals who cheer this opinion[155] never tire of telling us, when the constitutional rights of one class of persons are not secure, neither are the rights of anyone else. It's only a question of time.

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[152] Eric Bailey, *The State Lake Stays Blue but Critics of Panel See Red Environment*, LOS ANGELES TIMES, May 13, 2002 at B5.

[153] Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[154] Ambler Realty Co. v. Village of Euclid, 297 F. 307 (N.D. Ohio 1924).

[155] My co-counsel, Professor Gideon Kanner, informed me that after the *Tahoe-Sierra* opinion came down, one of his colleagues on the Loyola Law School faculty confronted him and said, "I'm glad you lost." Conversation with Professor Gideon Kanner.

Some Permanent Problems with the Supreme Court's Temporary Regulatory Takings Jurisprudence

Steven J. Eagle*

I. INTRODUCTION

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[1] the United States Supreme Court held that temporary moratoria on development imposed for purposes of comprehensive land-use planning do not constitute categorical takings. While this holding was unexceptional, it was accompanied by expansive dicta and consequently was hailed as a major victory for land-use regulators.[2]

It is too early to determine whether *Tahoe-Sierra* will be of lasting import. For now, the case, at best, might be viewed as a continuation of the Supreme Court's turn away from a rule-based regulatory takings jurisprudence signaled the year before in *Palazzolo v. Rhode Island*.[3] The pivotal concurring opinion in *Palazzolo* by Justice Sandra Day O'Connor declared: "Our polestar . . . remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings."[4] This pronouncement was quoted with great approbation by Justice John Paul Stevens and is the leitmotiv of his 6 to 3 majority opinion in *Tahoe-Sierra*.[5]

The metaphor of the judge as navigator, plotting a course in regulatory takings cases by reference to the true north of *Penn Central*,[6] permeates the Stevens opinion in what otherwise would be a fairly pedestrian *Tahoe-Sierra*

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[1] 535 U.S. 302, 122 S. Ct. 1465 (2002).

[2] Robert Freilich, who filed an amicus brief for the American Planning Association, hailed the decision as "a constitutional acceptance of the need for planning in our society." Bob Egelko, *Property Owners Lose Key Tahoe Case*, SAN FRANCISCO CHRONICLE, April 24, 2002 A1. Lora Lucero, an attorney for the American Planning Association, "called the ruling 'the best victory for planning in more than a decade' and said it reaffirmed 'the value of planning' in development." Jan Crawford Greenburg, *Court Rejects Blanket Compensation for Halted Building*, CHICAGO TRIBUNE, April 24, 2002 at 8.

[3] 533 U.S. 606 (2001). The Court split 5-4 in *Palazzolo*.

[4] *Id.* at 633 (O'Connor, J., concurring) (citing Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978)).

[5] *Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1481, n.23.

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

case.[7] This article suggests that a different metaphor would be better. *Tahoe-Sierra* posits no external (much less infallible) guide, but simply mandates that owners and regulators follow the yellow brick road to the courthouse.

In a sense, though, it is fitting that Justice O'Connor cites Justice William Brennan's *Penn Central* opinion in establishing the fixed polestar that would inform the judge as astronomer. After all, Brennan's well-known dissent in *San Diego Gas & Electric Company v. City of San Diego*[8] invoked a similar metaphor and borrowed the image of judge as scientist. The quest to distinguish "regulation" from "taking," as he put it, was the "equivalent of the physicist's hunt for the quark."[9]

However, whether the metaphor is the judge's quest for the Polestar, Dorothy in search of the Wizard,[10] or the Supreme Court Justice who thinks he is hunting the Quark when he is actually hunting the elusive (and imaginary) Snark,[11] the path chosen by Justice O'Connor's working majority in *Palazzolo* and the Court in *Tahoe-Sierra* ultimately is self-referential.

II. TAHOE-SIERRA: A SHORT HISTORY

There are many aspects of the *Tahoe-Sierra* litigation that are worthy of note. One is how it took over twenty years for a land use case to be decided. Another is how a Supreme Court holding that is totally consistent with the response preferred by petitioner's in its proffered certiorari question is deemed to be a victory for the respondent. Not the least in importance is that what appears to be the permanent prohibition on the economically viable use of hundreds of parcels was treated as two moratoria suspending development for a total of 32 months. These facets of *Tahoe-Sierra* should not surprise the

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[7] The regulatory takings implications inherent in the *facts* of *Tahoe-Sierra* are not pedestrian at all. Had the Court ruled that all moratoria constituted takings or had it considered all of the relevant facts, the effect on regulatory takings law would be profound. However, as the matter came before the Court, given the law of the case and the very limited grant of certiorari, *Tahoe-Sierra* is of intrinsic little importance. While its holding, that *not* all moratoria constitute regulation takings, favors the respondent, is in no way inconsistent with the holding sought in petitioner's petition for certiorari. *See infra* text accompanying notes 50-51.

[8] 450 U.S. 621 (1981).

[9] *Id.* at 650, n.15 (Brennan, J., dissenting).

[10] The "yellow brick road," as the reader might recall, was the path upon which the Munchkins set Dorothy and her dog Toto in order to see the Great Wizard of Oz, whom everyone assured her had the power to return her from the beautiful, if sometimes dangerous, Land of Oz (located somewhere over the rainbow) to Kansas. THE WIZARD OF OZ (Metro-Goldwyn-Mayer 1939). *See* H. Lee Hetherington, *The Wizard and Dorothy, Patton and Rommel: Negotiation Parables in Fiction and Fact*, 28 PEPP. L. REV. 289, 291 (2001).

[11] *See* Gideon Kanner, *Hunting the Snark, Not the Quark: Has the U.S. Supreme Court Been Competent in Its Effort to Formulate Coherent Regulatory Takings Law?*, 30 URB. LAW. 307 (1998) (citing Lewis Carroll, The Annotated Snark 51 (1962)).

experienced regulatory takings litigator or scholar. Nevertheless, their cumulative impact is ironic in light of the Court's explicit invocation of "fairness" as the touchstone of regulatory takings jurisprudence.

A. The Facts

Lake Tahoe is a pristine alpine lake nestled in the mountains between Northern California and Nevada. By the late 1950s, burgeoning development had led to increased runoff into the lake and nutrient loading, which resulted in erosion and a proliferation of algae that threatened the lake's clarity. The inadequacy of local efforts to deal with these problems led to the creation of a bi-state compact creating the Tahoe Regional Planning Agency ("TRPA") in order "to coordinate and regulate development in the Basin and to conserve its natural resources."[12]

In 1980, TRPA was directed to develop regional air, water quality, soil conservation, and vegetation preservation standards within 18 months.[13] Thereafter, the agency had a year to adopt an amended regional plan to achieve the set preservation standards. To prevent inconsistent development, the regional planning compact also provided for a moratorium on development until adoption of a final plan or May 1, 1983, "whichever is earlier."[14] However, TRPA did not adopt a new regional plan until April 26, 1984. TRPA also bridged the gap with an informal delay on processing applications and a second moratorium.[15] Together, this period, which the Court refers to collectively as "the two moratoria," prohibited all development for a total of 32 months.[16]

On the day the 1984 plan went into effect, California challenged it as insufficiently restricting residential construction. An injunction against implementation was issued by the district court and this injunction remained in effect until a new plan was adopted in 1987.[17] The revised 1987 plan remains in effect.

Those challenging the TRPA plan included both the Tahoe-Sierra Preservation Council,[18] and about 400 individual owners who had purchased vacant lots prior to 1980 but who did not build or obtain vested rights before

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[12] Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 203, ___, 122 S. Ct. 1465, 1471 (2002).

[13] *Id.* at ___, 122 S. Ct. at 1472.

[14] *Id.*

[15] *Id.* at ___, 122 S. Ct. at 1473.

[16] *Id.*

[17] *Id.*

[18] The Council comprises about 2,000 owners of improved and unimproved lots in the Lake Tahoe Basin. *Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1473.

the effective date of the 1980 compact.[19] These undeveloped lots were not along the lake shore, but were scattered within the Tahoe Basin in residential subdivisions that already had been largely developed.[20] From the imposition of the first moratorium in 1981 until the present day, many owners of vacant lots have not been permitted to build. Some owners have died and others have sold to TRPA for low prices set by that agency.[21]

B. The Developing Litigation

The *Tahoe-Sierra* litigation has been protracted, with four published court of appeals decisions and a number of published trial court decisions.[22] Ultimately, the Supreme Court's opinion focused on a 1999 Nevada district court opinion,[23] its reversal by the Ninth Circuit,[24] and the circuit's denial of review *en banc*.[25]

1. The district court opinion

The District Court first considered whether the moratoria would constitute a taking under the traditional analysis set forth in *Penn Central Transportation Co. v. City of New York*.[26] The *Penn Central* approach requires the court to consider "a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action."[27] Weighing these factors, the district court concluded that no taking occurred.[28]

The court noted, however, that the moratoria temporarily denied the plaintiffs all economically viable use of their properties. As a result, the court concluded that government's actions constituted a "categorical" taking under

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[19] *Id.*

[20] *See* Michael M. Berger, *Tahoe-Sierra: Much Ado About—What?*, 25 U. HAW. L. REV. ___, (2003).

[21] *See id.*

[22] *Tahoe-Sierra*, 535 U.S. at ___, 122 S.Ct. at 1474.

[23] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226 (D. Nev. 1999).

[24] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764 (9th Cir. 2000).

[25] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 228 F.3d 998 (9th Cir. 2000)(denying reh'g en banc).

[26] 438 U.S. 104 (1978).

[27] Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001) (citing *Penn Central*, 438 U.S. at 124).

[28] *Tahoe-Sierra*, 34 F. Supp. 2d at 1240-42.

Lucas v. South Carolina Coastal Council,[29] which established the bright-line rule that compensation is required whenever a regulation deprives an owner of "all economically beneficial uses" of the land.[30]

The district court further found that although the prohibition on development "was clearly intended to be temporary," there was no fixed date for when it would terminate.[31] Therefore, compensation was required under *First English*, which held that a regulatory taking is compensable even if the taking proves to be only temporary because the regulation is later rescinded or invalidated.[32]

2. The Ninth Circuit opinion

The Ninth Circuit reversed the lower court decision, concluding that the district court had misinterpreted *First English* and incorrectly applied *Lucas*. Writing for the majority, Judge Reinhardt observed that the plaintiff in *First English* had sought "damages for the uncompensated taking of all use" of its property. The state court in *First English* dismissed the compensation claim, concluding that an injunction was the appropriate remedy in an inverse condemnation action of this type. Thus, "regardless of whether a taking occurred, the claimants could not recover damages during the period running from the time of enactment of the ordinance to the time when it was finally declared unconstitutional."[33] The Supreme Court disagreed, holding that subsequent invalidation of the regulation, "though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause."[34] Thus, the plaintiffs were entitled to compensation for the period of time that the regulation remained in effect.

Judge Reinhardt emphasized, however, that the question presented to the Supreme Court in *First English* "related only to the remedy available *once a taking had been proven*."[35] Although *First English* held that compensation is required even when a taking is temporary, Reinhardt correctly noted that "the Court stated explicitly that it was not addressing whether the ordinance constituted a taking."[36]

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[29] 505 U.S. 1003 (1992).

[30] *Tahoe-Sierra*, 34 F. Supp. 2d at 1242-45.

[31] *Id.* at 1250.

[32] First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987).

[33] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 778 (9th Cir. 2000).

[34] *First English*, 482 U.S. at 319.

[35] *Tahoe-Sierra*, 216 F.3d at 778 (emphasis in original).

[36] *Id.*

Turning to this latter question, the Ninth Circuit reversed the District Court's holding in *Tahoe-Sierra* that a categorical taking had occurred under *Lucas*. Contrary to the District Court's findings, Judge Reinhardt stated that the temporary moratorium did not render the plaintiffs' property valueless. Reinhardt reasoned that "[g]iven that the ordinance and resolution banned development for only a limited period, these regulations preserved the bulk of future developmental use of the property. This future use had a substantial present value."[37] Thus, since the moratoria did not deprive the property of all economically beneficial use, the panel concluded, *Lucas* was inapplicable.[38]

The Ninth Circuit denied review *en banc*.[39] However, a stinging dissent by Judge Alex Kozinski,[40] observed that "[t]he panel does not like the Supreme Court's Takings Clause jurisprudence very much, so it reverses *First English Evangelical Lutheran Church v. County of Los Angeles* . . . , and adopts Justice Stevens's *First English* dissent."[41] In his dissent, Justice Stevens argued that no taking had occurred because the regulation merely postponed development of the property for a fraction of its useful life.[42] Thus, the economic impact of postponed development was no greater than the economic impact of a regulation permanently restricting the use of only part of the property.[43] Judge Kozinski noted that although the Ninth Circuit did not cite

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[37] *Id.* at 781.

[38] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, ___, 122 S. Ct. 1465, 1476-77.

[39] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 228 F.3d 998 (9th Cir. 2000) (denying reh'g en banc).

[40] *Id.* at 998 (Kozinski, J., dissenting from denial of reh'g *en banc*, joined by O'Scannlain, Trott, T.G. Nelson, and Kleinfeld, JJ.).

[41] *Id.* at 999.

[42] *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 330, 332 (1987) (Stevens, J., dissenting). Stevens argued that the:

> [r]egulations are three dimensional; they have depth, width, and length. As for depth, regulations define the extent to which the owner may not use the property in question. With respect to width, regulations define the amount of property encompassed by the restrictions. Finally, and for the purposes of this case, essentially, regulations set forth the duration of the restrictions. It is obvious that no one of these elements can be analyzed alone to evaluate the impact of a regulation, and hence to determine whether a taking has occurred. . . . [I]n assessing the economic effect of a regulation, one cannot conduct the inquiry without considering the duration of the restriction between permanent restriction that only reduces the economic value of the property by a fraction—perhaps one-third—and a restriction that merely postpones the development of a property for a fraction of its usual life—presumably far less than a third?

Id.

[43] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764 (9th Cir. 2000). The court noted that:

> [p]roperty interests may have many different dimensions. For example, the dimensions of a property interest may include a physical dimension (which describes the size and

Justice Stevens' *First English* dissent, "the reasoning—and even the wording—bear an uncanny resemblance."[44] Kozinski further argued that "[a]lthough claiming its opinion is fully consistent with *First English*, the panel plagiarizes Justice Stevens's dissent . . . . [T]he panel places itself in square conflict with the majority's opinion in *First English*."[45]

One might speculate that Kozinski's fiery dissent brought *Tahoe-Sierra* to the Supreme Court's attention. In any event, the Supreme Court's opinion recounted that "[i]n the dissenters' opinion, the panel's holding was not faithful" to *First English* and *Lucas*, and stated that certiorari was granted because of "the importance of the case."[46]

C. The Supreme Court's Holding and Dicta

As Justice Stevens repeatedly emphasized, the Court's 6-3 holding in *Tahoe-Sierra* was "narrow." The Court simply refused to adopt a bright-line rule that a temporary moratorium on development—even one depriving the owner of all economic value of the land while it is in effect—is a per se taking requiring payment of just compensation. Although the opinion contained broad dicta commending the virtues of planning and the role of fairness in takings adjudication, Stevens made it clear that the Court was merely rejecting the application of *Lucas*'s per se rule and reiterating the primacy of the "ad hoc" approach adopted in *Penn Central*. There, Stevens noted that "we do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking."[47] Stevens wrote, "we simply recognize that it should not be given exclusive significance one way or the other."[48]

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shape of the property in question), a functional dimension (which describes the extent to which an owner may use or dispose of the property in question), and a temporal dimension (which describes the duration of the property interest). Furthermore, "[a] planning regulation that prevents the development of a parcel for a temporary period of time is conceptually no different than a land-use restriction that permanently denies all use on a discrete portion of property, or that permanently restricts a type of use across all of the parcel. Each of these three types of regulation will have an impact on the parcel's value. . . . There is no plausible basis on which to distinguish a similar diminution in value that results from a temporary suspension of development.

Id. at 776-77 (citations omitted).

[44] *Tahoe-Sierra*, 228 F.3d at 1000. Judge Kozinski quoted the key language from the Stevens' *First English* dissent, *see supra* note 42, immediately followed by the key language from the Ninth Circuit panel, *see supra* note 43. *Id.* at 1000-01.

[45] *Id.* at 1001-02.

[46] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, ___, 122 S. Ct. 1465, 1477 (2002).

[47] *Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1486.

[48] *Id.*

Although the decision is a victory for regulators, it does not signal a return to the Court's pre-1987 policy of almost unlimited deference to land-use regulation. Justice Stevens twice emphasized the narrowness of the opinion, adding that "nothing that we say today qualifies [our *First English*] holding."[49] Perhaps these reassurances played a role in the absence of concurring opinions from Justices Kennedy and O'Connor, who often write separately and who are the swing votes on takings issues.

1. Factors Shaping the Court's Decision

Two primary factors shaped *Tahoe-Sierra*'s narrow ruling. The first is the limited question upon which the Court granted certiorari. The second factor consists of several strategic decisions made by trial counsel many years earlier.

Petitioners sought certiorari on the question of "is it permissible for the Ninth Circuit Court of Appeals to hold—as a matter of law—that a temporary moratorium can *never* require constitutional compensation?"[50] The Supreme Court, however, limited its analysis to "whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a per se taking of property."[51] Framing the issue this way allowed the Court to focus solely on whether the 32-month moratoria fell within *Lucas*'s categorical test or the *Penn Central* analysis and to sidestep several other potential takings issues.

One of the issues sidestepped by the Supreme Court involved the District Court's grant of California's motion to enjoin implementation of TRPA's 1984 plan.[52] Although the injunction prohibited development from 1984 to 1987, the lower courts held that the delays were attributable to the court and not to the 1984 plan itself.[53] In his dissent, Chief Justice Rehnquist argued that the proximate cause of the development prohibition during this period was not the judicial injunction, but rather TRPA's failure to conform its 1984 Plan to the 1980 compact.[54] Justice Stevens and the majority declined to address this argument, however, because the petitioners had not challenged the lower courts' holding on this issue. Thus, Chief Justice Rehnquist's "novel

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[49] *Id.* at ___, 122 S. Ct. at 1482.

[50] Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency, Petition for Certiorari, Page i (emphasis in original).

[51] *Tahoe-Sierra*, 535 U.S. at ___, (2001), 122 S. Ct. at 1470 (granting certiorari).

[52] *Id.* at ___, 122 S. Ct. at 1473.

[53] *Id.* at ___, 122 S. Ct. at 1490-91 (Rehnquist, C.J., dissenting).

[54] *Id.* at ___, 122 S. Ct. at 1491 (Rehnquist, C.J., dissenting).

theory of causation was not briefed, nor was it discussed during oral argument."[55]

The Court's decision also did not address the constitutionality of TRPA's 1987 plan.[56] The plaintiffs had attempted to amend their complaint to allege that adoption of the 1987 plan also constituted a takings, but the district court held that the claim was barred by both California and Nevada's statutes of limitations.[57] Accordingly, even though TRPA regulations have precluded development of some of the landowners' small parcels from 1981 to the present day, the Court limited its review to the moratoria in effect for a total of thirty-two months.

These and other tactical decisions greatly limited the petitioners' case. As discussed below, of the seven theories that "arguably" could have supported a takings claim, the Supreme Court noted that four were unavailable because of the procedural posture of the case.[58]

III. *PENN CENTRAL* AS "POLESTAR"

Central to the *Tahoe-Sierra* decision was *Penn Central*'s "essentially ad hoc" test for regulatory takings, which was "designed to allow 'careful examination and weighing of all the relevant circumstances.'"[59]

Prior to the *Tahoe-Sierra* decision, the Court had recognized categorical exceptions to *Penn Central* review in a handful of circumstances: permanent physical occupations,[60] regulatory deprivations of all economic value,[61] and the imposition of severe retroactive liability on a limited class of parties that could not have anticipated it.[62]

Justice Stevens stressed that a categorical rule is appropriate when the government physically takes possession of an interest in property for some public purpose—even if the government takes only part of the property or its use is only temporary.[63] Stevens stated that those cases are to be distinguished

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[55] *Id.* at 1474, n.8.

[56] The Court did entertain a challenge to the 1987 plan in *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997). However, its holding was limited to the determination that petitioner's takings claim was ripe even though she had not attempted to sell the transfer of development rights that she received in an effort to mitigate the deprivation of her right to develop her lot in a largely built-out subdivision in the hills overlooking Lake Tahoe.

[57] *Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1474, n.7.

[58] *Id.* at ___, 122 S.Ct. at 1485. *See infra* Part V.

[59] *Id.* at ___, 122 S. Ct. at 1478 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001)).

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

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

[62] *See* Eastern Enter. v. Apfel, 524 U.S. 498 (1998).

[63] *Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1478.

from those involving government regulations restricting property's use. Stevens reasoned that "[t]he first category of cases [physical occupations] requires courts to apply a clear rule; the second [regulatory actions] necessarily entails complex factual assessments of the purposes and economic effects of government actions."[64]

Stevens stressed that "we still resist the temptation to adopt *per se* rules in our cases involving partial regulatory takings, preferring to examine 'a number of factors' rather than a simple 'mathematically precise' formula."[65] This point, Stevens added, had been affirmed by Justice O'Connor's concurring opinion in *Palazzolo*. In her words, which Stevens quoted, "[o]ur polestar instead remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings."[66] Justice O'Connor, it should be noted, had joined in Stevens' dissent in *First English*.

Although *Lucas* endorsed a categorical rule in a regulatory takings scenario, Stevens said that rule applied only in "'the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted.'"[67] Furthermore, according to Justice Stevens, "[a]nything less than a 'complete elimination of value,' or a 'total loss,' . . . would require the kind of analysis applied in *Penn Central*."[68]

The plaintiffs attempted to bring their case within the rule by arguing that the moratoria deprived them of all economically beneficial use of their property for a thirty-two month period. However, Justice Stevens found this argument unavailing because it "ignores *Penn Central*'s admonition that in regulatory takings cases we must focus on 'the parcel as a whole.'"[69] To view property in its entirety, Justice Stevens said, courts must consider not only the geographic dimensions of the parcel, but also the temporal aspect of the property owner's interest. In addition Stevens argued that "[l]ogically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted."[70]

Justice Thomas' dissent focused on the majority's analysis of the "parcel as a whole," citing the Court's discomfort with that concept in *Palazzolo* and

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[64] *Id.* at ___, 122 S. Ct. at 1479 (quoting Yee v Escondido, 503 U.S. 519, 523 (1992)).

[65] *Id.* at ___, 122 S. Ct. at 1481.

[66] *Id.* at ___, 122 S. Ct. at 1481, n.23 (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001)).

[67] *Id.* at ___, 122 S. Ct. at 1483 (quoting Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1017 (1992)).

[68] *Id.* (quoting *Lucas*, 505 U.S. at 1019-20, n.8).

[69] *Id.* (quoting Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 130-31(1978)).

[70] *Id.* at ___, 122 S. Ct. at 1483.

Lucas.[71] Thomas noted that he "had thought that *First English* put to rest the notion that the 'relevant denominator' is land's infinite life."[72] From a landowner's standpoint, Thomas wrote, "total deprivation of use is . . . the equivalent of a physical appropriation."[73] Thus, "a regulation effecting a total deprivation of the use of a so-called 'temporal slice' of property is compensable under the Takings Clause unless background principles of state law prevent it from being deemed a taking."[74]

Justice Stevens rejected this interpretation of *First English*. Echoing Judge Reinhardt's Ninth Circuit opinion, he emphasized that *First English* addressed the "remedial question of how compensation is measured once a regulatory taking is established," but did not address "the quite different and logically prior question whether the temporary regulation at issue had in fact constituted a taking."[75] According to Stevens, "*First English* expressly disavowed any ruling on the merits of the takings issue because the California courts had decided the remedial question on the assumption that a taking had been alleged."[76] He noted that upon remand, the California courts concluded that there had not been a taking in *First English*, and the U.S. Supreme Court declined review of that decision.

IV. THE INDETERMINACY OF THE POLESTAR APPROACH

The principal problem with the Court's "polestar" approach in temporary takings cases like *Tahoe-Sierra* is that it brings into play three vexing, and mutually exacerbating, doctrinal problems. The first is the circuity problem implicit in the Court's defining "property" in terms of "expectations" and "expectations" in terms of "property". The second problem is the Court's failure to define what constitutes a "temporary" taking. This includes the failure to determine whether the concept is grounded in the law of property or tort, as well as determining how "temporary" restrictions are to be interpreted in a society in which "permanent" ones are fleeting. Finally, there is the Court's insistence that doctrines pertaining to "physical" takings do not apply to "regulatory" takings, and that doctrines pertaining to "permanent" takings do not apply to "temporary" takings. Unfortunately, the meaning of the above terms, is neither self-evident nor fully defined by the Court.

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[71] *Id.* at ___, 122 S. Ct. at 1465, 1496 n.5 (2002).
[72] *Id.* at ___, 122 S. Ct. at 1496.
[73] *Id.*
[74] *Id.*
[75] *Id.* at ___, 122 S. Ct. at 1482.
[76] *Id.*

A. The Problem of "Reasonable Investment-Backed Expectations" Redux

In property law, the "expectations" of a person who sincerely hopes to acquire an interest in property some day are dismissed as "mere" expectations.[77] This is absolutely proper, since the hope of acquiring a right is not itself a right.[78] This is not to say, of course, that courses of dealing do not lead to the creation of contract rights among the contracting parties.[79] It also does not deny that even when dealing with government (or, perhaps, especially when dealing with government) enforceable property rights are created.[80]

However, property in land has an essential *in rem* aspect in that it is enforceable against all the world and not just against those with whom the owner is in privity.[81] Thus, the malleability by which expectations come to affect contract rights among specific persons is not present. Furthermore, a wholly different set of problems arise when the other person is the State, which often is the case when considering the constitutional dimensions of property. As the Supreme Court has noted, there is greater need for judicial review of State conduct when "the State's self-interest is at stake."[82]

In *Palazzolo v. Rhode Island*,[83] the Supreme Court unanimously rejected the positive form of the regulatory takings notice rule,[84] and recognized that the

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[77] *See, e.g.*, REST. PROP. Div. III Pt. IV (Introductory Note) (1940). Specifically, "[a]n expectancy, as the name indicates, is not an interest in any specific thing (see § 315, Comment a) but is merely the hope of receiving some of the assets which still are the property of a living person, but are likely to be left by such owner at the time of his death." *Id; see also* In re Tantillo's Trust Estate, 127 N.W.2d 798, 800 (Wis. 1964) (noting that "[v]ested or contingent, a future interest, as distinguished from a mere expectancy, is assignable).

[78] This seems self-evident, albeit perhaps not in accord with the tenor of the times, which is reflected in the Supreme Court's observation that the essence of American citizenship is "the right to have rights." Trop v. Dulles, 356 U.S. 86, 102 (1958) (holding expatriation of wartime military deserter beyond war powers of Congress).

[79] *See, e.g.*, REST. 2D CONTR. § 4 Comment a (1981) (stating that "[j]ust as assent may be manifested by words or other conduct, sometimes including silence, so intention to make a promise may be manifested in language or by implication from other circumstances, including course of dealing or usage of trade or course of performance."). *Id.*

[80] *See, e.g.*, Board of Regents v. Roth, 408 U.S. 564 (1972) (noting that "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.") *Id.* at 577.

[81] *See generally* Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001).

[82] United States Trust Co. v. New Jersey, 431 U.S. 1, 26 (1977).

[83] 533 U.S. 606 (2001).

[84] *See* Steven J. Eagle, *The Regulatory Takings Notice Rule*, 24 U. HAW. L. REV. 533 (2002).

State is not free simply to redefine property.[85] However, Justice O'Connor's pivotal concurring opinion began with her statement that she joined the Court's opinion, "but with my understanding of how the [notice rule] must be considered on remand."[86] After agreeing with rejection of the positive notice rule, O'Connor added that the "more difficult" issue is the "role the temporal relationship between regulatory enactment and title acquisition plays in a proper *Penn Central* analysis."[87] Specifically,

> [i]f investment-backed expectations are given exclusive significance in the *Penn Central* analysis and existing regulations dictate the reasonableness of those expectations in every instance, then the State wields far too much power to redefine property rights upon passage of title. On the other hand, if existing regulations do nothing to inform the analysis, then some property owners may reap windfalls and an important indicium of fairness is lost. As I understand it, our decision today does not remove the regulatory backdrop against which an owner takes title to property from the purview of the *Penn Central* inquiry. It simply restores balance to that inquiry. Courts properly consider the effect of existing regulations under the rubric of investment-backed expectations in determining whether a compensable taking has occurred. As before, the salience of these facts cannot be reduced to any "set formula."[88]

Justice O'Connor's view that the expectations of someone purchasing subsequent to a regulation having the effect of redefining property rights results in a change in the purchaser's rights even if the regulation, might not, by itself, pass constitutional muster was shared by the four *Palazzolo* dissenters.[89] While the concurring opinion of Justice Scalia rebuked the notion that regulations leading to otherwise compensable takings should be the basis for a change in subsequent buyers' expectations under *Penn Central* at all,[90] the O'Connor approach was adopted by the Court in *Tahoe-Sierra*.[91]

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[85] *Palazzolo*, 533 at 626-27. It is important to note that "[t]he State may not put so potent a Hobbesian stick into the Lockean bundle." *Id.* at 627.

[86] *Id.* at 632 (O'Connor, J., concurring).

[87] *Id.* at 632-33 (O'Connor, J., concurring).

[88] *Id.* at 635-36 (O'Connor, J., concurring) (emphasis added) (citation omitted).

[89] *Id.* at 655 (Breyer, J., dissenting); *id.* at 654, n.3 (Ginsburg, J., dissenting) (joined by Justices Souter and Breyer); *id.* at 643, n.6 (Stevens, J., concurring in part and dissenting in part).

[90] *Id.* at 637 (Scalia, J., concurring). The

> "'investment-backed expectations' that the law will take into account do not include the assumed validity of a restriction that in fact deprives property of so much of its value as to be unconstitutional. Which is to say that a *Penn Central* taking, no less than a total taking, is not absolved by the transfer of title.

Id. (citations omitted).

[91] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, ___, 122 S.Ct. 1465, 1478 (2002). The majority stated

It is not necessary here to rehearse at length[92] the transformation of what is now known as "reasonable investment-backed expectations" from its apparent genesis in a well-known article by Professor Frank Michelman,[93] through its adoption by Justice Brennan in *Penn Central*,[94] and through its use in other cases.[95]

Almost a decade after Professor Richard Epstein made the following observation, it remains true that no one "offers any telling explanation of why this tantalizing notion of expectations is preferable to the words 'private property' (which are, after all, not mere gloss, but actual constitutional text)."[96]

B. The Provisional Definition of "Temporary" Takings

The assertion that a governmental taking of property is "temporary" ought to have as a referent a statement about the essential nature of the temporary taking, the duration of the temporary taking, or both. Unfortunately, both before and after *Tahoe-Sierra*, neither definitional aspect is clear.

1. What is "Taken" in a "Temporary Taking"?

The leading temporary takings case, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[97] consistently used the words "temporary taking" in quotation marks. While the Court in *Tahoe-Sierra* now expresses the view that the term encompasses truncated permanent takings and not most moratoria, it still does not resolve the concept's underlying nature. In particular, the acquisition of property by government through direct or inverse condemnation means that the State has prospective ownership, with

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"[i]n our view the answer to the abstract question whether a temporary moratorium effects a taking is neither 'yes, always' nor 'no, never,' the answer depends upon the particular circumstances of the case. Resisting '[t]he temptation to adopt what amount to *per se* rules in either direction,' we conclude that the circumstances in this case are best analyzed within the *Penn Central* framework."

Id. (internal citation omitted) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring)).

[92] For a more detailed treatment of this issue, see Steven J. Eagle, *The Rise and Rise of "Investment-Backed Expectations,"* 32 URB. LAW. 437 (2000).

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

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

[95] *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164 (1979); Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

[96] Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 STAN. L. REV. 1369, 1370 (1993).

[97] 482 U.S. 304 (1987).

compensation being computed as of the date of the taking.[98] *First English* held that once the State has promulgated a regulation constituting a taking, it is not free to terminate its action without payment of compensation. Yet the State has the right to terminate with payment and "the landowner has no right under the Just Compensation Clause to insist that a 'temporary' taking be deemed a permanent taking."[99]

This formulation presents a serious conceptual problem. If the State has acquired "property" as of the moment of the imposition of its regulation, how might it retroactively disclaim a part of its interest? Conversely, if the promulgation of the regulation had deprived the owner of property, for which subsequent just compensation would relate back, how could the State unilaterally avoid part of its compensation obligation by unilaterally putting ownership of a reversionary interest in the land to the individual who, under traditional property law, would be deemed its former owner?[100]

This difficulty is well illustrated in *Yuba Natural Resources, Inc. v. United States*,[101] where the government prohibited a mineral owner from exercising its rights, asserting its paramount title.[102] Six years later, after Yuba prevailed in its quiet title action, the government retracted its letter of prohibition.[103] The Claims Court ruled that

> "nothing in the record supports the notion that in 1976 the United States took such rights only for a temporary period . . . That 6 years later the government chose to return the property to Yuba rather than to pay just compensation . . . did not retroactively convert the government's absolute taking of Yuba's property into a temporary holding thereof."[104]

The U.S. Court of Appeals for the Federal Circuit reversed.[105] Its opinion did not respond to the Claims Court's reasoning, but merely quoted *First English* to the effect that the government was free to abandon its intrusion.[106] If it is the case that *First English* permits the conversion of a permanent taking

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[98] *See id.* at 320.

[99] *Id.* at 317.

[100] The courts have not dealt with this issue. For a discussion of this issue, see Steven J. Eagle, *Just Compensation for Permanent Takings of Temporal Interests*, 10 FED. CIRCUIT B.J. 485 (2001).

[101] 10 Cl. Ct. 486 (1986), rev'd, 821 F.2d 638 (Fed. Cir. 1987).

[102] *Id.* at 487.

[103] *Id.*

[104] *Id.* at 499.

[105] Yuba Natural Res., Inc. v. United States, 821 F.2d 638 (Fed. Cir. 1987).

[106] *Id.* at 641-42 (quoting First English Evangelical Church of Glendale v. County of Los Angeles, 482 U.S. 304, 317 (1987). The court stated the action "merely results in 'an alteration in the property interest taken—from [one of] full ownership to one of temporary use and occupation. . . .In such cases compensation would be measured by the principles normally governing the taking of a right to use property temporarily.'" *Id.*

into a taking for a limited period, perhaps that convertibility feature should be taken into account in valuation of just compensation.[107]

Judge Jay Plager of the Federal Circuit has suggested that the temporary taking has been treated as if akin to a common law trespass.[108] A significant problem with this approach, however, is that the Constitution implies a sharp line between the consequences of tort and eminent domain. While the duty to pay just compensation for takings is self-executing,[109] the duty to pay tort damages is dependent on waiver of sovereign immunity.[110]

2. *In a society marked by impermanence, what is "temporary"?*

The duration of a temporary taking is not clear, either. In his *Tahoe-Sierra* dissent, Chief Justice Rehnquist noted that while, in his view, the moratoria were in place for six years,[111] the absolute prohibition on development in *Lucas*, deemed "permanent" by the Court, was in place only for two years.[112] Rehnquist added "[t]here is every incentive for government to simply label any prohibition on development 'temporary,' or to fix a set number of years. As in this case, this initial designation does not preclude the government from repeatedly extending the 'temporary' prohibition into a long-term ban on all development."[113]

While talismanic definitions find broad favor in the law, what seems "permanent" might not be. Rules can have transitory and successive meanings.[114] Correspondingly, discrete policies might be formulated in sequence, but all might maintain a substantive continuity of result.[115]

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[107] For advocacy of this approach, with the interest taken being deemed a fee simple determinable on the will of the State no longer to possess it, see Eagle, *supra* note 100, at 508-09.

[108] Hendler v. United States, 952 F.2d 1364, 1376-77 (Fed. Cir. 1991). *See also* Skip Kirchdorfer, Inc. v. United States, 6 F.3d 1573, 1582 (Fed. Cir. 1993).

[109] United States v. Clarke, 445 U.S. 253, 257 (1980).

[110] United States v. Sherwood, 312 U.S. 584, 586 (1941).

[111] *See supra* notes 54-55 and accompanying text.

[112] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, ___, 122 S. Ct. 1465, 1492 (2002) (Rehnquist, C.J., dissenting).

[113] *Id.*

[114] *See, e.g.*, Oliver Wendell Holmes, Jr., THE COMMON LAW 5 (1881) (referring to the ancient rule which "adapts itself to the new reasons which have been found for it, and enters on a new career.").

[115] This might well be the case respecting regulation in the Lake Tahoe Basin, where successive agencies have imposed successive comprehensive regulatory schemes—each aimed to protect eutrophication of the lake through the prevention of development in upland stream environment zones.

Furthermore, expert opinion on what is appropriate land use or regulation changes, sometimes fairly quickly.[116]

C. The Court's "Physical" vs. "Regulatory" and "Permanent" vs. "Temporary" Bifurcations are Illusions

When should the complete deprivation by the State of all economic use of private property constitute a compensable taking?

1. Background

One can approach this question through the use of a four-cell matrix, indicating the type of deprivation (physical or regulatory) as rows and the duration of the deprivation (permanent or temporary) as columns.[117]

Per Se Compensability for Complete Deprivation of Economic Use		
Type of Deprivation	Permanent Deprivation	Temporary Deprivation
Physical Deprivation	Yes (*Pumpelly*)	Yes (*General Motors*)
Regulatory Deprivation	Yes (*Lucas*)	No (*Tahoe-Sierra*)

As illustrated in the Table above, the Supreme Court's prior rulings have found compensable takings in Cells 1 through 3. Justice Stevens' opinion in *Tahoe-Sierra*[118] holds, however, that there is not a categorical taking in cell 4.[119]

The Court has long held that a permanent physical deprivation of all beneficial use constitutes a taking.[120] Likewise, regulations constituting

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[116] *See, e.g.*, Florida Rock Indus., Inc. v. United States, 18 F.3d 1560, 1566 (Fed. Cir. 1994) (noting that "yesterday's Everglades swamp to be drained as a mosquito haven is today's wetland to be preserved for wildlife and aquifer recharge; who knows what tomorrow's view of public policy will bring") (internal citation omitted).

[117] For the moment, the issue of whether the categories are internally coherent is ignored.

[118] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, ___, 122 S. Ct. 1465 (2002).

[119] This analysis concentrates on per se takings and thus gives little attention to partial regulatory takings under *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Nevertheless, a very significant element of *Tahoe-Sierra* is that is does recognize the viability and importance of the partial regulatory takings doctrine. *Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1481.

[120] *See, e.g.*, Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1871) (private land

permanent deprivation of all economic use are compensable takings under *Lucas v. South Carolina Coastal Council.*[121] In a group of post-World War II cases, the Court held that temporary physical occupations of private property by government also constitute takings of leasehold interests.[122]

One might think that the appropriate rule for Cell 4 in the table above (temporary regulatory deprivations) would be that established for total deprivations of use (*Lucas*) or for physical deprivations of use (*General Motors*). *Tahoe-Sierra* concluded that neither rule applied.

2. *"Physical" versus "regulatory" takings*

In explaining his dichotomy between physical and regulatory takings, Justice Stevens explained:

> Th[e] longstanding distinction between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa. For the same reason that we do not ask whether a physical appropriation advances a substantial government interest or whether it deprives the owner of all economically valuable use, we do not apply our precedent from the physical takings context to regulatory takings claims. Land-use regulations are ubiquitous and most of them impact property values in some tangential way—often in completely unanticipated ways. Treating them all as *per se* takings would transform government regulation into a luxury few governments could afford. By contrast, physical appropriations are relatively rare, easily identified, and usually represent a greater affront to individual property rights.[123]

This asserted distinction is not based on any essential formal proposition, but rather upon assumptions about the empirical outcomes that are apt to be produced.

As an initial matter, one might ask why, if physical takings rules were applied to regulatory takings, would land use regulation become a "luxury?" Most zoning and similar regulations affect substantial areas and provide, as do private covenants, that each owner enjoys the benefit of the imposition of restriction upon others. This "average reciprocity of advantage," as Justice

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permanently inundated by water backed up from downstream government dam). *See also* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (state-mandated cable TV box and wires on private apartment building).

[121] 505 U.S. 1003 (1992).

[122] *Tahoe-Sierra*, 535 U.S. at ___, 122 S.Ct. at 1478-79 (citing, *inter alia*, United States v. Gen. Motors Corp., 323 U.S. 373 (1945) and United States v. Petty Motor Co., 327 U.S. 372 (1946)).

[123] *Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1479.

Holmes put it in *Pennsylvania Coal Co. v. Mahon*,[124] can be viewed either as precluding a taking or as providing just compensation in kind.[125] Furthermore, the difficulty and expense attendant in commencing inverse condemnation litigation makes it very remote that small or far-fetched claims will be brought.

The fact that "physical appropriations are relatively rare" does not necessarily strengthen Justice Stevens' case.[126] In a world where government may impose physical seizure and pay just compensation, or may achieve most of its goals through ostensible regulation and pay no compensation, the rarity of physical seizures might bespeak opportunistic use or rule more than a light government hand.[127] It is true that physical seizures are "easily identified," but so would regulations that preclude all development.[128] Government's construction of a fence around (although not invading) private land that would preclude all use of it would be evident as well.[129]

Justice Stevens might be correct in asserting that physical seizures "represent a greater affront to individual property rights" than regulatory seizures.[130] This is not certain, however, since pride in ownership might be offset by outrage that the owner's only practical indicium of ownership would be the periodic receipt of a real estate tax bill.

3. "Permanent" versus "temporary" takings

While Justice Stevens makes much distinction between permanent and temporary deprivations in *Tahoe-Sierra*, two problems stand out. We do not know what "temporary takings" means, and we do not know when "temporary takings" are temporary.

As discussed earlier, the seminal case regarding "temporary takings" is *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.[131] The California Supreme Court had previously ruled in *Agins v. City of Tiburon*,[132] that a government entity could abrogate a regulation that

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[124] 260 U.S. 393, 415 (1922).

[125] *See generally*, RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 195-99 Harvard University Press (1985).

[126] *Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1479.

[127] This analysis neglects the availability of the partial takings remedy, which was confirmed in *Tahoe-Sierra*, but which has truly been rare in its application. *See supra* note 119.

[128] *Cf.* Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972); Zealy v. City of Waukesha, 548 N.W.2d 528 (Wis. 1996).

[129] *See* Stephen E. Abraham, *Landgate—Taken But Not Used*, 31 URB. LAW. 81, 95 (1999) (setting forth this hypothetical).

[130] *Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1479.

[131] 482 U.S. 304 (1987).

[132] 598 P.2d 25 (Cal. 1979), *aff'd on other grounds*, 447 U.S. 255 (1980).

was adjudicated to constitute a compensable taking in lieu of ratifying the regulation and paying just compensation. *First English* required compensation for the time the regulation was in effect, even if it subsequently was terminated. However, it was uncertain whether *First English* had a broader meaning.[133]

Some of the language in *First English* certainly suggested a broad reading. Chief Justice William Rehnquist's dissent in *Tahoe-Sierra*,[134] for instance, quoted what might have been *First English*'s overarching theme: "[T]emporary takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[135] Further supporting a broad interpretation was the *First English* analysis of the leasehold cases:

> Though the takings were in fact "temporary," there was no question that compensation would be required for the Government's interference with the use of the property; the Court was concerned in each case with determining the proper measure of the monetary relief to which the property holders were entitled. These cases reflect the fact that "temporary" takings which, as here, *deny a landowner all use* of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation.[136]

Chief Justice Rehnquist tied the *First English* emphasis on deprivation of "use" to his view that the moratoria depriving petitioners of all economic use constituted a taking, just as the deprivation constituted a taking in *Lucas*:

> Because of *First English's* rule that "temporary deprivations of use are compensable under the Takings Clause," the Court in *Lucas* found nothing problematic about the later developments that potentially made the ban on development temporary. More fundamentally, even if a practical distinction between temporary and permanent deprivations were plausible, to treat the two differently in terms of takings law would be at odds with the justification for the *Lucas* rule. The *Lucas* rule is derived from the fact that a "total deprivation of use is, from the landowner's point of view, the equivalent of a physical appropriation." The regulation in *Lucas* was the "practical equivalence" of a

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[133] *See* Thomas E. Roberts, *Moratoria as Categorical Regulatory Takings: What* First English *and* Lucas *Say and Don't Say*, 31 ENVTL. L. REP. 11037 (2001). "*First English* did not contain principles that address when a taking occurs. It only says what remedy is provided once a taking is found." *Id.* at 11044; *cf.* Steven J. Eagle, *Development Moratoria,* First English *Principles, and Regulatory Takings*, 31 ENVTL. L. REP. 11232 (2001) (asserting broader principles implicit in the case).

[134] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, ___, 122 S. Ct. 1465, 1490 (2002) (Rehnquist, C.J., dissenting).

[135] *Id.* at ___, 122 S. Ct. at 1492 (Rehnquist, C.J., dissenting) (quoting First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318 (1987)).

[136] *First English*, 482 U.S. at 318-19 (emphasis added) (citations omitted).

> long-term physical appropriation, i.e., a condemnation, so the Fifth Amendment required compensation. The "practical equivalence," from the landowner's point of view, of a "temporary" ban on all economic use is a forced leasehold.[137]

Justice Stevens' responsive enumeration of differences between a leasehold and a moratorium very much downplayed the *First English* and *Lucas* emphasis on deprivation of a landowner's use.

> Condemnation of a leasehold gives the government possession of the property, the right to admit and exclude others, and the right to use it for a public purpose. A regulatory taking, by contrast, does not give the government any right to use the property, nor does it dispossess the owner or affect her right to exclude others.[138]

Stevens also asserted in his opinion that the *Lucas* categorical rule was based only partially on an equivalence theory. It also resulted from the "less realistic" possibility that there was a reciprocity of advantage.[139]

Of course, it is not always easy to determine in practice when government "takes" and when it "regulates." The State might condemn land for preservation as virgin prairie grassland, for instance, but it might equally restrict the owner from any development. Its actions might not affect the owner's right to exclude others but eliminate the right to include them.[140] Furthermore, even in many cases where the deprivation of use is far from total, the existence of the owner's reciprocity of advantage remains dubious.[141]

The heart of Justice Stevens' effort to distinguish *Tahoe-Sierra* from *Lucas* rests on the assertion that that while there was a complete deprivation of value in the latter case, the temporary nature of the moratoria in *Tahoe-Sierra* meant that the affected parcels retained a residual value.

> An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole," whereas a temporary

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[137] *Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1492-93 (citations omitted) (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1011-12, 1033 (Kennedy, J., concurring)). "It is well established that temporary takings are as protected by the Constitution as are permanent ones." *Id.* at 1492-93 (quoting *First English*, 482 U.S. at 318).

[138] *Id.* at 1480 n.19.

[139] *Id.* (adding that, from a landowner's perspective, even a "minor infringement" might be deemed an appropriation).

[140] *See, e.g.*, the fence illustration in *supra* note 129.

[141] A classic illustration is the "polestar" case itself, *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978) (Rehnquist, J. dissenting) (Justice Stevens joined in the dissent)(noting that "[o]f the over one million buildings and structures in the city of New York, appellees have singled out 400 for designation as official landmarks.") *Id.* at 138.

> restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted.[142]

The Court's analysis quoted extensively from Judge Reinhardt's Ninth Circuit panel opinion, which, in turn, referred to concepts earlier articulated by Justice Stevens.[143] This was facilitated when Stevens, using his prerogative as senior justice in the majority, assigned himself to write the opinion.

V. SEVEN THEORIES OF "FAIRNESS AND JUSTICE": A ROADMAP FOR FUTURE LITIGATION

Although neither *Lucas* nor *First English* compelled the use of a categorical takings test, Justice Stevens went on to consider whether the circumstances justified the creation of a new per se rule. He observed that "any of seven different theories" was "arguably" a basis for finding the moratoria to be takings.[144] Regarding each, "the ultimate constitutional question is whether the concepts of 'fairness and justice' that underlie the Takings Clause will be better served by one of these categorical rules or by a *Penn Central* inquiry into all of the relevant circumstances in particular cases."[145]

A. Equating Temporary Moratoria to Temporary Physical Takings

The first theory considered by the Court was whether to extend the *Lucas* categorical rule to government regulations that temporarily deprive an owner of all economically viable use of the property. Conceptually, this rule would put regulatory takings on the same ground as physical appropriations of land, which have long been held compensable, regardless of whether the appropriations are permanent or temporary.[146] It also was how the Court chose to recast petitioner's prayer for certiorari in *Tahoe-Sierra*.[147]

Justice Stevens suggested several policy reasons militating against adoption of a categorical rule for temporary deprivations in the regulatory arena. First,

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[142] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 305, ___, 122 S. Ct. 1465, 1484 (2002) (citations ommitted).

[143] The relationship of the Stevens *Tahoe-Sierra* opinion, the Reinhardt Ninth Circuit opinion, and the Stevens dissenting opinion in *First English* is discussed in *supra* notes 39-45 and accompanying text.

[144] *Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1484.

[145] *Id.* at 1485.

[146] *See, e.g.*, Pumpelly v. Green Bay Co., 80 U.S. 166 (1871) (facing a situation with permanent flooding of land upstream from a dam); U.S. v. Gen. Motors Corp., 323 U.S. 373 (1945) (ruling on the temporary occupancy of an office building by government employees).

[147] *See supra* notes 50-51 and accompanying text.

the rule "would render routine government processes prohibitively expensive or encourage hasty decisionmaking."[148] The rule would apply not only to normal delays in obtaining building permits and changes in zoning ordinances, but also to orders temporarily denying access to crime scenes or to buildings in violation of health or safety codes.

More importantly, Justice Stevens said the majority was "persuaded that the better approach" to regulatory taking claims is to make a "careful examination and weighing of all the relevant circumstances."[149] In support of this conclusion, Stevens looked to Justice O'Connor's concurring opinion in *Palazzolo*, where she observed:

> The concepts of "fairness and justice" that underlie the Takings Clause, of course, are less than fully determinate. Accordingly, we have eschewed "any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government . . . . The outcome instead "depends largely 'upon the particular circumstances [in that] case.'"[150]

First English declared, however, that temporary takings are "not different in kind from permanent takings."[151] The Fifth Amendment does not on its face distinguish between physical, regulatory, permanent, temporary, complete, or partial takings. Accordingly, future litigants might suggest, in appropriate cases, that the segmentation of takings jurisprudence into physical and regulatory tracks leads to unjust results. Counsel may also argue that per se rules contain some flexibility that would offset the public policy concerns listed by Justice Stevens. Physical occupations, for instance, may be transient or tortuous, and permanent regulatory deprivations of all value are subject to a "background principles" exception.[152]

B. Moratoria in Excess of "Normal Delays"

The second theory discussed by Justice Stevens is a modified version of the first. The Court could "craft a narrower rule that would cover all temporary land-use restrictions except those 'normal delays in obtaining building permits, changes in zoning ordinances, variances and the like.'"[153] Justice Stevens acknowledged that a categorical rule using these standards "would

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[148] *Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1485.

[149] *Id.* at ___, 122 S. Ct. at 1486.

[150] Palazzolo v. Rhode Island, 533 U.S. 606, 633 (O'Connor, J., concurring).

[151] First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318 (1987).

[152] *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992).

[153] *Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1484.

certainly have a less severe impact on prevailing practices."[154] However, it "would treat these interim measures as takings regardless of the good faith of the planners, the reasonable expectations of the landowners, or the actual impact of the moratorium on property values."[155] Also, a moratorium is not apt to result in individual owners being singled out unfairly, and the benefits of planning present a "clear 'reciprocity of advantage'" to all owners.[156]

One of the problems with this argument is that "good faith" does not preclude a taking. Proper planning for the extensive Tahoe Basin, with its unique environmental problems, takes much longer than review of a subdivision development application. Moreover, the benefits of the moratoria extend to the regional economy, the national interest in the environment, and, most intensely, to owners who built prior to the 1980 compact, especially on expensive lakefront lots. It is not clear how those owners of scattered lots, in mostly developed subdivisions, who are excluded from building their vacation or retirement homes enjoy a reciprocity of advantage.

C. Moratoria in Excess of Specified Periods

Third, the Court could announce a rule that would "allow a short fixed period for deliberations to take place without compensation" but find a takings after that period.[157] Justice Stevens rejected this on the same basis as the rule permitting reasonable delays only.[158]

The history of regulation in the Tahoe Basin exemplifies the problems with this approach. On one hand, it is uncontroverted that the environmental problems are so complex, and the stakes for this national treasure so high, that proper planning requires more time than a durational limitation contemplating more routine situations is likely to provide. On the other hand, it was just as obvious 21 years ago as it is today that the key to preventing eutoprification of Lake Tahoe is the precluding of development in the "Stream Environment Zones" (i.e., the sloped uplands where the *Tahoe-Sierra* petitioners wished to develop their subdivision lots). As far as petitioners are concerned, a generic reasonable time for the promulgation of regulations is thus too short, but also too long.

Yet, limiting the noncompensable development moratorium to a fixed period has considerable merit for a different reason. Reciprocity of advantage is apt to accrue to owners where reasonable periods for planning are short, but not where the reasonable periods are long. The former situation is most likely

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[154] *Id.* at ___, 122 S. Ct. at 1486.

[155] *Id.* at ___, 122 S. Ct. at 1487.

[156] *Id.* at 1488-89 (quoting Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

[157] *Id.* at 1484.

[158] *See id.*

in suburban areas where routine subdivisions are being built. Residents in each might protect themselves from internal detrimental development through restrictive covenants. They would benefit, however, from sound planning, in order to protect against conditions that might reduce the value of their homes in nearby developments. The elaborate and expensive planning studies and procedures that require long periods of time, in contrast, are more apt to effect small groups of landowners and benefit many times that number of residents of surrounding areas. This was the case in the Tahoe Basin.

D. "Rolling Moratoria"

As a fourth theory, Justice Stevens noted that the Court could have characterized "the successive actions of TRPA as a 'series of rolling moratoria' that were the functional equivalent of a permanent taking."[159] Petitioner had presented the issue, but the Court's grant of certiorari did not encompass it because the case was tried in the district court and reviewed by the court of appeals on the theory that each of the two moratoria was a separate taking.

Given that a permanent prohibition on development was the obvious way of preserving Lake Tahoe from the outset, the "rolling moratorium" theory seems plausible. The Court's lack of interest on this point diverges sharply from the focus in its *Penn Central* analysis on the danger of "conceptual severance" of property rights and the need for treating the "parcel as a whole."[160] Future litigators might be expected to look for the imposition of sequential or extended moratoria without justification in events that could not have been foreseen earlier.

E. Bad Faith Moratoria as Takings

Tahoe-Sierra noted that, as a fifth theory, "we might have concluded that the agency was stalling in order to avoid promulgating the environmental threshold carrying capacities and regional plan mandated by the 1980 Compact."[161] In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[162] the Court upheld the award of regulatory takings damages based on a pretextual refusal to accept one development plan after another, when each plan complied with the city's previous demands. The assertion of a "bad faith" argument in *Tahoe-Sierra* was precluded by the district court's findings

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[159] *Id.* at ___, 122 S. Ct. at 1485.
[160] *Id.* at ___, 122 S. Ct. at 1483-84.
[161] *Id.* at ___, 122 S. Ct. at 1485.
[162] 526 U.S. 687, 698 (1999).

that TRPA had acted diligently and in good faith, which were not challenged by the plaintiffs on appeal. However, future litigants undoubtedly will explore whether new or extended moratoria result from conditions unforeseen at the outset.

F. Moratoria Not Substantially Advancing a Legitimate State Interest

The sixth theory—"that the state interests were insubstantial"—also was foreclosed by the District Court's unchallenged findings of fact.[163] In *Agins v. City of Tiburon*,[164] the Court said that "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests."[165] The Court declined to explain "substantial advancement" in *Del Monte Dunes*. Litigators undoubtedly will continue to question it in cases in which the state interest is less clear than in *Tahoe-Sierra*.

G. Moratoria "as Applied"

As a final theory, Justice Stevens suggested that the plaintiffs might have attempted to challenge the application of the moratoria to their individual parcels, rather than making a facial challenge. In doing so, some of the landowners might have prevailed under a *Penn Central* analysis. However, he noted that the plaintiffs had "expressly disavowed" a *Penn Central* analysis and did not appeal from the district court's conclusion that the evidence would not support recovery under a *Penn Central* theory.[166]

Mounting an "as applied" challenge in a complex takings case is formidable. Moreover, in state cases, "ripening" an action for federal judicial review is very difficult.[167] When it is not clear whether a moratorium will be extended, as presented in *Tahoe-Sierra*, the "ripeness" problem is exacerbated. As a result, counsel's decision not to pursue this theory in *Tahoe-Sierra* is understandable, given the then-undeveloped state of regulatory takings law and the daunting logistical problems in mounting fact-intensive litigation on behalf of many small landowners against a powerful agency. Nevertheless, the result was to limit Supreme Court review to a

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[163] *Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1485.

[164] 447 U.S. 255 (1980).

[165] *Id.* at 260 (citations omitted).

[166] *Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1485.

[167] *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, (1985) (holding that a landowner's claim was not ripe because it had not yet obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to the property). *Id.*

narrowly tailored facial challenge, precluding review of the moratoria as applied to individual parcels.

VI. CONCLUSION

Justice Stevens' *Tahoe-Sierra* opinion emphasized what he referred to as the "*Armstrong principle*,"[168] holding that "the Takings Clause was 'designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole.'"[169] Justice O'Connor's *Palazzolo* concurrence quoted the same words, citing to their use in *Penn Central*.[170]

For many, regulatory takings law is a quest for fairness. Among the thoughts on how to achieve this are recourse the "normal" behavior of landowners in a community,[171] ensuring that all members of the community have an effective right to participate in the political process,[172] or a synthesis of these ideas that would consider normal behavior yet avoid what often are biased local political processes.[173] Another approach might be what Carol Rose calls "regulatory property,"[174] through which rules enunciated at the state level have the effect of guiding individual landowners towards consistent uses of their property. On the other hand, adherence to traditional Lockean property concepts might better preserve both fairness and liberty.[175]

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[168] *Tahoe-Sierra*, 535 U.S. at ___, 122 S Ct. at 1478.

[169] *Id.* (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

[170] Palazzolo v. Rhode Island, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) (citing Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 123-24 (1978)).

[171] *See* Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 729-31 (1973).

[172] *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87 Harvard University Press (1980).

[173] *See, e.g.*, WILLIAM FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS, Harvard University Press (1995) (stressing the need for recourse to state government, controlled by shifting alliances, to ensure that owners of undeveloped land are not penalized by land use decisions of local governments, controlled by the stable and monolithic interests of existing homeowners).

[174] Carol M. Rose, *Takings, Federalism, Norms Regulatory Takings: Law, Economics, and Politics*, 105 YALE L.J. 1121, 1151 (1996) (citing Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335, 352-56 (1990)). Rose also asserts that "takings jurisprudence is not and cannot be aimed simply at fairness to individuals. . . . [I]t must also be aimed at allowing communities to alter their regulatory practices to confront changing patterns of resource use." *Id.* at 1149.

[175] *See generally*, RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN, Harvard University Press (1985).

The Supreme Court's recent decisions in *Palazzolo*[176] and *Tahoe-Sierra*[177] preserve core principles of the Rule of Law.[178] *Palazzolo* rejects the positive notice rule, preserving stability and denying the State the right to change the law at will.[179] *Tahoe-Sierra* affirms that development moratoria are not per se permissible as the State's *ipse dixit*.[180] Beyond these basics, however, the cases do little to clarify either the law or even the Court's sense of substantive "fairness."

In an era in which the Supreme Court displays no fealty to a Lockean (or other) doctrine of property rights, its recent emphasis on balancing tests gives judges great power, but gives no one much predictability.[181] In a society in which the notions of many about appropriate land uses change, standardless discourse about "permanent" and "temporary" regulatory simply magnifies the confusion. As Judge Kozinski stated in his dissent from denial of en banc review in *Tahoe-Sierra*, "[g]overnmental policy is inherently temporary while land is timeless."[182]

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

[177] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 122 S. Ct. 1465 (2002).

[178] *See* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 8-9 (1997) (noting that the Rule of Law generally is understood to emphasize (1) capacity (rules must be able to guide people in their affairs), (2) efficacy (rules actually do serve to guide people), (3) stability (the rule must be reasonably stable so that people can plan and coordinate their actions over time), (4) supremacy of legal authority (the law should rule officials, including judges, as well as ordinary citizens), and (5) impartiality (courts should enforce the law and use fair procedures)).

[179] *Palazzolo*, 533 U.S. at 626-27. *See supra* text accompanying notes 83-85.

[180] *See supra* text accomanying note 48.

[181] *See e.g.*, Raymond R. Coletta, *The Measuring Stick of Regulatory Takings: A Biological and Cultural Analysis*, 1 U. PA. J. CONST. L. 20 (1998). "There is no yellow brick road leading the conscientious jurist to the 'correct' denominator. In reality, the multi-factor case-by-case approach increases uncertainty by allowing courts to manipulate the factors toward their own predetermined conclusion." *Id.* at 67.

[182] 228 F.3d 998, 1001 n.1 (9th Cir. 2000) (Kozinski, J., dissenting from denial of review *en banc*).

Rules for the Relevant Parcel

Dwight H. Merriam*

I. INTRODUCTION

Understandably, the complexities and arcane nuances of takings cases sometimes overwhelm us. But it is possible to get some doctrinal clarity by deconstructing the takings issue into its component parts, making building blocks of manageable pieces, and looking at those individually. If we can create manageable parts for study and reflection, we may be able to shape the evolution of policy in the courts and in the legislatures, and even in the hearing rooms of local government.

I will identify the many definitions of the "relevant parcel"—an essential building block in most takings analyses, discuss the United States Supreme Court's jurisprudence on the subject, review decisions of the lower federal courts and the state courts, and ultimately, identify a series of tests for analyzing and determining the extent of the relevant parcel.

Too often, we jump directly to "is it a taking" without first determining if the necessary precedents exist.

First, and foremost, is the unappreciated question of what is property.[1] For purposes of this article, we will limit our analysis to real property and regulatory takings. One cannot take private property if what is taken is not property. Much of what you and I might think is property may not be. In Hawai'i, for example, an agreement by a developer to develop land and an option agreement are not property, and therefore, are not generally subject to the protections of the Fifth Amendment.[2]

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[1] James Burling in his article in this law review addresses the issue. *See generally* James Burling, *The Latest on Background Principles and the States' Law of Property after Lucas and Palazzolo*, 24 U. HAW. L. REV. 497 (2002).

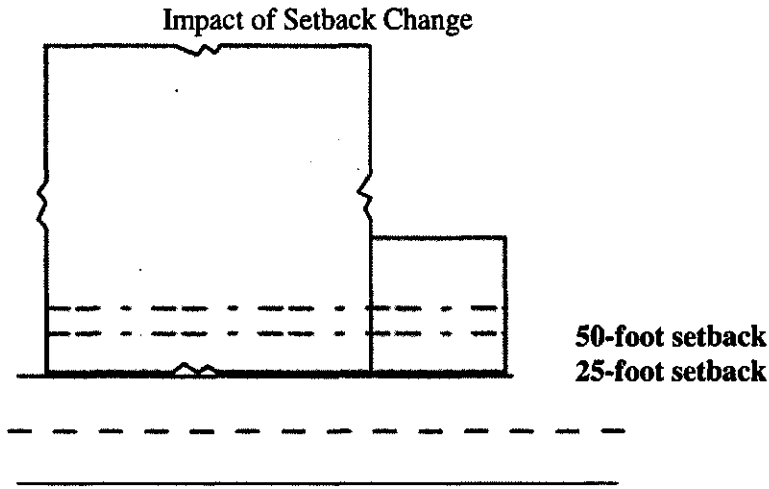
[2] Kaiser Dev. Co. v. City of Honolulu, 649 F. Supp. 926, 937 (D. Haw. 1986). s*ee also* Resolution Trust Corp. v. Charles House Condo. Ass'n, 853 F. Supp. 226, 230 (E.D. La. 1994) (stating that right of first refusal is at most a type of contractual right under Louisiana law and not a constitutionally protected interest); Page v. United States, 51 Fed. Cl. 328 (Fed. Cl. 2001) (holding permit to import ostrich eggs is not a compensable property protected by the Takings Clause because it was created by the government). *But see* Tulare Lake Basin Water Storage District v. United States, 49 Fed. Cl. 313, 321-22 (Fed. Cl. 2001) (finding contract for water creates a protectable property interest and the government's prohibiting delivery of that water is a compensable physical taking).

II. PROPORTIONALITY

Assuming the damaged or taken interest is property, the next questions are what is the extent of the property loss, and what is the relationship of that loss to the totality of the property held. Let us begin with an illustration of proportionality in takings, which is important in understanding why the determination of the relevant parcel is often critical.

Suppose there are two property owners, one with 100 acres and the other with a 10,000-square-foot lot. Both are zoned for four units to the acre, so the 100-acre parcel can have 400 homes, if we do not net out land area for roads and oddly shaped lots. The 10,000-square-foot lot can have one house.[3]

The local government changes its comprehensive plan by designating the road on which both parcels front as "arterial" when it was previously mapped as a "local" street. Since arterials carry much more traffic and developers will be required to dedicate right-of-way land as part of the subdivision approval process, the front yard setbacks in the zoning code for land along arterials is fifty feet, not twenty-five feet as it is for local streets. Here is how the change would appear as to these two parcels:



Assuming the 100-acre parcel is square, the large parcel loses 50,000 square feet—five times the total area of the small lot. The small lot loses a mere 2,500 square feet of developable area.[4]

[3] The acres we are using are "zoning acres" of 40,000 square feet, a convenient rounding down from the true acre of 43,560 square feet.

[4] A 100-acre parcel would be 4,000,000 square feet and the square root of that is 2,000. A 10,000 square foot parcel would be 100 feet on a side. The additional 25-foot front yard setback on the large parcel times the 2,000 feet of frontage results in a "loss" of 50,000 square

But the proportional loss is lopsided. The large parcel has lost just 1.25 % of its area, and the single-house lot has lost 25% of its area, and may not even be buildable because the house will be forced so far back on the lot. The new fifty-foot setback on the single-house lot consumes one-half of its 100-foot depth.

All three of the factors set out for analyzing partial regulatory takings in *Penn Central Transportation Co. v. New York*,[5] as reiterated in *Palazzolo v. Rhode Island*,[6] and reinforced in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[7] ("Tahoe-Sierra") are implicated in this example, and parcel "size" is part of the analysis. The diminution in land area (and presumably value) for the small parcel is twenty times greater than the

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feet. Doing the same for the additional 25 feet times the small parcel frontage of 100 yields a 2,500 square foot "loss".

[5] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action. A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Id. (citations omitted).

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

> Since *Mahon*, we have given some, but not too specific, guidance to courts confronted with deciding whether a particular government action goes too far and effects a regulatory taking. First, we have observed, with certain qualifications, that a regulation which "denies all economically beneficial or productive use of land" will require compensation under the Takings Clause. Where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action. These inquiries are informed by the purpose of the Takings Clause, which is to prevent the government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Id. at 617-18 (citations omitted).

[7] 535 U.S. 302, 122 S. Ct. 1465 (2002).

> We shall first explain why our cases do not support their proposed categorical rule—indeed, fairly read, they implicitly reject it. Next, we shall explain why the *Armstrong* principle requires rejection of that rule as well as the less extreme position advanced by petitioners at oral argument. In our view the answer to the abstract question whether a temporary moratorium effects a taking is neither "yes, always" nor "no, never"; the answer depends upon the particular circumstances of the case. Resisting "the temptation to adopt what amount to *per se* rules in either direction.

Id. at ___, 122 S. Ct. at 1478 (citing Palazzolo v. Rhode Island, 533 U.S. 606, 636 (2001)).

large parcel; the reasonable investment-backed expectations of the single-lot owner are virtually destroyed; and the benefit for the government in having greater setbacks along a major thoroughfare seems acceptable relative to the 100-acre parcel owner, while it is quite unfair to the single-lot owner. Though vested rights[8] may save the hapless small-lot owner, or a variance may right the wrong,[9] if anyone here has a taking by over-regulation, it is the owner of the 10,000-square-foot lot, because the proportional loss relative to the total land holding is so great.

As we shall see, if that small lot owner owned several other abutting rear lots all in the same name, all treated as one and all unaffected by the setback requirement, then the taking claim would probably evaporate.[10] The regulation is the same, but the effect on the total holdings is profoundly different.

III. THE DIMENSIONS OF PROPERTY

Determining the total property against which the loss must be measured is what we call the "relevant parcel" question. That is not an optimum definition, it is just the best we have. Sometimes it is called the "takings fraction."[11] Frequently, we hear it described as the "numerator-denominator" problem or simply the "denominator" problem.[12] The "parcel as a whole" rule is another variant[13] as is the "nonsegmentation" rule.[14] The total holdings are sometimes seen as the "bundle" of rights and what is taken as a "stick" plucked from that bundle.[15]

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[8] *See, e.g.*, Western Land Equities, Inc. v. City of Logan, 617 P.2d 388 (Utah 1980).

[9] For example, variances for lot size or set-back requirements.

[10] *See, e.g.*, Marchi v. Town of Scarbough, 511 A.2d 1071 (Me. 1986).

[11] *See* STEVEN J. EAGLE, REGULATORY TAKINGS §11-7 (2d ed. 2001).

[12] *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987).

The "numerator," as you have doubtless concluded, is the property taken; in our illustration the additional twenty-five-foot setback.

[13] Deltona Corp. v. United States, 657 F.2d 1184 (1981).

[14] *See* Walcek v. United States, 49 Fed. Cl. 248, 259 (Fed. Cl. 2001).

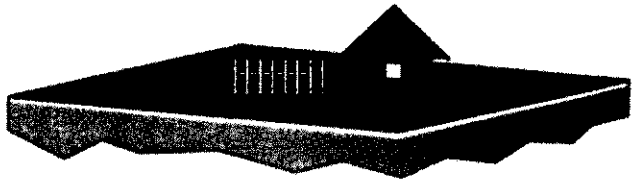
[15] *Keystone Bituminous Coal Ass'n.*, 480 U.S. at 497 (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-31).

> The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety. In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds.

Andrus v. Allard, 444 U.S. 51, 65 (1979).

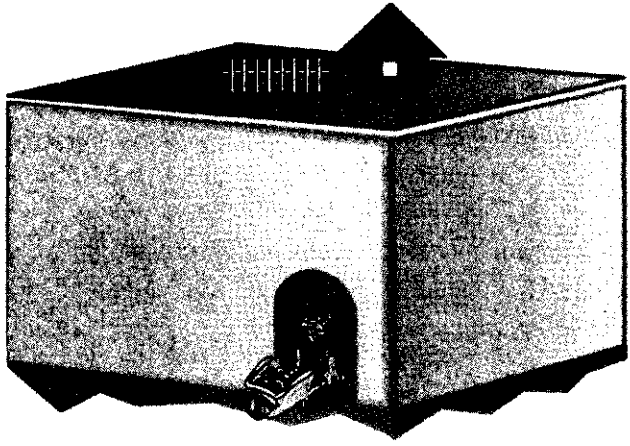
Before we can determine what the relevant parcel is, we need to know how to define what constitutes the potential real property in a takings case. Even a simplistic scheme, which collapses many categories into others, yields a dozen ways of thinking about property in the context of takings claims. First, the property might have some two-dimensional land area. Is the area of the property 10 acres or 100 acres?[16] In the last illustration, the question was is it 100 acres or 10,000 square feet?

Property in Two Dimensions



Second, the relevant parcel, or perhaps more correctly the "relevant property," could include not just the surface, but subsurface mineral and water rights.[17]

Surface and Subsurface Rights

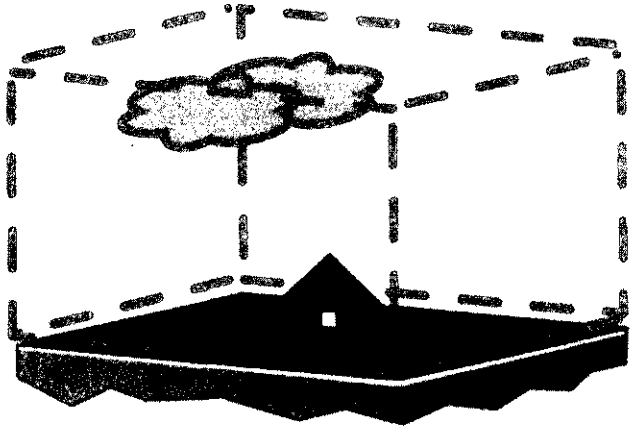


[16] *See* Palazzolo v. Rhode Island, 533 U.S. 606, 621 (2001) (deciding relevant parcel included 18 acres of wetlands plus an "indeterminate" upland parcel).

[17] *See Keystone Bituminous Coal Ass'n*, 480 U.S. 470 (1987).

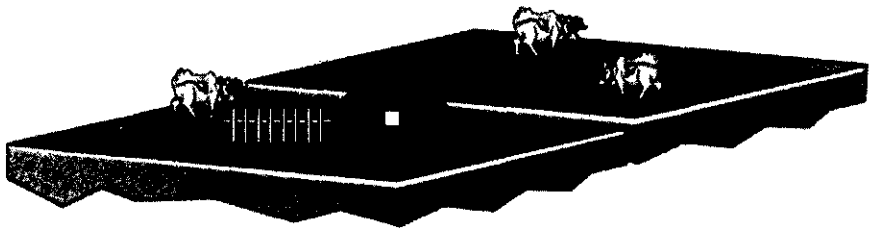
Third, air rights above the land could be included in the relevant parcel.[18]

Air Rights



Fourth, contiguous land holdings used as part of a consolidated operation might be considered part of the relevant parcel.[19]

Consolidated Operations

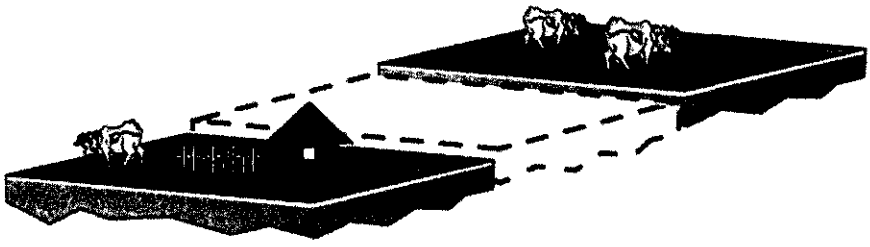


[18] *See Penn Central*, 438 U.S. at 104.

[19] *See* Forest Props. v. United States, 39 Fed. Cl. 56, 73 (Fed. Cl. 1997) (treating lake bottom and uplands as a single parcel where they were a single income producing unit for financing, planning and development).

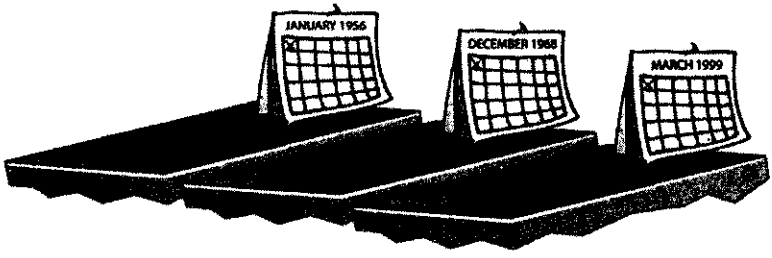
Fifth, the relevant parcel may include noncontiguous parcels operated as one consolidated operation.[20]

Noncontiguous Holdings



Sixth, parcels purchased at different times, before or after regulation, may be excluded or treated together as the relevant parcel.[21]

Later-Acquired Properties

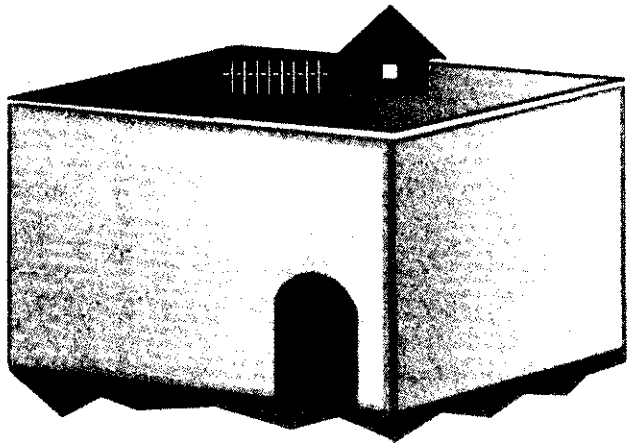


[20] *See* Ciampitti v. United States, 22 Cl. Ct. 310 (Cl. Ct. 1991) (treating noncontiguous properties as one).

[21] *See* Forest Props. v. United States, 39 Fed. Cl. 56, 73 (Fed. Cl. 1997) (lake bottom and upland purchased five months apart).

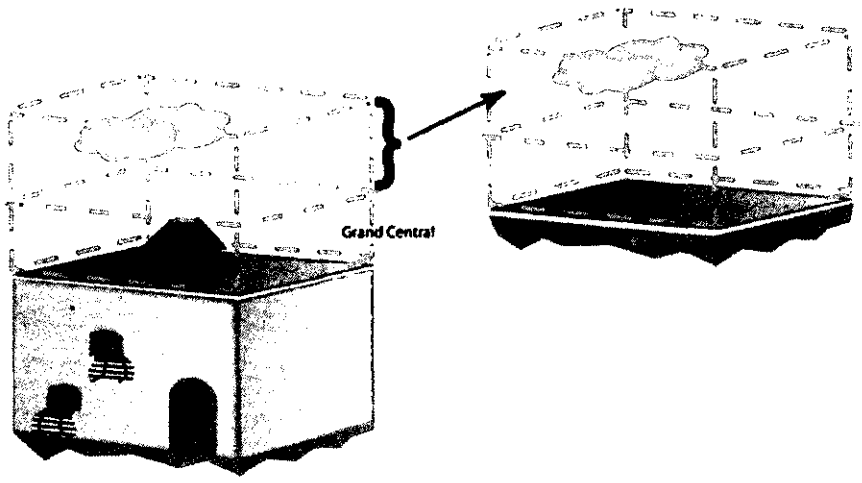
Seventh, it might include, as it did in one of the leading regulatory takings cases, the exclusive railroad franchise and all of the associated underground infrastructure, along with the air rights.[22]

Surface and Exclusive Franchise Rights



Eighth, the relevant parcel could include the ability to transfer all or part of the air rights or other development rights to another parcel.[23]

Transfer of Development Rights

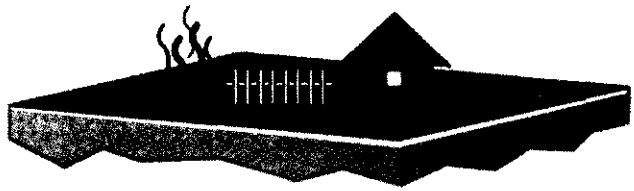


[22] *See Penn Central*, 438 U.S. at 104.

[23] *See id.*; Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997).

Ninth, economic burdens, such as the requirement to clean up pollution, may diminish the "size" of the relevant parcel.[24]

Encumbered Property



Tenth, economic benefits from off-site "positive externalities" may be included in determining the extent of the relevant parcel.[25] This is sometimes referred to as the "average reciprocity of advantage." This occurs when the restrictions on the property claimed to have been taken by over-regulation also restricts nearby properties, thereby protecting the regulated property and enhancing its value.

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[24] *See* Kessler v. Tarrats, 476 A.2d 326 (N.J. Super. Ct. App. Div. 1984) (stating that no taking for lien placed on property to recover cost of clean up).

[25] Deltona Corp. v. United States, 657 F.2d 1184 (1981) (Ct. Cl. 1981).

> We have every reason to believe that the Corps has been enforcing these new regulations on a uniform basis nationwide. Deltona will therefore share with other landowners both the benefits and burdens of the Government's exercise of its Commerce Clause powers. In assessing the fairness of the regulations, "these benefits must be considered along with any diminution in market value" which Deltona might suffer.

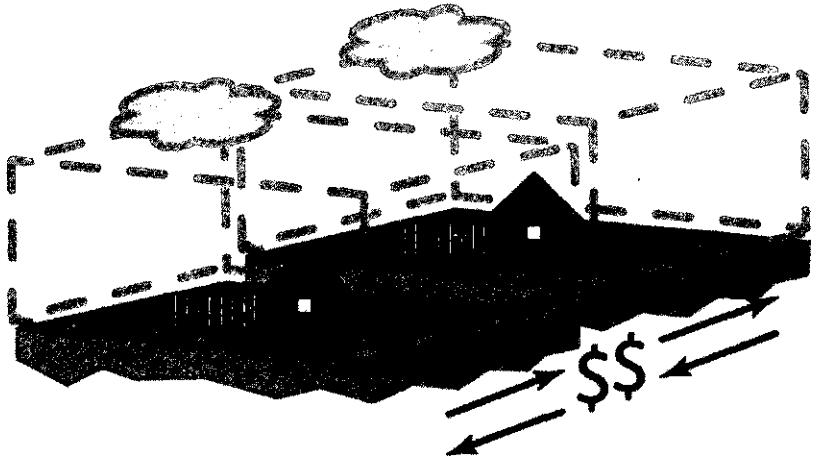
Id. at 1192 (citation omitted).

The Claims Court elaborated in Florida Rock Industries v. United States:

> The economic impact of certain land use controls, when shared by other members of the community, has been held to be non-compensable. "When there is reciprocity of advantage, paradigmatically in a zoning case . . . then the claim that the Government has taken private property has little force: the claimant has in a sense been compensated by the public program 'adjusting the benefits and burdens of economic life to promote the common good . . . .'" Accordingly, when the court assesses economic impact, it must determine whether Florida Rock has been compensated through the regulation itself.

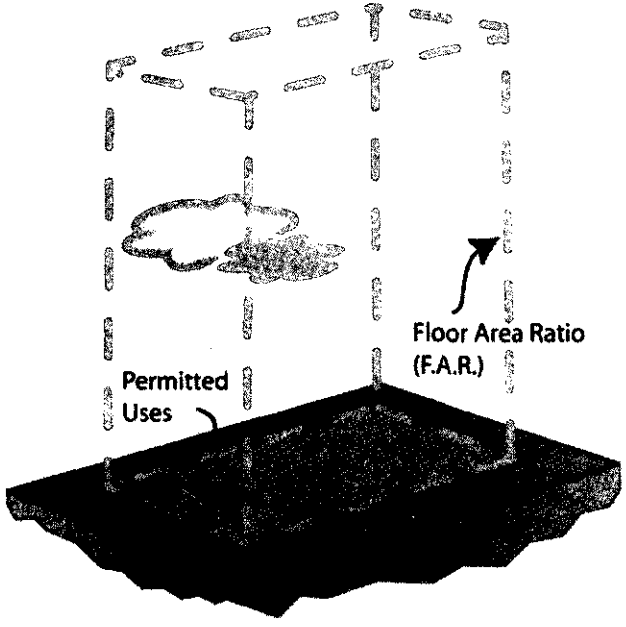
45 Fed. Cl. 21, 36-37 (Fed. Cl. 1999) (citations omitted).

Positive Externalities



Eleventh, the functional characteristics of the property—density, use, bulk and dimensional standards—may define the relevant parcel.[26]

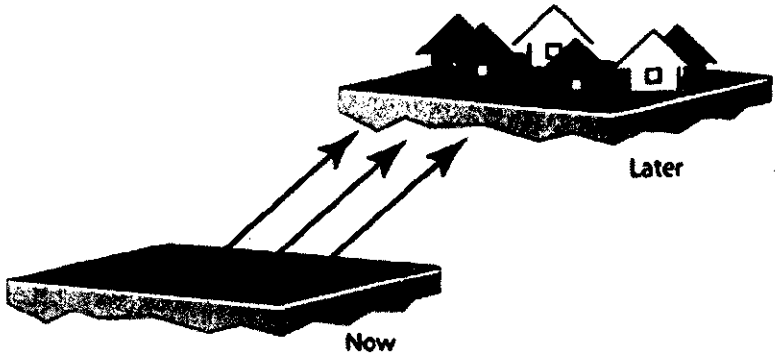
Functional Dimensions



[26] *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 330 (1987) (Stevens, J., dissenting).

Twelfth, the relevant parcel—now relax a bit and think back to that early Michael J. Fox movie, "Back to the Future,"[27]—could include property interests over time, such that a property might have no current use but could have speculative value today because of future potential use. The relevant parcel of real property can extend not only below the surface and to the very heavens above, but also across time itself. This question of temporal rights has been before the U.S. Supreme Court before[28] and the Court addressed them directly in *Tahoe-Sierra*.[29]

The Temporal Dimension



IV. THE *PENN CENTRAL* FACTORS AND A HYPOTHETICAL

As previously suggested, the importance of defining the relevant parcel arises out of the multi-factor takings analysis. In *Penn Central Transportation Co. v. City of New York*,[30] the U.S. Supreme Court set up a three-part analytic scheme for determining when a taking occurs. The three factors are: (1) the economic impact of the regulation on the landowner, (2) the extent to which the regulation interferes with distinct investment-backed expectations and (3) the character of the government action.[31] The Court reiterated these factors in *Palazzolo* as the ones to be considered in a regulatory takings case[32] that

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[27] BACK TO THE FUTURE (Universal Studios 1985). *See also* www.bttfmovie.com.

[28] *Id.*

[29] Tahoe Sierra Pres. Council v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 122 S. Ct. 1465 (2002).

[30] 438 U.S. 104 (1978).

[31] *Id.* at 124.

[32] Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001).

does not involve physical invasion and is not in that small class of so-called "categorical" takings cases as represented by *Lucas v. South Carolina Coastal Council*.[33] In *Tahoe-Sierra*, the Court again pushed the *Penn Central* test to the front.[34]

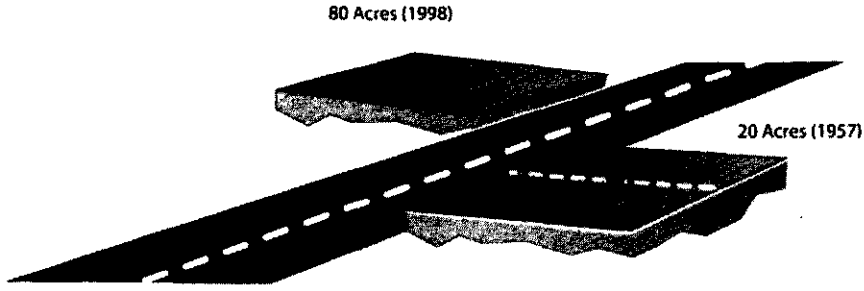
The first two of these three factors—economic impact and investment-backed expectations—require consideration of the relevant parcel. The third factor, which connotes a balancing of private burden and public benefit, almost always implicates the relevant parcel.

Now let us put to work what we now know about slicing and dicing real property interests and apply the basic principles of *Penn Central* to discover what role the relevant parcel has in determining whether a taking will be found. For this work we need a simple hypothetical with a couple of twists to foreshadow the cases that have attempted to define the relevant parcel.

Assume a 65-year-old Iowa farmer wants to liquidate his land holdings and retire to Lahaina. Right after college, some 45 years ago, he bought his first small acreage in Iowa, about twenty acres, on the north side of County Highway #1 for $500. About half of that twenty acres—ten acres or so—is wetlands with a portion in a pond, where he enjoys seeing the ducks during their twice-a-year migration. Because this portion of the land is so wet, he has not farmed this area.

Over the years he bought several parcels at other locations some distance from the first piece. Four years ago he picked up an eighty-acre parcel on the other side of the street, not directly across, but some few hundred feet away to the north. Since he bought that property, he has kept the eighty-acre parcel and the twenty-acre parcel in the same closely-held corporation. He has planted and harvested crops from the two parcels at the same time, driving his farm equipment down the road.

The Iowa Farm



[33] Lucas v. S. C. Coastal Council, 505 U.S. 1003 (1992).

[34] *See Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1481.

Thirty-five years ago, the U. S. Army Corps of Engineers took jurisdiction over the type of wetlands that he has,[35] and Iowa enacted state wetlands regulations about seventeen years ago.[36]

The farmer decides to sell the twenty-acre parcel as two, ten-acre homesteads for "martini farms," as they have come to be called[37]—rural getaways for the city folk in Des Moines who have made enough money to have a second home and want to dabble in farming.

To develop the ten-acre piece that is wetlands, he needs to fill most of it. Being a law-abiding citizen, and having been told by his civil engineer that he must, he applies to the U. S. Army Corps of Engineers and to the Iowa Environmental Protection Division for permission to fill part of that ten-acre building lot so that his future purchaser can construct a driveway, build a house and have enough upland for a yard.

Both the federal and state agencies deny his permit applications on the ground that the jurisdictional wetlands are a valuable resource for habitat and groundwater recharge.

The ten acres of wetlands which cannot be filled must be added to the remaining ten acres of that twenty-acre piece to make a single lot. Although the addition of the ten acres of wetland would probably increase the value of the upland by ten percent, both of these lots are worth about $50,000. Therefore, instead of having $100,000 of potential income from the sale of these lots, he only has $55,000 (the $50,000 for the upland ten-acre lot plus a small increment of additional value from the ten acres of wetlands). The farmer has "lost" $45,000 of potential value as a result of the regulation. Is it a compensable taking?

The short answer is: "It depends."

It depends in large measure on what is the relevant parcel. We should all agree that the numerator is the $45,000, out of $50,000 loss, that comes from his not being able to fill the wetlands to create a buildable lot. But what is the denominator, or relevant parcel, to which this loss must be compared? Is it the

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[35] *See* Deltona Corp. v. United States, 657 F.2d 1184, 1187 (Ct. Cl. 1981).

> Until 1968, the Corps administered the Rivers and Harbors Act solely in the interest of navigation and the navigable capacity of the nation's waters. However, on December 18, 1968, in response to a growing national concern for environmental values and related federal legislation, the Corps revised its regulations to implement a new type of review termed "public interest review." Besides navigation, the Corps would consider the following additional factors in reviewing permit applications: fish and wildlife, conservation, pollution, aesthetics, ecology, and the general public interest.

Id.

[36] IOWA CODE § 456B.13 (1986).

[37] This term is attributed to John DeGrove, the country's leading scholar on growth management. *See, e.g.*, JOHN M. DEGROVE, BALANCED GROWTH: A PLANNING GUIDE FOR LOCAL GOVERNMENT (Practical Management Series 1991).

ten acres of the new lot he created in this two-lot subdivision? If the denominator is the ten acres, then the farmer has a very good takings case, because 90% of the value has been lost.[38]

Or is it the entire twenty acres of the parcel that he purchased in 1957, long before federal and state wetlands laws went into effect? If the denominator is twenty acres, he may not have much of a takings case left. He has lost 45% of value, but some courts have held losses in excess of 45% takings.[39] We will not discuss the other two factors of *Penn Central*, but you have to ask what were the farmer's investment-backed expectations, and is it fair that the burden of wetlands preservation is on the farmer?

Since he purchased the eighty acres lot four years ago, he has been treating this total of 100 acres as a single farm unit, working both pieces of land at the same time in the same crops and owning and operating them both from a single corporation. Is the 100 acres, even though the bulk of it was purchased just recently and more than forty years after the first acreage, the relevant parcel? If it is, the loss of value on ten acres, even though nearly a complete wipe-out, is not likely to be more than a 10% loss when compared to the total of 100 acres. A 10% loss by over-regulation is not a compensable taking. Does it matter that he bought the twenty acres long before wetlands regulation and the additional eighty acres long after regulation? Does it matter what the zoning allows? Does it matter that he held and profited by farming the twenty-acre portion over forty-five years?

A look at how the United States Supreme Court, the lower federal courts, and state courts have addressed this difficult problem of defining the relevant parcel will help us create a workable analytic framework for answering these and other questions.[40]

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[38] *See* Bowles v. United States, 31 Fed. Cl. 37 (Fed. Cl. 1994) (92 to 100% diminution a taking); Formanek v. United States, 26 Cl. Ct. 332 (Cl. Ct. 1992) (finding an 88% diminution a taking).

[39] *See* Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal,, 508 U.S. 602 (1993) (finding no taking where there was a 46% diminution); Jentgen v. United States, 657 F.2d. 1210 (Cl. Ct. 1981) (finding no taking where there was a 50% diminution).

[40] The cases break down fairly neatly with these three categories of courts—U.S. Supreme Court, lower federal courts, and state courts. The Supreme Court has had little opportunity to deal with issue of relevant parcel doctrinally and few chances to address the more interesting and intractable factual issues on which the legal determination of the relevant parcel is necessarily based. The lower federal courts, however, with many takings cases and factually interesting natural resource matters, have developed a rather rich jurisprudence. And the state courts, the great micro-breweries of the law, have come up with variations to please just about every palate. The problem in organizing the cases is whether to try to extract first principles and follow those threads, or simply lean back onto *stare decisis* and see where it leads us. I have chosen the latter because I am looking for a template that can be placed over all relevant parcel cases. Yes, the analysis and outcomes will vary dependent on the facts, including the nature of the property alleged to have been taken, but perhaps we can start with one scheme for looking

V. U.S. SUPREME COURT ANALYSIS OF RELEVANT PARCEL ISSUE

Up until a quarter of a century ago, the U.S. Supreme Court had dealt with the relevant parcel question in rather general terms, but in the *Penn Central* decision in 1978, Justice Brennan, writing for the majority decision, said:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of interference with rights in the parcel as a whole . . . .[41]

You will recall that the Penn Central Railroad wanted to put a fifty-five-story tower on top of the Beaux Arts Grand Central Terminal, which originally was designed and constructed to support a tower about half that high. When the New York City Landmarks Commission held that a tower would be inappropriate, Penn Central sued, claiming a compensable taking of its air rights, the property interest in the zoning envelope above the terminal building.

Articulating what is sometimes called the "nonsegmentation" or "parcel-as-a-whole" rule, the Court decided there was no taking because Penn Central's property interests—including the railroad franchise, its ownership of the block, its subsurface rights and perhaps even the potential to transfer some of its development rights to other properties—had enough value that the diminution did not effect a taking.[42]

In *Penn Central*, there is discussion of the average reciprocity of advantage[43] that we will look at in some detail in *Ciampitti v. U.S.* decided by

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at these cases and not several categories such as mining cases, noncontiguous properties, properties purchased at different times and so forth. And if I am right that the relevant parcel analysis can be a unifying way of going at the three-part *Penn Central* analysis for partial takings, then it will be better to have a single structure, not several.

[41] Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978). Justice Rehnquist argued for a contrary result in his dissent. *See id.* at 150 n.13 (Rehnquist, J., dissenting).

[42] *Id.* at 643. For a useful analysis of the parcel-as-a-whole cases from the position of an advocate favoring the rule and rejecting segmentation see TIMOTHY J. DOWLING, *The Parcel-as-a-Whole Rule and Its Importance in Defending Against Regulatory Takings Challenges, in* TAKING SIDES IN TAKINGS ISSUES 75-79 (Thomas E. Roberts, ed. ABA 2002), and Chapter 6 of DOUGLAS T. KENDALL ET AL., TAKINGS LITIGATION HANDBOOK: DEFENDING TAKINGS CHALLENGES TO LAND USE REGULATIONS (American Legal 2000).

[43] *Penn Central*, 438 U.S. at 134-35.

> Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole—which we are unwilling to do—we

the Claims Court in 1991.[44] Economists and planners talk of "externalities."[45] The word itself hints at its meaning. By way of illustration, assume that the government purchases open space adjacent to your single-family, residential property for a nature preserve. More likely than not, your residential property value has been enhanced by the "positive externality" of having an abutting nature preserve. The value of your property is greater because of the restriction on the open space and that positive effect is external to the open space.

As you would imagine, a "negative externality" in the land use context is an adverse impact from a nearby use that flows over onto your property. If the open space next to your single-family lot was rezoned to commercial and then developed and operated as a dirt bike track, the negative externalities of noise, dust and traffic associated with the operation are almost certain to devalue the single-family use of your lot.

The Claims Court in *Ciampitti* suggests that the analysis should include determining whether other landholdings of the claimant in the immediate area are benefited by the regulation, and if they are, then they might be considered part of the relevant parcel.

This is a rational extension of the *Penn Central* consideration of the "average reciprocity of advantage." The average reciprocity of advantage is land-use law's equivalent of the Golden Rule—do unto others as you would have them do unto you.

The syllogism goes like this:

1. Your property and those nearby are restricted in their use.
2. Use restrictions protect your property from negative externalities and potentially create positive externalities.
3. Avoidance of negative externalities and the enhancement of positive externalities make your property more valuable.
4. Because your property is more valuable as a result of the area-wide restrictions, the restrictions on your property do not devalue it or at least do not rise to the level of a taking.

At one level, the average reciprocity of advantage argument seems tautological, but it is based on common perceptions of value. Tough controls can enhance value by providing not only for the avoidance of negative

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cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law.

Id.

[44] Ciampitti v. United States, 22 Cl. Ct. 310 (Cl. Ct. 1991); *see infra* note 132.

[45] For a PowerPoint lecture on the subject generally, see www.bized.ac.uk/stafsup/options/aec/rgsppt/external.ppt (last visited Feb. 28, 2003); *see also* ROBERT H. FRANK AND IAN C. PARKER, MICROECONOMICS AND BEHAVIOR § 17 *Externalities, Property Rights, and the Coase Theorem* (McGraw-Hill 2002).

externalities and the creation of positive externalities, but also a sense of stability and an enhancement of speculative value. Disney's new town of Celebration in Florida is a totally planned community with highly restrictive design regulations. It appears that properties sell for a substantial premium as a consequence of the combination of the perceived attractiveness of the community and the benefits deriving from these protections and the future stability.[46]

Justice Holmes apparently used the phrase "reciprocity of advantage" for the first time in 1922 in *Jackman v. Rosenbaum Co.*[47] Its antecedents might go back to 1885.[48] Importantly, the term was used in *Pennsylvania Coal Co. v. Mahon*,[49] where it was guaranteed a place in the lexicon of land use law. Thus, *Penn Central* advances the law of the relevant parcel by reinforcing the parcel-as-a-whole rule and reiterating the concept of the average reciprocity of advantage. While the Court apparently did not contemplate that the two concepts could be linked as they were later in *Ciampitti*, the *Penn Central* decision provided the doctrinal precedents for the linkage. As we will see later, the positive externalities from one portion of a property owner's holdings which improve the value of other holdings may lead to internalizing

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[46] *See* http://www.celebrationfl.com (last visited Feb. 28, 2003); DOUGLAS FRANTZ AND CATHERINE COLLINS, CELEBRATION, U.S.A. 221 (Henry Holt 1999).

[47] 260 U.S. 22, 30 (1922) (upholding a Pennsylvania statute codifying the common law right of an adjacent landowner to build a party wall on the property line, and, in the course of doing so, to remove the plaintiff's old unsafe wall).

[48] *See* Wurts v. Hoagland, 114 U.S. 606, 613-14 (1885).

> This review of the cases clearly shows that general laws for the drainage of large tracts of swamps and low lands, upon proceedings instituted by some of the proprietors of the lands to compel all to contribute to the expense of their drainage, have been maintained by the courts of New Jersey (without reference to the power of taking private property for the public use under the right of eminent domain, or to the power of suppressing a nuisance dangerous to the public health) as a just and constitutional exercise of the power of the legislature to establish regulations by which adjoining lands, held by various owners in severalty, and in the improvement of which all have a common interest, but which, by reason of the peculiar natural condition of the whole tract, cannot be improved or enjoyed by any of them without the concurrence of all, may be reclaimed and made useful to all at their joint expense.

Id.

[49] 260 U.S. 393, 415 (1922).

> It is true that in *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531, it was held competent for the legislature to require a pillar of coal to be left along the line of adjoining property, that, with the pillar on the other side of the line, would be a barrier sufficient for the safety of the employees of either mine in case the other should be abandoned and allowed to fill with water. But that was a requirement for the safety of employees invited into the mine, and secured an average reciprocity of advantage that has been recognized as a justification of various laws.

Id.

that impact as part of the takings calculus by including the positively impacted property in the relevant parcel.

The Court took on the relevant parcel issue a year after *Penn Central* in *Andrus v. Allard*,[50] applying a jurisprudential "bundle of sticks" argument to define the relevant property in a case where federal law banned the sale of certain bird artifacts.[51] The Court found no taking, because there were uses of the artifacts remaining for the owner, and the loss of one "strand" from the bundle, in this instance the right to sell the property, was not a taking because the bundle of rights must be looked at in its entirety:

> The regulations . . . do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner posses a full "bundle" of property rights, the destruction of one "strand" in the bundle is not a taking, because the aggregate must be viewed in its entirety . . . . [A]ppellees retain the rights to possess and transport their property, and to donate or devise the protected birds.[52]

The same reasoning seemed to follow in the 1987 decision of *Keystone Bituminous Coal Association v. DeBenedictis*,[53] a coal mining case in which a Pennsylvania law prohibited companies mining underground coal from removing support columns. Under Pennsylvania law, it is possible for owners of the surface land to convey away their rights to have the land supported, such that when the coal is mined from below and the surface collapses, the surface owners have no claim against the mining company.

The Pennsylvania legislature, concerned about the danger to public health and safety from the collapse of roads and the breaking of utility lines, enacted legislation prohibiting coal companies from removing all the coal and requiring them to maintain support columns, even when they had already purchased the rights to subsidence from the surface owners. The coal companies sued, claiming a taking of the 27,000,000 tons of coal that had to be left in the ground as support columns under the statute.

The Court held it was not a taking, because when compared with the relevant parcel of the total underground mining rights, the support columns

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[50] 444 U.S. 51 (1979).

[51] *Id.* at 65-66. *See* Eagle Protection Act 16 U.S.C. § 668 (1978), Migratory Bird Treaty Act, 16 U.S.C. § 703 (1978). For an interesting decision on numerators and denominators in yet another context, this one the operation of ocean-going oil barges, see *Maritrans Inc. v. United States*, 51 Fed. Cl. 277 (Fed. Cl. 2001).

[52] *Andrus*, 444 U.S. at 65-66; *see also* Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1577 (10th Cir. 1995).

[53] 480 U.S. 470 (1987).

were less than 2% of the coal. A 2% loss of value is unlikely to meet the *Penn Central* loss-of-value requirement.

The wonder of *Keystone*, of course, is that it is factually so similar to the earlier case of *Pennsylvania Coal Co. v. Mahon* establishing the bedrock principle that if a regulation goes too far it will be a taking: "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[54] In *Pennsylvania Coal*, the Court saw the support estate as a separate interest that could be taken and found that the regulation essentially extinguishing the interest was not justified.[55] A common joke among takings aficionados—and not much of takings law is all that funny—is that the only difference between the two cases is that the first dealt with anthracite (hard) coal and the second with bituminous (soft) coal. The real difference, of course, is that in *Pennsylvania Coal* the Court characterized the case under the Kohler Act as involving "a single private house"[56] and in *Keystone* it viewed the Subsidence Act as grounded on police power objectives of protecting the general public.[57] *Keystone* is indeed representative of the modern approach that rights in land cannot be considered in isolation, but must be viewed contextually in space, function and time.

Not until 1992 did the Court address the issue again, and the plaintiff in the case, David Lucas, had not even raised it. *Lucas* is the South Carolina case in which Lucas purchased two waterfront lots for close to $1 million, only to have them rendered unbuildable by a new state law intended to prevent development on shorefront lots subject to erosion. In dictum in a footnote, Justice Scalia took on the relevant parcel problem. A mark of erudition among

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[54] 260 U.S. 393, 415 (1922).

[55] *Id.* at 422.

[56] *Id.* at 413-14.

[57] *Keystone Bituminous Coal Ass'n*, 480 U.S. at 470 (1987):

> Unlike the Kohler Act, which was passed upon in *Pennsylvania Coal*, the Subsidence Act does not merely involve a balancing of the private economic interests of coal companies against the private interests of the surface owners. The Pennsylvania Legislature specifically found that important public interests are served by enforcing a policy that is designed to minimize subsidence in certain areas. Section 2 of the Subsidence Act provides:
>
> "This act shall be deemed to be an exercise of the police powers of the Commonwealth for the protection of the health, safety and general welfare of the people of the Commonwealth, by providing for the conservation of surface land areas which may be affected in the mining of bituminous coal by methods other than 'open pit' or 'strip' mining, to aid in the protection of the safety of the public, to enhance the value of such lands for taxation, to aid in the preservation of surface water drainage and public water supplies and generally to improve the use and enjoyment of such lands and to maintain primary jurisdiction over surface coal mining in Pennsylvania."

Id. (citation omitted).

land use lawyers is to refer to it only by number, as in: "How do reconcile that with Footnote 7, huh?" Among the inner circle you need not even mention *Lucas*. Usually, a snippet is quoted, but here is all of it as the issues are still with us, maybe more so after *Palazzolo* and *Tahoe-Sierra*:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole. (For an extreme—and, we think, unsupportable —view of the relevant calculus, see *Penn Central Transportation Co. v. New York City*,[58] where the state court examined the diminution in a particular parcel's value produced by a municipal ordinance in light of total value of the takings claimant's other holdings in the vicinity.) Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court. The answer to this difficult question may lie in how the owner's reasonable expectations have been shaped by the State's law of property—*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value. In any event, we avoid this difficulty in the present case, since the "interest in land" that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law, and since the South Carolina Court of Common Pleas found that the Beachfront Management Act left each of Lucas's beachfront lots without economic value.[59]

Interestingly, if you look at just the reported *Lucas* decisions, you would have to say there is no question that the numerator is the two lots that could not be developed and the denominator is the two lots. However, I sometimes wonder if it is possible the case could have turned out differently.

As chair of the American Planning Association's Amicus Curiae committee, I was driven to read the entire record and I was surprised at two things. I was struck by the fact that no effort was made to emphasize that after first restricting the Lucas lots, the state adopted a waiver process—essentially a variance by which development could be approved. There were only twelve lots statewide that fell under the provisions and ten applied for and were

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[58] 366 N.E.2d 1271, 1276-77 (N.Y. 1977), *aff'd*, 438 U.S. 104 (1978).

[59] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992) (citations omitted) (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922); Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 497-502 (1987); Keystone Bituminous Coal, 480 U.S. at 515-520 (Rehnquist, C.J., dissenting); Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 566-569 (1984)).

granted waivers. Guess who cleverly never applied? I have said elsewhere that one of the lessons of *Lucas* is that application for waivers should be a condition precedent to ripeness under state rules,[60] subject to the futility exception as most recently recognized in *Palazzolo*.[61]

Second, David Lucas' role at Isle of Palms was a little more complicated than that of an innocent purchaser of two empty waterfront lots poised for development.[62] He was one of the developers of the 1,600-acre development and had the pick of the litter early on when he choose these two lots. I have wondered if the denominator was something greater than two lots. What was the economic reality of the "purchase" of these two lots? Was the price tied to Mr. Lucas cashing out of the development deal?[63] Were there tax considerations, such as a desire to have a high basis for capital gains purposes? That background was never fully developed below and certainly did not end up before the Court.[64]

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[60] Dwight H. Merriam, *Reengineering Regulation to Avoid Takings*, 33 URB. LAW. No. 1, 17-18 (2001).

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

> Where the state agency charged with enforcing a challenged land use regulation entertains an application from an owner and its denial of the application makes clear the extent of development permitted, and neither the agency nor a reviewing state court has cited non-compliance with reasonable state law exhaustion or pre-permit processes, federal ripeness rules do not require the submission of further and futile applications with other agencies.

Id. at 625-26 (citation omitted).

[62] Lynn Riddle, *Court Sinks A Choice Lot*, N.Y. TIMES, Mar. 31, 1991:

> When David Lucas developed the 1,600-acre Wild Dunes resort on Isle of Palms 15 miles northeast of here in the early 80's, he picked out two choice oceanfront lots for himself. But by the time he was ready to build, the state had changed the law and made construction on such sites illegal.

Id.

[63] Email from Dwight Merriam, "Isle of Palms," Robinson & Cole, to David Lucas, (Feb. 28, 2002) (I asked David Lucas this question by e-mail on February 17, 2002: "I'm writing a short 'footnote' on your case and I remember someone in Charleston telling me you were one of the developers at Isle of Palms—maybe having purchased it from the Beach Company? Was the purchase of the two lots tied to your liquidating your interest in the development company?" He answered by e-mail on February 28, 2002: "No. They were an investment after the sale of my interest.").

[64] The greatest irony, of course, is that after Lucas settled with the state, paid for the lots and his damages and deeded the lots to the state, they were sold and developed and threatened by erosion. Lynne Langley, *Palms Board OKs Giant Sandbags*, POST AND COURIER (Charleston, SC), Oct. 21, 1995, at A17:

> Coastal Resource has never received an application for super-sized sandbags, she said, but the agency is taking enforcement action against three that were illegally installed on Sullivan's Island. Wild Dunes property owners, some of whom met with Coastal Resource staff Friday, want to protect 19 lots in the Beachwood East area. They include the two famous David Lucas lots that were part of a U.S. Supreme Court suit. Coastal Resource, then Coastal Council, denied Lucas building permits years ago because of

Footnote 7 has received a lot of play, as you will learn when we go on to the later cases in the lower federal and state courts. Note that Justice Scalia says that the New York Court of Appeals decision, not that of the U.S. Supreme Court, in *Penn Central* is "extreme" and "unsupportable" in its calculus of the relevant parcel.[65] New York's highest court took a somewhat expansive view of what might be included in the relevant parcel and Chief Judge Breitel, writing for the court, offered an intriguing but unacceptable concept of public and private increments in property value.[66]

Justice Scalia's fomenting of judicial debate on the relevant parcel issue was mostly neutralized by the Court's decision the next year, *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust*,[67] a pension fund case in which the unanimous Court held:

> [A] claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable. To the extent that any portion of the property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of the parcel in question.[68]

This is a restatement of the parcel-as-a-whole rule and the general impression among the takings bar was that there was not going to be much action on the relevant parcel front at the Supreme Court, that is, until along came the *Palazzolo* case.

The Pacific Legal Foundation in representing Anthony Palazzolo tried to nudge the relevant parcel issue before the Court like a playful puppy pushing a ball along with its nose to see if you will pick it up. Mr. Palazzolo's property on a saltwater pond in Rhode Island consists of eighteen acres, of which maybe two acres are upland. It would have been useful from Mr. Palazzolo's perspective to have the Court consider that the sixteen acres of wetlands prohibited from development (the numerator) over a denominator of sixteen acres of wetlands, but that was not to be because the issue had not

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> erosion threats. Lucas won his suit, the state revised the Beachfront Management Act, Coastal Resource granted a building permit and a new owner has nearly finished a house on one of the Lucas lots. Some property owners have lost 150 feet of beach in a year, McCaskill said. All the lots have at least 25 to 35 feet of sand at high tide, she said, and emergency provisions apply only when a beach shrinks to 10 feet.

Id.

[65] Lucas v. S. C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992).

[66] *See* Jon M. Conrad and Dwight H. Merriam, *Compensation in TDR Programs: Grand Central and the Search for the Holy Grail*, 56 J. OF URB. L. No. 1 (1978).

[67] 508 U.S. 602 (1993).

[68] *Id.* at 644.

been raised below. Justice Kennedy writing for the Court took the opportunity to comment on the problems they have had in defining the relevant parcel:

> In his brief submitted to us petitioner attempts to revive this part of his claim by reframing it. He argues, for the first time, that the upland parcel is distinct from the wetlands portions, so he should be permitted to assert a deprivation limited to the latter. This contention asks us to examine the difficult, persisting question of what is the proper denominator in the takings fraction. Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the value of the parcel as a whole, but we have at times expressed discomfort with the logic of this rule, a sentiment echoed by some commentators. Whatever the merits of these criticisms, we will not explore the point here. Petitioner did not press the argument in the state courts, and the issue was not presented in the petition for certiorari. The case comes to us on the premise that petitioner's entire parcel serves as the basis for his takings claim, and, so framed, the total deprivation argument fails.[69]

Justice Kennedy cites footnote seven and backs it up with support from law reviews. Then, like a teasing master who chooses to flick the ball away with his toe, he says he will not play.

As you might imagine, law academicians who study such things and hang on every word, shot out their tongues at this tasty tidbit, like the amazing poison arrow frog.[70] Professor John D. Echeverria, who heads the Environmental Policy Project at the Georgetown Law School, wrote after the *Palazzolo* decision that he thought the relevant parcel issue was "settled law"[71] and that Justice Kennedy's position was "a disingenuous effort to minimize the revolutionary change that repudiation of the property as a whole rule would entail."[72] The issue is not settled at all, retorted Professor Steven J. Eagle of George Mason University School of Law.[73]

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[69] Palazzolo v. Rhode Island, 533 U.S. 606, 631-32 (citations omitted). The dissenters rejected Palazzolo's theory of the relevant parcel: "After this Court granted certiorari, in his briefing on the merits, Palazzolo presented still another takings theory. That theory, in tension with numerous holdings of this Court was predicated on treatment of his wetlands as a property separate from the uplands. The Court properly declines to reach this claim." *Id.* at n.2 (Ginsburg, J., dissenting).

[70] The frog's tongue is attached at the front of its mouth and can extend up to a third of its body length. *See generally* Amphibian Conservation Alliance, *Welcome to FROGS.ORG*, *at* http://www.frogs.org (last visited Feb. 28, 2003); http://www.exploratorium.edu/frogs/ (last visited Feb. 28, 2003); Frogland, *Welcome to FROGLAND*, *at* http://allaboutfrogs.org/froglnd.shtml (last visited Feb. 28, 2003); Matt J., *Poison Arrow Frogs*, *at* http://www.lisle.dupage.k12.il.us/Schiesher/poison%20arrow%20frog%20by%20matt%20j.htm (last visited Feb. 28, 2003).

[71] John D. Echeverria, *A Preliminary Assessment of* Palazzolo v. Rhode Island, 31 ENVT'L. L. REP. 11112 (2001).

[72] *Id.* at 11114.

[73] Steven J. Eagle, Palazzolo v. Rhode Island*: A Few Clear Answers and Many New*

Perhaps all that Justice Kennedy meant was that the Court recognizes the rigidity of the parcel-as-a-whole rule and that it may wish to address the multi-factor analysis developed in the lower federal courts and in the state courts. It is dicta, after all, and dicta is the legal equivalent of musing. Musing is good, I think, coming from the Supreme Court. It invites the rest of us to ponder these issues and gives a socially acceptable excuse to debate or even write law review articles. As we shall see, there has been some wonderful experimentation with varied approaches in these other courts and that work may indeed inform the Court.[74]

One of the impressions I get from reading all the relevant parcel decisions is that there is a trend to a more subjective and holistic approach, capable of ready integration with the three-part *Penn Central* analysis. If, as I argue, the relevant parcel issue is not only integral with all three tests but may be, or may become, the conceptual basis for resolving the interdependencies between the three parts, then of course the Court would want the flexibility to be free from some of the rigidity implied by the nonsegmentation rule followed in *Keystone* and *Penn Central*. The Court, and everyone else, needs some flexibility if the complexities of these fact-driven cases are to be factored into the decision-making.

The *Tahoe-Sierra* decision shows that the Court has continued its creep toward subjectivity. I have often thought that the jurisprudence of takings has been forced into a Procrustean bed of a few rules, much like B.F. Skinner's early work was focused on Pavlovian stimulus-response—push a lever, get a pellet of food.[75] Regulation goes too far, get just compensation.

Later, Skinner came to realize that much of what we learn is from operant conditioning, where we have so many variable inputs we cannot identify them all, but from them we receive the cues necessary to respond.[76] We have all experienced this ourselves and we verbalize it as: "I just have a feeling." Takings jurisprudence and the Court's decision making process is inherently complex and responsive to many subtleties.

There is ample evidence, especially in the oral arguments before the Court where the Justices speak more freely than in the opinions, that they are concerned about fundamental fairness. It is hard to find a justice more forthcoming than Justice Scalia or anything in the land use arena more direct than the lambasting given to the lawyer for the City of Monterey in the opening moments of the argument and several minutes later in *Del Monte*

Questions, 32 ENVT'L L. REP. 10127, 10132 (2002).

[74] *See infra* note 115 and accompanying text.

[75] For background on his work, go to B.F. Skinner Foundation, *Burrhus Frederic Skinner, at* http://www.bfskinner.org (last visited Feb. 28, 2003).

[76] For a discussion of verbal operants, see B.F. Skinner Foundation, *A Brief Survey of Operant Behavior, at* http://www.bfskinner.org/Operant.asp (last visited Feb. 28, 2003).

Dunes v. City of Monterey. Monterey's counsel started out by describing the series of applications as "not atypical in some respects."[77] Justice Scalia, who sits low in his chair and has a habit of leaning way back, was mostly out of sight from those seated in the courtroom. His disembodied voice, *deus ex machina*, exclaimed: "Five times . . . And this is typical, you say?"[78]

Later, Justice Scalia said: "The landowner here essentially thinks that it was getting jerked around . . . isn't there some point at which . . . you begin to smell a rat, and at that point can't we say . . . this is simply unreasonable."[79]

Justice Kennedy expressed the same concerns about the treatment of the property owner, but in characteristically measured terms: even if the property has value, if the city is unreasonable and there is bad faith, is not "the city still liable in damages for that unreasonable treatment of the landowner?"[80]

I submit that part of what is going on in many of these cases is the Court looking into what is fair given the inextricable linkages between property under the Fifth Amendment and the people who own and control it. It is the human side of judging and not to be denied. While concern about people and even empathy for them may not make for a sound body of takings law, it can appropriately drive the movement for more flexible rules. In *Tahoe-Sierra*, the Court seized on "fairness and justice" as an organizing theme for discussing how the case should be analyzed.[81]

For those on the pro-government side, like Professor Echeverria, the increase in flexibility will not be beneficial because any construct that comprehends something other than the whole parcel as the only possible choice necessarily permits a smaller "denominator" with increased risk that there may be a taking.

For those leaning towards the property rights side, like Professor Eagle, the multi-factor approach may not be all that advantageous. Nothing beats the *Lucas*-type categorical taking with the just-write-a-check approach.

The latest case to come before the Court involving the relevant parcel issue is *Tahoe-Sierra*.[82] The owners of several hundred lots were delayed in developing their property by a thirty-two-month moratorium from 1981 through 1984. The imposed moratorium gave the regional planning agency time to develop plans to protect Lake Tahoe from further degradation by storm water run-off from increasing development around the lake. Even though the

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[77] Oral argument at 3, City of Monterey v. Del Monte Dunes at Monterey, Ltd., 1998 WL 721087 (Oct. 7, 1998) (No. 97-1235).

[78] *Id.* at 4.

[79] *Id.* at 16-17.

[80] *Id.* at 19.

[81] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 122 S.Ct. 1465, 1484-1486 (2002).

[82] *Id.*

lots were vacant during the thirty-two-months the case was before the Court, because of many lawsuits, the lots remained undevelopable for years.[83]

The takings claim was facial and categorical, avoiding the multi-factor balancing problems of an as-applied taking. The plaintiffs were in the difficult spot of having to defend the position that any delay through a moratorium was a taking. The Court knew full well where the plaintiffs were and how they got there. As Justice O'Connor said during the oral argument to Michael M. Berger, the lawyer for the takings claimants:

> J. O'CONNOR: Well, . . . Mr. Berger, you may well have been able to prevail under the *Penn Central* approach, I assume, viewed in its entirety over this period of time, but that was waived. Am I correct in that?
> MR. BERGER: We did not present a *Penn Central* case, that's correct.[84]

John G. Roberts, Jr., representing the Tahoe Regional Planning Agency and the other respondents, was quick to offer his own explanation for the procedural posture in the context of answering how the case should have been brought to avoid the problem of how to handle very short periods of total prohibition on use:

> MR. ROBERTS: Well, the first thing I'd say is, you bring an as-applied claim and not a facial claim. The facial claim is the mere enactment of this temporary moratorium effective [sic] taking. Well then, don't talk to me about what happened 15 years later, if the mere enactment of the temporary moratorium is your complaint. That's a different case, and he brought that case, and it was thrown . . . out because it was too late. There were challenges brought to the '84 plan, there were challenges brought to the '87 plan. Those challenges failed, and now the effort is to link those challenges up to . . . what's left, the little tail on the dog of this temporary moratorium that started the process.[85]

Justice Stevens asked the obvious and most difficult question:

> J. STEVENS: So that in your view—of course, the physical taking, even for 10 minutes, . . . would be a taking. There's no doubt about that. But your view is, even if the regulation prohibits all use of a piece of property, an automobile, whatever it may be, for 10 or 15 minutes, there is a taking. The damages may be infinitesimal, but there's always—past the liability stage.
> MR. BERGER: If there is a total prohibition of use–
> J. STEVENS: For 10 minutes.
> MR. BERGER: —there is liability.[86]

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[83] *Id.* at 1470.

[84] Oral argument at 11, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 2002 WL 43288 (U.S.S.Ct. Jan. 7, 2002) (No. 00-1167).

[85] *Id.* at 33.

[86] *Id.* at 12.

What had happened was that the case was presented as a *Lucas*-type per se categorical taking, and so the plaintiffs were left in a very tiny box with the difficult position of having to argue that any moratorium of any length was a per se taking that was compensable, even if the compensation was, to use Justice Stevens' terms, "infinitesimal."[87]

The Justices questioned the absolutist position of the property owners in *Tahoe-Sierra* and suggested that the Court was not close to accepting an expansion of categorical takings which after *Palazzolo* are probably limited to instances where the remaining value is less than 6% of the original.[88] After *Tahoe-Sierra*, my guess is that they are little more than a footnote in the history of taking jurisprudence.[89]

Tahoe-Sierra presents a property dimensioning issue that has to do with time, the twelfth and last of our illustrations of how property may be viewed in the takings analysis. It is a case about segmentation or conceptual severance.[90] In its decision, the Ninth Circuit identified three property attributes that might be conceptually severed: physical, as in property area; functional, as with possession and disposition—leaseholds are an example; and time, the "duration of the property interest."[91]

As to time, the numerator is the length of time the property is rendered unusable by a "temporary" moratorium.[92] The denominator, or relevant parcel against which the temporary loss is measured, has a time element linked to the length of prior ownership and the time it would take to put the property to use. Time has been an express or implied factor in many recent takings cases and others. In *Del Monte Dunes*, the Court recognized that an additional application would be futile after the government rejected five of them over five years.[93] The Court noted the delay at the oral argument.[94] This was a

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[87] *Id.*

[88] Dwight H. Merriam, *Palazzolo and Partial Takings* at 202, *in*, TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES (Thomas E. Roberts, ed. ABA 2001).

[89] Dwight H. Merriam, *Tahoe-Sierra Validates the Post-Palazzolo Ponderings on Partial Takings in* TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES (Supp. Thomas E. Roberts, ed. ABA 2002).

[90] *See* Tedra Fox, *Lake Tahoe's Temporary Development Moratorium: Why a Stitch Should Not Define the Property Interest in a Takings Claim*, 28 ECOLOGY L. Q. 399 (2001).

[91] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 774 (9th Cir. 2000).

[92] The use of the word "temporary" to describe a moratorium is irksome, but has gone too far to be reversed. A moratorium is by its own terms temporary: (a) "a legally authorized period of delay in the performance of a legal obligation or the payment of a debt" or "a waiting period set by an authority", or (b) "a suspension of activity." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY *at* http://www.m-w.com/cgi-bin/dictionary (last visited Feb. 28, 2003). The terminology apparently started in *Odabash v. Mayor and Council Borough of Dumont*, 319 A.2d 712 (N.J. 1974).

[93] *See generally* Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 920 F.2d 1496

factor in what I call the "three elderly widow" cases, a term based on the opening words of Mrs. Dolan's brief in the U.S. Supreme Court: "Mrs. Dolan, an elderly widow."[95] All three women plaintiffs were married when their cases started, but became widows before the court heard their cases.[96] The Supreme Court knew that Mrs. Dolan could not expand her business for five years while the case ascended to the Court.[97] The other widows are Mrs. Suitum, whose case regarding other restrictions at Lake Tahoe went on for twenty-two years,[98] and Mrs. Grace Olech, who came before the Court with an equal protection claim that the Village of Willowbrook failed to connect her property to the municipal water supply.[99] The Court ruled in favor of all three elderly widows. In *Tahoe-Sierra*, we have a case of over 700 property owners who were delayed for twenty-two years, initially by thirty-two months, the actual length of the moratorium at issue, and then further delayed by litigation mostly beyond the owners' control.

The Ninth Circuit had analyzed the issue of the relevant parcel first. It identified three dimensions:

> In other words, for purposes of determining whether a "taking" . . . of the plaintiffs' "property" has occurred, the proper inquiry is what constitutes the relevant "property"? Is it the fee interest that must be "taken," or is it some lesser unit of property? Property interests may have many different dimensions. For example, the dimensions of a property interest may include a physical dimension (which describes the size and shape of the property in . . . question), a functional dimension (which describes the extent to which an owner may use or dispose of the property in question), and a temporal dimension (which describes the duration of the property interest). At base, the plaintiffs' argument is that we should conceptually sever each plaintiff's fee interest into discrete segments in at least one of these dimensions—the temporal one—and treat each of those . . . segments as separate and distinct property interests for purposes of takings analysis. Under this theory, they argue that there was a categorical taking of one of those temporal segments.[100]

This is an interesting passage. Compare it with Justice Stevens' dissent in *First English*:

(9th Cir. 1990).

[94] *See supra* note 78 and accompanying text.

[95] Brief for Petitioner at 3, Dolan v. City of Tigard, 512 U.S. 374 (1994) (No. 95-518).

[96] The Chief Justice, a widower, graciously gave Mrs. Dolan the use of his family seat in the court room for the oral argument.

[97] Brief for Petitioner at 3-10, Dolan v. City of Tigard, 512 U.S. 374 (1994) (No. 95-518).

[98] *See generally* Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997).

[99] Vill. of Willowbrook v. Olech, 528 U.S. 562, 563 (2000).

[100] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 774 (9th Cir. 2000).

> Regulations are three dimensional; they have depth, width, and length. As for depth, regulations define the extent to which the owner may not use the property in question. With respect to width, regulations define the amount of property encompassed by the restrictions. Finally, and for purposes of this case, essentially, regulations set forth the duration of the restrictions. It is obvious that none of these elements can be analyzed alone to evaluate the impact of a regulation, and hence to determine whether a taking has occurred.[101]

I am not the first to recognize the strong parallel. I do not know who was, probably Circuit Judge Kozinski,[102] but Michael Berger noted it in his certiorari petition to the Court in a clever side-by-side comparison in his effort to convince the Court that the Ninth Circuit had "reversed" *First English.*[103]

Rejecting the property owners' argument for conceptual severance—they wanted the court to treat the thirty-two months as a separate temporal slice—the Ninth Circuit found precedent for a temporal "parcel as a whole" rule in *Agins v. City of Tiburon*: *"Mere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are "incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense."*[104]

The Ninth Circuit felt that "[t]o not reject the concept of temporal severance . . . would risk converting every temporary planning moratorium into a categorical taking."[105] Finding temporal severance would also be contrary to the Supreme Court's view that a *Lucas*-type categorical taking was "relatively rare" and it would disable governments from using temporary planning moratoria.[106]

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[101] First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 330 (Stevens, J., dissenting).

[102] Judge Kozinski, who dissented in the Ninth Circuit's vote to deny a rehearing, was nearly apoplectic over the Ninth Circuit embracing Stevens' theory:

> The panel does not like the Supreme Court's Takings Clause jurisprudence very much, so it reverses *First English Evangelical Lutheran Church v. County of Los Angeles* and adopts Justice Stevens's *First English* dissent. Because we are not free to rewrite Supreme Court precedent, I urged our court to take this case en banc. By voting not to rehear, we have neglected our duty and passed the burden of correcting our mistake on to a higher authority.

Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 228 F.3d 998, 999 (9th Cir. 2000) (citation omitted).

[103] Brief for Petitioner, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002) (No. 00-1167).

[104] *Tahoe-Sierra*, 216 F.3d at 776 (quoting Agins v. City of Tiburon, 447 U.S. 255, 263 n.9 (1980)) (emphasis added by the Ninth Circuit).

[105] *Id.* at 777.

[106] *Id.*

The Ninth Circuit reasoned that the holding in *First English* does not require conceptual severance of the temporal interest (as the property owners argued and the district court held). The court of appeals said *First English* was not even a case about what was a taking. It was merely about whether, once a taking was found, money damages had to be available as a remedy.

The temporary taking addressed in *First English* was made temporary not by the fact that it was for some segmented period, but because the possible permanent taking of the property became a likely temporary one when the regulation was invalidated. On remand, the state appellate court in *First English* held that there was no taking.[107]

The Ninth Circuit in *Tahoe-Sierra* then decided, based on a present value theory and the view that thirty-two months was but a small fraction of the "useful life" of the properties, that there was no taking for the thirty-two-month period.[108] Between 1984 and 1987, when the 1984 plan was subject to a temporary restraining order and injunction, the Ninth Circuit found no taking because TRPA could not have foreseen the court-ordered prohibitions on development. Finally, as to the post-1987 claims, the Ninth Circuit upheld the district court's decision that the claims were time-barred for reasons not important to understanding the Supreme Court's decision.

During oral argument, some of the Supreme Court Justices were interested in learning whether and how time as a dimension of property might be integrated with other ways of thinking about property:

> QUESTION: [J. GINSBURG] Mr. Berger, can you reconcile the different approach that this Court has said goes for spatial separation, like the air space in Penn Central, and time segregation? It seems to me that if the one—if Penn Central is the regime for splitting off the air rights, it should also be the regime for splitting off a discrete period of time.
>
> MR. BERGER: Your Honor, this Court and other courts have always dealt with the time value of property, if I may, differently than they have in these spatial terms. The fact is, leasehold interests, future interests have always been recognized as independent items of property that are independently protected by the Constitution. If you had a piece of property that had a landlord and a tenant and a lender and some remainder person—
>
> QUESTION: [J. STEVENS] But these are all physical takings.[109]

Given that I am writing this for the University of Hawai'i Law Review, I cannot resist passing on this almost-nostalgic reference to Honolulu by Justice Stevens:

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[107] *See* First English Evangelical Lutheran Church of Glendale v. County of L.A., 210 Cal. App. 3d 1353 (Cal. Ct. App. 1989).

[108] *Tahoe-Sierra*, 216 F.3d at 781-82.

[109] Oral arguments, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 2002 WL 43288, at 13 (Jan. 7, 2002) (No. 00-1167).

> QUESTION: [J. STEVENS, to the Solicitor General] May I ask, do you understand your opponent to be arguing that a curfew would be a taking?

Theodore B. Olson, the Solicitor General, appearing on behalf of the United States, was taken aback somewhat by the reference to a curfew, which has not been any significant part of takings jurisprudence in more than half a century, and he replied:

> GENERAL OLSON: A Taking—well, a curfew—
> QUESTION: [J. STEVENS] I remember in Honolulu during the war you couldn't go out after certain hours of the night, and so the property was totally useless when the curfew—would that be a taking under—
> GENERAL OLSON: Well, I think that they're arguing that any momentary suspension of the use of property would be a taking.
> QUESTION: [J. STEVENS] So it would be.[110]

The Court upheld the Ninth Circuit's decision that a thirty-two-month long moratorium on all development on hundreds of residential lots in the most sensitive runoff areas was not a facial taking. The author of the opinion was Justice Stevens, who wrote the dissent in *First English* that was paraphrased by the Ninth Circuit's majority with approval but without attribution.

Think about it, a pro-government decision with Stevens writing the opinion. You must have Souter, Ginsburg, Breyer, O'Connor, and probably Kennedy. Why O'Connor for sure? Remember what she said in *Palazzolo*[111] a year earlier about *Penn Central*?[112] She chairs the Court's *Penn Central* fan club and had a terse exchange with Scalia over it. It was clear when you counted the robes that she had a bare majority of the Court on her side in favor of a reinvigorated—if you believe it ever lost its strength—*Penn Central* three-prong analysis.

And the dissenters were as predictable as the Red Sox in the World Series. The losers this time around, when a decision finally went for the government after a string of four big losses in a short decade (*Lucas*, *Olech*, *Del Monte Dunes* and *Palazzolo*), were Chief Justice Rehnquist, Scalia and Thomas. The

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[110] *Id.* at 52.

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

[112] "Our . . . polestar instead remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings. Under these cases, interference with investment-backed expectations is one of a number of factors that a court must examine." *Id.* at 633 (O'Connor, J., concurring). "*Penn Central* does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required." *Id.* at 634 (O'Connor, J., concurring). "The temptation to adopt what amount to *per se* rules in either direction must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context." *Id.* at 635 (O'Connor, J., concurring).

Chief Justice somehow came up with a six-year moratorium, based on an odd causation theory. He also argued that a moratorium was the equivalent of a forced leasehold and consequently should be treated the same as physical taking and occupation.

Thomas wanted the Court, like in *Lucas*, to adopt the property owners' interpretation that *First English* supported, what I shall call "temporal segmentation," where you could look at the moratorium as a temporary taking of all of the use and time of the moratorium so that it was a complete loss and compensable as a categorical taking. The majority's full-blown acceptance of the "parcel-as-a-whole" rule, which generally precludes segmentation, meant that the thirty-two-month moratorium had to be looked at in light of some longer period—perhaps not eternity, as Justice Thomas speculated, but maybe the lives of the owners or the twenty-five years on average that property owners at Lake Tahoe held lots before developing. It does not matter what the exact "denominator" was in this case, except that it was substantially longer than the thirty-two-month period of the alleged taking or "numerator." A moratorium prohibiting property use for thirty-two months to develop a plan to save a threatened national treasure is not a facial taking, or "categorical" taking as that term emerged from *Lucas*. *Lucas* was a truly "extraordinary case," more akin to a physical invasion case, and not typical of nearly all other regulatory takings cases.

In terms of the relevant parcel, *Tahoe-Sierra* is of great interest because it adopts Justice Stevens' three categories of the measure of property: physical, functional, and temporal. As to the temporal dimension, the decision rejects segmentation and applies the parcel-as-a-whole rule to require consideration of the impact of future use on present value. While this is easy to apply to a moratorium of known length, the unanswered question is how will the temporal parcel-as-a-whole rule work with restrictive regulation? What shall we do with a long-term, highly-restrictive growth management program, say one that limits development to one residential unit per fifty acres until the year 2020 because of limited water or overcrowded schools? It seemed important in *Tahoe-Sierra* that the average length of time that owners held their lots before they developed their lots was twenty-five years. Although that is not a standard, it suggests that courts may consider holding periods in determining the relevant parcel.

While *Tahoe-Sierra* may expand the temporal dimension of the relevant parcel, the normal delays that come from the permitting process are not likely to be factored in, especially as part of the numerator and as the basis of a takings claim. As the Court said in *First English*: "We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before

us."[113] On the other hand, once it is determined that there a taking exists, a temporary taking is as compensable as a permanent taking, the only difference being the measure and extent of compensation.[114]

VI. LOWER FEDERAL AND STATE COURTS ON THE RELEVANT PARCEL ISSUE

The debate on relevant parcel has been more volatile, or at least uneven, in the lower federal and state courts, and there are some inconsistencies based on the type of real property interest at stake. This result may be in part because these lower courts are often the first adjudicators of the facts and law and are pushed and pulled in ways that the Supreme Court is not. In this section I will discuss rulings in the lower federal and state courts to identify the criteria used for defining the relevant parcel.

A. Lower Federal Courts

The 1981 decision by the U.S. Court of Claims in *Deltona Corp. v. United States*[115] is the earliest, important lower federal court case. It was cited in many later decisions and then slowly faded from further recognition.

Deltona developed and sold "finger fill" lots at Marco Island on the Gulf coast of Florida on a 10,000-acre parcel they purchased in 1964 for $7.5 million. They planned 12,000 lots in five phases. What a great business. Combine submerged lands, that means land underwater, and wetlands, dredge up the sandy bottom and pile the dredge spoils in long fingers and voila!—instant developable dry land next to deep water.

Deltona created and sold these lots for years until the U.S. Army Corps of Engineers obtained jurisdiction over the dredging and filling process and denied further approvals.[116] The area rendered undevelopable was 20% of the

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[113] First English Evangelical Lutheran Church of Glendale v. County of L.A., 482 U.S. 304, 321 (1987).

[114] The leading temporary physical taking case is *United States v. General Motors Corp.*, 323 U.S. 373 (1945) (compensation due even if the taking is only a day). *First English Evangelical Lutheran Church of Glendale v. County of L.A.*, 482 U.S. 304, 321 (1987) is probably the leading temporary takings case, but importantly on remand the lower California appellate court held that there was a sufficient use remaining in the property and therefore no taking. *See* First English Evangelical Lutheran Church of Glendale v. County of L.A., 210 Cal. App. 3d 1353 (Cal. Ct. App. 1989).

[115] 657 F.2d 1184 (Cl. Ct. 1981).

[116] *Id.* at 1190.

The crucial factor in this case is that since the late 1960's the regulatory jurisdiction of the Army Corps of Engineers has substantially expanded pursuant to § 404 of the FWPCA and under the spur of steadily evolving legislation the Corps has greatly added to the substantive criteria governing the issuance of dredge and fill permits within its

total acreage and 33% of the developable lots. The Claims Court held that there was no compensable taking because the Corps' intervention had not extinguished a fundamental attribute of ownership and Deltona was not prevented from "deriving many other economically viable uses from its parcel."[117] The court found that the "remaining land uses are plentiful and its residual economic position very great."[118]

On the relevant parcel issue, the court simply reiterated *Penn Central* without further comment:

> In applying the foregoing considerations, it is important to bear in mind the Supreme Court's admonition:
> "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel *as a whole*."[119]

It is important to note, however, that the court applied an "even if" analysis to the relevant parcel—even if the court considered only the highly-restricted last two phases of the five phase project as the relevant parcel, Deltona still had 111 acres of upland in those phases that it could develop without a Corps permit with a total market value of $2.5 million, twice what they paid for the two phases.[120]

Not long after *Deltona*, the Claims Court decided *Jentgen v. United States*,[121] another Florida wetlands case, and found no taking. In 1971, Jentgen purchased a 101.8-acre tract for $150,000. A year later Congress enacted section 404 of the Federal Water Pollution Control Act Amendments with the practical effect of putting the Corps of Engineers in the business of protecting wetlands.[122] The Corps denied Jentgen's application for a permit to dredge and fill 60 of the 80 acres of wetlands, but offered to allow 20 of those 80 acres to be filled.[123] Jentgen declined the offer, did not appeal the denial and instead sued for a taking.[124] "Reduced to its essentials, this case merely presents an instance of some diminution in value, or frustration of

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jurisdiction.

Id.

[117] *Id.* at 1192.

[118] *Id.*

[119] *Id.* at 1192.

[120] *Id.*

[121] 657 F.2d 1210 (1981), *cert. denied.* 455 U.S. 1017 (1982).

[122] 33 U.S.C. § 1344 (2002).

[123] *Jentgen*, 657 F.2d at 1212.

[124] *Id.*

reasonable investment-backed expectations . . . an insufficient basis . . . to establish a taking."[125] On the relevant parcel front, all the court did was quote verbatim what it said in *Deltona*, but without citation.[126]

The next case, this one in the Court of Appeals for the Federal Circuit, is yet another Florida wetlands case, *Florida Rock Industries, Inc. v. United States*, with a long and tortured later history.[127] Even though it is considered by some to be a denominator or relevant parcel case, it is not.[128] Think of it as numerator case—how much is considered taken.

The company purchased 1,560 acres, mostly wetlands, located in Dade County, Florida, west of Miami in 1972 for $2,964,000 solely to mine the limestone (to make concrete) on land zoned for that use. Congress amended the Clean Water Act after Florida Rock purchased. Prior to the amendment, Florida Rock could have mined limestone without any further approval. In 1978 it stated mining without a federal permit. The Corps issued a cease and desist order when it learned of the mining. In 1980 Florida Rock applied to the Corps to mine 98 of the 1,560 acres because that is all the Corps would consider in an application.

The federal circuit upheld the trial court's holding that only the ninety-eight acres should be considered as the numerator for determining the award of damages[129] and in the same breath warned the Corps that it was almost certain to pay damages for the remaining land:

> If the instant case, after the remand, still results in a substantial award against the government, the Army engineers probably would want to consider whether the continued protection of the 1,560 acres of wetlands was worth the damage to the public fisc. This right should be preserved to them.[130]

As to the denominator, the federal circuit rejected the mindless application of the parcel-as-whole rule in favor of what is essentially a futility exception to the rule:

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[125] *Id.* at 1214.

[126] *See id.*

[127] 791 F.2d 893, (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1053 (1987), *on remand* 21 Cl. Ct. 161 (1990) *vacated and remanded* 18 F.3d 1560 (Fed. Cir. 1994), *rehearing en banc denied* 1994 U.S. App. LEXIS 16257 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995), *on remand* 45 Fed. Cl. 21 (Cl. Ct. 1999), *appeal dismissed in part, motion granted in part*, 243 F.3d 555 (Fed. Cir. 2000), *appeal dismissed* 19 Fed. Cir. 865 (2001).

[128] Timothy J. Dowling, *The Parcel-as-a-Whole Rule and Its Importance in Defending Against Regulatory Takings Challenges in* TAKING SIDE IN TAKINGS ISSUES 75, 91 (Thomas E. Roberts, ed. ABA 2002) based on Chapter 6 of Douglas T. Kendall et al., TAKINGS LITIGATION HANDBOOK: DEFENDING TAKINGS CHALLENGES TO LAND USE REGULATIONS (American Legal 2000).

[129] *Florida Rock*, 791 F.2d at 906.

[130] *Id.* at 905.

> Defendant says there was no taking because the 98 acres held taken are only a small part of a single tract of 1,560 acres, the rest not taken, and no restriction arising from the denial of the permit applies to them. Such a contention had dignity and was of decisive importance in the cases of *Deltona*, and *Jentgen*, but there the Army engineers considered the entire tracts and determined that portions thereof could be developed as proposed. Here the Army engineers considered only the 98 acres. As to the rest, it is and, for the immediate future, remains illegal to mine without a permit in the only fashion Florida Rock considers feasible. Florida Rock could apply seriatim for permits to allow mining on the rest, and inevitably, from the evidence and the findings, have them denied. We do not think that the mere possibility a permit might be granted, like the possibility one might put a pot of water on a hot stove and have it freeze, is a reality requiring us to deem that viewing the 1,560 acres as a whole, Florida Rock might in theory mine a lot of limestone, or perhaps market a housing development as appellant also would have us speculate.[131]

This makes sense, especially since the alternative of considering the balance of the 1,560 acres to be potentially developable would have the practical effect of precluding a finding of a taking on the ninety-eight acres. It is this flexible, fact-based approach that the Supreme Court may be suggesting it will use.

Perhaps the first relevant parcel case to begin to analyze the interplay of multiple factors is *Ciampitti v. United States*,[132] a 1991 decision by the claims court. Ciampitti purchased dozens of undeveloped lots at Diamond Beach in Cape May County, New Jersey, with a plan to improve and sell them. His last acquisition was for forty-five acres with fourteen acres of state-regulated wetlands and four more acres of federal wetlands. Ciampitti had a deal to sell the non-wetland areas, more than half of the property, to a developer for more money than the entire purchase ($4.6 v. $3.3 million). When the Corps denied Ciampitti's application to fill the remaining land, he sued for a taking. His appraiser valued only the fourteen acres for which the permit was denied; the government's appraiser included in his appraisal over forty acres Ciampitti owned at the time the permit was denied.[133] So the relevant parcel issue was joined:

> From the appraisal testimony, the court finds that, if the proper comparison is between the value of the wetlands as if they could be developed versus their value after the permit denial, the plaintiff has shown a substantial destruction in value. The question, therefore, is whether that is the proper comparison.[134]

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[131] *Id.* at 904 (citations omitted).

[132] 22 Cl. Ct. 310 (Cl. Ct. 1991).

[133] *Id.* at 319 n.4.

[134] *Id.* at 317.

In determining the relevant parcel, the court looked what I believe is the first comprehensive list of factors to be considered:

> In the case of a landowner who owns both wetlands and adjacent uplands, it would clearly be unrealistic to focus exclusively on the wetlands, and ignore whatever rights might remain in the uplands. If a governmental entity required a buffer, for example, around a housing development, a court would not entertain a separate claim for the land dedicated to buffer. It would no doubt take into consideration the extent to which the whole parcel could be developed. *Factors such as the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the protected lands enhance the value of remaining lands, and no doubt many others would enter the calculus.* The effect of a taking can obviously be disguised if the property at issue is too broadly defined. Conversely, a taking can appear to emerge if the property is viewed too narrowly. The effort should be to identify the parcel as realistically and fairly as possible, given the entire factual and regulatory environment.[135]

The court found no taking because the relevant parcel was the forty-five acres owned at the time of the denial and, even minus the loss claimed by Ciampitti, there was $14 million of value left.[136] The court reasoned that Ciampitti had purchased all forty-five acres in a single purchase with a single mortgage, citing *Deltona* and *Jentgen*.[137] The court also discounted the fact that the two portions of the property were not contiguous. Ciampitti owned the connecting piece and he had treated both parts of this last purchase as a unified piece of property.[138]

Ciampitti is the first good example of a balance of several competing factors to be considered in development project that is typically complex and protracted. Many development projects are like this, with land boundaries, development and marketing strategies that change constantly, changing regulatory requirements, business cycles, shifts in ownership. The court identified these crucial factors and then applied them. Inherent in the analysis is the three-part *Penn Central* test.

The next case takes us out of the Federal Court of Claims into federal district courts pondering the wonders of an amortization scheme for billboards. In *Naegele Outdoor Advertising, Inc. v. City of Durham*,[139] Durham, North Carolina's amortization program eliminated all off-premises, commercial billboards, except along interstate highways or federally-aided primary highways, after a five-and-a-half year amortization period during

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[135] *Id.* at 318-19 (emphasis added).

[136] *Id.* at 319-20.

[137] *Id.*

[138] *Id.* at 320.

[139] 803 F. Supp. 1068 (N.C. 1992).

which the billboard owners would presumably make enough money to avoid there being a taking. A billboard owner sued the city and questioned the value of the denominator before the court could get to the takings analysis.

It came down to: Is it each individual affected billboard (all 105 of them in Durham) or is it the market area within which Naegele sells sign faces (in this case all 231 billboards in the Durham metro market)?[140] Because Naegele rented specific sign faces only 1.7% of the time, and 98.3% of the time rented space on a "showing" or "share" basis in which it promised a certain percentage of drivers would see the message, all of the signs in the smallest market area were appropriately the denominator or relevant parcel against which any loss on the signs prohibited by the regulation must be compared.[141] Had it chosen each individual sign as the denominator, the court was quick to admit that a "*Lucas* inquiry into the nature of Naegele's title could be determinative."[142] Again, this is an entirely logical application of a flexible approach, looking into the business realities of this particular outdoor advertising company and its market.

Likewise, a year later in *Tabb Lakes, Ltd. v. United States*,[143] the federal circuit decided not to define "whole parcel" as a matter of law but to reach its decision based on the facts of the case. Tabb Lakes, Ltd., a developer, purchased 167 acres in York County, Virginia, for a residential subdivision. It developed lots on the first two of five phases and sold most of them. The Corps claimed jurisdiction over thirty-eight acres of wetlands in the final four phases and issued a cease and desist order. Tabb Lakes ultimately sued and three years later the court held that the Corps did not have jurisdiction. Tabb Lakes sued for a temporary taking caused by the delay.

The relevant parcel question had two parts: (1) was each lot the denominator or was it some assemblage of larger parcels, and (2) was it all five phases or just the last three?

As to the first question, the answer was obvious:

> Clearly, the quantum of land to be considered is not each individual lot containing wetlands or even the combined area of wetlands. If that were true, the Corps' protection of wetlands via a permit system would, ipso facto, constitute a taking in every case where it exercises its statutory authority.[144]

And as to the second question, the court ducked it by finding that regardless the delay was not a taking because it was part of a permitting process:

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[140] *See id.* at 1073-74.

[141] *Id.*

[142] *Id.* at 1080 n.7.

[143] 10 F.3d 796 (Fed. Cir. 1993).

[144] *Id.* at 802 (citing Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) and Concrete Pipe & Prods. Inc. v. Constr. Laborers Pension Trust, 508 U.S. 602 (1993)).

> Plaintiff concedes that if we consider all five sections of the subdivision as "the property" (which the government argues is the relevant area), there is no taking. It maintains that looking to sections 3, 4, and 5, however, leads to the contrary conclusion. We agree with the Claims Court that this dispute need not be resolved. Even if only sections 3, 4, and 5 are considered, the permit system brings the facts of this case within the ambit of the holdings that preliminary regulatory activity does not effect a taking in the constitutional sense.[145]

Here again, we see the interplay between the diminution in value, investment-backed expectations, character of the government action analysis and the determination of the relevant parcel. As with the *Deltona* case, the court applied an "even if" test in the interactive analysis of the *Penn Central*-type partial taking and relevant parcel.

Next in line is the popular 1994 *Loveladies Harbor*[146] decision by the federal circuit, popular because of its pleasant name and engaging facts. The developer bought 250 acres on the New Jersey coast in 1958 and developed all but fifty-one acres before the enactment of the Clean Water Act in 1972. Of the fifty-one acres, fifty were wetlands.

Loveladies Harbor sought state and federal permits. The developer wrangled with the state and eventually settled by agreeing to develop just 12.5 of the fifty-one acres. It then went to the Corps where the state acknowledged it had settled the claim by Loveladies Harbor by permitting the filling of 12.5 acres, but claimed that Loveladies Harbor was not in compliance with federal coastal law, and that the Corps should deny the application. The Corps denied the permit. Loveladies sued the United States claiming a taking of 12.5 acres. The claims court found a taking of the 12.5 acres.[147]

Now the question is—what is the relevant parcel? The 250 acres purchased in 1958, the fifty-one acres left for development or the 12.5 acres permitted by the state to be filled as part of the settlement of the state case? If it is 250 or fifty-one acres, it almost certainly is not a taking. If all of 12.5 acres has been taken and the relevant parcel is 12.5 acres, then it is a *Lucas* categorical taking. Here is how the court prefaced its analysis:

> On the facts of the case before us, the question of whether there has been a partial or total loss of economic use (in the latter case a 'categorical' taking), depends on what is the specific property that was affected by the permit denial. If the tract of land that is the measure of the economic value after the regulatory imposition is defined as only that land for which the use permit is denied, that provides the easiest case for those arguing that a categorical taking occurred. On the other hand, if the tract of land is defined as some larger piece, one with substantial

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[145] *Id.*

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

[147] *Id.*

> residuary value independent of the wetlands regulation, then either a partial or no taking occurred, depending on the test as described in Florida Rock. This is the denominator problem.[148]

The court then offered: "Our precedent displays a flexible approach, designed to account for factual nuances."[149] Noteworthy facts in this case are that the 199 acres were developed without objections by the government and New Jersey had exacted 38.5 acres of open space out of the fifty-one acres (leaving the 12.5 acres in question) as a condition of its settlement. So, how could the open space land possibly be part of the denominator?[150] Thus, the court held the relevant parcel must be 12.5 acres, and it was a *Lucas* categorical taking.[151]

This is an unusual case because of the large area purchased and developed before the controlling federal law and the state's inconsistent decision to settle the case and then arguing that the settlement did not comply with federal coastal law. The 38.5 acres was set aside by the settlement for the state's benefit and yet the federal government attempted to count it in determining the relevant parcel. What if the developer of a disputed coastal development gave a conservation group an open space easement over part of the land? Would that land have to be excluded from the relevant parcel? The logic of *Loveladies* suggests it should be excluded. What if the shoe were on the other foot and the Corps settled first, but the state's law was more restrictive? Would the land preserved in the federal settlement by carved out of the relevant parcel? Of course the potential interplay of local government regulation must also be considered. Perhaps the lesson here is that settlements should not occur without all levels of government participating.

These cases seem to form clusters, following a developing line based on a common characteristic. *Deltona* and *Jentgen*, for example, cited in *Florida Rock*, are cited with approval in a factually similar case fourteen years later, *Broadwater Farms Joint Venture v. United States*.[152] Broadwaters Farms purchased at a foreclosure sale a previously-subdivided fifty-one lot residential property in 1987. Phase II had twenty-four lots and Phase III had the remaining twenty-seven lots. Phase II was mostly developed at the time of purchase; Phase III was raw land.

Broadwater quickly resold Phase II to a residential developer and then contracted to sell Phase III to the same developer subject to Broadwater

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[148] *Id.* at 1180 (footnote omitted) (citations omitted).

[149] *Id.* at 1181.

[150] *See id.* at 1182.

[151] *Id.* at 1181-82.

[152] 35 Fed. Cl. 232 (Fed. Cl. 1996); *vacated* by Broadwater Farms Joint Venture v. United States, 1997 U.S. App. LEXIS 19859 (Fed. Cir. 1997).

installing the infrastructure. Broadwater got to work and was 85% done, including all utilities installed and the road graded, when guess who arrived on the scene? A U.S. Army Corps of Engineers official inspected the property and declared that Phase II had been built in a jurisdictional wetland and that Phase III was in violation of the Clean Water Act. The Corps issued a cease and desist order.

An agreement was reached by which eleven of the twenty-seven lots in Phase III would be restored as wetlands. With reconfiguration of the layout, the loss was twelve lots. Was this a taking? What is the relevant parcel? Is it Phases II and III combined (as the United States argued for), Phase III alone, or each and every previously-subdivided lot in Phase III (as Broadwater Farms claimed)?

Broadwater Farms argued that it did not buy a single parcel with twenty-seven lots, but that it bought twenty-seven separate lots. The court rejected that idea, saying: "Plaintiff did not treat them in that manner [as separate parcels] before the Corps intervened. All fifty-one lots were financed and purchased at the same time as a whole. . . . The project's value to plaintiff was in overall development of the property, not in each individual lot."[153] Importantly, the court excluded Phase II from the relevant parcel citing *Loveladies Harbor* for the principle that there may not be a "rigid rule that the parcel as a whole must include all land originally owned by plaintiffs."[154] The court stated in *Broadwater Farms* that "[i]t is a determination that relies on the particular facts of the case."[155]

Here is how the court reasoned that Phase II should not be part of the relevant parcel:

> Phase II development was complete soon after plaintiff's purchase, and was sold in the regular course of business a year before the Corps became involved in this matter. We have no indication that plaintiff disposed of the property in anticipation of a takings claim. It would not realistically reflect plaintiff's

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[153] *Broadwater*, 35 Fed. Cl. at 240 (citations omitted). The court also rejected Broadwater's claim that the lots were the relevant parcels because they were taxed each individually under state law. *Id.* at n.3.

> Plaintiff contends that the State of Maryland's treatment of each lot as a separate parcel for tax purposes is decisive on this issue. This is an important argument. The Supreme Court has noted that a solution to the "parcel as a whole" question may lie in "whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land."

Id. (citation omitted). "However, we find that other considerations show that the proper parcel as a whole is Phase III." *Id.*

[154] *Id.* at 240 (quoting Loveladies Harbor, Inc. v. United States, 15 Cl. Ct. 381, 392 (1988), *summary judgment denied*, 21 Cl. Ct. 153 (1990), *aff'd*, 28 F.3D 1171 (Fed. Cir. 1994)).

[155] *Id.*

property interest to charge it now for property it did not own at the time of the taking.[156]

The Court of Federal Claims held that the loss of twelve lots was not a taking because the property had "substantial residual value."[157]

The court of appeals upheld the determination of the relevant parcel, noting that the loss in anticipated gross value was 28%.[158] The court however, vacated the decision and remanded it to the Claims Court because it had failed to analyze the second and third factors from *Penn Central* as to investment-backed expectations and the character of the government's action.[159] Importantly, the court of appeals expressly recognized the need to look at the interplay of the three factors against the backdrop of the relevant parcel: "The trial court will also have the opportunity to balance these findings with its assessment of the economic impact of the regulation to determine whether Broadwater is entitled to compensation under a partial regulatory taking analysis."[160]

Thus, even though we have a single entity purchasing a property in a single transaction, part of that property may be conveyed out and excluded from the relevant parcel if it was commercially reasonable to do so and there was no apparent intent to gerrymander the remaining property in support of a taking claim.

District Intown Properties Partnership v. District of Columbia[161] is a case involving property across from the National Zoo in Washington, D.C. District Intown Properties purchased real property including an apartment building and landscaped lawns in 1961. In 1988, District Intown subdivided the property into nine contiguous lots, one containing the apartment building and the other eight carving up the lawn. On March 2, 1989, five days before District Intown received zoning approval for construction on the eight lawn lots, a community group filed a landmark designation petition, which the Landmark Preservation Review Board approved on May 17 of that year. The Review Board recommended denial of the building permits because any construction on the lawn would destroy its landmark status. In a subsequent hearing, the Mayor's agent agreed. District Intown sued, claiming the zone change elicited a taking.

The Court of Appeals for the District of Columbia Circuit upheld the district court's determination that the relevant parcel was the full nine lots, including the apartment building, rather than just the eight lots, because the

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[156] *Id.*

[157] *Id.* at 241.

[158] Broadwater Farms Joint Venture v. United States, No. 96-5100, 1997 U.S. App. LEXIS 19859 at *7 (Fed. Cir. July 31, 1997).

[159] *Id.* at *8.

[160] *Id.* at *8-9.

[161] 198 F.3d 874 (D.C. Cir. 1999), *cert. denied*, 531 U.S. 812 (2000).

nine lots were spatially and functionally contiguous, had been treated as a single indivisible property for more than twenty-five years, and even after subdivision were not treated as separate from the apartment building by the owner for accounting of maintenance expenses.[162] District Intown argued that *Penn Central* weighed against treating the nine lots as one relevant parcel, but the court noted that the *Penn Central* opinion was simply criticizing the trial court for considering "all of Penn Central's holdings in the vicinity of Grand Central Station as part of the denominator."[163] The court also distinguished similar arguments with regard to *Florida Rock*[164] and *Loveladies Harbor*.[165] The court noted favorably the *Loveladies Harbor* emphasis on a "flexible approach, designed to account for factual nuances," and "the timing of transfers in light of the developing regulatory environment."[166] The court discounted the fact that the eight lawn lots had been taxed at a higher rate as developable property by the District of Columbia since subdivision, noting that the owner was free to recombine the lots and thus avoid this negative result.

The concurrence by Judge Williams criticizes the majority's use of the *Ciampitti* factors, saying that instead of focusing on the property's use before regulation, "[t]he Fifth Amendment must be applied 'with reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.'"[167] The concurrence also argued that of the *Ciampitti* factors, the fourth one (the extent to which the regulated parcel benefits the neighboring lot), which the majority seemed to brush aside, seems to be the most relevant. The court cited to *Keystone* and noted that when a regulated tract benefits contiguous property, it is less likely the regulation will have a net negative impact.[168] This is the internalized average reciprocity of advantage discussed earlier.[169] In *Keystone*, the court refused to treat the "support estate" as a separate interest from the rest of the estate because it had value only insofar as it protected or enhanced the value of the estate to which it was associated.[170] In *District Intown Properties*, Judge Williams emphasized the importance of "synergies" between interests to determine the

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[162] *Id.* at 880.

[163] *Id.* (emphasis omitted).

[164] *Id.* at 881.

[165] *Id.*

[166] *Id.* (citing Loveladies Harbor, 28 F. 3d at 1180 (Fed. Cir. 1994)).

[167] *Id.* at 888 (Williams, C.J., concurring) (quoting Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 143 n.6 (1978) (Rehnquist, J., dissenting)) (emphasis omitted).

[168] *Id.*

[169] *See supra* note 42 accompanying text.

[170] Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 501 (1987).

relevant parcel.[171] What is so interesting and important about this decision is that the court is right upfront about using "[a]ll relevant and subjective factors [to] support . . . [its] conclusion."[172]

Again, there is the shifting between the diminution of value analysis and the relevant parcel question, suggesting the inextricable linkage. The court applies a two-stage "even if" analysis—even if the lots are treated separately, there is no *Lucas* categorical taking[173] and even if the relevant parcel is subject to a *Penn Central* inquiry, there is still no taking because of a lack of investment-backed expectations.[174] Also linked in this case are the character of the government's action, given the historic designation issues, and location across from the National Zoo. Here, the reasoning is based on the complete integration of the *Lucas* and *Penn Central* tests with the determination of the relevant parcel.

In *Forest Properties, Inc. v. United States*,[175] Forest sought to develop 53 acres of upland adjoining 9.4 acres of wetland "lake-bottom" property at Big Bear Lake in southern California. Forest Properties purchased the 53 acres of upland in 1988 for $3.6 million after the seller had filed an application to fill 9 of the 9.4 acres of lake bottom to create 100 house lots. Five months later Forest Properties purchased the 9.4 acres of lake bottom without additional payment. It later claimed the $3.6 million was payment for both. The seller assigned the dredging permit application to Forest Properties. Pursuant to an agreement with the water district arising out of the settlement of a dispute the seller had with the district, the lake bottom would revert to the district if dredging and filling was not completed in three years.

The story follows the usual line—the Corps of Engineers denied a section 404 permit[176] to fill the 9 acres of wetland and then denied a subsequent scaled-down application for 4.4 acres. Forest developed the upland acreage and then filed suit alleging a regulatory taking and a physical invasion taking of the wetland property. Forest Properties made $4.9 million on the 106 upland lots it developed ($12 million in sales minus the $3.6 million purchase price minus the development costs) and "lost" $2.36 million it would have made on the filled-land lots.[177]

The Court of Appeals for the Federal Circuit quickly dismissed the physical invasion argument, noting that the reversion would result from the contractual

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[171] District Intown Props. v. District of Columbia, 198 F.3d 874, 890 (D.C. Cir. 1999).

[172] *Id.* at 877.

[173] *Id.* at 882-83.

[174] *Id.* at 883-84.

[175] 177 F.3d 1360 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 951 (1999)

[176] *Id.* at 1364.

[177] *Id.*

arrangement between the plaintiff and the water district, rather than from the denial of the fill permit.[178]

The court also found that the relevant parcel in the regulatory taking analysis was the entire 62+ acres (53 acres of upland and 9.4 acres of lake bottom) pointing out that the two holdings had always been treated as a single income-producing unit, and that only the owner of the upland portion could take advantage of the option on the wetland portion.[179] The court was not persuaded by arguments that plaintiff had two different kinds of title to the two parcels (fee simple in the upland and equitable title in the wetland), that these interests had been acquired in separate transactions at different times, that different local government authorities had regulatory jurisdiction over the two parcels, and that the two parcels were capable of separate development.[180]

The obvious relationship between the determination of the relevant parcel and the diminution of value test from *Penn Central* is starkly presented in the court's own view of this case compared with its decision in *Loveladies Harbor*:

> This case stands in sharp contrast to *Loveladies Harbor*, where the evidence led the Court of Federal Claims to find that the fair market value of the relevant parcel (there the submerged land) was $2,658,000 before the denial of the fill permit and only $12,500 after the denial—a diminution in value of 99%. We held that "The trial court's conclusion that the permit denial was effectively a total taking of the property owner's interest in these acres is fully supported in the record: there is no clear error in that conclusion."[181]

Palm Beach Isles Associates v. United States,[182] another Federal Circuit case barely three years old, has a fact pattern that reads like a demented land use law professor's final exam. As with most of these cases, you will benefit by making a sketch of the property. Judge Plager, who wrote for a unanimous panel and authored the *Loveladies Harbor*[183] decision in 1994, must have seen this case as an opportunity to define the relevant parcel more subjectively.

Palm Beach Isles Associates, ("PBIA"), purchased 311.7 acres of land in 1956 north of Palm Beach, Florida with the Atlantic Ocean to the east and Lake Worth to the west.[184] In 1968, PBIA sold 261 upland beachfront acres to a developer. The remaining 50.7-acre parcel consisted of 1.4 acres of

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[178] *Id.* at 1364-65.

[179] *Id.* at 1365.

[180] *Id.*

[181] *Id.* at 1367 (citations omitted) (quoting Loveladies Harbor v. United States, 28 F.3d 1171, 1182 (Fed. Cir. 1994)).

[182] 208 F.3d 1374 (Fed. Cir. 2000) [hereinafter "*Palm Beach I*"].

[183] 28 F.3d 1171 (Fed. Cir. 1994).

[184] *Palm Beach I*, 208 F.3d at 1377. This case precedes Palm Beach Isles Assoc. v. United States, 231 F.3d 1365 (Fed. Cir. 2000) [hereinafter "*Palm Beach II*"].

shoreland wetlands adjacent to the road and 49.3 acres of submerged land below the mean high water mark in the bed of Lake Worth (a tidal water with direct access to the ocean) adjacent to the wetlands.

Much like *Loveladies Harbor*, PBIA got into a fight with the state over the filling, sued and settled.[185] The issue in PBIA's case concerned the acknowledgement of rights under the deed by which PBIA purchased from the state.[186]

Now, plug in the usual wetlands takings claim story line—the U.S Army Corps of Engineers denied a permit to fill the 50.7 acres under the Clean Water Act, and PBIA filed suit, alleging a taking and over $10 million in damages.[187] The Court of Federal Claims first found that the submerged acreage was subject to the federal navigational servitude, and therefore the owners never had the right to develop it.[188] The trial court then determined that the remaining wetland acres should not be considered on their own, but as part of the original 311.7 acres acquired in 1956. After applying the *Penn Central* three-pronged traditional regulatory takings analysis,[189] the court found there was no taking despite the complete loss of value as to the wetland parcel, and granted the government's summary judgment motion. The court held that PBIA could not have reasonably expected to develop the remaining property when it sold the larger portion in 1968.[190]

The Court of Appeals for the Federal Circuit reviewed making an independent determination of whether the standards for summary judgment were met. The Federal Circuit Court's analysis began by determining the relevant parcel. Notably, the court added the word "economic" in defining the parcel:

> Whether the asserted imposition causes a total wipeout or something less (see *Florida Rock* for a discussion of the implications of "something less") depends in a case such as this on what is the economically relevant parcel—the "denominator problem." We must decide if the whole 311.7 acre parcel is the relevant denominator, as argued by the Government and found by the Court of Federal Claims, or whether the relevant parcel is the 50.7 acres for which the permit was denied, as argued by PBIA. This is a conclusion of law, based on the facts of the case.[191]
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> The problem is referred to as the denominator problem because, in comparing the value that has been taken from the property by the imposition with the value that

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[185] *Palm Beach I* 208 F.3d at 1378.

[186] *Id.*

[187] *Id.*

[188] *Id.*

[189] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

[190] *Palm Beach I*, 208 F.3d at 1379.

[191] *Id.* at 1380 (footnote omitted).

remains in the property, "one of the critical questions is determining how to define the unit of property whose value is to furnish the denominator of the fraction."[192]

The Federal Circuit said it could gain some insight from *Loveladies*.[193] It discussed the case and then turned to the problem at hand—what to do with the Claims Court's decision that all 311.7 acres was the relevant parcel because the regulatory structure on which the permit denials was based were in place before PBIA sold of the 261 acres?[194]

The federal circuit said again that it would not be fettered by rigid rules and that it would follow the "flexible approach":

> The timing of property acquisition and development, compared with the enactment and implementation of the governmental regimen that led to the regulatory imposition, is a factor, but only one factor, to be considered in determining the proper denominator for analysis. As we said in *Loveladies Harbor*, "[o]ur precedent displays a flexible approach, designed to account for factual nuances." In a given case, other factors may be more compelling.
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> In this case, PBIA never planned to develop the parcels as a single unit. Furthermore, PBIA bought the land in 1956 and sold the 261 acres in 1968, both events occurring before the environmental considerations contained in the Clean Water Act came into play, beginning in 1972. It is inappropriate to consider those transactions to have occurred in the context of the substance of a regulatory structure that was not in place at the relevant times.
>
> The regulatory imposition that infected the development plans for the 50.7 acres was unrelated to PBIA's plans for and disposition of the 261 acres of beachfront upland on the east side of the road. The development of that property was physically and temporally remote from, and legally unconnected to, the 50.7 acres of wetlands and submerged lake bed on the lake side of the spit. Combining the two tracts for purposes of the regulatory takings analysis involved here, simply because at one time they were under common ownership, or because one of the tracts sold for a substantial price, cannot be justified. The trial court's conclusion to the contrary was error.
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> Once the proper parcel is defined as the 50.7 acres, it becomes clear that, without the dredge and fill permits, the entire 50.7 acres, including the 1.4 acres of wetlands, have no or minimal value. Thus, the facts are uncontrovertible [sic, presumably "incontrovertible"] that the permit denial has the effect of denying the property owner *all* economically viable use of the property, and, since the State has stipulated that the property owner under state law has the right to dredge and fill, the denial by the Corps of the permits constitutes a categorical

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[192] *Id.* at 1380 n.4 (citation omitted) (quoting *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497 (1987)).

[193] *Id.* at 1380-81.

[194] *Id.* at 1381.

> taking of the 50.7 acres by the Federal Government. The Court of Federal Claims erred in holding otherwise.
> Since there is a categorical taking of the 50.7 acres, the issue of PBIA's investment-backed expectations under prong (2) of the Loveladies Harbor analysis is not applicable. We move to the Government's asserted defense under prong (3) [navigational servitude].[195]

The court remanded the case for a determination on whether the United States could properly argue the federal navigational servitude issue.[196] The government filed a petition for rehearing before both the panel and the court en banc. The panel reheard the case, and issued a supplementary opinion in which it concluded, among other things, that the 1.4 acres of wetland should be analyzed separately from the rest of the parcel because they were not subject to the navigational servitude. The court remanded the case again with direction to the trial court to that effect.[197]

What happened was essentially a failure of nomenclature. The 1.4 acres of "wetlands" were not submerged lands and therefore not subject to the navigational servitude. The wetlands were, for relevant parcel purposes, "uplands" that should be considered on their own.

The petition for rehearing by the full court was denied, but Judge Gajarsa wrote a dissenting opinion in which he accused the panel of finding the relevant parcel by altering the factual determinations of the trial court, and in which he argued that the Clean Water Act regulatory scheme requiring dredge and fill permits in fact had been at least partially in place and under active consideration at the time the 261 acres was sold, and that this upland portion had been sold for a significant profit. Gajarsa would have found the full 311.7 acres to be the relevant parcel.[198]

A nearly encyclopedic summary of all of the Court of Federal Claims decisions on the relevant parcel can be found in the twenty-five page decision by that court in 2001 in *Walcek v. United States*.[199] The plaintiffs purchased 14.5 acres at Bethany Beach, Delaware having purchased the property in 1971 shortly before the enactment of the Clean Water Act. Of the 14.5 acres, 13.2 acres are federally regulated wetlands under the Clean Water Act. Between

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[195] *Id.* (citations and footnotes omitted).

[196] *Id.* at 1386.

[197] *Palm Beach II*, 231 F.3d 1365 (Fed. Cir. 2000). The more important question, perhaps, was how to resolve the difference in dicta between *Florida Rock Industries v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), and *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), on whether with a *Lucas* categorical taking there should be any analysis of investment-backed expectations. The court concluded that they were wrong in the first decision and that there should be no analysis of investment-backed expectation with a categorical taking. *Id.* at 1364.

[198] *Id.* (Gajarsa, J., dissenting).

[199] 49 Fed. Cl. 248 (Fed. Cl. 2001).

1984 and 1987, the property owners began developing the property without the required permits. The Corps issued a cease and desist order directing them to remove the unauthorized fill. The Walceks then submitted an application to the Corps to fill the property to enable a seventy-seven lot development in a project that included bulkheading, drainage ditches and fill.

The State found that development of the property was inconsistent with state law and ultimately the Corps proposed three alternative developments—a twenty-eight lot single family subdivision, a twenty-six lot subdivision and a thirty-six unit townhouse development. The property owners rejected these alternatives and sued for a taking. In deciding the plaintiffs' claims, the Court of Federal Claims held that the limitations on the development constituted a mere diminution (less than 60%) in value which was not compensable and that the plaintiffs could realize a return consistent with reasonable investment-backed expectations.

The court's analysis of its prior decisions on the economic impact and its associated determination of the parcel as a whole, the numerator, the denominator, and investment-backed expectations is worth reading.[200]

The most recent federal relevant parcel decision is probably that of the Court of Appeals for the Federal Circuit in *Walcek* on September 11, 2002, affirming the dismissal of the complaint by the Court of Federal Claims.[201] The federal circuit noted that the Walceks had argued that the relevant parcel was the 13.2 acres of wetlands, including the 2.2 acres which were permitted for development. The trial court on that basis had held that there was no categorical taking.[202] James S. Burling of the Pacific Legal Foundation argued for the plaintiffs and tried, as he did in *Palazzolo*, to revisit the issue of the relevant parcel by arguing that the 11 acres of wetlands should be the relevant parcel.[203] He was rebuffed, as he was in *Palazzolo*, because the Walceks had failed to raise the 11-acre argument below.[204] The Federal Circuit also said that there was no Supreme Court precedent to alter the result.[205] In *Palazzolo*, the Court declined to reach the issue because *Palazzolo* had failed to raise it below.[206]

Ultimately, the Federal Circuit found no error in the Court of Federal Claims' analysis of the *Penn Central* factors and its finding that there was no

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[200] *Id.* at 258-72.

[201] Walcek v. United States, 303 F.3d 1349 (Fed. Cir. 2002).

[202] *Id.* at 1354-55.

[203] *Id.* at 1354.

[204] *Id.* at 1355.

[205] *Id.*; *see* Palazzolo v. Rhode Island, 533 U.S. 606, 631-32 (2001).

[206] *Id.*

taking. The Federal Circuit was quick to cite to *Tahoe-Sierra* as a basis for upholding the trial court's decision based on the parcel as a whole.[207]

The lower courts have been building on prior cases in an attempt to construct an orderly scheme for analyzing these disorderly cases. In *Brace v. United States*,[208] the Court of Federal Claims denied the defendant's motion for summary judgment where the plaintiff alleged a taking as a result of the United States's cease and desist order which forced Brace to stop draining a wetland on his farm, in violation of the Clean Water Act. The court found that there was a genuine issue of material fact with regard to a determination of the relevant parcel for takings analysis and denied the government's motion for summary judgment.[209]

Although the United States argued that the relevant parcel was the full 600 acres of the plaintiff's farm, Brace argued that the relevant parcel was a 60-acre portion purchased separately and referred to as "Parcel B," half of which was rendered valueless as a result of the cease and desist order. The court noted that there was some question as to whether the plaintiff owned the full 600 acres or whether parts of it were actually owned, not by Brace himself, but by Brace Farms, Inc., and found that this was a material fact that would affect the relevant parcel analysis.[210] The court quoted the factors listed in the 1991 *Ciampitti* case[211] as important in the relevant parcel inquiry. These factors include the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, and the extent to which the protected lands enhance the value of the remaining lands. The Claims Court, however, distinguished the plaintiff's position in *Ciampitti* from Brace's. Ciampitti was forced to purchase the property as a whole, whereas Brace clearly identified each parcel as being a distinct and separate lot when he first purchased it.[212] The court also distinguished *Florida Rock* by pointing out that Brace had purchased after the enactment of the controlling federal law, not before as in *Florida Rock*.[213]

After the denial of the motion for summary judgment, the parties stipulated that the relevant parcel would be the Murphy Farm property of about 60 acres, 30 acres of which is the wetlands site, though the exact acreage of the entire parcel remained in some dispute.[214] The defendant United States again moved

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[207] *Id.* at 1356.

[208] 48 Fed. Cl. 272 (Fed. Cl. 2000).

[209] *Id.* at 284.

[210] *Id.* 280.

[211] *Id.* at 280.

[212] *Id.*

[213] *Id.* at 281.

[214] Brace v. United States, No. 98-897 L, 2002 U.S. Claims LEXIS 25 (Fed. Cl. Feb. 11, 2002).

for summary judgment and the Court of Federal Claims denied it, concluding that there was a factual dispute as to whether there was a nexus between the 30 acres of wetlands to be restored and an interstate body of water.[215] The need to determine the factual question of the connection to an interstate body of water was decided by an intervening U.S. Supreme Court decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* in which the Court held that isolated ponds may not be considered navigable waters simply because they serve as a habitat for migratory birds.[216] If the 30 acres of wetlands is not connected to an interstate body of water, then the Corps of Engineers do not have jurisdiction. In addition, the Court of Federal Claims wanted to know the actual acreage of the total holdings because acreage is relevant in establishing the parcel as a whole.

In summary, the lower federal court decisions help us to see the increasing juxtaposition of jurisprudential rules in a flexible analysis which may lead to an increased predictability in outcomes. At least, they collectively suggest a set of factors to be applied. Flexibility is not necessarily ad hoc, but suggests a willingness to use a multi-factor analysis for a fair and just result.

B. State Cases

There has been much experimentation on at the state level, where there always has been with land use law. The state cases may be even more helpful in developing a coherent analytic framework for determining what is the relevant parcel.

The early cases seem to take a broad pro-property owner point of view, while more recent cases are disparate. In New York, for example, the cases first followed the *Penn Central*-type analysis favored by government agencies.[217] More recently, in *Seawall Associates v. City of New York*,[218] New York's highest court invoked the principle of "conceptual severance" to invalidate a city law requiring owners of single-room occupancy units to maintain them for the poor.[219] The decision focused on the value of the rights destroyed by the regulation without regard to the other uses remaining in the property or the relationship of the value of the prohibited use to the total value of the property. Although not a physical invasion case, the facts in *Seawall* are egregious enough to make the analogy tenable.

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[215] *Id.* at *12-14.

[216] 531 U.S. 159, 173-74 (2001).

[217] *See, e.g.*, Spears v. Berle, 397 N.E.2d 1304 (N.Y. 1979); Pecora v. Gossin, 356 N.Y.S.2d 505 (N.Y. Sup. Ct. 1974), *aff'd*, 370 N.Y.S.2d 281 (N.Y. App. Div. 1975).

[218] 74 N.Y.2d 92 (1989).

[219] *Id.* at 111-16.

California, like some other states, has a seemingly inconsistent body of law on this issue. One California case followed the Ninth Circuit approach with the pro-developer orientation.[220] Yet there are numerous other California cases that have gone the other way and treated the relevant parcel issue more expansively, finding no taking.[221]

The following discussion reviews the more important state cases as they have developed over time. The multi-factor inquiry from the *Zealy v. City of Waukesha*[222] decision pulls together some of the principles developed in prior cases. What is central in *Zealy*, which is very much the second prong of the three-part multi-factor analysis of *Penn Central*, are the reasonable expectations of the property owner at the time of the purchase. One important concept from *Zealy* that is reflected in other decisions and is certain to become part of the analytic scheme is the way the owner has treated otherwise unrelated parcels.[223] If the owner has treated them as a single unit for purposes unrelated to the inverse condemnation action, then it is more likely that the assemblage will be considered the relevant parcel.

Although I have already offered a dozen variations of how property might be perceived for a takings analysis, there are other variations, as seen in *Karam v. State of New Jersey*,[224] involving adjoining upland and riparian lots. A riparian lot is land under water. The State sold the riparian lot to the former owners in 1924 with the condition that it be used only for the erection of a pier, and that the upland and riparian lots remain in common ownership.[225] Subsequent regulation, however, designated the riparian lot as a "special restricted area" and prohibited the construction of a dock.[226] Because the conditions in the grant would permit only a dock on the lot and the regulation prohibited the use, the court found a denial of all economically viable use of the riparian property.

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[220] Twaine Harte Ass'n, Ltd. v. County of Tuolumme, 217 Cal. App. 3d 71, 85-88 (Cal. Ct. App. 1990).

[221] *See, e.g.*, Aptos Seascape Corp. v. County of Santa Cruz, 138 Cal. App. 3d 484 (Cal. Ct. App. 1982); City & County of San Francisco v. Golden Gate Heights Inv., 14 Cal. App. 4th 1203 (Cal. Ct. App. 1993); Ramona Covenant of Holy Names v. City of Alhambra, 21 Cal. App. 4th 10 (Cal. Ct. App. 1993); *see also* K&K Constr., Inc. v. Dept. of Natural Res., 575 N.W. 2d 531, 537 n.6 (Mich. 1998) (separate zoning of separate parcels irrelevant because owner had intended to use all three parcels in one development plan); American Dredging Co. v. Dept. of Envtl. Quality 404 A.2d 42 (N.J. Super. Ct. App. Div. 1979); Zealy v. City of Waukesha, 548 N.W.2d 528 (Wis. 1996).

[222] Zealy v. City of Waukesha, 548 N.W.2d 528 (Wis. 1996).

[223] *Id.* at 534.

[224] 705 A.2d 1221 (N.J. Super. 1998), *aff'd* 723 A.2d 943 (N.J. 1999), *cert. denied*, 528 U.S. 814 (1999).

[225] *Id.* at 1223.

[226] *Id.*

The appellate division of the Superior Court found that the relevant parcel was the combined acreage of both the upland and riparian lots, and thus found no taking.[227] The upland and riparian lots had always been treated as a single lot for purposes of taxation. The fact that the grant of the riparian lot required ownership of the adjoining upland lot weighed heavily toward the conclusion that the right to construct a dock conveyed in the grant of the riparian lot was incidental to the use of the upland property.[228] Over the years the upland and riparian lots had always been conveyed as a single unit.[229] Even when the lots had been subdivided into several smaller lots, it was done in such a way that each lot had an upland and riparian portion.[230] The New Jersey Supreme Court upheld the decision "for substantially the same reasons" as those cited in the appellate decision, and the U.S. Supreme Court denied certiorari.

An example of a delay case is *Town of Jupiter v. Alexander*,[231] in which the property owner alleged a temporary taking for the two years that had elapsed between her first application for a change in zoning and the final issuance of permits.[232] The property consisted of two parcels, a mainland parcel fronting on the Loxahatchee River and an island located about 500 yards southeast of the mainland parcel that was accessible only by boat.[233] On remand, the trial court found that a taking had occurred as to the island parcel. The Florida Fourth District Court of Appeals applied a multifactor inquiry derived from the 1986 case of *Dept. of Transp. v. Jirik*[234] to determine whether the mainland and island parcels should be analyzed together.[235]

The factors considered in *Jirik* were (1) physical contiguity, (2) unity of ownership, and (3) unity of use.[236] The third factor was further broken down into eight criteria consisting of (1) intent of the owner; (2) adaptability of the property; (3) dependence between parcels; (4) highest and best use of the property; (5) zoning; (6) appearance of the land; (7) actual use of the land; and (8) the possibility of tracts being combined in use in the reasonably near future. The *Jupiter* court[237] found that despite the lack of contiguity between the parcels, there was unity of use, and therefore the relevant parcel must include both tracts.[238] The parcels were always bought and sold together, all

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[227] *Id.* at 1228.
[228] *Id.*
[229] *Id.*
[230] *See id.*
[231] 747 So. 2d 395 (Fla. App. 1998), *reh'g denied* 729 So. 2d 389 (Fla. 1999).
[232] *Id.* at 399.
[233] *Id.* at 397.
[234] 498 So. 2d 1253 (Fla. 1986).
[235] *Jupiter*, 747 So. 2d at 400.
[236] *Id.* at 400; *Jink*, 498 So. 2d at 1255.
[237] 747 So. 2d at 400.
[238] *Id.* at 401.

plans for development had contemplated that the mainland parcel would furnish support for the island parcel, and the development of the island parcel required mainland support because it was inaccessible by any other method.[239] Because the plaintiff was always able to develop the mainland parcel throughout the two years of deliberations, there was no taking.[240]

Sea Cabins on the Ocean IV Homeowners Association, Inc. v. City of North Myrtle Beach[241] is yet another parcel-as-a-whole case where riparian rights had to be considered in relation to the upland property. Owners of a pier sued the City for a temporary taking when they were prevented from repairing the pier for four years after a hurricane because of a series of decisions on a permit to repair or rebuild.[242] The pier was an element owned in common by all the apartment owners in the development.[243] The court found that the relevant parcel was the entire unit owned by each apartment owner, including the apartments themselves and each owner's share of the common elements.[244] Since the units were still rentable and salable, they had not been deprived of all economically viable use for the time in question and thus there was no temporary taking.[245]

Another recent nonsegmentation case is *City of Annapolis v. Waterman*.[246] Developers of a three-acre parcel, who had promised to set aside 2,375 square feet of recreational open space for residents in later phases of a subdivision as a condition of approval in the first phase, sued the City when a condition of subdivision approval on the third and final phase of the project required them to leave "lot 1" of the final proposed five-lot phase open for recreational use.[247]

After determining the standards by which the condition of dedication should be tested, the court addressed briefly the relevant parcel issue, stating that the lower court erred in considering only "lot 1" in finding a taking in the denial of the subdivision proposal.[248] The court stated that the lower court should have regarded "*at least*"[249] the entire third phase (roughly 0.87 acres or about 37,900 square feet) which was under consideration for subdivision into five lots. The *Annapolis* court relied on *Penn Central*, *Keystone Bituminous*,

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[239] *Id.*
[240] *Id.*
[241] 523 S.E. 2d 193 (S.C. App. 1999).
[242] *Id.* at 196.
[243] *Id.* at 199.
[244] *Id.* at 200.
[245] *Id.* at 203-04.
[246] 357 Md. 484 (Jan. 7, 2000).
[247] *Id.* at 1001.
[248] *Id.* at 1025.
[249] 357 Md. at 526 (emphasis in original).

Pennsylvania Coal, *Andrus*, *Tabb Lakes*, and *Concrete Pipe* for the "non-segmentation" principle, and in the end found no taking.[250]

Not on our list of recommended reading, but worth mentioning, is *Manufactured Housing Communities of Washington v. State of Washington*.[251] Owners of a mobile home park challenged a state regulation requiring the postponement of all mobile home park sales for thirty days and notifying residents of an impending sale to give them the opportunity to bid on the park.[252] The court found that the right of first refusal was a valuable stick in the bundle of property rights and therefore the regulation was in violation of the Washington state constitution, which provides greater protection from takings than the U.S. Constitution.[253] Three justices dissented from the majority opinion, noting particularly that the U.S. Supreme Court's *Andrus* decision clearly shows that the right to sell property is not so fundamental as to require it to be completely unrestricted by regulation. The dissent concluded that the decision will lead to the dangerous result that any regulation of an attribute of property will be a taking.

A decision from the Colorado Supreme Court in December, 2001, suggests that in finding the relevant parcel in a mining case, the courts might treat the mining interest differently than other types of real property interests. In *Animas Valley Sand & Gravel, Inc. v. Board of County Commissioners of the County of La Plata*,[254] the court took the pro-government view that it "must look at the regulation's effect on the entire parcel owned by the landowner. Thus, it is inappropriate to limit a takings inquiry solely to one particular right in the land, or, to a particular part of the land."[255]

In 1961, Animas Valley Sand and Gravel ("AVSG") purchased 46.57 acres. In 1979, it divided that property into two parcels—4.65 acres in Tract A and 41.92 acres in Tract B. AVSG sold Tract A to the president and majority shareholder of AVSG. In 1993, the county adopted its land use plan at a time when AVSG had a permit to mine about eight acres of Tract B and two acres of Tract A. The plan identified those ten acres as part of the "industrial district," and permitted AVSG to continue its sand and gravel operation. The plan designated the rest of the property as a "river corridor district" with several uses allowed, but not sand and gravel mining.

After the county refused to designate all of the 41.92 acres in Tract B for industrial use, AVSG sued for a taking. The trial court found no taking, holding that the river corridor district land was not economically idle. The

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[250] *Id.* at 1023-24.

[251] 13 P.3d 183 (Wash. 2000).

[252] *Id.* at 185.

[253] *Id.* at 367.

[254] 38 P.3d 59 (Colo. 2001).

[255] *Id.* at 61.

appellate court agreed that there was no taking, but it remanded the case, because it believed the trial court might have placed an inappropriate burden of proof on AVSG.

Both the trial court and the appellate court agreed on how the property was to be defined. They both believed that while certain rights could not be severed from other rights, "the land may be geographically severed to ascertain the economic viability of the most severely affected portion of the land."[256]

In the end, the Colorado Supreme Court reversed the Court of Appeals and remanded it back to the trial court to retry the case and to apply the fact-specific inquiry to Tract B, all 41.92 acres, including both the eight acres that were designated for mining and the remaining 33.92 acres that were prohibited from mining. The Court held that a taking could occur under a fact-specific inquiry even if the property had some economically viable use; that the taking inquiry had to look at the entire bundle of property rights, not just those rights involving minerals; and that the entire parcel had to be examined, not just that portion that was prohibited from mining.

The Court cited the Supreme Court opinion in *Andrus v. Allard*[257] for the principle: "where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety."[258] The Court also cited *Keystone*[259] for this principle and concluded: "[i]n this case, the trial court and court of appeals were correct in holding that the appropriate focus of a takings inquiry is the property rights as an aggregate rather than merely the mineral rights."[260]

In supporting its position, the Colorado court cited *Penn Central*[261] and *Dolan*.[262] The Court took what could be characterized as a non-segmentation position, stating:

> Were we to accept AVSG's position that a court should evaluate the effect of a regulation with respect to only one segment of the parcel, virtually any land use regulation would effect a taking if the landowner defined the relevant parcel small enough. For example, were partitioning allowed, a zoning ordinance that required a setback would effect a taking of the land between the lot line and the building line. Such a regime would defeat the balance of interests reached in takings jurisprudence. Nonetheless, AVSG claims that such a partition is appropriate because the River Corridor property is the only portion affected by

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[256] *Id.* at 62.

[257] 444 U.S. 51, 66 (1979).

[258] *Id.* at 65-66.

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

[260] *Animas Valley Sand & Gravel*, 38 P.3d at 68.

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

[262] Dolan v. City of Tigard, 512 U.S. 374 (1994).

> the plan. This characterization is incorrect. The county regulated the entire forty-four acres of Tract B under the plan. To segment out only the portion most adversely affected by the plan would be to ignore the possibility that the county designated eight acres as industrial property precisely to allow AVSG an economically viable use of Tract B.[263]

In *Adams Outdoor Advertising v. City of East Lansing*,[264] we see the property interest of the tenant, which has sometimes been treated as a distinct interest and the sole extent of the denominator,[265] considered instead as a derivative of the larger whole under a non-segmentation or parcel-as-a-whole analysis.

The plaintiff billboard company claimed that the City's sign code prohibiting rooftop signs and requiring the removal of nonconforming signs by May 1, 1987 caused a taking of their rooftop leasehold interest. The state trial court and Court of Appeals concluded that the provision resulted in a taking, but the Michigan Supreme Court reversed, basing its decision on the relevant parcel analysis. The court reasoned that since the regulation would not deprive the lessor of anything more than a single stick in the bundle of property rights, the lessor would still have economically viable use of the property, and the lessee cannot acquire more than what the lessor has. The relevant parcel was not the rooftop leasehold interest of the Adams Outdoor Advertising, but the entire property.[266]

Even recently, however, there have been decisions that might be considered conservative or at least more deterministic than flexible or subjective. A Pennsylvania trial court went so far as to repudiate *Ciampitti* in its search for certainty.[267] In *Machipongo Land & Coal Company, Inc. v. Commonwealth of Pennsylvania*[268] two mine owners challenged the Department of Environmental Regulation's designation of several acres of their property as "unsuitable for surface mining" for the purposes of watershed protection. Machipongo alleged that 157 of its 2,037 acres were located within the designated area, resulting in a taking of at least 1,344,800 tons of coal valued

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[263] *Animas Valley Sand & Gravel, Inc.*, 38 P. 3d 59 at 69.

[264] 614 N.W.2d 634 (Mich. 2000), *cert. denied*, 532 U.S. 920 (March 19, 2001).

[265] *See* Naegele Outdoor Advert., Inc. v. City of Durham, 844 F.2d 172 (4th Cir. 1988).

[266] *See Adams*, 614 N.W.2d at 634. In a concurring opinion, Justice Marilyn Kelly argued that the majority's analysis was improper because it was based on the interests of a party who was not before the court, and that the defendant's relevant parcel arguments had not been preserved for review because they were first raised in the Court of Appeals. Justice Kelly would have found no taking because the leaseholds in question were acquired after the enactment of the sign code, and therefore the lessee never acquired the right to display such signs when leasing the property. *See id.* at 640 (Kelly, J., concurring).

[267] Machipongo Land & Coal Co. v. Commonwealth of Pennsylvania, 719 A.2d 19 (Pa. Commw. Ct. 1998).

[268] *Id.*

at $2,846,550. The second property owner, Erickson/Naughton, alleged that 27 of its 1,350 acres were similarly restricted, resulting in a taking of at least 377,900 tons of coal valued at $566,850.

The trial court first considered analyzing the relevant parcel as all contiguous land under common ownership, but rejected this approach because it unfairly handicaps owners of larger parcels and does not address the problem of lands that have been subdivided and partially sold off. The court also rejected the "multifaceted" approach of cases like *Ciampitti* because it fails to create any certainty for regulators or property owners. Instead, the court adopted the approach advocated by the plaintiffs, defining the property interest by the regulation involved, with some important modifications. The court offered a series of questions that must be answered in analyzing the relevant parcel: (1) whether the regulated land had value prior to regulation; (2) whether the regulated land has a separate use from the non-regulated contiguous parcel, that is, whether it may be profitably used if it is the only parcel; and (3) if the regulated land has value separate from the contiguous land, whether all of its economic benefit is gone.

The court determined that under Pennsylvania law, which recognizes the coal/mineral estate as separate from the surface or support estate, the appropriate denominator was solely the coal estate, not including surface rights. The motion for summary judgment was then denied because genuine issues of material fact remained with regard to the questions posed by the court.

Following the decision on the motion for summary judgment, there was a four-day bench trial in which the court ultimately held that there was a *Lucas* categorical taking because the regulation prevented the mining of coal. A taking occurred as to the Erickson/Naughton surface reserves and the Machipongo underground reserves, but there was no taking of the Machipongo surface reserves because they were not large enough to be mined. The Commonwealth and the coal company both appealed.

The Supreme Court of Pennsylvania on May 30, 2002 reversed the Commonwealth Court and remanded the case back to the lower court on certain technical issues. The decision disallowing severance of certain property interests is definitely pro-government and anti-property rights.[269]

The Supreme Court of Pennsylvania first addressed the standing issue, citing *Palazzolo* and holding that the transfer of interests to a beneficiary after the regulation took effect did not deprive the Erickson Family Trust of

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[269] Machipongo Land & Coal Co. v. Commonwealth of Pennsylvania, 799 A.2d 751 (Pa. 2002). For another case involving coal mining in which the issue of acid mine drainage was central, however, only in the context of investment-backed expectations, see *Rith Energy, Inc. v. United States*, 247 F.3d 1355 (Fed. Cir. 2001).

standing.[270] The Court then turned to the relevant parcel issue and addressed both vertical and horizontal severance.

As to vertical severance, the Court roundly rejected the trial court's recognition of the separable coal estate under Pennsylvania law on the ground that *Keystone Bituminous Ass'n*[271] had contravened Pennsylvania's doctrine of a separate coal estate by adopting the parcel as a whole as the standard. Consequently, the Supreme Court of Pennsylvania held that the relevant parcel could not be "vertically segmented and must be defined to include both the surface and mineral rights."[272]

As to horizontal severance in the trial court's adoption of the coal owners' position that the parcel should be defined as the coal estate in the regulated area, the Supreme Court of Pennsylvania not only rejected that approach as "overly restrictive" but also cleverly rejected the Department of Environmental Regulation's approach of defining the parcel as including all of the coal owners' land as "overly inclusive."[273] The Court opted for a fact-driven "flexible approach" following those factors used by the Court of Appeals for the Federal Circuit to define the relevant parcel, including the unity of ownership, contiguity, times of acquisition, treatment of the parcel as a single unit, beneficial impacts of the regulation on unregulated holdings, when property was transferred, investment-backed expectations and the owners' plan for development.[274] The matter was remanded to the trial court to address these factors and to determine the "appropriate horizontal conceptualization" under both a *Lucas* and *Penn Central* analysis.[275]

The Supreme Court of Pennsylvania upheld the trial court's decision that there was no taking of the Machipongo surface mine because it was not economically viable to remove the coal. The Court held that as to the Machipongo property because there was no vertical severance and there had been some economic return from the sale of timber and leases for gas development, there was some economically viable use and no *Lucas* claim.[276] The Court remanded the action for a *Lucas* analysis on the Erickson/Naughton property because of the lack of factual evidence in the record on what property interests were held. The Court undertook a *Penn Central* partial takings analysis as to the Machipongo property and directed the trial court to conduct a trial on the facts relevant to that determination.[277]

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[270] *Id.* at 762.

[271] 480 U.S. 470, 500 (1987).

[272] *Machipongo Land & Coal Co.*, 799 A.2d at 768.

[273] *Id.*

[274] *Id.*

[275] *Id.* at 769.

[276] *Id.* at 769-70.

[277] *Id.* at 771.

Finally, in what appears to be a remarkable departure from most precedent, the Court extended the nuisance exception of *Lucas* to the *Penn Central* partial takings analysis for the Machipongo holdings. It held that if the regulation was designed and in fact did prevent the pollution of public waterways, the loss would not be compensable under the nuisance exception of *Lucas*.[278]

VIII. POTENTIAL DETERMINANTS OF THE RELEVANT PARCEL

Whether a court interprets the denominator issue broadly depends upon the discrete nature of the interest. For example, with water,[279] mining,[280] grazing, billboards[281] or similar property rights, most jurisdictions would find that the claimed right is separate from the land to which it is appurtenant, so the relevant parcel becomes insignificant in the face of the loss of the right.

The nature of the right itself may create a bias in the courts regarding the determination of the relevant parcel. It is sometimes believed that some sticks in the bundle of rights are "worth" more than others, such as the right to exclude people from entering private property. When the right to exclude others is at stake, the courts have tended to find that the relevant parcel is insignificant or at least relatively insignificant. The *Kaiser Aetna* case here in Hawai'i is a good example, but so are *Nollan* and *Dolan*.[282] When an "essential attribute of property" is damaged or destroyed by regulation, courts are likely to find a taking without spending much time debating the relevant parcel.

The third general cluster we find in these cases that may point to some type of orderly approach has to do with the multi-dimensional relationship of the physical and functional attributes of the property. The courts must evaluate whether the subsurface rights are immediately adjacent to the surface rights, whether the additional twenty acres abutting or across the street or close by treated as part of a single parcel, whether the property is consistently zoned,

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[278] The coal owners' petition for certiorari was denied. Machipongo Land & Coal Co. v. Pennsylvania, 123 S. Ct. 486 (2002) (mem.).

[279] *See* Fallini v. United States, 31 Fed. Cl. 53, 57 (Fed. Cl. 1994), *vacated*, 56 F.3d 1378 (Fed. Cir. 1995), *cert. denied*, 517 U.S. 1243 (1996) (water rights found separate from the land to which the right is appurtenant).

[280] *See, e.g.*, R.T.G., Inc. v. Ohio, 98 Ohio St. 3d 1 (2002) (coal rights severable).

[281] *See, e.g.*, Patrick Media Group v. Cal. Coastal Comm'n, 9 Cal. App. 4th 592 (1992); Tahoe Reg'l Planning Agency v. King, 233 Cal.App.3d 1365 (1991); Naegele Outdoor Advert., Inc. v. City of Durham, 844 F.2d 172 (4th Cir. 1988).

[282] *See, e.g.*, Kaiser Aetna v. United States, 444 U.S. 164 (1979); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987); Dolan v. City of Tigard, 512 U.S. 374 (1994).

whether the land is planned for the same use, and whether the land is financed the same under the same method.[283]

Finally, as we noted before, there is the issue of the dimension of time. Courts must take into consideration when the property was acquired relative to the adoption of the property restrictions.[284] If the property was acquired before, the relevant parcel is more likely to be defined as the property coincident with the area now restricted, thereby making it much easier to prove the taking claim. In an interesting twist on the temporal dimension, courts must also examine the impact of the government's attempts to recreate conditions that existed at a prior time, such as reintroducing an animal species to its historic range.[285] There are not enough cases of this type to suggest any consistent pattern.

IX. FINDING SOME PATTERN

Only in the last four years have we begun to see enough refinement of the case law to begin to develop a definitive typology. Courts at both the federal and state level have decided cases inconsistently and they have sometimes adopted a casual view that the relevant parcel should be determined by an *ad hoc*, fact-based inquiry. As we saw in *Loveladies Harbor Inc., v. United States*,[286] for example, the federal circuit said that it would follow a flexible approach to respond to the factual differences from one case to the next. So too in *Tabb Lakes Ltd. v. United States*,[287] the federal circuit decided not to define "whole parcel" as a matter of law but to reach its decision based on the facts of the case.

However, even before *Loveladies Harbor* and *Tabb Lakes*, we began to see some indication that there might be a departure from the *ad hoc* approach and the beginnings of an analytic framework based on a flexible, multi-factor analysis. In *Ciampitti*,[288] the Court of Federal Claims identified several factors to consider in determining the extent of the relevant parcel.

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[283] *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

[284] *See, e.g.*, Loveladies Harbor, Inc. v. United States, 21 Cl. Ct. 193 (Cl. Ct. 1988), *aff'd*, 28 F.3d 1171 (Fed. Cir. 1994).

[285] *See, e.g.*, Moerman v. California, 17 Cal. App. 452, 21 Cal. Rptr. 2d 329 (1993), *cert. denied*, 511 U.S. 1031 (1994) (rejecting taking claim for property damage arising out of Tule elk relocation program).

[286] 28 F.3d 1171, 1181 (Fed. Cir. 1994).

[287] 10 F.3d 796 (Fed. Cir. 1993).

[288] 22 Cl. Ct. 310 (Cl. Ct. 1991).

X. Factors for Analyzing Relevant Parcel

Taking the best of what the totality of this jurisprudence offers, the following factors should be considered in determining the extent of the relevant parcel:

Physical Extent
1. Contiguity
2. Subsurface, surface, air rights
3. When acquired

Functional Extent
1. Public regulation
2. Private regulation
3. Governmental plans
4. Government taxing
5. Private plans
6. Restrictions benefiting other holdings
7. Investment-backed expectations
8. Size and character of properties commercially traded in the community
9. Ownership
10. Operations

Temporal Extent
1. Expectations of future development potential
2. Holding periods typical of the class of property

Together, these factors fairly encompass all those identified by the courts. The recent decision in *Tahoe-Sierra* does not contravene the multi-factor analysis inherently in defining the relevant parcel. The parcel-as-a-whole theory so strengthened in *Tahoe-Sierra* still requires knowing the extent of the physical, functional and temporal parcel.

XI. Conclusion

Size matters in a takings case. It matters how much is taken, perhaps less important in absolute terms than it is relative to the total property. A taking of a large amount of property in absolute terms still may not be a taking if it is a tiny fraction of the total holdings. The relevant parcel can be measured physically, functionally and temporally.

Part of the reason for the continuing dispute over what is a taking and what is appropriate for compensation is a disagreement based on perception, to some degree, over what is acceptable in terms of the absolute and proportional extent of the restriction on property rights. Fundamentally, as Alice learned, the perception of relative differences and relevant size, and what just feels right, may be more important than what is absolute.

> The Caterpillar and Alice looked at each other for some time in silence: at last the Caterpillar took the hookah out of its mouth, and addressed her in a languid, sleepy voice.
> 'Who are *you*?' said the Caterpillar.
> This was not an encouraging opening for a conversation. Alice replied, rather shyly, 'I—I hardly know, sir, just at present—at least I know who I *was* when I got up this morning, but I think I must have been changed several times since then.'
> 'What do you mean by that?' said the Caterpillar sternly. 'Explain yourself!'
> 'I can't explain *myself*, I'm afraid, sir' said Alice, 'because I'm not myself, you see.'
> 'I don't see,' said the Caterpillar.
> 'I'm afraid I can't put it more clearly,' Alice replied very politely, 'for I can't understand it myself to begin with; and being so many different sizes in a day is very confusing.'
> 'It isn't,' said the Caterpillar.
> 'Well, perhaps you haven't found it so yet,' said Alice; 'but when you have to turn into a chrysalis—you will some day, you know—and then after that into a butterfly, I should think you'll feel it a little queer, won't you?'
> 'Not a bit,' said the Caterpillar.
> 'Well, perhaps your feelings may be different,' said Alice; 'all I know is, it would feel very queer to *me*.'[289]

The world of the relevant parcel is indeed a wonderland, where size seems to change in confusing ways. Let us hope that we can find some order amidst the disarray.

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[289] L. CARROLL, ALICE'S ADVENTURES IN WONDERLAND 1, 43-44 (Puffin Books 1997 ed.).

An Analysis of *Tahoe-Sierra* and Its Help and Hindrance in Understanding the Concept of a Temporary Regulatory Taking

Thomas E. Roberts*

I. INTRODUCTION

In *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,[1] the United States Supreme Court held that temporary restrictions on land use are not facial regulatory takings. This alone is not startling since it confirms a substantial body of case law developed in the lower federal and state courts. The opinion is noteworthy, however, as the first takings law victory for the government since 1987 and because it contains the Court's most thorough discussion of regulatory takings principles since *Penn Central Transportation Co. v. City of New York*,[2] decided in 1978. Five aspects of the opinion are significant to regulatory takings law. First, the Court clarified that *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*[3] was a remedy case, not a substantive decision about whether moratoria were takings. Second, the Court drew a line between physical and regulatory takings, pointing out that considerations and rules applicable to one type of taking are not necessarily applicable to the other. Third, it refused to extend the categorical rule of *Lucas v. South Carolina Coastal Council*[4] in favor of the ad hoc *Penn Central* test. This marks the second time in the last two years that the Court has done so.[5] Fourth, the Court reaffirmed the "parcel-as-a-whole approach," a concept put in doubt just a year earlier in *Palazzolo v. Rhode Island*.[6] Finally, the Court declared that value, not use, was the fundamental concern of the Takings Clause.[7]

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1 535 U.S. 302, 122 S. Ct. 1465 (2002).

2 438 U.S. 104 (1978).

3 482 U.S. 304 (1987).

4 505 U.S. 1003 (1992).

5 *See* Thomas E. Roberts, *Facial Takings Claims Under* Agins-Nectow: *A Procedural Loose End*, 24 U. HAW. L. REV. 623, 630 (2002).

6 533 U.S. 606 (2001).

7 A sixth aspect deals with the background principles of property rules developed in *Lucas* as a defense to a categorical taking. In his dissent, Chief Justice Rehnquist took the position that "zoning and permitting regimes [dating back to colonial times] are a longstanding feature of state property law and part of a landowner's reasonable investment-backed expectations." *Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1495 (Rehnquist, J., dissenting). This is an important concession since some commentators have taken the view that only common law

Beyond these general principles, which cut across all regulatory takings cases and will have widespread impact in the lower courts, the *Tahoe-Sierra* opinion both helps and hinders understanding of the concept of temporary regulatory takings. Lower courts have often been confused by the terminology of takings and have had particular trouble with the permanent versus temporary labels in the context of regulatory challenges. While the Court's rejection of the petitioner-landowners' argument that temporary restrictions were temporary takings should provide help to the lower courts, work remains in defining a temporary regulatory taking.

Now that the *Tahoe-Sierra* opinion has held that temporary restrictions are not necessarily temporary takings, the Court needs to address what type of government action can effect a temporary taking. In this regard, the Court fails when it suggests, without explanation, that an illegal government act can be a temporary regulatory taking.[8] To read the Takings Clause to authorize compensation where there is no legitimate public purpose is to read the public purpose requirement out of the Takings Clause. The idea that illegal acts can be takings intermingles due process with the takings doctrine, a mixture that is hardly new but still mischievous. The mischief maker is the "substantially advance" language of *Agins v. City of Tiburon*.[9] The Court needs to consider whether treating wrongful acts as takings is consistent with the Fifth Amendment's Takings Clause.

After setting out the facts and the procedural background of *Tahoe-Sierra* in Part II, I describe in Part III the Supreme Court's opinion in terms of the five critical aspects noted above. In Part IV, I analyze the criticisms posed by the dissent and property rights advocates who address the *Tahoe-Sierra* opinion. In Part V, I break down the various kinds of actions that might be challenged as temporary regulatory takings. Particular note is taken of the treatment of government conduct that bars use for a period of time but is determined to be unauthorized. This is an unsettled matter in the courts.

II. FACTS AND PROCEDURAL BACKGROUND

Although challenges to the regulation of land use by the Tahoe Regional Planning Agency ("TRPA") have produced a *Bleak House*[10] collection of four

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rules and codified common law rules qualify as background principles. Here, the Chief Justice, as well as Justices Scalia and Thomas, tells us that statutes and ordinances, specifically land use statutes and ordinances, are background principles. Since the other six justices likely agree with this proposition, it appears to be a unanimous view.

[8] *Id.* at ___, 122 S. Ct. at 1485.

[9] 447 U.S. 255, 260 (1980); *see* discussion *infra* note 157.

[10] CHARLES DICKENS, BLEAK HOUSE (Nicola Bradbury ed., Penguin Classics 1997) (1853).

Ninth Circuit opinions,[11] the facts for purposes of the issue addressed by the Supreme Court were fairly simple and straightforward. The Tahoe Regional Planning Compact[12] established TRPA to develop a plan to reverse the deterioration in the quality of the waters of Lake Tahoe.[13] In August of 1981, TRPA enacted a moratorium effectively freezing new development activity in environmentally sensitive areas while it engaged in the process necessary to create a permanent plan.[14] The moratorium was to last until a new regional plan was in place.[15] TRPA did not finish the plan as expected, leading it to enact a second moratorium in August of 1983.[16] This moratorium lasted until April of 1984 when the final plan was enacted.[17]

The State of California challenged the new plan on the day it was adopted, claiming it was insufficiently rigorous to protect the lake.[18] The federal district court enjoined the plan's implementation.[19] This injunction lasted until 1987 when a revised regional plan became effective.[20]

In the meantime, two months after the plan's adoption in 1984, a group of landowners sued TRPA, claiming the thirty-two month delay from August of 1981 to April of 1984 and the 1984 plan had taken their property within the meaning of the Fifth Amendment Takings Clause, entitling them to compensation.[21]

Examining TRPA's actions in enacting the moratoria and developing the plan, the federal district court found the intense development activity in the Lake Tahoe area and the ecological sensitivity of the lake made TRPA's planning task tremendously complex.[22] The court found that TRPA acted reasonably and did not waste time in enacting a new plan.[23] Nonetheless, the

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[11] *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 911 F.2d 1331 (9th Cir. 1990) (dealing with Nevada landowners); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 938 F.2d 153 (9th Cir. 1991) (dealing with California landowners); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F.3d 753 (9th Cir. 1994); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764 (9th Cir. 2000).

[12] The Tahoe Regional Planning Compact was passed by the Nevada and California legislatures and approved by the United States Congress to preserve the scenic beauty of Lake Tahoe. Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1232 (D. Nev. 1999).

[13] *Id.*

[14] *Id.* at 1233.

[15] *Id.* at 1234.

[16] *Id.* at 1235.

[17] *Id.* at 1236.

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.* at 1236-37.

[22] *Id.* at 1235.

[23] *Id.* at 1250-51.

district court was compelled by Supreme Court precedent, specifically the 1987 *First English* case and the 1992 *Lucas* case, to hold that the moratoria were categorical takings.[24] In reaching its decision, the district court stood alone as it broke ranks with numerous state court decisions that had rejected expansive readings of Supreme Court precedent.[25] The Ninth Circuit Court of Appeals reversed the district court.[26]

In reversing the district court, the Ninth Circuit court stressed that the landowners claimed only a categorical taking and brought only a facial challenge.[27] The court then rejected the landowners' argument that the thirty-two month moratoria period should be carved out of the bundle of property rights and viewed separately for the purpose of determining the ordinance's economic impact.[28]

The court of appeals found the *Lucas* categorical rule inapplicable.[29] Since only the present right of use was lost, no landowner had suffered a denial of all economically viable use or value as required by *Lucas*.[30] Although it appeared to the court that some limited uses were permitted during the moratoria, the court assumed all use was denied for the thirty-two months.[31] Yet, the temporary ordinance preserved the future use of the property, and this future use had a substantial present value.[32]

The *First English* case was of no help to the plaintiffs either. The court of appeals reasoned that *First English* did not support the temporal severance argument.[33] The opposite, in fact, was true because the *First English* court acknowledged that normal delay would not effect a taking.[34]

The landowners petitioned the Supreme Court for review, submitting three questions.[35] The first question presented was whether it was "permissible for the Ninth Circuit Court of Appeals to hold—as a matter of law—that a

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[24] *Id.* at 1251.

[25] *See* JULIAN C. JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 10.9C (Prac. ed. 2003).

[26] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 789 (9th Cir. 2000).

[27] *Id.* at 773.

[28] *Id.* at 779.

[29] *Id.* at 782.

[30] *Id.*

[31] *Id.*

[32] *Id.* at 781.

[33] *Id.* at 778.

[34] *See* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321 (1987).

[35] Tahoe-Sierra Pres. Council, Inc. v. Tahoe-Sierra Reg'l Planning Agency, 216 F.3d 764 (9th Cir. 2000), *petition for cert. filed*, 533 U.S. 948 (June 29, 2001) (No. 00-1167).

temporary moratorium can *never* require constitutional compensation."[36] The second was whether

> a land use regulatory agency [can] escape its constitutional duty to pay for land taken for public use by the expedient of enacting a series of rolling, back-to-back 'temporary' moratoria/prohibitions extending over a period of 20 years, and then claiming that each of the individual prohibitions on *all* use must be viewed in isolation from the others and, when so viewed, none was severe enough by itself to cross the constitutional taking threshold?[37]

The third question was whether

> a land use regulatory agency [can] purport to 'protect the environment' at a major regional location (here, Lake Tahoe) by compelling a selected group of individual landowners to forego *all* use of their individual homesites, and thereby compel a *de facto* donation of their land for public use without compensation.[38]

The Court granted review on only the first question presented, and it recharacterized that question as "[w]hether the Court of Appeals properly determined that a temporary moratorium on land development does not constitute a taking of property requiring compensation under the Takings Clause of the United States Constitution."[39] In a six-to-three decision, the Supreme Court affirmed the Ninth Circuit's determination, concluding that the moratorium was not a facial taking.

The wording of the first question was odd because, as it turns out, the petitioners got what they asked for and still lost. The issue in the Ninth Circuit was whether moratoria were always takings, not whether they could be takings at times.[40] Yet, it was this latter claim that the first question was presented for review. There was, though, never any argument about the idea that moratoria could be takings. The real question was whether moratoria were always takings.

The district court said the moratoria were facial takings under the principles stated in *First English* and *Lucas*; that court also said there was no taking under *Penn Central*.[41] The issue addressed by the Ninth Circuit was the

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[36] *Id.* Petitioners, the Court, and everybody else refers to "temporary moratorium." Yet, a moratorium is, by definition, temporary. One word, "moratorium," is sufficient.

[37] *Id.*

[38] *Id.*

[39] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 533 U.S. 948, 949 (2001) (granting certiorari).

[40] Steven J. Eagle affirms my reading and notes the landowners' certiorari petition "did not assert that all planning moratoria constitute takings." *See* Steven J. Eagle, *Tahoe-Sierra and Its Implications for Takings Law*, *in* TAKING SIDES ON TAKINGS ISSUES 15, 26 (Thomas E. Roberts ed., 2003).

[41] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226, 1240, 1245 (1999).

agency's claim that the first proposition regarding facial takings was incorrect. The petitioners did not appeal the question of whether the district court's second finding that there was no *Penn Central* taking was correct.

If the Supreme Court had not recharacterized the question and if the Court answered it the way the petitioners presented it, the petitioners would have lost outright without further argument. They asked the Court to find that moratoria can be takings, but that would not have helped them because the district court had found the actions of the agency to be reasonable and not a *Penn Central* taking. Furthermore, as noted, that finding was not appealed.

The petitioners' only prospect for victory was an affirmation of the district court's holding. The Supreme Court's rewriting of the issue gave it the opportunity to answer this question of whether the moratoria were facial takings. The petitioners lost this argument, but thanks to the rewriting of the question presented, at least they had a chance. Perhaps the petitioners phrased the question as they did in reliance on Judge Kozinski's reading of the Ninth Circuit opinion to take the position that moratoria never could be takings.[42] No court had ever said such a thing, it is disputable that the Ninth Circuit court said that,[43] and it is unlikely any court would ever agree with that

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[42] *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 228 F.3d 998, 999 (2000). It was no doubt galling to property rights attorneys, as it most certainly was to Judge Kozinski, that the Ninth Circuit used without attribution, language of Justice Stevens' *First English* dissent to make its point. Putting aside the lack of attribution as irrelevant, they seem to think that the Ninth Circuit court's use of Stevens' dissent is irrefutable proof that the court erred. However, all points made in a dissent are not necessarily at odds with the majority opinion from which the dissent is lodged. This was true with respect to Justice Stevens' dissent, which was, in so far as the part used by the Ninth Circuit court, consistent with the majority opinion in *First English*. *See* Thomas E. Roberts, *Moratoria As Categorical Regulatory Takings: What* First English *and* Lucas *Say and Don't Say*, 31 ENVTL. L. RPTR. 11037, 11042 (2001).

[43] The contention that the Ninth Circuit held that moratoria can never be takings was made by Judge Kozinski in his dissent to the Ninth Circuit court's refusal to rehear the case en banc. *Tahoe-Sierra*, 228 F.3d at 999. *See also* Michael M. Berger, Tahoe-Sierra*'s Impact on the Law of Regulatory Takings, in* TAKING SIDES ON TAKINGS ISSUES 81 (Thomas E. Roberts ed., 2003) (stating that the Ninth Circuit court gave a "virtual *carte blanche* to moratoria"). The district court said moratoria were per se facial takings, and it was the Ninth Circuit which rejected this inflexible rule. To the Ninth Circuit court, "[t]o not reject the concept of temporal severance, we would risk converting every temporary planning moratorium into a categorical taking." Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 216 F.3d 764, 777 (9th Cir. 2000). This concern with classifying all moratoria as takings suggests some might be takings.

Furthermore, the panel noted that the district court found that TRPA worked diligently and the thirty-two month delay was but "a small fraction of the useful life of the Tahoe properties." *Id.* at 782. This suggests that were the facts to the contrary, the court would consider whether a taking had occurred. Also, the panel expressly conceded that "were a temporary moratorium designed to be in force so long as to eliminate all present value of a property's future use, [it] might be compelled to conclude that a categorical taking had

proposition.[44] Judge Kozinski's strident dissent may have caught the eye of the Court and aided the landowners in securing a grant of certiorari. But Judge Kozinski's dissent ultimately did not help the petitioners. At the end of the day and after all the appeals, the landowners' case depended on convincing the Court to follow the district court's ruling and expand the holdings in two cases, *First English* and *Lucas*. In a six-to-three decision, the Court affirmed and closely followed the Ninth Circuit court's opinion, rejecting the claim that moratoria were facial per se takings under *Lucas* and *First English*.[45]

III. FIVE CRITICAL ASPECTS OF THE SUPREME COURT OPINION

A. First English *was a remedy case*

In *First English*,[46] the Court held that the remedy for a regulatory taking was compensation.[47] Declaratory or injunctive relief was not adequate to relieve the effects of a taking that had already occurred. The holding of *First English* was limited: "[w]e merely hold that where a government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation[.]"[48] *First English* gave the government the option of either keeping a regulation found to be a taking in place and paying compensation for a permanent taking or rescinding the excessive regulation and paying only for the period of the taking, rendering it a temporary one. While the *First English* mandate requiring compensation became operative only after a court had determined a regulation to be a taking, language in the opinion stating that temporary takings which deny all use are no different than permanent takings led to the argument that temporary denials of all use, such as moratoria, were takings.[49] In *Tahoe-Sierra,* the Court rejected this argument.

Writing for the majority in *Tahoe-Sierra*, Justice Stevens reminded us that *First English* was "unambiguously" a remedy case where the Court expressly disavowed ruling on the merits as to when takings occur.[50] The fact that *First*

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occurred." *Id.* at 781.

[44] All courts agree that a moratorium can be a taking. *See* JUERGENSMEYER & ROBERTS, *supra* note 25, at §§ 9.5 & 10.9C.

[45] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, ___, 122 S. Ct. 1465, 1477, 1490 (2002).

[46] 482 U.S. 304 (1987).

[47] *Id.* at 321.

[48] *Id.*

[49] *See id.* at 318. The argument was aided by the fact that the regulation challenged in *First English* was a moratorium.

[50] *Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1482. I have acknowledged that I think there were some ambiguities. *See* Roberts, *supra* note 42, at 11040.

English involved a moratorium was irrelevant to the holding. To the extent that *First English* addressed the issue of moratoria as takings, it had suggested that the mere denial of all use for a period of time did not, in and of itself, constitute a taking.

B. Regulatory takings and physical takings pose different issues and are determined by separate principles

In *First English*, citing temporary, physical takings cases, the Court said "[t]hese cases reflect the fact that 'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation."[51] This equating of permanent and temporary takings is sometimes taken to mean that physical and regulatory takings are always subject to the same test and same considerations.

The *Tahoe-Sierra* opinion says that is not the case. The distinction

> between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses, on the other, makes it inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a 'regulatory taking,' and vice versa . . . . [W]e do not apply our precedent from the physical takings context to regulatory takings claims.[52]

How this plays out in future cases remains to be seen, but this point emphasizes that the strength of the public gain is relevant in regulatory takings cases while not so for permanent physical invasion cases.[53]

C. Penn Central *is in;* Lucas *is out*

The *Tahoe-Sierra* Court also rejected the landowners' and district court's interpretation of *Lucas*.[54] In *Lucas,* the Court held that when a regulation deprives a property owner of all economically viable use or value, a taking requiring compensation occurs unless the state can prove the regulation does no more to restrict use than what the courts could do under background principles of property law or the law of private or public nuisance.[55] Ignoring, or treating as irrelevant, the fact that *Lucas* involved a permanent restriction, the landowners argued that a moratorium that denies all economically viable

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[51] 482 U.S. at 318.

[52] *Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1479.

[53] *See* JUERGENSMEYER & ROBERTS, *supra* note 25, at § 10.3.

[54] *See generally Tahoe-Sierra*, 535 U.S. at 302, 122 S. Ct. at 1465.

[55] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027, 1029 (1992).

use is a *Lucas* taking.[56] The *Tahoe-Sierra* opinion tells us that the permanence of the regulation in *Lucas* was critical to the premise that the Takings Clause protected against the "obliteration of value." The mere fact that one is delayed for a period of time does not rise to the same level of severity. Regulations are only to be construed as constructive takings in instances where they are truly excessive, and these instances, *Lucas* and *Tahoe-Sierra* say, will be extremely rare. As the Court said, "our holding [in *Lucas*] was limited to 'the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted.' . . . Anything less than a 'complete elimination of value,' or a 'total loss,' the [*Lucas*] Court acknowledged, would require the kind of analysis applied in *Penn Central*."[57]

As it did in *Palazzolo*,[58] the Court indicated a distaste for categorical rules in the takings area. "[W]e still resist the temptation to adopt per se rules in our cases involving partial regulatory takings, preferring to examine 'a number of factors' rather than a simple 'mathematically precise' formula."[59] The parameters placed on *Lucas* mean that it will rarely apply. With *Tahoe-Sierra* limiting *Lucas* to permanent regulations that deprive property of all value and *Palazzolo* holding a 93.7% loss insufficient to trigger *Lucas*, "all" pretty much means "all."[60]

The *Penn Central* Court's fact-specific inquiry is the "default rule."[61] *Penn Central* listed three factors for consideration: (1) the economic impact on the claimant, (2) the extent to which the regulation interfered with investment-backed expectations, and (3) the character or extent of the government action.[62]

The presentation of the issue as a facial claim determined the outcome in *Tahoe-Sierra*.[63] The burden of the landowners was to show that the mere enactment of this moratorium effected a taking. The extremist nature of the argument, which boiled down to the contention that a moratorium of any length, from ten minutes to ten years, was a categorical taking,[64] doomed it.

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[56] *See generally Tahoe-Sierra*, 535 U.S. at 302, 122 S. Ct. at 1465.

[57] *Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1483.

[58] 533 U.S. 606 (2001).

[59] *Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1481 (emphasis omitted).

[60] The value of Palazzolo's land allegedly dropped from the $3,150,000 value to $200,000. That was insufficient to state a total takings claim. *See Palazzolo*, 533 U.S. at 616.

[61] *Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1484.

[62] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

[63] The landowners had good reason to bring a facial claim. Prevailing would allow them to avoid the more time consuming process needed to prevail in an as applied claim, and they would not have to confront evidence that the Agency had acted in good faith and in a reasonably timely manner. But the claim was simply too extreme, as its adoption would have lead to the wholesale elimination of a valuable land use planning tool.

[64] *See* United States Supreme Court Official Transcript of Jan. 7, 2002 at 12, Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 122 S. Ct. 1465 (2002) (No.

In an effort to narrow their argument, the landowners claimed that delays occasioned by the permitting process were qualitatively different from delays occasioned by moratoria. The notion that there was a constitutional difference between a law that prohibited use until one pursued a permitting process, which might or might not result in the landowner gaining permission to develop the land, and a law that prohibited use until the government could develop a plan as to how land should be used was a hard sell. Consider this exchange at oral argument:

> QUESTION [by Justice Scalia]: What do you do about the fact that there is a regulatory taking of sorts whenever you have a permit system,[65] let's say the normal zoning regime in which you cannot construct any building on your acreage without first applying and getting the approval of the zoning agency?
> MR. BERGER [Petitioners' counsel]: Justice Scalia—
> QUESTION: During that period, there's been a total taking. You cannot do anything with that property until you get the building approved.
> MR. BERGER: Clearly you cannot do anything until you've gotten the property approved, but it seems to me that there is a fundamental difference between a landowner working through a system whose end product is, at least theoretically and probably very likely, the issuance of a permit to go ahead and develop something that is economically productive on that land as opposed to being stuck in a system where you're forbidden—
> QUESTION [by Justice O'Connor]: But that would have been during that interval of time it meets your test. Nothing can be done until the permit issues, so a fortiori, under your theory, compensation due.
> MR. BERGER: I don't believe so, Justice O'Connor, because—
> QUESTION: Well, that's what it sounds like . . . .[66]

The Court did not buy the argument and ultimately said that under a permit system, "there is no guarantee that a permit will be granted."[67] Unable to make the distinction exempting normal permitting processes, the Court was not inclined to eradicate a valuable and sensible land regulation tool by making all delays in use automatically compensable takings. Although holding moratoria to be categorical takings would not technically eradicate them, the required compensation would render them prohibitively expensive.

Moratoria or interim development controls, as they are sometimes labeled, said the Court, are "essential tool[s] of successful development."[68] Informed decisionmaking demands that, at least in some instances, authorities are able

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00-1167).

[65] The Justice is assuming the applicability of the petitioners' theory.

[66] Official Transcript at 14-15, *Tahoe-Sierra* (No. 00-1167).

[67] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, ___, 122 S. Ct. 1465, 1487 n.31 (2002).

[68] Id. at ___, 122 S. Ct. at 1487.

to halt development while options are studied and affected persons consulted. If compensation is required every time a moratorium is put in place, imposing moratoria would become prohibitively expensive and the government would not enact them even though they would be needed. Then landowners and regulators would be in a race. The landowners, hearing of possible changes but not under a freeze, would move with haste to build or at least acquire a vested right before the government got around to changing the law. In turn, the government would race to put a new law into effect even without adequate planning. Thus, prematurely developed, hastily passed, and possibly ill-conceived legislation would follow if all moratoria were takings.

D. The Parcel as a Whole

In *Tahoe-Sierra*, the Court gives its strongest support to date for a broad "parcel–as–a-whole rule." The critical determinant in whether a court uses the *Lucas* categorical rule or the *Penn Central* multi-factored test is the relevant property unit against which to measure economic loss. Choosing only the portion of land affected by a regulation increases the prospect of a total diminution in value. That, in turn, invokes the *Lucas* categorical takings rule.

In *Penn Central*, the Court applied the whole parcel rule for the first time in the modern takings era. There, the Penn Central Railroad was unable to build a fifty story office tower in the airspace above Grand Central Station due to the station's status as a historic landmark.[69] The railroad claimed a total economic loss of its unused airspace. The railroad, said the Court, was wrong to limit the focus to the airspace above the terminal, for "'[t]aking' jurisprudence does not divide a single parcel into discrete segments," but rather focuses "on the nature and extent of the interference with rights in the parcel as a whole."[70] When viewing the parcel as a whole, the loss of the airspace still left the railroad with a reasonable use of the existing building.

In the years after *Penn Central*, the Court continued to use the whole parcel rule.[71] Then in a *Lucas* footnote, the Court said "[r]egrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured."[72] The Court voiced disapproval of what it styled the "extreme" approach used by the New York Court of Appeals in the *Penn Central* case. There, the state court looked to all the land owned

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[69] Penn Cent. Transp. Co. v. City of New York, 439 U.S. 104, 116-17 (1978).

[70] *Id.* at 130–31.

[71] *See generally* Andrus v. Allard, 444 U.S. 51 (1979); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Concrete Pipe and Prods. of Cal., Inc. v. Constr. Laborers Pension Trust, 508 U.S. 602 (1993).

[72] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992).

by the railroad in the vicinity of Grand Central Station as the relevant property unit. The *Lucas* opinion did not disapprove of the Supreme Court's own combination of surface and air rights in *Penn Central.*

In 2001, the Court injected doubt about the whole parcel rule when, in *Palazzolo v. Rhode Island,*[73] it referred to this *Lucas* footnote as an indication of "discomfort with the logic of [the whole parcel] rule."[74] But, since Palazzolo had not challenged the application of the whole parcel rule, the Court refused to consider the argument that only Palazzolo's land affected by the wetlands regulation should be treated as the relevant parcel. Curiously the *Palazzolo* Court spoke of the *Lucas*'s footnote comment as an expression of discomfort with the rule's logic. To many observers, the remark suggested the Court might backtrack on the "imprecise" rule.

Less than a year after expressing this curious "discomfort with the logic of the rule," the Court strongly endorsed the whole parcel approach in *Tahoe-Sierra.*[75] Citing *Penn Central's* statement that "[t]aking jurisprudence does not divide a single parcel into discrete segments,"[76] the Court refused to consider the temporal severance sought by the landowners who argued that they had suffered a total loss for thirty-two months. To accept this severance would mean every delay in use is a total ban, invoking the *Lucas* rule.

Though the Court twice said that a court "must focus on the whole parcel,"[77] it does not seem likely that the broadest characterization of property will always be used. Such a rigid rule would not come within the spirit of *Tahoe-Sierra* that takings be judged by specific reference to the facts of each case. As the *Lucas* Court said, the question of segmentation or aggregation may be answered by examining "how the owner's reasonable expectations have been shaped by the State's law of property -- *i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land."[78]

E. Value and Use, and Limiting Lucas

Language of value and use are liberally sprinkled throughout and often used interchangeably in takings opinions.[79] In *Lucas,* the Court held that a taking

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[73] 533 U.S. 606 (2001).

[74] *Id.* at 631.

[75] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, ___, 122 S. Ct. 1465, 1481 (2002).

[76] *Id.* (quotations omitted).

[77] *Id.* at ___, 122 S. Ct. at 1481, 1483.

[78] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 n.7 (1992).

[79] *See generally* Douglas T. Kendall, *Defining the* Lucas *Box:* Palazzolo, Tahoe, *and the Use/Value Debate, in* TAKING SIDES ON TAKINGS ISSUES 427 (Thomas E. Roberts ed., 2002);

occurs if a regulation denies a property owner all economically viable use and eliminates all value. In that case, the trial court had found the owner's lots "valueless." Though building on the lots was not allowed, had the lots not been valueless, would a taking have occurred? Under the *Tahoe-Sierra* analysis, the answer would be "no."

In *Tahoe-Sierra*, the landowners claimed a total deprivation of economic use for the thirty-two month period of the moratoria. Relying on severance of this slice of time, they argued their "total loss" invoked *Lucas*. Repeatedly referring to value as the key to determining economic impact, the Supreme Court pointed out that the landowners had not lost all value. Not only were lots sold during the moratoria,[80] they would recover value when the moratoria ended.[81]

The *Lucas* categorical rule is premised, according to the Court, on the "'complete elimination of value.'"[82] If the *Lucas* case were retried today, the landowner would lose the advantage of the categorical rule. As it happened, after the Supreme Court remanded the *Lucas* case to the South Carolina Supreme Court, the state purchased the two lots for $425,000 per lot (including legal fees the state paid the landowner $1.5 million). Apparently deciding that keeping the lots unimproved would not advance the anti-erosion goals of the state's beachfront management law (contradicting the position it had taken before the Supreme Court), the state decided to resell the lots for residential development. Wanting top dollar, the state set a resale price of $450,000 per lot.[83] A neighboring lot owner offered to buy one of the lots for $315,000 and promised not to build on it, but the state rejected this offer and proceeded to sell the lots for a total of $785,000.[84] If one assumes that these numbers were before a court after *Tahoe-Sierra*, there would be no categorical taking at least as to the one lot, which was worth $315,000 to the neighbor.

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see also generally James Burling, *Can Property Value Avert a Regulatory Taking When Economically Beneficial Use Has Been Destroyed?*, *in* TAKING SIDES ON TAKINGS ISSUES 451 (Thomas E. Roberts ed., 2002).

[80] Numerous lots were sold during the moratorium for prices ranging from $19,000 to $41,000. *Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct at 1476 n.12.

[81] *Id.* at ___, 122 S. Ct. at 1484.

[82] *Id.* at ___, 122 S. Ct. at 1483.

[83] Gideon Kanner, *Not with a Bang, but a Giggle: The Settlement of the* Lucas *Case*, *in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 308, 309 (David L. Callies ed., 1993).

[84] Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating from the "Rule of Law"*, 42 N.Y.L. SCH. L. REV. 345, 382 n.236 (1998).

IV. CRITICISMS OF THE *TAHOE-SIERRA* OPINION

A. The Chief Justice's Dissent

The soundness of the majority's position is bolstered by the unpersuasiveness of the dissents. Chief Justice Rehnquist, who wrote a dissent in which Justices Thomas and Scalia joined,[85] was troubled by the fact that the majority considered the delay to have lasted only thirty-two months. This was true, of course, for the moratorium, but the Chief Justice would have added the three years that the plan was enjoined, which in effect, he says extended the moratorium to six years.[86] In his view, "because a ban on all development lasting almost six years does not resemble any traditional land-use planning device," there was a taking.[87] While six years is more onerous and less likely to be reasonable than thirty-two months, the point is irrelevant. The length of the delay, whether it be three, six, or nine years, made no difference to the plaintiffs' facial claim. The issue was whether any moratorium, regardless of length, was a taking.

The dissent, seemingly unwilling to acknowledge the extreme facial claim being presented, misconstrues the majority's holding as extreme and absolute. The dissenters contend that under the Court's opinion, "the takings question turns entirely on the initial label given a regulation," and "[t]here is every incentive for government to simply label any prohibition on development 'temporary.'"[88] The government, the dissent worries, can now enact moratorium after moratorium or "repeatedly extend" a temporary ban without liability.

How the dissent can read the majority opinion, which relies heavily on the *Penn Central* ad hoc test, to express an inflexible rule based on labels is a mystery. The majority, in fact, acknowledges that moratoria can run too long, that they can be takings, and that the "duration of the restriction is [but] one of the important factors"[89] to consider. The majority simply refuses to treat duration as the sole factor.

The dissent's fundamental point was that regulatory takings are the same as physical takings.[90] To illustrate the equivalence, the Chief Justice sets up a hypothetical to show that moratoria are no different than the forced leaseholds the government took during World War II. The Chief Justice assumes the

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[85] *Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1490 (Rehnquist, J., dissenting). Justice Thomas, joined by Justice Scalia, also separately dissented solely on the segmentation issue.

[86] *Id.* at ___, 122 S. Ct. at 1492.

[87] *Id.* at ___, 122 S. Ct. at 1490.

[88] *Id.* at ___, 122 S. Ct. at 1492.

[89] *Id.* at ___, 122 S. Ct. at 1489.

[90] *Id.* at ___, 122 S. Ct. at 1492.

government, contemplating the creation of a national park around the lake to preserve its scenic beauty, takes "a 6-year leasehold over petitioners' property, during which any human activity on the land would be prohibited, in order to prevent any further destruction to the area while it was deciding whether to request that the area be designated a National Park."[91] "Surely," the Chief Justice asserts, "that leasehold would require compensation."[92] Labeling this government restriction a leasehold to make it seem the same as a physical taking is a ruse. A lease is a contract for the exclusive possession of land.[93] Leaseholds, by definition, involve physical invasions, but the dissent's example involves no physical invasion. Talk about letting labels control![94] In contrast to the dissent, the majority might take into consideration the six year time period to decide whether the designation of an area as a park is a taking under the *Penn Central* test. The majority would not, however, allow the mere imposition of the freeze to constitute a taking.

B. Property Rights Advocates' Laments Are Overblown and Misplaced

Property rights advocates have lodged a variety of criticisms against the *Tahoe-Sierra* opinion. The opinion is said to represent a threat to individual liberties, to have imposed indefensible distributional consequences, to have endorsed the random selection of individuals to bear the brunt of saving the lake, to constitute a deceptive exercise of legal authority to achieve the justices' subjectively desired results, to have forced aging individuals into interminable litigation so that they have died unable to enjoy their land, and to have thrust elderly women with few assets into poverty.

The opinion, it is said, "is a soulless, bureaucratic screed, callously nullifying the cherished constitutional rights of individuals."[95] This seems a bit haywire. That our civil liberties are threatened by the Court's endorsement of the government stopping development for a reasonable period of time in order to anticipate and plan for the consequences of development is difficult to swallow. As even the advocates note in their effort to downplay the impact of the decision, a moratorium is subject to attack on the grounds that it is

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[91] *Id.* at ___, 122 S. Ct. at 1493.

[92] *Id.*

[93] The point is fundamental. *See* BLACK'S LAW DICTIONARY 615 (6th ed. 1991).

[94] Over and over again, the Court has stressed that the right to exclude is the paramount property right. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 831 (1987); Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979). In these and many other cases, the Court says the right to exclude is one of the most essential rights, but since no other right even rises to this level, I conclude the right to exclude is the paramount right.

[95] Michael M. Berger, *Murky Waters: Owners Pay Price for High Court's Failure to Follow Laws of the Land*, LOS ANGELES DAILY J., May 10, 2002.

unreasonable. Why it is unfair in principle to say to the owner of an undeveloped lot, "don't dig and build here until we figure out how much runoff to the lake will occur due to your digging and building and decide what to do about the runoff," is beyond me. Only a system of law that denied the people, through their government, any voice whatsoever in regulating the external impacts of land development would find this restraint unfair in principle.

Professor Epstein says the Court "upheld the power of [TRPA] to impose a rolling moratorium on new home construction[,] . . . [giving the agency] a green light to another 20 years of moratoria."[96] It is hard to know where to begin. To start, the moratoria lasted three years, not 20 years. Since 1987, a permanent plan has been in place, thousands of landowners have been permitted to proceed with development, and many others have been granted valuable options in the form of transferable development rights.[97] Only a "very small minority [of the plaintiffs] even allege that they continue to be precluded from developing their lots."[98]

The only way the Court can be accused of "upholding" twenty years of continuous moratoria is through the Court's denial of certiorari on the "rolling moratoria" issue.[99] It is unusual to read so much in to a denial of certiorari. One certainly cannot find anything in the opinion as endorsing such a proposition. As noted above, the Court recognized that moratoria could be unreasonable as applied.[100] But the accusation fails to even acknowledge possible legitimate reasons to decline to hear the question. Perhaps the Court thought the record was not properly developed to present the issue, or perhaps the Court thought the claim obviously lacked merit since there was evidence that some uses were allowed after 1987.

Professor Epstein also grouses that Justice Stevens "was indifferent to . . . indefensible distributional consequences [and that Stevens] believed none of the 'temporary' - 20 years and running - moratoria on all construction should be regarded as a per se taking."[101] If significant distributional consequences

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[96] Richard A. Epstein, *Taking by Slivers*, NAT'L L. J., May 8, 2002, *at* http://www.law.com/servlet/ContentServer?pagename=OpenMarket/Xcelerate/View&c=LawArticle&cid=1022183116939&live=true&cst=1&pc=0&pa=0.

[97] *See* John L. Marshall, *Sweet Affirmation*, 54-6 LAND USE L. & ZONING DIG. 17, 18 (2002) (speaking with personal knowledge as General Counsel to TRPA).

[98] *Id.*

[99] Professor Epstein's "rolling moratoria" does not refer to the two ordinances of 1981 and 1983 that totaled 32 months and which were the focus of the Court's decision, but rather to the twenty years that have elapsed since the imposition of the initial moratorium, a time period the Court expressly disavowed addressing.

[100] *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, ___, 122 S. Ct. 1465, 1489 (2002).

[101] Epstein, *supra* note 96.

occurred as a result of the twenty years of litigation, that again is an observation and complaint about a matter that was not before the Court. To the extent that the matter was addressed by the Court, the acknowledgment that moratoria can be held to be takings suggests the Court is open to such argument in the proper case. The Court dealt with the matter of moratoria in principle in the facial context. So considered, the distributional consequences of moratoria are not necessarily great. They are likely de minimis if the moratorium is less than a year, and even if the moratorium lasts several years, the effects are not necessarily great. Do they become "indefensible" at some point? That question, the Court says, must be decided on the facts of each case. Might twenty years be so regarded? Yes.

Michael Berger, counsel for the landowners in *Tahoe-Sierra*, complains that "faultless individuals whose property winds up in the path of these regulations"[102] were unfairly picked on by TRPA and that the Supreme Court "decided that it was OK to make randomly selected landowners foot the bill."[103] He notes that "some of those who were frozen out were literally next door (sometimes on both sides) to lots with homes on them."[104] There was nothing random about the land subjected to the moratoria. TRPA did not throw darts at a map of Lake Tahoe to determine which lots to freeze, but rather it froze undeveloped land in the most environmentally sensitive areas of the lake basin.[105]

That existing homes were not affected by the moratoria is hardly surprising. Protecting existing uses from newly adopted regulations is almost always a part of land use regulation. When land is downzoned from commercial use to residential use, legislators almost never compel an existing commercial user to comply with the new law, even if it is next door.[106] Upon discovering that Lake Tahoe was in danger from development, a rational, and probably the

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[102] Berger, *supra* note 95.

[103] *Id.*

[104] Michael M. Berger, Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*: What Did It Decide, and What Did It Not?, in* THE SUPREME COURT SPEAKS: TAHOE-SIERRA, A PERMANENT ANSWER FOR TEMPORARY TAKINGS?, 1, 2 (A.B.A. 2002). Mr. Berger also says that development on the lakeshore continues with permission to build being granted to the rich and powerful, including Michael Millken, Mike Love of the Beach Boys, and heirs to the Singer sewing machine fortune. Berger. *Id.* (citing Eric Bailey, *Lake Stays Blue But Critics of Panel See Red*, LOS ANGELES TIMES, May 13, 2002 at B5). If those individuals were granted permission to build because of their personal influence, that is, in my view, immoral. That of course does not mean it did not happen, but if it did, the permits granted could have been challenged on a host of traditional grounds. *See* JUERGENSMEYER & ROBERTS, *supra* note 25, at § 5 (on obtaining and resisting grants of permission to develop). Also, this flagrant abuse of land use permitting that the Los Angeles Times reports has absolutely nothing to do with the issue decided by the Court.

[105] *See Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1472.

[106] *See* JUERGENSMEYER & ROBERTS, *supra* note 25, at § 4.32.

only, approach to protect the lake while planning is to curb new development. Since the inception of zoning, the government has recognized that equitable considerations may favor those who have already invested in improvements on their lots.

What else was TRPA to do? It certainly could not tell the landowners to tear down their homes. The soil disturbance involved in making them tear down their homes would surely create additional runoff in the lake. The property rights advocates, of course, do not suggest such an irrational and draconian approach. Rather, they likely would find a special assessment against existing homeowners with proceeds paid to those who had not developed before the freeze. Or the community's general tax funds could be used to pay those who had to wait. While both of these choices may have merit, that does not mean the regulatory route chosen was unfair. The average lot owner in the area would not have been affected by the freeze since the average holding time from purchase of a lot in the basin to development was twenty five years.[107]

Another critic, Gideon Kanner, speaking of the *Tahoe-Sierra* decision, bemoans that the "legal doctrine laid down yesterday merely serves as a ball to be kicked around in whatever direction the judicial majority *du jour* finds subjectively desirable."[108] Broad attacks on the ad hoc nature of the law, using takings law as an example, may be appropriate, but it is unfair to single out the opinion in *Tahoe-Sierra* as the embodiment of this evil. The Court's intervention in the presidential election in *Bush v. Gore*[109] is arguably one such example of "a jurisprudence of result-orientation masquerading as exposition of legal doctrine."[110] These sentiments of Professor Kanner (the example of *Bush v. Gore* is mine) deserve to be aired, but they apply to other areas of constitutional law as well as to takings law and to all factions on the Court.

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[107] *Tahoe-Sierra*, 535 U.S. at ___, 122 S. Ct. at 1475.

[108] Gideon Kanner, *Rolling the Dice with Ambrose Bierce*, 54-6 LAND USE L. & ZONING DIG. 12, 12 (2002).

[109] 531 U.S. 98 (2000). *See* Linda Greenhouse, *Learning to Live with* Bush v. Gore, 4 GREEN BAG 381, 383 (2d ed. 2001) ("*Bush v. Gore* instead reveals the nasty little secret that the Court is at heart a political institution whose members reach decisions not according to neutral principles but in the service of an ideological agenda. For example, Bruce Ackerman of Yale Law School, one of the desperados, writes that although 'this view goes against the grain of my entire academic career, which has been one long struggle against the view that law is just politics,' he has reluctantly come to hold it. 'The Court has betrayed the nation's trust in the rule of law,' he wrote in [*The Court Packs Itself*, AMERICAN PROSPECT, Feb. 21, 2001, at 48]").

Addressing whether the decision can be defended on extralegal grounds, see Ward Farnsworth, *"To Do a Great Right, Do a Little Wrong": A User's Guide to Judicial Lawlessness*, 86 MINN. L. REV. 227 (2001).

[110] Kanner, *supra* note 108, at 12.

The complaints about *Tahoe-Sierra* are also inconsistent. After sounding the alarm, the critics tell us the opinion really does not stand for anything. In an effort to downplay the decision, they contend that the government won nothing in the case and that the case would only have been noteworthy had the landowners won.[111] The decision that moratoria have to be determined on a case-by-case basis, according to Mr. Berger, is "hardly earth-shaking. Indeed, no real change from the rule as it stood before the decision came down."[112] While I agree,[113] one wonders how it is that Mr. Berger could earlier write that confusion in the law had been "wrought by lawyers and academics who refuse[d] to accept the idea that the temporary prohibition of use requires compensation,"[114] and that the Ninth Circuit's *Tahoe-Sierra* opinion was in "direct conflict with Supreme Court decisions."[115]

Some critics grieve over the long suffering landowners, pointing out that some of the original landowners have died in the twenty some years of litigation. Others raise the example of the elderly woman reduced to poverty.[116] Of course, those who have died lost the luxury of having had what for many would have been a second home complete with a federal tax deduction on interest paid on any mortgage. But, by proclaiming the deaths of some, the critics act as if the government now owns the lots rather than the heirs or devisees of the deceased.

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[111] *See* Berger, *supra* note 104, at 2.

[112] Berger, *supra* note 104, at 3.

[113] *See* Roberts, *supra* note 42, at 11043.

[114] Michael M. Berger, *What's "Normal" About Planning Delay?*, *in* TAKING SIDES ON TAKINGS ISSUES 274 (Thomas E. Roberts ed., 2002).

[115] *Id.* at 283.

[116] Tales of poor, little old ladies mislead the debate but make for good press.

> Dorothy Cook, seventy-seven years old. All her modest assets are tied up in a single holding, a vacant lot, sixty by a hundred feet, close to Lake Tahoe. She bought the lot for fifty-five hundred dollars in 1979. She estimates she's poured another six thousand into it in property taxes. But she's not allowed to build on it because of the California-Nevada Environmental Agency established to protect the Tahoe region, which in 1981, imposed a moratorium on development. She buys it, two years later, she's told she can't build on it and the moratorium has gone on for years now. Should Dorothy Cook receive compensation? . . . This poor lady gets wiped out to boost the property values of the people who are neighbors.

Peter Robinson: *Transcript 629: Taking It to the Limit* (Feb. 22, 2002), *at* http://www.uncommonknowledge.org/01-02/629.html; *see also* Epstein, *supra* note 96.

V. CLASSIFYING TEMPORARY REGULATORY TAKINGS

Now that the Court has held that a temporary restriction barring all use is not necessarily a taking, hopefully more care will be taken not to use the terms "temporary restrictions" and "temporary takings" as if they were equivalents. If we are finally past that point, we should be clear about what we mean by a "a temporary regulatory taking."

First, a permanent restriction may, at the option of the state, become a temporary taking after a judicial finding that the restriction goes "too far." Though courts sometimes speak of such a finding as an invalidation of the law, that is wrong.[117] Rather, the finding converts an exercise of the police power into an exercise of the power of eminent domain. The state then decides whether to keep the law in force, making the taking permanent, or rescind the law, making the taking temporary.

Second, where the regulation being challenged has terminated prior to the time the takings question reaches court, the state has no option. If there was a taking, it was necessarily temporary.

A. Permanent Restriction Becoming a Permanent or Temporary Taking After Judicial Finding That Restriction Goes Too Far

Lucas is an example of the government deciding to keep an excessive regulation in place and pay permanent compensation. After the Supreme Court found a regulatory taking in *Lucas* and the state supreme court found no background principle of law that insulated the state from having to compensate the landowner,[118] the state bought the lots in fee simple.[119] Though none of the opinions of the state courts or the Supreme Court mentioned it, South Carolina had the option of rescinding the regulation and paying the landowner for his interim loss.[120] The state might have repealed the law or granted a variance, leaving Mr. Lucas free to develop. In so doing, it would have converted the would-be permanent taking into a temporary taking.[121] The state then would

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[117] *See* Roberts, *supra* note 42, at 11037.

[118] Lucas v. S. C. Coastal Council, 424 S.E.2d 484, 486 (1992).

[119] If the state had been serious about its anti-erosion policy or had the state been able to afford them, it could have kept the lots. After all, it paid Mr. Lucas for the fee interests. Instead, the state turned around and sold the lots. *See* text accompanying *supra* note 84.

[120] The state court opinions fail to recognize that an option existed. The trial court, we are told in the Supreme Court opinion, found the regulation took the property and ordered the state to pay $1.2 million in compensation. *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, ___, 122 S. Ct. 1465, 1482 (2002) (describing the state trial court action).

[121] The state did amend its beachfront law during the litigation and under the amendment, the property owner was eligible to apply for an exception from the building ban. Had he done

have owed the landowner for loss of use for roughly the four year period from 1988 to 1992.

The retention option is available to the state because the premise behind the exercise of the power of eminent domain is that it serves a public use or public purpose. A regulation deemed a taking is not illegal but simply excessive, and it is this excessiveness that converts an otherwise valid police power measure into an exercise of the eminent domain power. The rescission option is available because a private person, by bringing an inverse condemnation action, cannot compel the government to exercise the power of eminent domain to buy an interest in land it does not want. But, even if the state elects this option, it must pay for the past taking.

B. Temporary Restrictions Becoming Temporary Takings: Restriction Ends Prior to Resolution of a Judicial Challenge

Where the regulation being challenged has terminated before the question reaches the court, as was the case in *Tahoe-Sierra*, the government has no option to rescind. Rather, the action is complete, and if the government took property while the regulation was in force, then the remedy is to compensate for the temporary loss of use.

Four possible scenarios may arise. One, the regulation may have ended by virtue of its own terms. Two, the regulation may have been intended to be permanent or indefinite in duration, but it is voluntarily repealed for whatever reason. Three, the government may have subsequently acquired the property in question by purchase or direct condemnation. Four, a court may have found the regulation invalid on other grounds.[122] These are necessarily temporary takings claims[123] because the property is, at the time of trial, either free of the restriction or the land is owned by the government.

1. Moratoria

Moratoria, which end on their own terms, fall in the first category. *First English* did not decide when, if ever, moratoria could be takings. In dicta, the *First English* Court raised the issue by its general observation that normal delays were not compensable.[124] *Tahoe-Sierra* specifically addressed the

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so and obtained a permit, he still could have recovered compensation for the period of time the law took his property.

[122] The takings claim may be addressed as part of the case finding the law invalid, as was true in *St. Lucas Association v. City of Chicago*, 571 N.E.2d 865 (Ill. App. Ct. 1991), or the inverse condemnation action may follow the suit on invalidity.

[123] They are temporary takings *claims*, not necessarily temporary takings.

[124] *See* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,

issue, holding that moratoria could be, but were not necessarily, takings. The factors to be applied are those set out in *Penn Central*.[125] Though government can legally freeze land use under state law, a temporary takings claim would allege that the otherwise valid moratorium, as applied to the landowner, went "too far." State law, for example, may authorize a three year moratorium, but a court may find that application of a three year moratorium in certain circumstances went too far. Note that the moratorium in this scenario is legal but excessive in its impact. If the moratorium is illegal under state law or under some provision of the constitution other than the Takings Clause, then it falls under the fourth category discussed below.

2. Otherwise valid law is rescinded prior to any finding of a taking

In the second category of temporary takings cases, the state elects to lift an otherwise valid regulation prior to a court finding a taking. This may be because the authorities anticipate a successful judicial attack and want to minimize damages, or it may be simply be a change of mind as to the wisdom of the law. For example, where a pro-environmental state legislature enacts a stringent restriction to save sensitive wetlands by prohibiting their fill, pro-development forces might gain control of the legislature and repeal the law. The period the law was in effect conceivably could have effected a temporary taking if a landowner tried to get development permission but was turned down based on the now-repealed law.[126]

Shopco Group v. City of Springdale[127] is an example of a category two case. Plaintiffs sought to have the city rezone land that they had operated as a private park for twenty-five years. When plaintiffs were denied the rezoning, they sought a declaration that the zoning classification was invalid.[128] During the pendency of the suit, the city changed its mind and rezoned the parcel to allow office use. The action then proceeded on the question of whether damages were due for a temporary taking of the property during the time period that the ordinance was effective.[129]

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482 U.S. 304, 321 (1987).

[125] 438 U.S. 104, 124 (1978).

[126] It would not necessarily have done so. The *Penn Central* test would have to be applied to make that determination. *See* text accompanying *supra* note 62 (listing the three factors of the test).

[127] 586 N.E.2d 145 (Ohio Ct. App. 1990). *See generally* Thomas E. Roberts and Thomas C. Shearer, *Report of the Subcommittee on Land-use Litigation and Damages: Regulation, Property Rights, and Remedies*, 23 URB. LAW. 785, 790 (1991).

[128] *Shopco*, 586 N.E.2d at 147.

[129] *Id.* at 148.

The Ohio appellate court took the position that the *First English* compensation remedy was limited to instances where the landowner could demonstrate that it had lost "all use" of its property.[130] Though the record revealed that there was no use to which the property could economically be put under the prior zoning, the court noted that the plaintiffs continued to use the property as a park as they had for twenty-five years and there was some evidence that the property had "a value."[131] A temporary taking, as opposed to a permanent taking required a showing that all use, not simply economically viable use, was denied.[132] This was a misreading of *First English* as it was premised upon the *First English* Court's repeated references to a denial of "all use." Examined in context, it is clear that the Supreme Court was simply assuming a denial of all use as alleged in the complaint and not describing the degree of loss necessary to sustain a takings claim. Since *First English* did not address the merits of the takings claim, but only the remedy issue, it was wrong for the *Shopco* court to take the *First English* reference to "all use" as a necessary predicate to the finding of a taking on the merits.

Under *Shopco*, when a regulation is challenged, a city, fearing that a court might find the law to be illegal or to be a taking, can repeal the law and avoid all liability if the property had "some value." This misuses *First English* and invites the kind of abuse that the Supreme Court was attempting to prevent. By changing its mind and rezoning the property to allow some use, the city should be able to shorten the period of the taking and reduce its liability, but it should not be able to so easily erase its liability. After *Tahoe-Sierra*, the finding of some value will preclude a *Lucas* claim, but it should not prevent a *Penn Central* claim.

3. Government acquisition of the regulated land prior to judicial finding of a taking

City of Monterey v. Del Monte Dunes at Monterey, Ltd.[133] is an example of the third category. There, after having been denied development permission a number of times over a period of years, the property owner sold the land to the state.[134] The case then proceeded to trial on the argument that the loss of use from denial of the permit request until sale of the property had effected a temporary taking.[135] The lower court and the court of appeals held that there was a taking, and the United States Supreme Court affirmed the decision.

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[130] *Id.*

[131] *Id.* at 150.

[132] *Id.* at 149.

[133] 526 U.S. 687 (1999).

[134] *Id.* at 700.

[135] *Id.* at 698.

4. Unauthorized governmental action

The fourth category is the most intriguing as it deals with when, if ever, an illegal or erroneous governmental action can be a taking.[136] It is also the most important since most allegations of temporary takings probably fall in this category. Assume that a court finds the denial of development permission to have been invalid under state law and orders a permit issued or the land rezoned. The zoning, for example, might be found to be illegal spot or contract zoning. The question then is whether the period between the denial of the permit and the court's order directing its issuance is compensable as a taking. The problem with answering in the affirmative is that the exercise of the power of eminent domain requires legitimate government action. The problem with answering in the negative is that the government's wrongful act caused an injury to a property owner which may not be otherwise remediable. Unfortunately, the cases that deal with this issue reflect, as John Echeverria says, "doctrinal confusion of astonishing proportions."[137]

The purpose of the compensation requirement and the literal language of the Fifth Amendment support the view that illegal acts cannot be takings. The Fifth Amendment provides that a taking for a public use, interpreted broadly by the Court to mean public purpose,[138] triggers the obligation to compensate. When the government seeks to condemn land, it brings a condemnation action where it must show a valid public purpose and then have the compensation it owes assessed by the court. If the government acts in such a way that it condemns land without paying for it, the landowner must bring an inverse condemnation action seeking compensation. A predicate of obtaining compensation under the Fifth Amendment is that the property has been taken for a public purpose.

Though illegitimate actions cannot be takings because they do not meet the public use or public purpose requirement of the Fifth Amendment,[139] the government or its agents may be liable in damages under some other theory.

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[136] It may well matter which adjective is used to describe the government action. It may be ultras vires or unauthorized. It may be authorized but illegally carried out. *See, e.g.*, Jed Michael Silversmith, *Takings, Torts & Turmoil: Reviewing the Authority Requirement of the Just Compensation Clause*, 19 UCLA J. ENVTL. L. & POL'Y 359, 373-77 (2001-02). For purposes of the general discussion here, unless otherwise noted, I use these terms interchangeably to refer to improper government action.

[137] John D. Echeverria, *Takings and Errors*, 51 ALA. L. REV. 1047, 1058 (2000); *see generally* Matthew D. Zinn, Note, *Ultra Vires Takings*, 97 MICH. L. REV. 245 (1998).

[138] *See* JUERGENSMEYER & ROBERTS, *supra* note 25, at § 16.4.

[139] Adams v. United States, 20 Cl. Ct. 132, 137 (1990). *See generally* Echeverria, *supra* note 137; Zinn, *supra* note 137.

Such actions, for example, might be for torts[140] or be actionable under the civil rights statute, 42 U.S.C. section 1983, as violations of the Due Process Clause.[141] But the language of the Fifth Amendment does not contemplate an award of just compensation, as opposed to damages, for illegitimate government action.

As obvious as this is, courts sometimes blithely assume that an unauthorized government action, including one that fails to advance a legitimate state interest, is a taking.[142] These courts typically assume the loss is remediable under the Fifth Amendment's Takings Clause without addressing the public use requirement.[143] The unarticulated premise of this view presumably is that the Takings Clause should provide a monetary cause of action for any property owner who suffers from any kind of government imposed harm.[144] Could this view be correct?

In numerous instances, both recent and ancient, the Court has said that a taking must be for a legitimate public purpose. As Chief Justice Rehnquist has said:

> This basic understanding of the [Fifth] Amendment makes clear that it is designed not to limit the governmental interference with property rights per se, but rather to secure compensation in the event of *otherwise proper interference* amounting to a taking.[145]

Justice Kennedy has said:

> The [Takings] Clause operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge. The Clause presupposes what the government intends to do is *otherwise constitutional*.[146]

This is not new. In 1910, in *Hooe v. United States*,[147] the Court said:

> But it is contended by the plaintiffs that their right to recover does not depend upon contract, expressed or implied, but upon the duty, expressly imposed by the Constitution, to make just compensation for private property taken for public use. . . . The argument is ingenious but it is unsound. It cannot be said that any claim

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[140] *See, e.g.*, Firemen's Ins. Co. v. Bd. of Regents, 909 S.W.2d 540 (Tex. App. 1995).

[141] *See* JUERGENSMEYER & ROBERTS, *supra* note 25, §§ 10.22 to 10.27.

[142] *See, e.g.*, Clay County v. Harley and Susie Bogue, Inc., 988 S.W.2d 102 (Mo. Ct. App. 1999).

[143] *See* Corn v. City of Lauderdale Lakes, 904 F.2d 585 (11th Cir. 1990).

[144] "Harmed" means has suffered a taking under the substantive principles of *Lucas* or *Penn Central*.

[145] First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 315 (1987) (emphasis added and omitted).

[146] Eastern Enter. v. Apfel, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in part and dissenting in part) (emphasis added).

[147] 218 U.S. 322 (1910).

> for a specific amount of money against the United States is founded on the Constitution, unless such claim be either, expressly or by necessary implication, *authorized by some valid enactment of Congress.*[148]

Finally, to quote Justice Holmes, often said to be the author of the regulatory takings doctrine, in *Pennsylvania Coal Co. v. Mahon*:

> We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. . . . We assume, of course, that the statute was passed upon the conviction that an exigency existed that would warrant it, and *we assume that an exigency exists that would warrant the exercise of eminent domain.* But the question at bottom is upon whom the loss of the changes desired should fall.[149]

Yet, the Court has been inconsistent.[150] The idea that illegal acts can be compensable takings finds support in *Agins v. City of Tiburon*[151] where the Court said that the "application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests."[152] Without explaining how this can be so,[153] the Court has allowed this idea, which it drew directly from the Due Process Clause,[154] to become a commonly articulated takings test. And the idea is one that has lead to awards of compensation for temporary takings where the government has arbitrarily zoned land.[155] The message persists in *Tahoe-Sierra,* where the Court recites the "substantially advances" mantra[156] and assumes that illegal exercises of

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[148] *Id.* at 335 (emphasis added). *See also* Langford v. United States, 101 U.S. 341 (1879); United States v. Lynah, 188 U.S. 445, 479 (1903) (Brown, J., concurring) ("[I]f property were seized or taken by officers of the government without authority of law, . . . there could be no recovery . . . ."); Tempel v. United States, 248 U.S. 121 (1918).

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

[150] *But see* Zinn, *supra* note 137, at 247 ("[T]he Federal Circuit Court of Appeals and the U.S. Supreme Court have almost unanimously held that unauthorized federal agency actions cannot give rise to takings liability.").

[151] 447 U.S. 255 (1980).

[152] *Id.* at 260.

[153] The Court in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* acknowledges that it "has provided neither a definitive statement of the elements of a claim for a temporary regulatory taking nor a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests outside the context of required dedications or exactions." 526 U.S. 687, 704 (1999).

[154] *See* Roberts, *supra* note 5, at 639-40 (discussing facial takings claims under *Agins-Nectow*).

[155] *See, e.g.*, State *ex rel.* Shemo v. Mayfield Heights, 765 N.E.2d 345 (Ohio 2002).

[156] Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, ___, 122 S. Ct. 1465, 1479 (2002).

authority can be takings because it refers to a potential "bad faith theory" of recovery.[157]

Where a court is willing to find a taking for unauthorized zoning, what is the test to determine whether a taking has occurred? One might conclude that if the *Agins* formula is to be taken at its word, a finding that a governmental act does not advance a legitimate state interest would end the case. Nothing more need be considered; the taking is established, and compensation would be ordered. Courts, however, have not taken that path but rather have applied a *Penn Central* analysis to such claims.

Take, for example, *St. Lucas Association v. City of Chicago.*[158] A landowner unsuccessfully sought an upzoning for land that was zoned residential in the 1920s but by the 1980s was surrounded by non-residential uses. After the city refused to rezone the land, the landowner sued the city claiming the existing zoning was invalid. The court agreed. Using a state substantive due process balancing test, the court found continued residential zoning of the property was unreasonable in light of the significant economic hardship imposed on the landowner by having to forego more intensive uses and the minimal public gain achieved by the current classification.[159] The court ordered the city to issue a permit.[160]

The landowner in *St. Lucas* then sought compensation, arguing that its property had been temporarily taken while the ordinance was applied to it.[161] The court rejected this claim. Its discussion of the takings claim assumes the possibility of the invalid ordinance taking property, but relying on *Penn Central*, the court found the property had economically viable uses during the time it was improperly zoned.[162] Other courts have ruled similarly.[163] The

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[157] *Id.* at ___, 122 S. Ct. at 1485. How bad faith plays into the test of whether a taking has occurred is not clear. If the *Agins* substantially advance test is being used, a bad faith governmental action (denying Jerry a rezoning because Jerry has been critical of the council) might well substantially advance legitimate state interests even if it is motivated by ill will. If a *Penn Central* test is used does bad faith enter into the question of the "character" of the governmental action?

[158] 571 N.E.2d 865 (Ill. App. Ct. 1991).

[159] *See id.* at 868-75.

[160] *Id.* at 875.

[161] *Id.* Presumably this would be from the time the rezoning was denied until the court invalidated the zoning. The takings claim would not have been ripe until the rezoning was denied since under the circumstances seeking the rezoning likely was necessary to obtain a final decision.

[162] *Id.*

[163] *See* City of Va. Beach v. Va. Land Inv. Ass'n No. 1, 389 S.E.2d 312 (Va. 1990) (where a downzoning was declared invalid as piecemeal zoning, not justified by a change in circumstances). The court held that no temporary taking had occurred while the invalid ordinance was in effect since the landowner could only show that it was unable to develop its property as a planned unit development. Other economically viable uses remained. *Id.*; *see*

affirmation of *Penn Central* in *Tahoe-Sierra* and *Palazzolo* arguably endorses this approach.

The California Supreme Court concedes without discussion that erroneous acts can be takings, but it does not find that all such acts are takings. Thus, it has said "a regulatory mistake resulting in delay does *not*, by itself, amount to a taking of property."[164] For this and other courts,[165] the distinction between a compensable and non-compensable delay turns on the degree of illegality.

In *Landgate, Inc. v. California Coastal Commission*,[166] a two year delay in issuance of a permit resulted from a state agency's erroneous assertion of jurisdiction over a proposed development.[167] It was held not a compensable taking. Following the decisions of a number of other courts, the California court held that "a regulatory mistake resulting in delay does *not*, by itself, amount to a taking of property."[168] The *Landgate* court proceeded to analyze the nature of the delay and found it to be normal, reasonable delay and thus, not a taking under what the dissent called the squishy *Penn Central* test.[169] This holding comports with the *Tahoe-Sierra* opinion's rejection of the idea that a temporary restriction, by itself, does not constitute a taking.

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also Sea Cabins on the Ocean IV Homeowners Ass'n v. City of North Myrtle Beach, 548 S.E.2d 595, 604 (S.C. 2001) ("[A]lthough a property owner who successfully challenges the applicability of a governmental regulation is likely to have suffered some temporary harm during the process, the harm does not give rise to a constitutional taking."); Miller & Son Paving, Inc. v. Plumstead Township, 717 A.2d 483 (Pa. 1998), *cert. denied*, 525 U.S. 1121 (1999) (holding that an invalid zoning ordinance was not a *per se* taking of property; property owner failed to establish a regulatory taking because the property owner was not denied all beneficial use of the property).

[164] Landgate, Inc. v. Cal. Coastal Comm'n, 953 P.2d 1188, 1195 (Cal. 1998).

[165] *See generally id.* at 1195-96.

[166] *Id.* at 1188.

[167] *See id.* at 1191-93.

[168] *Id.* at 1195.

[169] Judge Brown's dissent in *Landgate*, read in light of *Tahoe-Sierra*, suggests the correctness of the decision to use *Penn Central* to decide whether the delay was a taking. Judge Brown said:

> After paying grudging lip service to *Lucas*'s categorical rule, the majority falls back on *Penn Central*'s squishy "multi-factor" test, a standard so amorphous it is capable of producing virtually any result. This is the very test *Lucas* overruled pro tanto in cases, like this one, where the restraint at issue denies *all* economic use. The tortuous logic by which today's majority decides an order of the coastal commission--one that finally and unqualifiedly denied the landowners here *all* use of their property for over *two years*--was a mere "temporary delay" is worth examining in detail.
>
> First, the majority resuscitates the *Penn Central* test in this case by ignoring another equally clear precedent, [*First English*].

Id. at 1207-08 (Brown, J., dissenting).

It was important to the *Landgate* court that the commission's erroneous exercise of jurisdiction, though ultimately found to be wrong, was bolstered by advice from the state attorney general, advice that was plausible but erroneous.[170] The court observed that it would be "a different question if . . . [the government's] position was so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project before it. Such a delaying tactic would not advance any valid government objective."[171] The court's implication is that a taking would then be found.

Following the *Landgate* opinion's distinction between plausible, though erroneous, exercises of authority and unreasonable ones, and the suggestion that the latter can be temporary takings, the court in *Ali v. City of Los Angeles*[172] found a temporary taking where the city's action was "unreasonable from a legal standpoint" and thus did not advance any valid government objective. [173] The city had denied demolition permits to the owner of a single room occupancy hotel (SRO) for the sole purpose of delaying development of the parcel for purposes other than an SRO. The court held this to be a direct violation of a state statute directing cities not to prohibit such conversions, and as such, the court found it was the kind of case the state supreme court had in mind in *Landgate* when it said, or rather implied, that unreasonable government acts could be takings.[174]

My difficulty with the *Landgate/Ali* approach is not that it differentiates between degrees of liability but rather the conclusion it draws from the distinction. *Landgate* takes the position that an erroneous, but plausible, act is not necessarily a taking, but that a clearly illegal act, since it does not advance a valid government objective, is a taking. While it says the clearer the illegality the more likely it is that a taking will be found, I think it should say the reverse: the clearer the illegality, the less likely it is that a taking should be found.

While purity of theory tells us that unauthorized acts cannot be takings, it may be that some illegal acts can be takings based on the idea that an agency has the power to test its authority to regulate in the same way a court has jurisdiction to determine its own jurisdiction.[175] If a court wrongfully determines that it has subject matter jurisdiction and enters a judgment, that

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[170] *Id.* at 1200.

[171] *Id.* at 1199.

[172] 91 Cal. Rptr. 2d 458 (1999), *cert. denied* 531 U.S. 827 (2000).

[173] *Id.* at 464 (citation omitted). For criticism of this finding, see Anthony Saul Alperin, *The "Takings" Clause: When Does Regulation "Go Too Far"?*, 31 SW. U. L. REV. 169 (2002).

[174] *Ali*, 91 Cal. Rptr. 2d at 464.

[175] *See, e.g.*, United States v. Ruiz, 122 S. Ct. 2450, 2454 (2002); United States v. United Mine Workers of America, 330 U.S. 258, 291 (1947).

judgment is entitled to full faith and credit.[176] Likewise, the existence of regulatory authority may support recognition of a similar implied, legitimate power in government agencies to test the reach of their regulatory authority.

The rule would then be that where a court determines that an agency's exercise of authority was plausibly correct, a taking could be found under *Penn Central* principles. The takings public purpose rationale for this is that the state act, though ultimately deemed wrong was nonetheless within the government's power to test the reach of its regulatory authority. Then, only if the delay suffered was excessive would it be a taking. The delay suffered by the landowner can be seen as serving a legitimate public purpose. In contrast, loss and delay sustained where the exercise of authority is clearly lacking is not done for a legitimate public purpose and thus could not be a taking under the Fifth Amendment.

The seeming oddity that the more unlawful the act, the less likely it is that compensation will be paid makes sense in the context of deciding when the Fifth Amendment's Takings Clause is applicable to the effects of regulatory action. The very idea that a regulation can be a taking is judicial gloss on the Fifth Amendment and should be narrowly applied for several reasons. The Takings Clause was not designed as a remedy for all wrongs, and the public treasury ought not be tapped to cover clearly illegal actions of government employees. The Due Process Clause is a more appropriate vehicle to deal with these wrongs. Governmental immunity would be impliedly eliminated by findings of such actions to be takings. While this might not necessarily be a bad idea, it ought not be done by implication under the Fifth Amendment.

A principled application of the Fifth Amendment Takings Clause would exclude illegal actions from its purview. In fact, some contend that a principled application of the Amendment would reject the hybrid doctrine of regulatory takings in its entirety.[177] History, however, teaches us that this hybrid doctrine, joining due process constraints on the regulatory power and Takings Clause constraints on the eminent domain power, is likely to remain a part of our law. Once we concede that regulations can, at times, effect takings, we must recognize that pure application of eminent domain law is not possible. Concessions to the joinder of due process and takings principles, though, ought to be done sparingly. Adoption of the *Agins* test, for example, allows due process principles to usurp takings principles, although doing so under the takings rubric. Just as clearly illegal government action ought not

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[176] Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n, 455 U.S. 691, 706-07 (1982); Durfee v. Duke, 375 U.S. 106, 111 (1963) ("[A] judgment is entitled to full faith and credit--even as to questions of jurisdiction--when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.").

[177] *See* discussion in JUERGENSMEYER & ROBERTS, *supra* note 25, at § 10.2.

be treated as a taking because the pretense of a public purpose is lacking, a colorably legal act that advances the legitimate public purpose of the state engaging in good faith exercises of the police power could be a taking under *Penn Central.*

VI. CONCLUSION

The *Tahoe-Sierra* opinion confirmed what several commentators[178] and all courts,[179] save one,[180] had said about moratoria: they are not per se facial takings. In that sense, the decision is not surprising. In other takings cases, notably *Nollan* and *Dolan,* the Court adopted a stance in line with, and relied upon, the treatment accorded the issue by the bulk of the state courts. The Court did likewise here.

The result, however, was not a foregone conclusion. As I have previously written,[181] the *First English* opinion contained some confusing and arguably contradictory statements about temporary takings. While other courts have avoided the error of the *Tahoe-Sierra* district court, it is good that the Supreme Court has set the matter straight. It is difficult to imagine the decision going the other way, and the inability of the two dissenting opinions to offer persuasive methods of dealing with the issue bolsters this view.

Laments of property rights advocates that the sky is falling are overblown. Complaining that mom and pop, ordinary folk, have been grievously wronged by the Court's ruling are emotional reactions to the difficult procedural setting in which the case was heard, and such complaints obfuscate discussion of the issue decided by the Court.[182] The claim that the opinion upheld a twenty year moratorium is wrong. The Court did no such thing. What the Court did was to reject a radical argument and confirm, in principle, the right of government to impose reasonable delays on development without compensating affected landowners. Landowners, after *Tahoe-Sierra,* retain reasonable development rights.

Emboldened by a noisy dissent from Judge Kozinski of the Ninth Circuit, the landowners pressed a strained constitutional argument that had found favor

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[178] *See e.g.*, Roberts, *supra* note 42, at 11037; Daniel P. Selmi, *Moratoria and Categorical Takings, in* TAKING SIDES ON TAKINGS ISSUES 307 (Thomas E. Roberts ed., 2002); Frank Michelman, *Takings, 1987,* 88 COLUM. L. REV. 1600, 1621 (1988); Thomas E. Roberts, *Zoning Moratoria as Regulatory Takings, in Recent Developments in Environmental Preservation and the Rights of Property Owners,* 20 URB. LAW. 969, 1012 (1988).

[179] *See* JUERGENSMEYER & ROBERTS, *supra* note 25 at § 10.9C (listing decisions upholding moratoria against takings challenges).

[180] *See, e.g,* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226 (1999).

[181] Roberts, *supra* note 42, at 11038-39.

[182] *See supra* note 116.

only in the district court. The landowners may not have had much to lose, but the property rights movement did. And, in the end, the movement suffered dearly for the Court took the opportunity to draw back from expanding private rights under the Takings Clause of the Fifth Amendment.

The need to clarify what kind of action can constitute a temporary regulatory taking was partially advanced and partially set back a notch by the opinion. We know beyond doubt that temporary restrictions are not per se temporary takings. Yet, the Court, in dicta, intimates that an illegal moratorium, one that does not substantially advance a legitimate state interest, can be a taking. To read the Takings Clause this way is to read the public purpose requirement out of the clause, and such a reading divorces the concept of a regulatory taking from its supposed constitutional home. The intermingling of takings and due process is hardly new,[183] and the mischief maker, again, is the *Agins* opinion. The Court needs to openly consider whether treating wrongful acts as takings is consistent with the Fifth Amendment's Takings Clause. As Professor Echeverria says, the need for the Court to clarify the matter is urgent.[184]

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[183] *See generally* Roberts, *supra* note 5, at 639-44.

[184] *See* Echeverria, *supra* note 137, at 1048.

Privacy and Genetics: Protecting Genetic Test Results in Hawai'i

I. INTRODUCTION

In May 2002, Burlington Northern Santa Fe Corp. ("Burlington Northern") paid approximately $2.2 million to settle a lawsuit with thirty-six of its railroad workers in which the workers alleged that Burlington Northern secretly tested its employees for a genetic predisposition to carpal tunnel syndrome.[1] Burlington Northern performed this test on their employees so that they could blame "any future health problems on [the employee's] genetic makeup, not the physical stress on the job."[2] Janice Avary, wife of a Burlington Northern employee, uncovered Burlington Northern's scheme "when she asked workers in a doctor's office why they planned to take seven vials of blood from her husband, Gary, on behalf of Burlington Northern" while he "was recuperating from a successful operation for carpal tunnel injuries."[3] This scenario illustrates potential genetic test result privacy issues that Hawai'i state laws do not currently protect. These issues include the fear of not knowing whether one has been tested, the need for one's authorization for the analysis and disclosure of the test results, and the potential damage caused by stigmatization and discrimination due to genetic test results.[4] Most importantly, this example illustrates the dramatic impact that genetic test results can have on an individual's life.

Genetic test results need specific regulations to protect autonomy, confidentiality, and privacy because of the results' greater potential to do harm to the individual.[5] With rapid technological advances in health care and the advent of electronic medical records, the privacy of an individual's genetic test results is increasingly threatened because information can be distributed

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[1] *Genetic Tests Outpace Efforts to Safeguard People's Data*, USA TODAY Aug. 19, 2002, at A10 [hereinafter *Outpace*]. *See also* Joanne L. Hustead & Janlori Goldman, *Genetics and Privacy*, 28 AM. J.L. & MED. 285, 295 (2002) (stating that although there were complex issues regarding the type of genetic testing raised by this case, since the suit was settled, none of these issues were addressed by the courts).

[2] *Outpace*, *supra* note 1.

[3] Indiana Affirmative Action Association, *Genetic Testing in the Workplace*, Summer 2001 Newsletter, *available at* http://www.inaaa.org/newsletters/2001/summer/page2.htm (last visited Nov. 6, 2002).

[4] *See Railway Co. Settles Genetic Testing Suit for $2.2M*, NEWSDAY, May 9, 2002, at A20 (stating that workers were forced to take a physical examination, which included a genetic blood test, yet workers were not told of the nature of the test nor was permission obtained from the individual workers) [hereinafter *Railway*].

[5] N.J. STAT. ANN. § 10:5-44 (West 2002); OR. STAT. § 192.533(1) (2001).

quickly to a broad audience and "patients need privacy safeguards to protect sensitive information."[6] Furthermore, advances in science made abnormal genes easier to discover and increased the amount of genetic tests available for clinical use.[7]

Legislation affecting the protection of genetic test results include the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"),[8] the repealed Privacy of Health Care Information Act ("PHCIA"),[9] the Hawai'i employment nondiscrimination laws,[10] and the Hawai'i health insurance nondiscrimination laws.[11] Effective protection for genetic test results requires that genetic policy address both the privacy and nondiscrimination aspects.[12] Although HIPAA provides some privacy safeguards, HIPAA safeguards are inadequate to protect the privacy of genetic test results.[13]

In absence of a comprehensive law in Hawai'i to protect genetic test results, it is necessary to look to other jurisdictions. The Genetic Privacy Act ("GPA")[14] and the New Jersey Genetic Privacy Act ("New Jersey Act")[15] exemplify comprehensive genetic privacy protections. Additionally, Colorado state law illustrates different ways to limit availability of genetic test results by making them confidential and privileged.[16]

Surveying current laws enables us to understand where current legislation stands, recognize possible loopholes, and ways to close these loopholes to protect genetic test results more effectively. Although current nondiscrimination laws prevent misuse of genetic test results, federal and state laws governing privacy of genetic test results provide inadequate protection.

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[6] Sharon J. Hussong, *Medical Records and Your Privacy: Developing Federal Legislation to Protect Patient Privacy Rights*, 26 AM. J.L. & MED. 453, 455 (2000). Due to the "explosion in the computer industry over the last ten years, it is increasingly easy to collect and exchange information." Karen Ann Jensen, *Genetic Privacy in Washington State: Policy Considerations and a Model Genetic Privacy Act*, 21 SEATTLE U. L. REV. 357, 363 (1997).

[7] *See* Joanne L. Hustead et al., *Genetics and Privacy: A Patchwork of Protections*, Health Privacy Project 33 Apr. 2002 [hereinafter *Patchwork*](stating that as of January 23, 2002, clinical genetic testing is available for 529 diseases compared to 361 at the end of 1999).

[8] Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified in scattered sections of 29 U.S.C., 42 U.S.C., 26 U.S.C., and 18 U.S.C.).

[9] HAW. REV. STAT. § 323C (1999).

[10] HAW. REV. STAT. ANN. § 378 (West 2002).

[11] *Id.* §§ 431:10A-118, 432D-26, and 432:1-607.

[12] *See* Hustead & Goldman, *supra* note 1, at 287.

[13] *See* Jensen, *supra* note 6, at 371.

[14] George J. Annas et al., *The Genetic Privacy Act and Commentary, available at* http://www.bumc.bu.edu/www/sph/lw/pvl/act.html (last visited on Feb. 10, 2003) [hereinafter *GPA*].

[15] N.J. STAT. ANN. § 10:5 (West 2002).

[16] COLO. REV. STAT. ANN. § 10-3-1104.7 (West 2002).

Therefore, by adopting elements from the GPA, New Jersey Act, and Colorado law, Hawai'i can create a foundation for protecting genetic test results.

This article seeks to establish a basis for legislation that protects the genetic test results of the average health care consumer, but acknowledges that privacy of genetic information, in general, is difficult to define and protect because of the numerous characteristics of genetic information.[17] Section II provides background on the complex characteristics of genetic test results and examines reasons for the protection of genetic test results. Additionally, Section II explores three important policy considerations: autonomy, confidentiality, and privacy. Section III examines HIPAA, the repealed PHCIA, and Hawai'i employment and health insurance nondiscrimination laws. Section IV evaluates the GPA, New Jersey Act, and Colorado law as models of legislation offering protection of genetic test results. Finally, Section V proposes elements of future legislation to close loopholes left by HIPAA, and concludes by noting that although these pieces of legislation are intended to protect the privacy of health information, more specific legislation is required to protect genetic test results.

II. BACKGROUND

Genetic diseases are linked to genetic abnormalities,[18] some of which occur when a gene is partially or totally missing or is damaged.[19] Genetic diseases also occur when an individual is homozygous for a recessive allele.[20]

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[17] Although this paper discusses genetic nondiscrimination and genetic research, these issues are not the focus of this paper and thus, this paper does not analyze these issues in depth.

[18] *See* Denise Casey, *What Can the New Gene Tests Tell Us?*, 36 The Judges' Journal 3 (1997); *available at* http://www.ornl.gov/hgmis/publicat/judges/judge.html (last visited Sept. 20, 2002). Genetic tests can identify some genetic diseases, like cystic fibrosis, Huntington's disease, Fragile X syndrome, phenylketonuria, sickle cell disease, and Thalassemias. *Id.*; *see also* WILLIAM K. PURVES ET AL., LIFE: THE SCIENCE OF BIOLOGY 335-36 (Andrew D. Sinauer ed., Sinauer Associates, Inc. 1995).

[19] R. SCOTT HAWLEY & CATHERINE A. MORI, THE HUMAN GENOME: A USER'S GUIDE 6 (1999). Specifically, these alterations result in the absence of certain proteins or in the production of different proteins, where the protein being produced is functioning abnormally, which inhibit its normal process or functioning in a totally different manner. *Id.* For example, in individuals with Huntington's disease, a brain-degenerative disease that "slowly diminishes the affected individual's ability to walk, think, talk and reason," the nucleotide sequence "CAG" is repeated between 40-125 times. *See* LORI B. ANDREWS, THE CLONE AGE: ADVENTURES IN THE NEW WORLD OF REPRODUCTIVE TECHNOLOGY 172-73 (Henry Holt and Co. 2000) (1999) [hereinafter CLONE AGE]; Huntington Disease Society of America, *available at* http://www.hdsa.org (last visited Nov. 5, 2002). The number of repetitions is inversely related to the onset age of the disease. *Patchwork*, *supra* note 7, at 34.

[20] An allele is a form of a gene. PURVES, *supra* note 18, at 217. A gene is a basic unit of heredity, passed on from generation to generation. TERESA AUDESIRK & GERALD AUDESIRK,

Therefore, by identifying these recessive alleles in an individual, diagnosing the individual for that particular disease becomes easier.[21]

A. Genetic Testing Results and Genetic Information

Genetic test results are discrete pieces of genetic information, which are obtained from the analysis of an individual's biological sample. Genetic testing is a powerful method of determining an individual's genetic disorders[22] and "include[s] the many different laboratory assays used to diagnose or predict a genetic condition or disease susceptibility."[23] Genetic tests analyze human DNA, chromosomes, proteins, and metabolites[24] to detect abnormalities in the genotype or phenotype, which indicate a genetic disease.[25]

Genetic test results are a unique subset of genetic information and include two types of information, predictive and diagnostic. Predictive genetic test results include sensitive information, such as the identification of a patient who is a carrier of a defective gene.[26] Diagnostic genetic test results merely confirm that an individual has a genetic disease.[27] Additionally, genetic test

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BIOLOGY: LIFE ON EARTH 183 (Sheri L. Snavely ed., Prentice-Hall, Inc. 1996) (1986). A gene has a specific location on a chromosome. PURVES, *supra* note 18, at 218. Humans are diploid organisms, meaning they have two sets of chromosomes in their cells. *Id.* at 202. When characterizing one's genotype, or actual DNA code, as homozygous, it means that the individual has two of the same allele. *Id.* at 217. When an individual is heterozygous, the individual has two different alleles for a trait. *Id.* Genetic diseases such as cystic fibrosis, Tay-Sachs disease, phenylketonuria, and sickle cell anemia are caused by recessive alleles. *Id.* at 334-35.

[21] *See id.*

[22] Richard A. Bornstein, *Genetic Discrimination, Insurability and Legislation: A Closing of the Legal Loopholes*, 4 J.L. & POL'Y 551, 558 (1996); ASSESSING GENETIC RISKS IMPLICATIONS FOR HEALTH AND SOCIAL POLICY 65 (Lori B. Andrews et al. eds., 1994) [hereinafter ASSESSING GENETIC RISKS].

[23] ASSESSING GENETIC RISKS, *supra* note 22, at 65. Types of genetic tests include: carrier testing, prenatal diagnostic testing, newborn screening, predictive testing, diagnostic testing, and forensic/identity testing. *See Patchwork*, *supra* note 7, at 8-9.

[24] A metabolite is any organic compound resulting from metabolism. AMERICAN HERITAGE DICTIONARY 789 (2d ed. 1982).

[25] PROMOTING SAFE AND EFFECTIVE GENETIC TESTING IN THE UNITED STATES: FINAL REPORT OF THE TASK FORCE ON GENETIC TESTING xi (Neil A. Holtzman & Michael S. Watson, eds., 1997). Currently, clinical genetic tests are available for 529 genetic diseases. *Patchwork*, *supra* note 7, at 33.

[26] An example would be an individual who has the BRCA1 gene and is currently asymptomatic, but does not know if or when she will be symptomatic for the disease. *See Patchwork*, *supra* note 7, at 36.

[27] *See* NATIONAL CONFERENCE OF STATE LEGISLATURES, GENETICS POLICY REPORT: INSURANCE ISSUES 7 (Cheye Calvo & Alissa Johnson, eds., 2001) [hereinafter NCSL Insurance Issues].

results are extremely specific,[28] easily obtainable,[29] and potentially vulnerable to misuse.[30]

Genetic information, on the other hand, is a broad category of information that includes genetic test results.[31] Genetic information includes public information, such as eye color, which does not require protection.[32] Furthermore, genetic information includes family history that can be "tainted by bad or failing memories."[33] "Genetic information" is different from genetic test results because it also includes abstract knowledge.[34]

B. Protection of Genetic Test Results

Genetic test results should be protected for four reasons: (1) genetic test results are an individual's "future diary"[35] of private, personal, and probabilistic information;[36] (2) samples necessary to run an analysis are small, easily obtainable and can occur without one's knowledge;[37] (3) the potential harm on the individual as well as the individual's relatives that result from

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[28] *See* Graeme T. Laurie, *Challenging Medical Legal Norms: The Role of Autonomy, Confidentiality, and Privacy in Protecting Individual and Familial Group Rights in Genetic Information*, 22 J. LEGAL MED. 1, 5-6 (2001).

[29] *See* George J. Annas, *Genetic Privacy: There Ought to Be a Law*, 4 TEX. REV. L. & POL. 9, 10 (1999) [hereinafter *There Ought to be a Law*].

[30] *Id.* at 12 (stating that historically, genetic information has been "subject to tremendous abuse and misuse in society," such as genocide).

[31] *See GPA*, *supra* note 14, at Commentary to § 3(m).

[32] For example, information that an individual has blue eyes is purely informational and is not sensitive information because this is public information; thus, the privacy protection of this information is unnecessary. *Id.*

[33] Laurie, *supra* note 28, at 3. One commentator noted that:

> [F]amily history is abstract knowledge that has been tainted by bad or failing memories, lack of accurate data about why someone has become ill or died, and by an absence of understanding about the pattern of disease in a family pedigree. In contrast, genetic test results can offer a high degree of specificity.

Id.

[34] *Id.*

[35] Some commentators characterized the essence of genetic information as a "future diary." *See GPA*, *supra* note 14, at Introduction. This future diary contains coded information about an individual and an individual's probable medical future. *There Ought to be a Law*, *supra* note 29, at 11; Jensen, *supra* note 6, at 360; Richard S. Fedder, J.D., Ph.D., *To Know or Not to Know: Legal Perspectives on Genetic Privacy and Disclosure of an Individual's Genetic Profile*, 21 J. LEGAL MED. 557, 561 (2000).

[36] Jensen, *supra* note 6, at 360

[37] *See also*, *GPA*, *supra* note 14, at Introduction.

disclosure;[38] and (4) the limitations of genetic testing.[39] Without protection, people may be subjected to discrimination.

Genetic tests, as a future diary, read an individual's DNA, which holds information about "everything that an individual is or will become."[40] This informative quality regarding an individual's genetic predispositions contributes to the potency of genetic test results. This predictive characteristic of genetic test results increases an individual's need for security, especially when probabilistic information is improperly used to discriminate against or stigmatize an individual.[41] Additionally, since genetic information is an identifier of individuals,[42] it is highly personal.[43]

Another concern is that genetic testing can be performed on a small sample, which testers can procure without an individual's knowledge.[44] By utilizing the polymerase chain reaction ("PCR"),[45] laboratories can duplicate millions of copies of DNA in a matter of minutes from a small sample size, such as a strand of fallen hair or saliva found on a licked stamp.[46] Consequently, the small sample size creates concern because anyone can easily obtain sample and analyze it without the sample source's knowledge.[47]

Genetic test results, when improperly used, results in various types of harm.[48] For example, employers can use genetic test results to screen potential employees for personality traits and health predisposition.[49] Additionally, an insurer's knowledge of genetic test results could affect insurance coverage for

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[38] *See* Kimberley Nobles, *Birthright or Life-Sentence: Controlling the Threat of Genetic Testing*, 65 S. CAL. L. REV. 2081, 2089-90 (1992).

[39] *See* BERNARD LO, M.D., F.A.C.P., RESOLVING ETHICAL DILEMMAS: A GUIDE FOR CLINICIANS 353-55 (Williams & Wilkins 1995).

[40] Fedder, *supra* note 35, at 561.

[41] *Id.*

[42] *See GPA*, *supra* note 14, at § 3(m).

[43] *See* Hustead & Goldman, *supra* note 1, at 285 (stating that each individual has a unique set of DNA which is immutable).

[44] *See GPA*, *supra* note, 14, at Introduction.

[45] PCR is "the process of rapidly amplifying a defined region of DNA by sequential steps of denaturation and replication." Hawley, *supra* note 19, at 394.

[46] See *GPA*, *supra* note 14, at Introduction.

[47] Ronald M. Green and A. Mathew Thomas, *DNA: Five Distinguishing Features for Policy Analysis*, 11 HARV. J.L. & TECH. 571, 575-576 (1998).

[48] Nobles, *supra* note 38, at 2089-90.

[49] *See* Lori B. Andrews, *A Conceptual Framework for Genetic Policy: Comparing the Medical, Public Health and Fundamental Rights Models*, 79 WASH. U. L.Q. 221, 260 (2001) [hereinafter *Models*] ("Although his father and uncle both had the disease, a graduate student chose not to be genetically tested for it because he was worried about his job prospects."). *See* Nobles, *supra* note 48, at 2089.

the affected individual and his blood relatives.[50] For example, genetic testing for Fragile X syndrome[51] in Colorado schools resulted, in some cases, in the loss of health insurance for that child, his parents, and his other healthy siblings.[52] Additionally, schools can use genetic test results to screen students for learning disabilities and mental retardation, and potentially segregate those students "into remedial learning courses regardless of their actual intelligence and work ethic," thus harming students with the stigma of being slower.[53] Genetic discrimination is a serious concern that has both grave social and economic impacts.[54]

There are a few, but very important limitations of genetic testing that merit the protection of genetic test results.[55] Genetic testing is limited by the uncertainty of disease manifestation,[56] misinterpretation,[57] and low clinical sensitivity rates.[58] These limitations mean that genetic test results cannot always provide a complete and accurate picture of an individual's future health.

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[50] *See Models*, *supra* note 49, at 259-260. "[R]elatives of people with Huntington's disease have been refused health insurance." *Models*, *supra* note 49, at 260. HIPAA & Hawai'i health insurance nondiscrimination laws prohibit the use of genetic information in calculating health insurance premiums. *See* 29 U.S.C. § 1182 (2002), HAW. REV. STAT. ANN. §§ 431:10A-118 (West 2002) (health insurance), 432D-26 (West 2002) (health maintenance organization), 432-1-607 (West 2002) (mutual benefit societies). Not only does genetic information expose information about an individual, it exposes information about an individual's blood relatives. Hustead & Goldman, *supra* note 1, at 285. *See There Ought to be a Law*, *supra* note 29, at 11-12; ASSESSING GENETIC RISKS, *supra* note 22, at 254. Arising from the concept of heredity, there are issues of whether there is a duty to disclose genetic test results to blood relatives and if so, whose duty is it to disclose: the individual or the physician. *See generally*, David J. Doukas and Jessica W. Berg, *The Family Covenant and Genetic Testing*, 1 AM. J. OF BIOETHICS 2 (2001). If a disclosure is compelled, the individual loses his or her privacy. *See* Laurie, *supra* note 28, at 10 (stating that there is a privacy issue "when the individual wishes to keep the data private and the family wishes to invade that private sphere").

[51] Fragile X syndrome is the "most common form of inherited mental retardation." Casey, *supra* note 18, at 3-4.

[52] *See* CLONE AGE, *supra* note 19, at 182.

[53] Jason Mark Anderman, *Uneven Ground: Children's Privacy Rights in New Jersey*, 213 N.J. LAWYER 25, 26 (2002). *See* Mark A. Rothstein, *Genetics and the Work Force of the Next Hundred Years*, 2000 COLUM. BUS. L. REV. 371, 381 (2000).

[54] A graduate student decided against being genetically tested for hemochromatosis, a fatal disease, because he was worried about his job prospects. *Models*, *supra* note 49, at 260. Additionally, a man tested and treated successfully for hemachromatosis was still dropped by his insurer because "he might stop taking the treatment and develop the costly disease." *Id.*

[55] NEW ETHICS FOR THE PUBLIC'S HEALTH 339 (Dan E. Beauchamp & Bonnie Steinbock eds., Oxford University Press 1999).

[56] *See* Lo, *supra* note 39, at 354.

[57] *Id.* at 354-55

[58] ASSESSING GENETIC RISKS, *supra* note 22, at 37.

Uncertainty of disease manifestation is a limitation of genetic testing because some genetic diseases are complex. Variable expression is one of these complexities because the genetic test result alone will not prepare the doctor or tested individual for the severity of the disease.[59] Additionally, some genetic diseases, called multi-factorial diseases, require the interplay of multiple genes and/or environmental factors before the disease manifests.[60] Therefore, with multi-factorial diseases, the genetic test result alone will not accurately predict the occurrence of the disease.[61]

Misinterpretation of test results is another limitation.[62] Genetic testing can give false positive or false negative results.[63] The current lack of clinical geneticists and genetic counselors compounds this problem.[64] The shortage of adequately trained personnel to conduct and interpret these intricate tests creates a number of quality control issues, such as whether the tests are run properly, results are interpreted properly, and the right information is properly communicated to the tested individual.[65] Ultimately, misinterpretations have severe consequences because misinterpretations may affect an individual's decisions in marriage or reproduction.[66]

Additionally, some genetic tests have low clinical sensitivity rates,[67] which limit their ability to give accurate results.[68] For example, more than 170 alleles can cause cystic fibrosis.[69] Genetic testing for the eight most common mutations of cystic fibrosis gives a sensitivity of 85%, and thus "72% of couples at risk for bearing a child with cystic fibrosis would be identified."[70]

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[59] For example, in cases where an individual is homozygous for cystic fibrosis, a genetic test alone cannot tell a practitioner the severity of the disease that will manifest in the individual. *See* Lo, *supra* note 39, at 354.

[60] *See id.*

[61] *See id.*

[62] *See id.* at 354-55.

[63] *Id.*

[64] *See id.* at 355.

[65] *Id.*; PATCHWORK, *supra* note 7, at 10.

[66] *See* Lo, supra note 39, at 355. Genetic test results can have a great impact on "relationships with spouses and potential spouses." Models, *supra* note 49, at 245. As genetic information is becoming more available, genetic information can become an important factor when choosing a mate. *See id.* For example, individuals of Ashkenazi Jewish descent have a "one in twenty-five chance of having a Tay-Sachs mutation" and individuals who are carriers for the disease are not set up by the matchmaker for marriage. *Id.* Most individuals, however, "do not consciously seek a partner based on his or her genetic pedigree." *Id.* at 246.

[67] Clinical sensitivity is the "ability of the test to detect all patients who will get, or who have, the disease." ASSESSING GENETIC RISKS, *supra* note 22, at 37.

[68] *See id.*

[69] Lo, *supra* note 39, at 354.

[70] *Id.*

Therefore, "some couples at risk for [cystic fibrosis] will not be identified by screening," and thus, will be misled by the negative test results.[71]

C. Policy Considerations

Effective protection for genetic test results requires consideration of autonomy, confidentiality, and privacy.[72] These three concepts define and protect an individual's rights, and are integral in formulating effective genetic test results protection. Furthermore, each concept addresses society's concerns associated with genetic testing. These concerns include controlling disclosure of existing genetic test results, preventing their misuse, and preventing unwarranted intrusion into an individual's private information.[73]

Autonomy is an individual's freedom to make his own decisions without external control.[74] In a genetic testing context, autonomy is an individual's right to make an informed decision regarding whether to undergo genetic testing.[75] Additionally, the individual has the right to be informed and to control the subsequent use of biological materials from the individual's body.[76] Without autonomy, clinical geneticists can perform the genetic test without the individual's knowledge.[77] Due to the sensitive and private nature of genetic test results, the decision to undergo genetic testing "must be made without interference, intrusion, or coercion."[78]

Furthermore, autonomy "comes with the recognition that the decision to participate in genetic testing and other genetic services must be voluntary."[79] A voluntary and informed decision preserves an individual's autonomy. A voluntary and informed consent[80] requirement in the genetic testing process ensures autonomy by providing an individual with reasonable information to make an informed decision of whether to undergo testing.[81]

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[71] *Id.*

[72] *See* Laurie, *supra* note 28, at 26.

[73] *Id.*

[74] *See* ASSESSING GENETIC RISKS, *supra* note 22, at 248. Although special autonomy issues are beyond the scope of this paper, these issue are appropriately raised for the genetic testing of minors and incompetent persons, which must be evaluated and treated in legislation. *See GPA*, *supra* note 14, at Commentary to §§ 141-43.

[75] *See* ASSESSING GENETIC RISKS, *supra* note 22, at 248. *See also* Jensen, *supra* note 6, at 364.

[76] *See* ASSESSING GENETIC RISKS, *supra* note 22, at 248.

[77] *Id.*

[78] Jensen, *supra* note 6, at 364.

[79] ASSESSING GENETIC RISKS, *supra* note 22, at 260.

[80] Informed consent is "a *process* of education and the opportunity to have questions answered—not merely the signing of a form." ASSESSING GENETIC RISKS, *supra* note 22, at 22.

[81] *Id.* at 259.

Confidentiality connotes that some information is sensitive and access is limited to authorized parties.[82] Between the two parties, there is an "expectation that it will not be disclosed to others or will be disclosed to others only within limits."[83] Thus, confidentiality requires that disclosed information will not be redisclosed without the tested individual's consent.[84] Due to the sensitive and private nature of genetic test results, confidentiality is important to the tested individual because it allows the tested individual to control and further limit access to his results.[85] Confidentiality establishes the foundation for measures such as authorization for use and disclosure of genetic test results and a sample destruction policy.[86]

Privacy, however, is the most important concern because the disclosure of genetic test results can have harmful consequences. Privacy is "an umbrella concept encompassing issues of both autonomy and confidentiality."[87] Privacy can mean "informational privacy," which allows an individual the "right to control who can gain access to his or her private health care information."[88] Privacy also includes the "confidentiality, anonymity, or secrecy of the data that result from genetic testing and screening."[89]

In western society, there is a strong public interest in protecting privacy.[90] Privacy generates a sentiment that it is in the public's interest "to reduce to a minimum all potential harm to individuals."[91] Therefore, in a genetic testing context, it is in the public's best interest to protect and keep results private. Thus, privacy requires that legislation require consent for disclosure and re-disclosure of genetic test results.[92] Additionally, to prevent the use of discovery in lawsuits to gain access to genetic test results, genetic test results, in general, should be confidential and privileged information.[93]

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[82] *Id.* at 250.

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.* at 279.

[87] *Id.* at 250.

[88] Jensen, *supra* note 6, at 362.

[89] GENETICS: ETHICS, LAW AND POLICY 594 (Lori B. Andrews et al. eds., WestGroup 2002) [hereinafter GENETICS].

[90] *Laurie*, *supra* note 28, at 27-29.

[91] *Id.* at 29.

[92] *See* ASSESSING GENETIC RISKS, *supra* note 22, at 249 (stating that "privacy includes the right to make an informed, independent decision about whether—and which—others may know details of their genome").

[93] *See* COLO. REV. STAT. ANN. § 10-3-1104.7 (West 2002).

III. ANALYSIS: FEDERAL AND STATE LEGISLATION

Currently, few federal and state laws affect the protection of genetic test results in Hawai'i: HIPAA, the repealed PHCIA, the Hawai'i health insurance nondiscrimination laws, and employment nondiscrimination laws. HIPAA's limited reach in protecting genetic test results and the lack of a comprehensive privacy statute in Hawai'i both contribute to the insufficient protection of genetic test results.

A. HIPAA Insufficiently Protects Privacy for Genetic Test Results

Although there is no comprehensive federal medical or genetic test result privacy act, HIPAA[94] is the most important federal law in governing health information.[95] HIPAA protects health information as it filters through the health care system.[96] HIPAA has two parts affecting genetic information:[97] the first part addresses insurance reform by protecting health insurance coverage for workers and their families when they change or lose their jobs;[98] the second part, the administrative simplification provision, establishes national health data privacy standards.[99] Due to advances in health information systems and the growing complexity of the health care industry, Congress recognized the need for "standards for the privacy of individually identifiable health information."[100] The privacy regulation,[101] a subpart of the

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[94] *See* Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified in scattered sections of 29 U.S.C., 42 U.S.C., 26 U.S.C., and 18 U.S.C.).

[95] *See* Hustead & Goldman, *supra* note 1, at 288.

[96] *Id.*

[97] *Id.* at 286-87.

[98] Pub. L. No. 104-191, 110 Stat. 1936, Title I (1996) (codified in scattered sections of 29 U.S.C., 42 U.S.C., 26 U.S.C., and 18 U.S.C.); 29 U.S.C. §§ 1181, 1182 (2002). HIPAA prevents the misuse of genetic information in the health insurance industry by prohibiting its use as a preexisting condition when group health plans and insurance issuers are deciding to continue or issue a new health insurance policy. 29 U.S.C.A. § 1182(a)(1) (2001). HIPAA prohibits group health plans and insurance issuers from using genetic information as a factor in denying an individual enrollment in a group health plan, or raising an individual's premium. *Id.* §§ 1182(a)(1)(F); 1182(b)(1). HIPAA insurance reform, however does not apply to self-funded or individual health insurance plans, leaving approximately sixteen million people in the United States unprotected. *See generally Outpace*, *supra* note 1.

[99] Pub. L. No. 104-191, 110 Stat. 1936, Title II, Subtitle F (1996) (codified in scattered sections of 29 U.S.C., 42 U.S.C., 26 U.S.C., and 18 U.S.C.); Hustead & Goldman, *supra* note 1, at 286-87.

[100] Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 14776, 14777 (Mar. 27, 2002).

[101] On August 14, 2002, the Department of Health and Human Services issued the Final Privacy Rule with an effective date of October 15, 2002. Standards for Privacy of Individually

administrative simplification provision, is "the first federal law to protect health information created or received by health care providers and health plans"[102] and is a baseline for protecting protected health information.[103]

The privacy regulation regulates some use and disclosure of genetic test results, however, it does not provide absolute protection.[104] In order for HIPAA to protect genetic test results, it must be "protected health information,"[105] a subset of "individually identifiable health information."[106] Furthermore, the privacy regulation is limited in scope and targets compliance from three groups of individuals and entities:[107] (1) health care providers[108] that transmit claims-type information electronically, (2) health plans,[109] and (3) health care clearinghouses.[110]

Identifiable Health Information, 67 Fed. Reg. 53182, 53182 (Aug. 14, 2002). HIPAA compliance by covered entities, other than small health plans, is required by April 2003. 45 C.F.R. § 164.534 (2001). *See also* Jennifer Kulynych & David Korn, *Use and Disclosure of Health Information in Genetic Research: Weighing the Impact of the New Federal Medical Privacy Rule*, 28 AM. J.L. & MED. 309, 312 (2002).

[102] Hustead & Goldman, *supra* note 1, at 289.

[103] *Id.* at 292-293. Any state laws that are contrary to or provide less protection than HIPAA are superseded by HIPAA, but any state laws stricter than HIPAA are not preempted. 45 C.F.R. §§ 160.201-160.205 (2002).

[104] *See* Hustead & Goldman, *supra* note, at 289.

[105] "Protected health information" is "individually identifiable health information" maintained or transmitted by electronic media or any other form or medium, except for "individually identifiable health information" in: (i) Education records covered by the Family Educational Right and Privacy Act, as amended, 20 U.S.C. § 1232g; and (ii) Records described at 20 U.S.C. § 1232g(a)(4)(B)(iv). 45 C.F.R. § 164.501; Kulynych & Korn, *supra* note 101, at 312.

[106] 106 "Individually identifiable health information" is health information that is collected from the individual and is created or received by

> a health care provider, health plan, employer, or health care clearinghouse; and (2) Relates to the past, present, or future physical or mental health or condition of an individual . . . and (i) That identifies the individual; or (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

45 C.F.R. § 160.103 (2002).

[107] *Id.* § 160.102.

[108] "Health care providers" include doctors, hospitals, clinics, pharmacists, laboratories etc. Health care provider means "a provider of services . . . , a provider of medical or health services . . . , and any other person or organization who furnishes, bills, or is paid for health care in the normal course of business." *Id.* § 160.103.

[109] A "health plan" is an individual or group plan that provides, or pays the cost of, medical care. Some government funded plans are excluded. *Id.*

[110] "Health care clearinghouses" are entities that (1) process and facilitate or (2) receive, process, and facilitate the processing of health information. *Id.* Entities, such as pharmaceutical companies, workers' compensation insurers, life or disability insurers, employers, and many researchers, who receive or create health information are not directly required to comply with HIPAA. Hustead & Goldman, *supra* note 1, at 288.

HIPAA privacy regulation protects genetic test results as "protected health information" by regulating its use and disclosure by covered entities[111] and requiring authorization from an individual in certain scenarios.[112] However, in the course of treatment, payment, or health care operations, a covered entity may use and disclose genetic test results without the individual's authorization.[113] The Privacy Regulation places an affirmative duty on the covered entity to "guard against misuse of individuals' identifiable health information and limit the sharing of such information."[114] If the individual or entity is not a covered entity, the individual or entity does not have to comply with HIPAA and can disclose protected health information without consequence.

Although HIPAA takes a step in the right direction by providing some protections,[115] it provides minimal protection and does little to preserve the privacy of all genetic test results. HIPAA protects against misuse of genetic test results in the health insurance industry.[116] However, it is ineffective in fully protecting genetic test results because it has no specific provisions for genetic test results that protect to all genetic test results, does not define genetic test results or genetic information, and does not protect DNA samples.

HIPAA does not explicitly guarantee protection of genetic test results.[117] Individuals are "vulnerable to unauthorized redisclosure" of genetic test results.[118] Furthermore, HIPAA has been criticized for "failing to include specific language protecting the confidentiality of patient health information."[119] Generally, the privacy regulation does not protect genetic information compiled and genetic testing performed in the course of

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[111] "Covered entity" is a health plan, health care clearinghouse or health care provider "who transmits any health information in electronic form in connection with a transaction covered by [the Privacy Rule]." 45 C.F.R. § 160.103.

[112] *See id.* §§ 164.506, 164.508. Also, HIPAA will not always protect genetic test results that are a result of genetic research. *See* Hustead & Goldman, *supra* note 1, at 290. Privacy Regulation will not protect genetic information compiled and genetic testing performed in the course of research. *Id.* However, if the researcher is a health care provider and if the researcher or the institute bills insurance companies for health care services, the information will be protected by HIPAA. *Id.*

[113] 45 C.F.R. § 164.502(a)(1)(ii).

[114] Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 53182, 53182 (Aug. 14, 2002).

[115] Jensen, *supra* note 6, at 371.

[116] 29 U.S.C. § 1182(a)(1)(F) (2002).

[117] *See* Hustead & Goldman, *supra* note 1, at 289. Unlike genetic test results, psychotherapy notes are specifically protected under HIPAA regarding its privacy protection. *See* 45 C.F.R. § 164.508(a)(2) (a covered entity must get an authorization for the use or disclosure of psychotherapy notes).

[118] Jensen, *supra* note 6, at 371.

[119] *Id.*

research.[120] Without power to control outsider's access to such personal and sensitive information, privacy and confidentiality are lost.

HIPAA lacks definitions for "genetic test results" and "genetic information," which creates ambiguities in their protection. Although HIPAA explicitly mentions "genetic information" in its nondiscrimination provision, no guidance is given as to its definition.[121] Therefore, one could broadly interpret genetic information to include family history.[122]

Finally, HIPAA does not protect DNA samples because the definitions of protected health information and individually identifiable health information do not include biological materials.[123] Protection of these samples is necessary because laboratory workers or clinical geneticists can extrapolate DNA from a small sample size.[124] Without such protection, an individual loses his genetic autonomy because he no longer has control over the sample, the sample collection process, and ultimately, the decision to have genetic testing performed.[125]

B. PHCIA Might Not Have Provided Adequate Protection

It is helpful to examine Hawai'i's PHCIA to see how much genetic test result protection would have been afforded had it not been repealed.[126] The Hawai'i Legislature enacted PHCIA in 1999,[127] and subsequently repealed it

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[120] *See* Hustead & Goldman, *supra* note 1, at 290. If the researcher is a health care provider and if the researcher or the institute bills insurance companies for health care services, the information will be protected by HIPAA. *See id.*

[121] 29 U.S.C. § 1181(b)(1)(B) (2002).

[122] According to the HIPAA preamble, genetic information could also include family history. Hustead & Goldman, *supra* note 1, at 289. This is significant because it would broaden the scope of protection of family history as is currently used in medical practice and thus, would alter the way medicine is practiced. *See GPA*, *supra* note 14, at Commentary to § 3(m).

[123] *See* 45 C.F.R. § 164.501; *see also* Hustead & Goldman, *supra* note 1, at 289. HIPAA governs the privacy of "protected health information," a subset of "individually identifiable information," which is a subset of "health information." *See* 45 C.F.R. § 164.501. One of the key elements of "health information" is that it is information that is either oral or recorded in any medium or form. *Id.*

[124] *See supra* Part II.B.

[125] *See Outpace*, *supra* note 1; *see also supra* Part II.B.

[126] HAW. REV. STAT. § 323C (1999).

[127] *Id.* This bill garnered much support from the medical community, health insurers, and health care providers. *See* HAW. H.R. STAND. COMM. REP. NO. 37, at 1022 (1999). Before the passing of this legislation, individuals had a right of privacy, although not absolute, of their personal medical informational under existing laws. HAW. H.R. STAND. COMM. REP. NO. 596, at 1238 (1999). The Committee on Consumer Protection and Commerce recognized the importance of a comprehensive health information privacy act because existing laws were ambiguous, piecemeal, and inadequately protected the individual's privacy right in the current medical system. HAW. H.R. STAND. COMM. REP. NO. 596, at 1238 (1999).

in 2001.[128] Although PHCIA was repealed, PHCIA would have provided more explicit protection of genetic test results than HIPAA currently affords. PHCIA provided a "comprehensive regulation of the handling and disclosure of medical records."[129] Additionally, PHCIA recognized the evolution of the patient-physician relationship into a multi-party relationship and also required compliance from entities, not traditionally included in the patient-physician relationship.[130] Furthermore, PHCIA protected an individual's right to privacy of medical information.[131]

PHCIA's provisions were similar to the HIPAA privacy regulation.[132] PHCIA's three major provisions included: (1) the right of an individual to access their medical records;[133] (2) a notice of confidentiality practices to patients;[134] and (3) a prohibition on all organizations with access to patient health information from using or disclosing it for reasons unrelated to the delivery and payment of the patient's medical treatment.[135] PHCIA also required entities to establish safeguards for protected health information encountered by the entity.[136] As an incentive for compliance, PHCIA created significant penalties for the violation of an individual's privacy rights.[137]

Although there was no explicit genetic test result provision, PHCIA regulated the use and disclosure of genetic test results by allowing the entity to use or disclose protected health information for delivery and payment of the patient's medical treatment.[138] PHCIA set parameters regarding the use and

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[128] HAW. REV. STAT. § 323C (2001). In 2001, the legislature repealed the PHCIA in part because the community recognized the "difficulty and/or impossibility of compliance." 2001 Haw. Sess. Laws 244 § 1 at 638. Some of this difficulty was due to the broad definition of "entity" and the increased scope of compliance. Carly Kelly, *HIPAA Compliance: Lessons From the Repeal of Hawai'i's Patient Privacy Law*, 30 J.L. MED. & ETHICS 309, 310 (2002). Citing lack of support for the PHCIA in light of the impending adoption of HIPAA and no evidence of widespread abuse of medical records privacy in Hawai'i, the legislature repealed the act in June 2001. 2001 Haw. Sess. Laws 244 § 1 at 638.

[129] HAW. H.R. CONF. COMM. REP. NO. 92, at 951 (1999).

[130] "[T]he patient-doctor relationship has expanded into a multi-party relationship that includes employers, health plans, consulting physicians and other health care providers, laboratories and hospitals, researchers and data organizations, and various governmental and private oversight agencies." 1999 Haw. Sess. Laws 87 § 1 at 155.

[131] HAW. H.R. CONF. COMM. REP. NO. 92, at 951 (1999).

[132] *See* Kelly, *supra* note 128, at 309.

[133] HAW. REV. STAT. § 323C-11 (Supp. 1999) (stating an individual's right to inspect and copy their medical record, which the entity maintains, within thirty days of submitting a written request to the entity).

[134] *Id.* § 323C-13 (requiring health plans and providers to communicate their confidentiality practices to patients).

[135] *Id.* § 323C-21. *See* Kelly, *supra* note 128, at 309-310.

[136] *Id.* § 323C-14.

[137] *Id.* §§ 323C-51, 323C-52, 323C-53.

[138] *Id.* §§ 323C-21(b), 323C-13.

disclosure of "protected health information,"[139] which was defined as any individually identifiable information including tissue and genetic information.[140]

PHCIA also limited use and disclosure of "protected health information" to the purposes for which it was collected and any use or disclosure for any other purpose required the individual's consent.[141] PHCIA allowed the individual greater control over "protected health information" by including an opt-out provision. [142] In certain scenarios, such as with a coroner's inquiry into death,[143] health research,[144] or identification of deceased individual,[145] protected health information could be disclosed without authorization. Additionally, entities can disclose protected health information for public health reasons and for civil, judicial, and administrative procedures.[146]

PHCIA's effectiveness is difficult to determine due to its broad scope, even though PHCIA would have provided more protection than HIPAA.[147] PHCIA would have ensured the protection of genetic test results as genetic information because of its explicit definition of protected health information.[148] Even if the Hawai'i Legislature had not repealed PHCIA, the lack of a definition of genetic information could have been problematic because its definition could be extended to include family history and public genetic information. Moreover, PHCIA had no provision for requiring informed consent for tested

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[139] "Protected health information" is "any information, identifiable to an individual, including demographic information, whether or not recorded in any form or medium that relates directly or indirectly or the past, present, or future: (1) physical or mental health or condition of a person, including tissue and genetic information." *Id.* § 323C-1. However, there is no definition of genetic information in this section. *Id.*

[140] *Id.* § 323C-21 (stating general rules regarding use and disclosure). Although not specifically mentioned, genetic test results are a part of genetic information. *Id.* § 323C-1.

[141] *Id.* § 323C-21(e). However, an entity can use and disclose protected health information for treatment, payment or qualified health care operations. *Id.* § 323C-13. Authorization is required for disclosing protected health information other than for treatment, payment or qualified health care operations. *Id.* §§ 323C-22, 323C-23 (1999).

[142] *Id.* § 323C-21(c) (stating that "[p]rotected health information related to health care services paid for directly by the individual shall not be disclosed without consent").

[143] *Id.* § 323C-31.

[144] *Id.* § 323C-37.

[145] *Id.* § 323C-33.

[146] *Id.* § 323C-36, 323C-38. Genetic information could potentially be disclosed to a third party through discovery proceedings. *Id.* § 323C-38(a).

[147] *See* Kelly, *supra* note 128, at 310. The broader definition of protected health information and reach of who needed to comply with PHCIA contributed to the difficulty in assessing its effectiveness. *See id.*

[148] *See supra* note 139 and accompanying text.

individuals nor a sample destruction policy.[149] Nonetheless, PHCIA provided a means for civil actions to hold persons accountable for their actions.[150]

C. Hawai'i Health Insurance and Employment Nondiscrimination Laws Alone Provide Insufficient Genetic Test Result Protection

Hawai'i health insurance nondiscrimination laws[151] do not specifically protect the privacy of genetic information,[152] which includes genetic test results. The laws, however, protect individuals from the misuse or discriminatory use of their genetic test results.[153] In 1999, the Hawai'i Legislature enacted laws that prohibit health insurers, health maintenance organizations, and mutual benefit societies from disclosing genetic information about an individual or family member[154] without consent.[155] These laws also prohibit those entities from requesting or requiring genetic services[156] or from using them to determine an individual's benefits plan or to accept an individual for enrollment in a plan.[157]

Subsequently, in July 2002, the Governor of Hawai'i signed an employment nondiscrimination law that prohibits discrimination based on genetic information.[158] The law classified genetic information as a disability[159] and defined a genetic test as "a laboratory test which is generally accepted in the scientific and medical communities for the determination of the presence or

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[149] *See generally* HAW. REV. STAT. § 323C (Supp. 1999).

[150] *Id.* § 323C-52.

[151] *Id.* §§ 431:10A-118 (West 2002) (health insurance), 432D-26 (West 2002) (health maintenance organization), 432-1-607 (West 2002) (mutual benefit societies).

[152] These laws broadly define "genetic information" as "information about genes, gene products, hereditary susceptibility to disease, or inherited characteristics that may derive from the individual or family member." *Id.* §§ 431:10A-118(b), 432D-26(b), 432-1-607(b).

[153] *Id.* §§ 431:10A-118, 432D-26, 432-1-607.

[154] "Family member" is defined as "with respect to the individual, another individual related by blood to that individual." *Id.* §§ 431:10A-118(b), 432D-26(b), 432-1-607(b).

[155] *Id.* §§ 431:10A-118(a)(3), 432D-26(a)(3), 432-1-607(a)(3).

[156] "Genetic services" is defined as "health services to obtain, assess, or interpret genetic information for diagnosis, therapy, or genetic counseling." *Id.* §§ 431:10A-118(b), 432D-26(b), 432-1-607(b).

[157] *Id.* §§ 431:10A-118(a)(1), (2), 432D-26(a)(1), (2), 432-1-607(a)(1), (2).

[158] 2002 Haw. Sess. Laws 217, at 882-83.

[159] 159 HAW. REV. STAT. ANN. § 378-1 (West 2002). "Disability" means "the state of having a physical or mental impairment which substantially limits one or more major life activities, having a record of such an impairment, or being regarded as having such an impairment." *Id.* "Being regarded as having such an impairment" includes but is not limited to employer consideration of an individual's genetic information, including genetic information of any family member of an individual, or the individual's refusal to submit to a genetic test as a condition of initial or continued employment. *Id.*

absence of genetic information."[160] With the employment nondiscrimination law in place, an employer cannot discharge or refuse to hire somebody due to genetic information.[161]

These laws explicitly protect the misuse of genetic test results by the health insurance industry and employers by incorporating them into the definition of genetic information.[162] Thus, an individual's genetic test results can not be used against him.[163] However, these laws do not protect against re-disclosure to a third party if the employer receives genetic information. Although these statutes provide some degree of protection from the harmful effects of genetic test results, a comprehensive policy regarding privacy is necessary to effectively protect genetic test results.[164]

IV. OTHER LEGISLATION

Many states, legislatures and governmental agencies put the protection of genetic test results privacy on their agendas. Some states, such as New Jersey,[165] enacted comprehensive statutes.[166] Other states, by taking a piecemeal approach, enacted statutes focusing only on genetic nondiscrimination or genetic test results.[167] Evaluating components of legislation in other jurisdictions can create a foundation for future legislation in Hawai'i that will successfully protect genetic test results.

A. Genetic Privacy Act of 1995

The Human Genome Project's ("Project") Ethical, Legal and Social Implications task force authored the GPA,[168] a proposal for federal legislation,

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[160] *Id.*

[161] *Id.* § 378-2(1)(A).

[162] *See supra* note 152 and accompanying text.

[163] HAW. REV. STAT. ANN. §§ 431:10A-118(a)(1) (West 2002), 432D-26(a)(1) (West 2002), 432-1-607(a)(1) (West 2002).

[164] *See* Hustead & Goldman, *supra* note 7, at 287.

[165] N.J. STAT. ANN. § 10:5 (West 2002); N.M. STAT. ANN. § 24-21 (2002).

[166] *See also* N.M. STAT. ANN. § 24-21 (2002)

[167] ALA. CODE §§ 36-18-20, 36-18-21 (2002); GA. CODE ANN. 31 § 54 (2002).

[168] *Ethical, Legal and Social Issues, at* http://www.ornl.gov/hgmis/elsi/elsi.html (last visited Feb. 16, 2003). The Project's purpose was to unravel and map the genetic code of the Human Genome. *See About the Human Genome Project, at* http://www.ornl.gov/hgmis/project/about.html (last visited Feb. 16, 2003). The project is scheduled for completion in 2003. *See* U.S. Human Genome Project 5-Year Research Goals 1998-2003, *at http://www.ornl.gov/TechResources/Human_Genome/hg5yp/* (last visited Feb. 16, 2003). Current goals of the Project include addressing various ethical, legal, and social issues arising from the project, such as clinical, reproductive, and privacy issues. *See Ethical, Legal and Social Issues, at* http://www.ornl.gov/hgmis/elsi/elsi.html (last visited Feb. 16, 2003).

to protect genetic privacy by prohibiting the unauthorized collection and analysis of an individual's DNA.[169] The GPA's main premise is that no stranger should have or control another's identifiable DNA samples or genetic information unless that individual specifically authorizes it.[170] Although never enacted into law,[171] the GPA could potentially protect genetic test results and provide a source of "uniformity across state lines."[172] Anticipating that Congress might not adopt the GPA, its authors recommended that individual states adopt the GPA until Congress acts.[173]

The GPA is a good piece of model legislation because it provides protection along every step of the genetic testing process, from deciding to undergo genetic testing to disclosing the results to a third party. It protects "individual privacy while permitting medical uses of genetic analysis."[174] The GPA specifically protects "private genetic information,"[175] requires informed consent and voluntary authorization,[176] provides sample safeguards,[177] and regulates the disclosure and re-disclosure of genetic test results.[178]

The GPA safeguards "private genetic information," which is defined as "any information about an identifiable individual that is derived from the presence, absence, alteration, or mutation of a gene or genes, or the presence or absence of a specific DNA marker or markers" that was obtained from a DNA analysis, or from what is otherwise considered genetic test results.[179] Unlike HIPAA, the GPA specifically provides protection for a particular type of genetic information.[180] Compared to PHCIA, which guarded "protected health information," the GPA's scope is under-inclusive because it only protects

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[169] *GPA*, *supra* note 14, at Introduction.

[170] *Id.* Furthermore, the GPA is instructive in addressing issues of autonomy in minors and incompetent persons. *Id.* at § 141, 143.

[171] *See* GENETICS, *supra* note 89, at 614 (stating that the approach advocated in the GPA was not enacted because "the procedures they endorsed were seen as onerous and unnecessary, too time-consuming and expensive, and perhaps would interfere with patient care and research."). *Id.*

[172] *GPA*, *supra* note 14, at Introduction.

[173] *Id.*

[174] *Id.*

[175] *Id.* at Commentary to § 3(m).

[176] *Id.* at §§ 101-03.

[177] *Id.* at §§ 101-05.

[178] *Id.* at §§ 111-15.

[179] 179 *Id.* at § 3(m). Genetic information that is derived from family history, medical examinations, and pedigrees are not considered private genetic information and are not covered under this act. *Id.* at Commentary § 3(m). The authors noted that "[e]xtending the umbrella of protection through such an expansive definition would necessitate the overhaul of well established medical information practices and policies." *Id.*

[180] *GPA*, *supra* note 14, at § 3(m).

DNA analysis.[181] The GPA's authors realized that some genetic information is more sensitive than other genetic information and thus, GPA made a distinction between different types of genetic information and provided protection to the category that needed it the most.[182]

The GPA is more effective than a policy which protects all genetic information because it is specifically tailored to certain types of information and there are many types of genetic information, each with varying degrees of sensitivity.[183] Furthermore, tailoring legislation to protect genetic test results is more practical because it is easier to classify and identify.[184] Basing a privacy act in terms of genetic information can be more slippery and may cause confusion because, depending on its definition, it can include medical information, as well as family history.[185]

Additionally, the GPA requires a prospective test individual to undergo an informed consent process.[186] To further ensure an individual's autonomy, a voluntary and informed process must precede the sample collection. The GPA states that the individual has the right to inspect records containing genetic test results; the right to have the DNA sample destroyed; and the right to revoke consent to the genetic analysis at any time prior to the completion of the analysis.[187] Also, the GPA requires a statement that the genetic analysis may result in obtaining potentially important information about the individual's genetic relatives and that the individual will have to decide whether to share that information with relatives.[188]

These provisions successfully maintain the integrity of the individual's autonomy and privacy by ensuring that the individual voluntarily underwent genetic testing through the informed consent process. Likewise, the right to revoke consent at any point before analysis completion also preserves autonomy because the tested individual retains control over the choice to undergo genetic testing and receive test results.[189] Confidentiality is also preserved by these provisions because they allows the tested individual to decide whether to tell family members his genetic test results.[190]

The GPA prohibits sample collection without the individual's informed and voluntary authorization.[191] This prohibition provides the individual with

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[181] *Id.* at Commentary § 3(m).
[182] *Id.*
[183] *See GPA*, *supra* note 14, at § 3(m).
[184] *See id.* at Commentary § 3(m).
[185] *Id.*
[186] *See GPA*, *supra* note 14, at §§ 101-03.
[187] *Id.* at §§ 101(b)(5), (6), (7); 104 (b), (c); 105(d), (e).
[188] *Id.* at § 101(b)(8).
[189] *Id.* at § 101(b)(7).
[190] *Id.* at § 101(b)(8).
[191] *Id.* at § 101(a).

greater control over genetic test results through the individual's control over the sample and its subsequent analysis.[192] Furthermore, the individual can request immediate destruction of the sample.[193]

By requiring voluntary and informed authorization of sample collection and analysis, preservation of a patient's autonomy and privacy occurs because both coerced and unauthorized sample collection are prohibited. In Burlington Northern, for example, an employer collected samples without the individual's knowledge and acquired genetic information against the individual's will.[194] By requiring the analysis to remain within the scope of written authorization,[195] the tested individual retains control over analysis and information derived from a particular sample. Additionally, by requiring sample destruction within a certain time period, there is less opportunity to exploit the sample through additional, unauthorized testing.

The GPA requires the individual's authorization for disclosure of protected genetic information to persons other than the tested individual.[196] Re-disclosure of such information to third parties is prohibited without authorization.[197] To further protect an individual's privacy, disclosures must be accompanied by the following statement: "This information has been disclosed to you from confidential records protected under the Genetic Privacy Act and any further disclosure of the information without specific authorization is prohibited."[198] Requiring such authorization secures additional privacy because the individual chooses whom to disclose information to and thus, creates a boundary beyond which information cannot pass.[199]

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[192] *Id.* at Introduction.

[193] *Id.* at § 105(d). The sample may be routinely destroyed unless the tested individual directs otherwise in writing or all individual identifiers, which link the sample to the sample source, are destroyed. *Id.* at § 104(c). "Individual identifiers" include the "name, address, Social Security number, health insurance identification number, or similar information by which the identity of a sample source can be determined with reasonable accuracy, either directly or by reference to other available information." *Id.* at § 3(h).

[194] *See Railway*, *supra* note 4.

[195] *See GPA*, *supra* note 14, at § 105(a).

[196] *Id.* at §§ 111, 112. For minors under the age of sixteen and incompetent persons, the individual's parents or personal representatives may authorize disclosure. *GPA*, *supra* note 14, at § 142; *id.* at § 144. Minors between the ages of sixteen and seventeen may authorize disclosure. *Id.* at § 142(a).

[197] *See GPA*, *supra* note 14, at § 111.

[198] *GPA*, *supra* note 14, § 112(e).

[199] There is a conflicting issue, however, over the duty to disclose as seen in *Tarasoff v. Regents of University of California*, 551 P.2d 334 (Cal. 1976), where there was a duty to disclose when the professional in a confidential relationship knew information that might result in the death of another.

B. New Jersey Act

In 1996, New Jersey passed one of the most comprehensive state genetic privacy act in the country.[200] The New Jersey Act protects privacy and autonomy by requiring informed consent for the collection of genetic information[201] and prohibiting disclosure of genetic information without the individual's consent.[202] Also, under the New Jersey Act, a person cannot disclose genetic information unless the tested individual provides informed consent.[203] Finally, the New Jersey Act allows a tested individual to sue for actual damages for violations of this act.[204]

Unlike the GPA,[205] the New Jersey Act is defined in terms of genetic information,[206] and not genetic test[207] results. The New Jersey Act is broader in scope than the GPA because the New Jersey Act is not limited to DNA analysis.[208] Compared to the GPA, the New Jersey Act is over-inclusive. This broad scope is potentially hazardous because it would be harder to delimit what can and should be protected.[209] Unlike the GPA, the New Jersey Act requires the immediate destruction of the DNA sample upon request, unless retention is necessary.[210] Such a policy may not be feasible, especially in a high volume laboratory.

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[200] N.J. STAT. ANN. § 10:5 (West 2002). *See also* Kourtney L. Pickens, *Don't Judge Me by My Genes: A Survey of Federal Genetic Discrimination Legislation*, 34 TULSA L. J. 161, 171-2 (1998).

[201] *Id.* § 10:5-45. In situations where genetic testing is performed pursuant to paternity cases, federal law, gene banking, criminal investigations, anonymous research, and identification of deceased individuals is not subject to the informed consent requirement. *Id.*

[202] *Id.* § 10:5-46. However, genetic test results for determining paternity, gene bank, criminal and death investigations, court authorization, and anonymous research are not subject to the consent requirement. *See id.*

[203] *Id.* §§ 10:5-47.a.(5), § 10:5-48.a. However there are some statutory exceptions requiring disclosure without consent which include: testing performed pursuant to paternity cases, federal law, gene banking, criminal investigations, and identification of deceased individuals. *Id.* § 10:5-47.

[204] *Id.* § 10:5-49.

[205] *See supra* Part IV.A.

[206] "Genetic Information" is defined as the information about "genes, gene products or inherited characteristics that may derive from an individual or family member." N.J. STAT. ANN. § 10:5-5.

[207] "Genetic Test" is defined as "a test for determining the presence or absence of an inherited genetic characteristic in an individual, including tests of nucleic acids such as DNA, RNA and mitochondrial DNA, chromosomes or proteins in order to identify a predisposing genetic characteristic." *Id.*

[208] *See supra* note 181; ct. *GPA*, *supra* note 14, at § 3(m); *supra* Part IV.A.

[209] *See GPA*, *supra* note 14, at Commentary to § 3(m).

[210] N.J. STAT. ANN. § 10:5-46(b); *GPA*, *supra* note 14, at § 104(c).

On balance, the New Jersey Act provides a good model for legislation with its comprehensive approach.[211] It simultaneously addresses genetic test results privacy and nondiscrimination concerns, thus, avoids the possibility of inconsistencies and loopholes.[212] Similar to the GPA, the New Jersey Act recognizes the right to autonomy by providing informed consent and safeguards sample and test results from exploitation.[213] Also, the New Jersey Act's prohibition on disclosure of the identity of any individual who has undergone genetic testing[214] protects the individual's privacy more than the GPA. Most important, the New Jersey Act establishes basic protections and provides an incentive for compliance because the New Jersey Act allows individuals to file civil actions against those who violate it.[215]

C. Colorado Statute

Unlike the GPA and the New Jersey Act, Colorado's statute treats information derived from genetic testing[216] as confidential and privileged.[217] Genetic test results, however, can be released for purposes of diagnosis, treatment or therapy.[218] This provides for greater privacy protection of genetic testing results, while not drastically stifling the flow of information. Similar to the New Jersey Act and the GPA, Colorado's legislation permits the tested individual to allow the release of genetic test results to a third party if the tested individual signs a written consent.[219]

Colorado's statute is not too restrictive because it balances the needs of both sides of the health care spectrum. Health care providers are allowed to access an individual's information for the specific purposes of diagnosis, treatment and therapy[220] and therefore, the quality of health care should not decrease. Yet, the tested individual has the comfort of knowing that this information is

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[211] *See* Hustead & Goldman, *supra* note 1, at 287 (stating that both privacy and nondiscrimination laws should be considered together).

[212] *See id.* at 286-87; Anita Silvers & Michael Ashley Stein, *An Equality Paradigm for Preventing Genetic Discrimination*, 55 VAND. L. REV. 1341, 1354 (2002).

[213] N.J. STAT. ANN. §§ 10:5-45; 10:5-46; 10:5-47. *See* discussion *supra* Part IV.A.

[214] N.J. STAT. ANN. § 10:5-47 (stating that "a person may not disclose or be compelled, by subpoena or any other means, to disclose the identity of an individual upon whom a genetic test has been performed").

[215] N.J. STAT. ANN. § 10:5-49.

[216] The Colorado Revised Statutes defined "genetic testing" as "any laboratory test of human DNA, RNA, or chromosomes that is used to identify the presence or absence of alterations in genetic material which are associated with disease or illness." COLO. REV. STAT. ANN. § 10-3-1104.7(2)(b) (West 2002)..

[217] COLO. REV. STAT. ANN. § 10-3-1104.7(3)(a) (West 2002).

[218] *Id.*

[219] *Id.*

[220] *Id.*

privileged, confidential, and out of the reach of the court in discovery except in certain situations.[221]

V. PROPOSED MODEL LEGISLATION

Although the full impact of genetic test results on society has yet to be seen and experienced, the Burlington Northern case is illustrative of potential impacts. Legislation has not kept up with technological advances.[222] Currently, Hawai'i protects genetic test results through HIPAA, Hawai'i health insurance nondiscrimination laws and the Hawai'i employment nondiscrimination laws. These laws, however, do not fully protect genetic test results.[223] Further legislation is necessary to protect the sample, the results, and the decision to undergo genetic testing.[224] Successful legislation must address privacy, autonomy and confidentiality concerns.[225] There are six fundamental building blocks that are essential in establishing a genetic privacy act that addresses these policy considerations: (1) clear definition; (2) informed consent; (3) sample control; (4) disclosure/re-disclosure policy; (5) confidentiality of identification and genetic test results; and (6) cause for action.[226]

A. Defining "Genetic Test Results"

Legislation that protects genetic test results should have a clear definition of "genetic test results." "Genetic test results" should be defined as "any information about an identifiable individual that is derived from the presence, absence, alteration, or mutation of a gene or genes, or the presence or absence of a specific DNA marker or markers obtained from DNA analysis."[227]

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[221] *Id.* The exceptions include: genetic testing performed "in the course of a criminal investigation or a criminal prosecution, and to the extent allowed under the federal or state constitution." Also, "any research facility may use the information derived from genetic testing for scientific research purposes so long as the identity of any individual to whom the information pertains is not disclosed to any third party." COLO. REV. STAT. § 10-3-1104.7(4) (2002); COLO. REV. STAT. ANN. § 10-3-1104.7(5).

[222] *Models*, *supra* note 49, at 222 (stating that "[d]espite the potential for abuses with genetics and despite its historical misuse in the eugenics movement . . . no comprehensive legal policy exists for regulating genetics").

[223] *See* discussion *supra* Parts III.A & C.

[224] Other issues that are not covered in this paper, such as genetic research and genetic counseling as part of the standard of care, should nonetheless be addressed in legislation, but are beyond the scope of this paper.

[225] *See* discussion *supra* Part II.C.

[226] Genetic counseling does not protect genetic test result privacy, but genetic counseling should be recommended as a part of the standard of care for the genetic testing process. *See GPA*, *supra* note 14, at Commentary to § 101.

[227] *GPA*, *supra* note 14, at § 3(m).

Utilizing the Hawai'i Revised Statutes' current definition of "genetic test" in defining genetic test results is unacceptable for genetic privacy legislation because it is too broad and would result in an over-inclusive law.[228] As evidenced in PHCIA, the lack of a clear definition results in ambiguities in its implementation.[229]

By using a narrow definitions in formulating a genetic privacy act, like the one adopted in the GPA,[230] specific types of information, namely genetic test results, would be regulated.[231] Genetic test results are specific, potentially more harmful than the broader category of "genetic information" and require specific attention.[232] Therefore, legislation should be in terms of "genetic test results" and specifically defined.[233]

B. Prohibiting Involuntary, Unwarranted, and Coerced Genetic Testing Through Informed Consent.

Legislation that protects genetic test results must have an informed consent provision[234] that requires voluntary informed consent.[235] The informed consent provision should at least provide: the reason(s) for undergoing the genetic

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[228] *Supra* notes 147, 149; *supra* Part III.B.; Sonia M. Suter, M.S., J.D., *The Allure and Peril of Genetics Exceptionalism: Do We Need Special Genetics Legislation?*, 79 WASH. U.L.Q. 669 (2001).

[229] *See* Kelly, *supra* note 132, at 310.

[230] *See* discussion *supra* Part IV.A.; *see GPA*, *supra* note 14, at 3(m).

[231] NCSL Insurance Issues, *supra* note 27, at 8.

[232] *See* discussion *supra* Part III.A. & III.B.

[233] Alternatively, some states have defined genetic privacy in terms of genetic information. *See* N.J. STAT. ANN. § 10:5 (West 2002); OR. REV. STAT. §§ 192.531-192.549 (2001). This is permissible because "any definition of genetic information must include the results of a genetic test." NCSL Insurance Issues, *supra* note 27, at 8. If legislation is constructed in terms of genetic information, the legislation must be carefully drafted to be limited in scope and not define genetic information too broadly because there would be problems implementing the plan due to ambiguities and "an expansive definition would necessitate the overhaul of well established medical information practices and policies." *GPA*, *supra* note 14, at Commentary to § 3(m). The Oregon statutes are instructive and defined "genetic information" as "information about an individual or the individual's blood relatives obtained from a genetic test." OR. REV. STAT. § 192.531(9) (2001).

[234] *See* Robin J.R. Blatt, *Elements of Informed Consent for Clinical Genetic Testing*, THE GENE LETTER, Volume 1, Issue 2, Sept. 1996. Basic elements of informed consent include: statement of paternity, if applicable; injury statement which limits the liability of the physician or institution in the event of injury; summary authorization statement; signature; date; a statement of confidentiality of the genetic test results; a list of family issues arising from genetic testing; and a research clause indicating that the tested individual gives authorization for the storage and future use of his or her sample with the condition that all individual identifiable information are destroyed. *Id.*

[235] *GPA*, *supra* note 14, at § 101-03; N.J. STAT. ANN. § 10:5-45 (West 2002).

testing; disabilities (conditions) identified by the genetic test;[236] and the accuracy and sensitivity of the genetic test and the genetic test results.[237] Also, the informed consent provision must include a genetic test description, which should include background information about the test, the test procedures and possible issues confronted during the test.[238] Informed consent should also inform the individual about the various risks involved in genetic testing, such as the physical and emotional risks associated with the genetic test.[239] Furthermore, the informed consent policy should give the individual the right to revoke consent for the genetic test at any time before testing begins.[240]

The above provisions are necessary to protect an individual's autonomy. However, for public policy reasons there should be exceptions to the informed consent requirement.[241] These exceptions should include that for criminal investigations, federal law, medical research and identification of deceased individuals.[242]

Neither HIPAA nor PHCIA contained an informed consent provision.[243] By adopting an informed consent policy, informed consent facilitates communication and reflection amongst the individual and health care provider."[244] Furthermore, it ensures that the genetic test result is information the individual wanted to know and it safeguards the individual's autonomy and freedom of choice.[245] Therefore, legislation must adopt an informed consent provision except in certain scenarios.

C. Protecting individual sample from unauthorized collection and analysis.

Legislation should also include a policy for sample collection, analysis, and destruction that limits the information extracted from genetic testing.[246] The policy should require that the sample be collected for and the analysis restricted to the genetic testing to which the individual has consented.[247] The

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[236] *See* GPA, *supra* note 14, at § 101(b).

[237] *See id.*

[238] *See id.*

[239] GPA, *supra* note 14, at § 101(b).

[240] *See There Ought to be a Law*, *supra* note 29, at 13; *see GPA supra* note 14, at § 101(b)(7); *see* discussion *supra* Part III.A.

[241] *See GPA supra* note 14, at §§ 121-23, 131, 151-53; N.J. STAT. ANN. § 10:5-45 (West 2002).

[242] *Id.*

[243] *See* discussion *supra* Part III.A. & III.B.

[244] *See* Blatt, *supra* note 234

[245] *Id.*; *see* discussion *supra* Part II.C.

[246] *See GPA*, *supra* note 14, at § 101-05.

[247] *GPA*, *supra* note 14, at § 101-03.

New Jersey Act adopted such a policy.[248] A policy protecting samples is imperative to guard against unwarranted and unauthorized genetic test results.[249] Currently, there are no HIPAA provisions regulating samples for genetic testing.[250] Adopting this policy is beneficial because an individual's autonomy and privacy are protected by limiting the types and amount of information extracted from the sample.[251]

Additionally, legislation must require routine sample destruction as soon as conclusive results are established.[252] However, an exception should be made if the individual has consented to immediate destruction or consented to other uses of his sample, such as for research.[253] A sample destruction policy is necessary to protect the sample from future unauthorized testing. Neither HIPAA nor the repealed PHCIA provided such protection for the individual's sample.[254] On the other hand, the New Jersey Act requires immediate destruction upon request,[255] which diminishes the opportunity for sample exploitation.[256] Requiring immediate destruction, however, poses additional hardship on laboratories performing the tests. By adopting a routine sample destruction policy, the tested individual has "reassurance that once authorized analysis has been completed, the sample itself can be destroyed, preventing any additional unauthorized analysis."[257] Therefore, legislation must require that sample (1) be collected and analyzed to the extent of the consent and (2) be destroyed routinely, unless the individual has consented otherwise.

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[248] N.J. STAT. ANN. § 10:5-45 (West 2002). "No person shall obtain genetic information . . . from an individual's DNA sample, without first obtaining informed consent." *Id.*; *see* discussion *supra* Part IV.B.

[249] *See* discussion *supra* Part III.A.

[250] *See* discussion *supra* Part III.A.

[251] *See* discussion *supra* Part II.B.

[252] *See GPA*, *supra* note 14, at § 104.

[253] *See GPA*, *supra* note 14, at Commentary to § 131 (guidelines for genetic research are enacted by an Institutional Review Board). For example, if the individual has consented to research on the sample, then the sample may be utilized for that purpose once all identifiable information associated with the sample has been stripped, except for sex, age, and ethnic background of the individual. *Id.*

[254] *See* discussion *supra* Parts III.A. & III.B.

[255] N.J. STAT. ANN. § 10:5-46(b) (West 2002).

[256] Alternatively, the GPA requires that samples be routinely destroyed. *GPA*, *supra* note 14, at § 104(c). Routine destruction of samples provides a greater opportunity for sample exploitation, but may be more feasible for workflow.

[257] *GPA*, *supra* note 14, at Commentary to § 104.

D. Disclosure of Genetic Test Results

Effective legislation must also protect an individual's informational privacy by regulating genetic test result disclosure.[258] The tested individual should have unrestricted access to his genetic test results, enabling the individual to make full use of any information obtained from the genetic test.[259] However, similar to the New Jersey Act and GPA, any disclosure of genetic test results to third parties should require the individual's authorization.[260] Re-disclosure of genetic test results should be prohibited.[261] Parties seeking the genetic test results must be required to obtain the tested individual's written authorization.[262] Furthermore, when one discloses genetic test results to an authorized party, one must notify the authorized party that this information is confidential and may not be redisclosed under any circumstances to a third party.[263] Such a policy would create a barrier that limits to whom genetic test results may travel.[264]

Although HIPAA requires the individual's authorization for certain disclosures of "protected health information," HIPAA does not place any restrictions on re-disclosures by entities not subject to HIPAA.[265] This creates a high potential for unwanted or unauthorized disclosures.[266] By adopting this proposed policy, the individual has the ability to maintain privacy by controlling who is privy to the individual's genetic test results. In addition, such a provision safeguarding the privacy of genetic test results complements nondiscrimination laws, which prevents the misuse of this potentially harmful information.[267] Therefore, legislation must adopt a disclosure and re-disclosure policy requiring the tested individual's authorization for dissemination of information.

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[258] *See* Jensen, *supra* note 6, at 380-81.

[259] *Id.* at 381.

[260] N.J. STAT. ANN. § 10:5-45; *GPA*, *supra* note 14, at §§ 112, 141. In cases of minors and incompetent persons, the individual's representative the legal guardian may give authorization. *See GPA*, *supra* note 14, at §§ 141, 142, 144.

[261] *GPA*, *supra* note 14, at §§ 111, 112.

[262] *Id.* at § 112(e)

[263] *Id.*

[264] *See* discussion *supra* Part III.A.

[265] *See* discussion *supra* Part III.A

[266] Jensen, *supra* note 6, at 371.

[267] *See* Hustead & Goldman, *supra* note 1, at 287.

E. Information About the Individual and Individual's Results are Confidential and Privileged

To protect an individual's informational privacy, legislation must restrict a third party's reach into information about the identity of the tested individual as well as that individual's results.[268] Identity and results should be confidential and privileged and outside of the reach of the judicial system, such as a discovery proceeding. Protecting individual's privacy and confidentiality would be pointless if all one needed to do was go to court to get the tested individual's medical records.[269]

There are certain exceptions to this privilege that are valid policy reasons for not keeping this type of genetic test results confidential and privileged. These exceptions are recognized in the GPA[270] and the New Jersey Act.[271] The exceptions may include, but are not limited to criminal investigations and body identification.[272] Colorado allows for the flow of genetic test results for diagnosis, treatment and therapy.[273] HIPAA does not have a provision for making genetic test results confidential and privileged. Without such a policy, individuals could go to court and utilize discovery to find out a tested individual's genetic test result. Therefore, genetic test results should have the status of being confidential and privileged information, with the same exceptions for disclosure. Also, uses pertaining to the diagnosis, treatment and therapy, but not including payment for these services, should be excepted from this status.

F. Cause for action

Finally, there should be a cause for civil action for damages and equitable relief.[274] Enforcement should include a monetary fine up to $5000, and/or other relief such as a temporary restraining order or a prison term up to one year, depending on the gravity of the infraction.[275] Enforcement of the

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[268] For the similar reasons, the same groups excepted from obtaining informed consent should not have their genetic information covered under this policy. *See* discussion *supra* Part V.D.

[269] *See* interview with Sylvia M. Au, State Genetic Coordinator, HI Dep't of Health, in Honolulu, HI (Sept. 17, 2002).

[270] *See GPA*, *supra* note 14, at Part C.

[271] N.J. STAT. ANN. § 10:5-46 (West 2002).

[272] *See GPA*, *supra* note 14, at Part C; N.J. STAT. ANN. § 10:5-46 (West 2002).

[273] COLO. REV. STAT. § 10-3-1104.7(3)(a) (2000).

[274] N.J. STAT. ANN. § 10:5-49 (2002); *GPA*, *supra* note 13, at §§ 171, 172; N.M. STAT. ANN. § 24-21-6 (Michie 2002).

[275] *See* N.J. STAT. ANN. § 10:5-49(b) (West 2002); *see GPA*, *supra* note 13, at §§ 171, 172; *See Jensen*, *supra* note 7 at 384.

penalties will promote compliance with the proposed genetic act and result in the preservation of the individual's autonomy and privacy rights.[276]

Although HIPAA has civil and criminal penalties, HIPAA does not create a civil cause of action for violations.[277] Thus, there is not as strong of a deterrent as the New Jersey[278] and GPA[279] provide, and as did PHCIA,[280] a mechanism to pursue a civil action for violations of the privacy act. New Jersey makes the violator liable to the tested individual for "all actual damages, including damages for economic, bodily, or emotional harm which is proximately caused by the disclosure."[281] Furthermore, the violator is punishable by a "$5,000 [fine], a prison term of one year, or both."[282] The GPA provides for civil remedies and makes a distinction between negligent and willful violations.[283] By establishing greater liability for those who disclose another's genetic test results without proper authorization, genetic legislation promotes an incentive for compliance.[284] Therefore, legislation must adopt a civil cause of action as well as enforce penalties, which may include a monetary fine, temporary restraining order, or prison term.

VI. CONCLUSION

As technology advances, we will learn more about genetics, improve the ability to predict diseases, and genetic testing will become more common in the health care industry. Nonetheless, as technology advances, that law must also advance. The focus of legislation must have the proper scope. If not, we will be faced with a serious dilemma of nonfunctional laws that are expensive and confusing to implement.

Current state and federal laws inadequately guard genetic test results in Hawai'i. Although federal legislation may be enacted in the future to protect genetic test results, the state is in "a better position to assess the local communities' needs."[285] Thus, Hawai'i should adopt its own legislation to protect genetic test results. This legislation must address six fundamental building blocks: clear definitions, informed consent, sample control, disclosure and re-disclosure, confidentiality of identity and results, and a cause

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[276] *See Jensen*, *supra* note 6, at 287.
[277] *See* PATCHWORK, *supra* note 7, at 28.
[278] N.J. STAT. ANN. § 10:5-49 (West 2002).
[279] *GPA*, *supra* note 13, at §§ 171, 172.
[280] HAW. REV. STAT. § 323C-52 (1999).
[281] N.J. STAT. ANN. § 10:5-49(c) (West 2002).
[282] *Id.* § 10:5-49(b) (West 2002).
[283] *GPA*, *supra* note 13, at §§ 171(d), (e).
[284] Jensen, *supra* note 6, at 384.
[285] Hussong, *supra* note 6, at 473.

for action. These building blocks are the foundation to legislation that adequately protects the policy considerations of autonomy, confidentiality and privacy.

While the state waits to see the effects of HIPAA before crafting new legislation,[286] there will be a need for legislation in the near future providing protection for genetic test results privacy. Genetic test results are pervasive and impact so many areas of life. By revealing a gross amount of information about of individuals, which could ultimately result in discrimination, such legislation cannot be sidelined for very long.

Allison Ito[287]

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[286] Before its full repeal, the Committees on Consumer Protection and Commerce and Judiciary and Hawaiian Affairs recommended that PHCIA not be outright repealed, but rather amended to have an effective date as of July 2004 after HIPAA implementation due to the uncertainty of HIPAA's effects. *See* HAW. H.R. STAND. COMM. REP. NO. 193, at 1205-06 (2001). This implies that some form of health privacy legislation forthcoming.

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Fido Seeks Full Membership In The Family: Dismantling The Property Classification of Companion Animals By Statute

I. INTRODUCTION

A little white ten-year old Bichon Frise lapdog named Leo captured international attention when his twenty-seven year old killer was sentenced to three years in prison in San Jose, California.[1] On February 11, 2001, Sara McBurnett fell victim to road rage when she accidentally tapped the back of a four-wheel-drive vehicle.[2] Immediately following the accident, the male driver exited his vehicle and approached McBurnett's car.[3] McBurnett rolled down her window to speak with the male driver as Leo sat on her lap.[4] Rather than speaking to McBurnett, the man unexpectedly reached into her car, grabbed Leo, tossed Leo into three lanes of traffic and fled the scene.[5] McBurnett jumped out of her car in an attempt to save Leo, but it was too late. Leo was ultimately crushed by a car and died.[6]

Animal lovers across the world sympathized with McBurnett and raised over $120,000 to provide reward money in locating the killer.[7] The San Jose

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[1] Audrey Gillan, *Road Rage Killer Dogged by the Call of Justice*, THE AGE COM.AU WORLD NEWS, *at* http://www.theage.com.au/news/world/2001/06/19/FFXW0SO43OC.html (June 19, 2001); *Three Years for Road-Rage Dog Killer*, BBC NEWS, *at* http://news.bbc.co.uk/hi/english/world/americas/newsid.1437000/1437987.stm (July 13, 2001); *Man Gets 3 Years for Throwing Dog in Traffic*, CNN.COM, *at* http://www.cnn.com/2001/LAW/07/13/roadrage.dog/ (July 13, 2001).

[2] Gillan, *supra* note 1; *Three Years for Road-Rage Dog Killer*, *supra* note 1; *Man Gets 3 Years for Throwing Dog in Traffic*, *supra* note 1.

[3] Gillan, *supra* note 1; *Three Years for Road-Rage Dog Killer*, *supra* note 1; *Man Gets 3 Years for Throwing Dog in Traffic*, *supra* note 1.

[4] Gillan, *supra* note 1; *Three Years For Road-Rage Dog Killer*, *supra* note 1; *Man Gets 3 Years for Throwing Dog in Traffic*, *supra* note 1.

[5] Gillan, *supra* note 1; *Three Years for Road-Rage Dog Killer*, *supra* note 1; *Man Gets 3 Years for Throwing Dog in Traffic*, *supra* note 1.

[6] Gillan, *supra* note 1; *Three Years for Road-Rage Dog Killer*, *supra* note 1; *Man Gets 3 Years for Throwing Dog in Traffic*, *supra* note 1.

[7] Gillan, *supra* note 1; *Three Years for Road-Rage Dog Killer*, *supra* note 1; *Man Gets 3 Years for Throwing Dog in Traffic*, *supra* note 1. Since an anonymous e-mail reported the killer, $75,000 of the $120,000 reward money went to John Mora who witnessed the crime and testified. Gillan, *supra* note 1; *Three Years for Road-Rage Dog Killer*, *supra* note 1; *Man Gets 3 Years for Throwing Dog in Traffic*, *supra* note 1. The remaining amounts were dispersed among four other citizens who assisted in the investigation. Gillan, *supra* note 1; *Three Years for Road-Rage Dog Killer*, *supra* note 1; *Man Gets 3 Years for Throwing Dog in Traffic*, *supra* note 1.

police department reported that the money donated on Leo's behalf far exceeded the average amount donated in child molestation and rape cases.[8] As a result, an anonymous e-mail led McBurnett to Leo's killer, twenty-seven year old Andrew Burnett.[9] Following the killer's conviction and three-year sentence, McBurnett stated, "It wasn't just a dog to me . . . [f]or me it was my child . . . [h]e killed my baby right in front of me."[10]

Companion animals are defined as "those animals who live and share their lives with human beings, who are responsive to and interact emotionally with their guardians, and who are valued as ends in themselves."[11] Animal activists typically prefer the term "companion animal" over "pet," as it better describes the relationship between a human and domestic animal, and fully encompasses the role that such animals play in people's lives.[12] Likewise, the term "animal guardian" is preferred over "owner" based on the property connotation associated with the term "owner."[13]

Animal guardians claim that there is little distinction between their companion animals and their children.[14] For instance, more than 80% of companion animal guardians consider their companion animals as family members.[15] A 1991 survey of 41 million animal guardians revealed that 6.2 million claimed their attachment to their animal was as close as a child, and 4.2 million considered their relationship as close as a spouse.[16] Another study

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[8] Staff and Wire Reports, *Reward Grows to Catch Road-Rage Driver Who Killed Dog*, CNN.COM, *at* http://www.cnn.com/2000/US/03/08/road.rage.dog/ (Mar. 8, 2000).

[9] Gillan, *supra* note 1.

[10] Sherry F. Colb, *FindLaw Forum: The Highway Dog Killing and Animals Rights*, CNN LAW CENTER, *at* http://www.cnn.com/2001/LAW/08/columns/fl.colb.dogkilling/ (Aug. 31, 2001).

[11] Debra Squires-Lee, *In Defense of Floyd: Appropriately Valuing Companion Animals in Tort*, 70 N.Y.U. L. REV. 1059, 1098 n.2 (1995). This paper narrowly focuses on dogs and cats as companion animals; however, it does not reject that other domesticated animals, including but not limited to fish, mice, rats, hamsters, gerbils, rabbits, and birds, may be included in the definition of companion animals. Nevertheless, due to the statistical prevalence of dogs and cats in the United States and their involvement as subjects of published case law, this paper will primarily focus on dogs and cats.

[12] *Id.*

[13] *Id.*; *see also* discussion *supra* Part II.A.2 (various states and counties that enacted statutes to amend the term "animal owner" with "animal guardian").

[14] *See generally* Squires-Lee, *supra* note 11, at 1065-66; ROD PREECE & LORNA CHAMBERLAIN, ANIMAL WELFARE & HUMAN VALUES (Wilfrid Laurier University Press 1993); Steven M. Wise, *Recovery of Common Law Damages for Emotional Distress, Loss of Society, and Loss of Companionship for the Wrongful Death of a Companion Animal*, 4 ANIMAL L. 33 (1998); Gerry W. Beyer, *Pet Animals: What Happens When Their Humans Die?*, 40 SANTA CLARA L. REV. 617 (2000).

[15] PREECE & CHAMBERLAIN, *supra* note 14, at 242.

[16] *Id.* Additionally, thirteen million dog owners claimed that their relationship with their dog was as close as a best friend. *Id.*

revealed that 70% considered their companion animals as children.[17] Childless couples, couples preparing for parenthood, and older married couples claim that their companion animals even serve as replacements for children.[18]

Despite these surveys, the law fails to reflect the special relationship shared between animal guardians and their companion animals as such animals are legally classified as property.[19] Consequently, a majority of courts reject independent claims made by animal guardians for the wrongful death of their companion animal, and preclude recovery for non-economic damages, such as loss of society/companionship, pain and suffering, and mental anguish, when their companion animals are killed as a result of a negligent act.[20] Furthermore, the best interests of companion animals are deemed irrelevant in custody and visitation disputes as most courts reject the application of the best interests standard to animals as property.[21]

The relationship between an animal guardian and a companion animal is similar to a parent and child. Because the law recognizes and protects the relationship between family members, the relationship between an animal guardian and a companion animal deserves similar protection. Courts should recognize that the established legal doctrine of companion animals as property is archaic and fails to reflect the modern social view of these animals. This paper proposes that various state legislatures should progressively dismantle the property classification of companion animals by enacting statutes permitting animal guardians recovery for non-economic damages in torts, and requiring courts to apply the "best interests of the pet" standard in custody and visitation disputes.

Section II of this paper sets forth the conflict between the social and legal views of companion animals, and the historical evidence supporting each. Section III analyzes court opinions that treat companion animals as property and illustrates how the conflicting views of companion animals are manifested in case law. Section IV identifies the current trend in court decisions and legislative actions suggesting that both judges and legislators acknowledge companion animals as more than property. Section V advocates the enactment of statutes as an effective means to dismantle the property classification of

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[17] Wise, *supra* note 14, at 46 (citing The 1995 AAHA Report: A Study of the Companion Animal Veterinary Services Market 13 (1995)).

[18] Squires-Lee, *supra* note 11, n.3 (citing Elizabeth C. Hirschman, *Consumers and Their Animal Companions*, 20 J. CONSUMER RES. 616, 621 (1994)). Over 50% of animal guardians stated that they even shared the same bed with their companion animals. *Id.*

[19] 4 AM. JUR. 2D *Animals* §§ 5-7 (1995).

[20] *See* discussion *infra* Part III.A.

[21] *See* discussion *infra* Part III.B.

companion animals such that companion animals can finally gain legal recognition as family members.

II. CONFLICTING VIEWS OF COMPANION ANIMALS: SOCIETY VS. LAW

Recent surveys conducted in the United States revealed that animal guardians consider their companion animals as members of the family.[22] In contrast, established legal doctrine classifies companion animals as property.[23] The property status of companion animals directly conflicts with the notion that these animals are sentient and emotive beings. As a result, the law fails to reflect society's recognition of companion animals as family members. Although theology is cited as the primary basis supporting the established legal doctrine of companion animals as property, other historical evidence suggests that the human-animal bond is as strong today as it was in ancient times.

A. Social View of Companion Animals as Family Members

Companion animals play a well established role in society as family members. Domesticated dogs have been sharing their lives with humans for more than 12,000 years.[24] In comparison to other countries, the United States carries the highest per capita of dogs sharing a human-animal bond.[25] In the United States, there are approximately 68 million animal guardians with dogs in their household.[26] 40 million, or four in ten households, have at least one dog.[27] Approximately 63% of animal guardians with dogs have one dog in the household, 24% have two dogs, and 13% have three or more dogs.[28]

Domesticated cats have been companion animals for approximately 4,500 years and more than seventy-three million currently reside in U.S.

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[22] *See* discussion *supra* Part I.

[23] *See* discussion *infra* Part III.

[24] American Veterinary Medical Association Task Force on Canine Aggression and Human-Canine Interactions, *A Community Approach to Dog Bite Prevention*, 218 J. AM. VETERINARY MED. ASS'N 1732, 1733 (2001) (citing B.V. BEAVER, CANINE BEHAVIOR: A GUIDE FOR VETERINARIANS (WB Saunders Co. 1999)). Due to the high number of dogs and cats sharing their lives with humans, these particular animals appear to shape the definition of "companion animals" as they are the subject of virtually all published case law. *See id.*

[25] *Id.*

[26] The Humane Society of the United States, *U.S. Pet Ownership Statistics*, *at* http://www.hsus.org/ace/11831 (last visited Feb. 8, 2003) (citing the American Pet Products Manufacturers Association (APPMA) 2001-2002 National Pet Owners Survey).

[27] *Id.*

[28] *Id.*

households.[29] Over thirty-four million, or three in ten households, have at least one cat.[30] Approximately 49% of animal guardians with cats have one cat in the household, and the remaining percentage have two or more cats.[31]

1. History of the human-animal bond

Historical evidence suggests that companion animals were intimate acquaintances treasured by their human counterparts. In 1978, archeologists in northern Israel discovered a 12,000 year-old skeleton of a human and a dog buried together.[32] The skeleton was situated such that the woman's arm embraced the dog while her hand rested on the dog's shoulder.[33] Archeologists interpreted the careful placement of the skeletons as evidence of "the bonds that existed between these two individuals during life."[34] Additionally, ancient Egyptians considered their dogs both assistants and protectors.[35] Hence, a common practice in Egyptian burial ceremonies involved embalming and entombing companion animals in specially designed chambers and temples.[36]

In the seventeenth century, King Charles pampered his Spaniels and aristocrats frequently showered their companion animals with royal treatment.[37] Other early examples recognizing companion animals as human acquaintances include Shakespeare's Alcibiades who had a "handsome" dog.[38] Senator Vest coined the famous phrase of a dog as "man's best friend."[39] Sir Walter Scott made references to dogs as the "companion of our pleasures and our toils hath [the Almighty] invested [them] with a nature noble and incapable of deceit," and even Mark Twain distinguished man from dog by stating, "if you pick up a starving dog and make him prosperous, he will not bite you."[40] Thus, for many centuries animal guardians highly regarded the value of animals as loyal companions.

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[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] Squires-Lee, *supra* note 11, at 1064; Nahrstedt v. Lakeside Vill. Condo. Assoc., 878 P.2d 1275, 1294, n.45 (Cal. 1994).

[33] Squires-Lee, *supra* note 11, at 1064.

[34] *Id.*

[35] Lyann A. Epstein, *Resolving Confusion in Pet Owner Tort Cases: Recognizing Pets' Anthropomorphic Qualities Under a Property Classification*, 26 S. ILL. U. L. J. 31, 32 (2001).

[36] *Id.*

[37] *See* PREECE & CHAMBERLAIN, *supra* note 14, at 236.

[38] C.C.M. Pedersen v. United States, 115 Ct. Cl. 335, 339 (Ct. Cl. 1950).

[39] *Id.*

[40] *Id.*

2. Animal guardians reject the notion of "ownership"

As shown by various surveys, animal guardians view their companion animals as children, not property. Constitutional Law Professor at the Harvard Law School, Laurence H. Tribe, stated in his address entitled *Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise*, "[w]hen people ask my wife Carolyn and me whether we own any dogs, we say no . . . [w]e don't 'own' our dog Annie . . . I can't really think of myself as owning a dog . . . [w]e and Annie are a kind of family."[41] Professor Tribe's perspective is one shared by most animal guardians. Based on this premise, a national animal rights organization, In Defense of Animals, embarked on "The Guardian Campaign."[42] This campaign advocates for the statutory replacement of the term "animal owner" to "animal guardian."[43] Supporters of this campaign argue that the change in terminology "denotes a much higher level of responsibility than being the owner of a thing."[44]

In July 2000, Boulder County, Colorado, was the first jurisdiction in the nation to amend their county ordinance by adopting the change in terminology.[45] Boulder's City Council passed the amendment in an eight to one vote, and sparked a trend for other municipal counties to replace its ordinances that reference the term "animal owner" to "animal guardian."[46] Seven other counties have followed Boulder County's lead, including San Francisco,[47] Berkeley[48] and West Hollywood[49] in California; the City of

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[41] Laurence H. Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us About the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 ANIMAL L. 1, 7 (2001).

[42] *The Guardian Campaign*, *at* http://www.idausa.org/guardian.html (last visited Feb. 13, 2003).

[43] Squires-Lee, *supra* note 11, at 1098 n.2.

[44] Richard Schlesinger, *Unleashing More Responsibility*, CBS NEWS, http://www.cbsnews.cbs.com/now/story/0-1597-222543-412-00.shtml (Aug. 7, 2000) (quoting Jan McHugh, director of the Humane Society).

[45] *On July 11, 2000, the Boulder, Colorado City Council Voted 8-1 to Change the City's Municipal Code to Refer to People as the Guardian of Their Companion Animals Instead of as Their "Owners."*, IN DEFENSE OF ANIMALS, *at* http://www.idausa.org/campaigns.html (July 12, 2000). The Boulder City Council passed the amendment in an eight to one vote. *Id.*

[46] *See* discussion *supra* Part II.A.2.

[47] *Board Vote Allows San Francisco Residents to be Recognized as Animal "Guardians" by a Vote of 8-3 San Francisco Becomes the 7th U.S. City to Codify the Term Animal Guardian*, *at* http://www.idausa.org/news/currentnews/sfguardian.html (last visited Feb. 13, 2003). San Franciso County amended its code to include the designation of "animal guardian" on January 13, 2003. *Guardian Campaign Updates*, at http://www.idausa.org/campaigns/guardian/updates.html (last visited Feb. 13, 2003). The San Francisco Board of Supervisors approved the measure by a vote of eight to three. *Board Vote Allows San Francisco Residents to be Recognized as Animal "Guardians" By a Vote of 8-3 San Francisco Becomes the 7th U.S. City*

Sherwood in Arkansas;[50] Amherst in Massachusetts;[51] and the Village of Menomonee Falls in Wisconson.[52] Although replacing the terms "animal owner" to "animal guardian" did not affect the substantive provisions of the law, the primary focus of the amendment was to transform the perception of companion animals.[53]

One year following Boulder County, Rhode Island took an even bolder stance by becoming the first in the nation to apply the change in terminology to its entire state legislation concerning companion animals.[54] Both the House

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to Codify the Term Animal Guardian, *at* http://www.idausa.org/news/currentnews/sfguardian.html (last visited Feb. 13, 2003). San Francisco was the seventh city in the nation to codify the change in terminology. *Id.*

[48] *By Unanimous Vote, City of Berkeley Recognizes and Codifies the Benefits of Animal Guardianship*, IN DEFENSE OF ANIMALS, *at* http://www.idausa.org/news/newsarchives/news_berkeley.html (Feb. 28, 2001). On February 27, 2001, the Berkeley City County passed legislation to amend their county code and refer to companion animal owners as "guardians." *Id.* The amendment was passed by an unanimous vote by the Berkeley City Council. *Id.*

[49] *West Hollywood Becomes Second U.S. City to Replace Animal Owner with Animal Guardian*, IN DEFENSE OF ANIMALS, *at* http://www.idausa.org/news/newsarchives/news_hollywood.html (Feb. 21, 2001). West Hollywood's City Council approved the amendment to change all references of "animal owner" to "animal guardian" on February 20, 2001 with no opposition. *Id.*

[50] *City of Sherwood, Arkansas Recognizes Concept of Animal Guardianship*, In Defense of Animals, *at* http://www.idausa.org/news/currentnews/news.sherwood.html (Sept. 26, 2001). Sherwood, Arkansas passed the amendment to reference those who care for companion animals as guardians on September 24, 2001 by an unanimous vote by the Sherwood City Council. *Id.* The passage of this amendment made Sherwood County the fourth in the nation to adopt such legislation. *Id.*

[51] *Amherst, MA, Becomes Sixth City to Recognize Concept of Animal Guardianship, at* http://www.idausa.org/morenews.html (May 15, 2002). Amherst amended its code on April 24, 2002. *Guardian Campaign Updates*, at http://www.idausa.org/campaigns/guardian/updates.html (last visited Feb. 13, 2003). Amherst was the sixth city to codify the change in terminology. *Amherst, MA, Becomes Sixth City to Recognize Concept of Animal Guardianship, at* http://www.idausa.org/morenews.html (May 15, 2002).

[52] *Village of Menomonee Falls, WI Becomes Fifth City to Recognize Animal Guardianship, at* http://www.idausa.org/morenews.html (Mar. 11, 2002). The Village of Menomonee Falls amended its code on March 11, 2002. *Guardian Campaign Updates*, at http://www.idausa.org/campaigns/guardian/updates.html (last visited Feb. 13, 2003). The Village of Menomonee Falls was the fifth city to recognize animal guardianship. *Village of Menomonee Falls, WI Becomes Fifth City to Recognize Animal Guardianship, at* http://www.idausa.org/morenews.html (Mar. 11, 2002).

[53] Schlesinger, *supra* note 44.

[54] *Therapy Dogs DJ, Maj-En, and Panda Girl Inspire Students to Initiate Rhode Island Victory, at* http://www.idausa.rg/campaign/guardian/rhodeisland/rhodeisland.html (last visited Feb. 27, 2003). Students from the DJ Pet Assisted Therapy/Service Learning Program at Feinstein High School in Rhode Island initiated the amendment to change all references to

and Senate of Rhode Island passed the amendment without strong opposition.[55] Veterinarian, Founder and President of In Defense of Animals, Elliot M. Katz, stated in an interview that the "underlying cause of so much of the mistreatment and abuse and exploitation of animals in society comes about because animals are just seen as and perceived as property."[56]

3. Companion animals as sentient and emotive beings

Scientific evidence supports the contention that companion animals are sentient and emotive beings. Research has shown that mammals share similar emotive and cognitive characteristics with humans and that mammals are remarkably similar to humans both neurologically and genetically.[57] Moreover, many scientists have concluded that the DNA of animals and humans have "a ninety percent match or agreement with each other."[58]

Companion animals represent a variety of human-like traits and emotions such as loyalty, trust, courage, playfulness, and happiness, as reported by many animal guardians.[59] Animal guardians claim that their companion animals are capable of returning love and affection.[60] Companion animals even appear to exhibit negative human-like traits and emotions such as avarice, apathy, pettiness, hatred, fear, and jealousy.[61]

Economic studies reject the notion that companion animals are fungible, inanimate pieces of property. In 1996, the American Veterinary Medical Association reported that animal guardians spent nearly $11.1 billion on health care for their companion animals.[62] Currently, companion animals receive a wide range of services such as psychiatric care, plastic surgery, acupuncture, and radiation treatment.[63] According to a 1997 Veterinary Fee Reference, "nearly three-quarters of all small animal practices [in the United

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"animal owner" in Rhode Island's entire state legislation to "animal guardian." *Id.*

[55] *Id.*

[56] *Id.*

[57] Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. ENVTL. L.J. 531, 539 (1998).

[58] Epstein, *supra* note 35, at 34-35.

[59] Kelch, *supra* note 57; William C. Root, *'Man's Best Friend': Property or Family Member? An Examination of the Legal Classification of Companion Animals and its Impact on Damages Recoverable for Their Wrongful Death or Injury*, 47 VILL. L. REV. 423, 436 (2002).

[60] Root, *supra* note 59, at 436.

[61] Kelch, *supra* note 57, at 539.

[62] Wise, *supra* note 14, at 46.

[63] Squires-Lee, *supra* note 11, at 1067.

States] gross $300,000-$500,000 per year, almost one-quarter gross more than $750,000 per year, and more than one-tenth gross more than one million dollars per year."[64]

Steven M. Wise has practiced animal protection law for twenty years and teaches "Animal Rights Law" at the Harvard Law School, Vermont Law School, John Marshall Law School, and in the Masters Program in Animals and Public Policy at Tufts University School of Veterinary Medicine.[65] Professor Wise raises the salient point that if companion animals were truly fungible, veterinarians would be non-existent and small animal practices would go out of business.[66] Animal guardians would simply abandon their pets and replace them, similar to pieces of personal property, rather than seeking treatment.[67] Professor Wise states:

> But human companions do not usually throw their companion animals out. They do not usually abandon them. They do not euthenize them merely to obtain newer, younger, or healthier ones. This is because the value of their companion animals to them is not economic. Companion animals are not fungible. They are of a different order.[68]

In support of Professor Wise's assertion, the chief of staff at a prestigious Boston animal hospital reported that throughout his medical experience, "[t]he vast majority of [animal guardians] order him to save the animal no matter what the cost."[69]

The relationship animal guardians share with their companion animals is similar to the relationship shared between parents and children. In both instances, the extent of attachment to each other intensifies over time and the relationship evolves in similar patterns.[70] It is through the shared lives of "daily rituals and habits of behavior" that companion animals and their animal guardians nourish the depth of their relationship, raising it to a similar degree

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[64] Wise, *supra* note 14, at 46 (citing American Animal Hospital Association, *The Veterinary Fee Reference—A Comprehensive Survey of Small Animal Services and Fees with National and Regional Analysis*, K2-K16 (1997)).

[65] *Homepage for Steven M. Wise, at* http://literati.net/Wise/ (last visited Feb. 25, 2003). Professor Wise was also the former president of the Animal Legal Defense Fund, founder and president of the Center for the Expansion of Fundamental Rights, has written numerous scholarly articles about animal rights and has collaborated and communicated for years with leading scientists in the fields of primatology and animal intelligence and behavior. *Id.* He lives in Needham, Massachusetts with his wife and law partner Debra Slater-Wise, three children, and two companion animals. *Id.*

[66] Wise, *supra* note 14, at 47.

[67] *Id.*

[68] *Id.*

[69] *Id.* at 46-47.

[70] *See* Squires-Lee, *supra* note 11, at 1065-66.

of a parent and child.[71] Like children, companion animals play significant roles in their animal guardians' lives by "providing faithful, intimate companionship that is unconditional and nonjudgmental."[72] Accordingly, USA Today reported in 1999 that 79% of animal guardians allow their pets to sleep in bed with them; 37% carry photos of their pets in their wallets; and 31% even take time off from work to stay home with their sick companion animal.[73]

Based on the intensity of the relationship shared between animal guardians and their companion animals, animal guardians suffer deep emotional distress when coping with the loss of their companion animal whether by separation or death.[74] A comparison study between the grief following the loss of a companion animal and the loss of a human found that 18% of adults "were unable to carry out their daily life activities during the time following the death of their [companion animal]."[75] This finding illustrates that the grief reactions of animal guardians following the loss of a companion animal were comparable to human reactions to the loss of a spouse, parent, or child.[76]

The grief experienced by animal guardians, however, is clearly distinguishable from an owner's loss of a valuable piece of personal property.[77] Loss of a companion animal has often been compared to "the loss of a child-surrogate, a child's playmate, [or] a companion in old age.'"[78] The attachment animal guardians share with their companion animals is not predicated on sentiment, like a family heirloom. Instead, loss of a companion animal to an animal guardian is based on a deeply shared relationship of mutually exchanged emotions.[79]

B. Legal Classification of Companion Animals as Property

Although companion animals are considered family members by their animal guardians, established legal doctrine classifies these animals as property.[80] The property status of companion animals is typically codified in

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[71] *See id.*

[72] *Id.* (citing Hirschman, *supra* note 18, at 618).

[73] Beyer, *supra* note 14, at 617-18 (citing Cindy Hall & Suzy Parker, *USA Snapshots—What We Do For Our Pets*, USA TODAY, Oct. 18, 1999, at 1D).

[74] Squires-Lee, *supra* note 11, at 1069-70.

[75] Root, *supra* note 59, at 439.

[76] *Id.* at 440.

[77] *See* Squires-Lee, *supra* note 11, at 1071.

[78] *Id.*

[79] *Id.* at 1070-71.

[80] *See* 4 AM. JUR. 2d *Animals* § 6 (1995). Dogs were considered a lesser type of property than other animals pursuant to ancient common law. *Id.* However, today the common law has evolved to recognize a full and complete property in dogs. *Id.*

state statutes or judicially defined as chattel, a term intended to cover every kind of personal property.[81] In the eyes of the law, animal guardians share a legal relationship with their companion animals, not as family members, but as owners of property. The concept of property ownership or title refers to the possession, use and disposal of a thing.[82] Thus, companion animals possess no legal rights, may neither own nor inherit property, and the owners of companion animals as property may not sue in the companion animal's name.[83]

1. Historical view of companion animals as property

Professor of law and philosophy at Rutgers University School of Law, and author of *Animals, Property, and the Law*, Gary L. Francione,[84] explained that there are two primary justifications for maintaining the property status of animals.[85] The first justification is found in theology.[86] According to the book of Genesis, man is given "dominion over the fish of the sea, and over the birds of the air, and over the cattle, and over all the earth, and over every creeping thing that creeps upon the earth."[87] Likewise, the Western theory of linear hierarchial ascendancy, otherwise known as the Great Chain of Being, advances that plants fall under the lowest level of the chain, non-human animals above plants, humans above non-humans, and the highest level is occupied by God.[88]

The second justification is qualitative. Accordingly, because companion animals are defective and qualitatively different from humans, they are thought to be inherently inferior.[89] Aristotle considered animals as lesser beings based on their lack of a human-like rational soul.[90] Moreover, both Descartes and

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[81] *See id.*

[82] DEIDRE E. GANNON, THE COMPLETE GUIDE TO DOG LAW 5 (Howell Book House Macmillan Pub. Co. 1994).

[83] MARY RANDOLPH, DOG LAW: A PLAIN-ENGLISH LEGAL GUIDE FOR DOG OWNERS & THEIR NEIGHBORS § 1.10 (Nolo 4th ed. 2001).

[84] *Interview With Professor Gary L. Francione on the State of the U.S. Animal Rights Movement*, ACT'IONLINE, *at* http://www.friendsofanimals.org/action/summer2002/summer2002garyfrancione.htm (Summer 2002). Professor Francione taught the first course on animal rights and the law in an American law school in 1989. *Id.*

[85] GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 36-38 (Temple University Press 1995).

[86] *Id.* at 36-37.

[87] *Id.* at 36 (citing *Genesis* 1:26).

[88] Derek W. St.Pierre, *The Transition From Property to People: The Road to the Recognition of Rights for Non-Human Animals*, 9 HASTINGS WOMEN'S L.J. 255, 261 (1998).

[89] Francione, *supra* note 85, at 37.

[90] *Id.*

Kant, who were influential philosophers that gained notoriety for their contemplations of human existence, rejected animals as conscious or sentient beings due to their inability to "exhibit linguistic behavior."[91]

2. Legal treatment of humans as property

The law is not estranged to treating emotional and sentient beings as property. The legal view of companion animals as property resembles the antiquated view of Africans, women, and even children as property.[92] In the seventeenth century, Africans were freely bought and sold as chattel by their owners.[93] Rather than protecting slaves as individuals, the law governing slaves only offered legal protection to preserve the property value of the slave to his or her slave owner.[94] Similar to Descartes' view of animals, one of the justifications offered in support of slavery was the belief that Africans possessed no mind or will to truly be a person.[95] As stated by the Alabama Supreme Court in 1861, "a slave has no legal mind, [and] no will which the law can recognize."[96] Consequently, the legal system relied on this justification to maintain its treatment of African slaves as property.[97]

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[91] *Id.* at 37-38; *contra* PAUL WALDAU, THE SPECTER OF SPECIESISM: BUDDHIST AND CHRISTIAN VIEWS OF ANIMALS 86-87 (Oxford University Press 2002). There are other indigenous traditions, late eighteenth-century secular utilitarianism, and even Buddhism that consider nonhuman lives sacred. PAUL WALDAU, THE SPECTER OF SPECIESISM: BUDDHIST AND CHRISTIAN VIEWS OF ANIMALS 86-87 (Oxford University Press 2002). Paul Waldau, author of *The Spector of Speciesism: Buddhist and Christian Views of Animals*, challenged Descartes' view and stated that it is "not based on familiarity with a full range of other animals, nor is it based on a commitment to know other animals and the realities of their lives." *Id.* Waldau further claimed that because of Descartes' exclusive prejudice, Descartes and others advancing a similar view, ultimately "missed some animals as opportunities to understand better the realities of living beings." *Id.*

Waldau argued that the justification based on qualitative differences fails to explore the possibility of other viewpoints. *Id.* According to Waldau, our ethical traditions that limit self-interested acts against other humans presupposes that one can see from another's point of view. *Id.* Accordingly, "[t]his occurs despite the fact that we do not know exactly, or even approximately, what it is like to be another complex human individual." *Id.* Waldau suggests that the principle of considering other viewpoints when examining certain effects on other humans, should be similarly applied to animals in attempt to understand their complex viewpoints and interests. *Id.*

[92] St.Pierre, *supra* note 88, at 255.

[93] *Id.*

[94] *Id.* at 262.

[95] *Id.* at 264; FRANCIONE, *supra* note 85, at 38.

[96] *Id.* (quoting Creswell's Ex'r v. Walker, 37 Ala. 229, 236 (1861)).

[97] *Id.*

Likewise, women were designated as property by law.[98] However, the property status of women was slightly different from slaves, as women became the property of their husbands only upon marriage.[99] Similar to the "qualitative differences" justification for classifying animals as property,[100] biological differences played a significant role in the justification for designating women as property.[101] "Women, the physically weaker sex, were seen as delicate and less rational, therefore unable to handle the rights reserved for men."[102]

While theology serves as one of the justifications for classifying animals as property,[103] it also once served to justify Africans and women as property.[104] Religion drove the English, and later the Americans, to view Africans as heathens.[105] "African spiritualism and earth-centered totemism were incomprehensible to the English whose minds were bound by their Christian theology."[106] In regard to women, God declares to all women in the book of Genesis that "your desire shall be for your husband, and he shall rule over you."[107]

In the same way, the law also designated children as property.[108] In 1646, Massachusetts Colony passed the "Stubborn Child Law" which authorized the government to impose the death penalty upon children for merely disobeying their parents.[109] Until the early 1800s, society reasoned that because children did not possess the power to own property, they were ultimately deemed as nothing more than such.[110] Traditional English common law preserved the perspective of biblical times when children were "considered the creation of

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[98] *Id.* at 266-67.

[99] *Id.* at 266.

[100] *See* discussion *supra* Part II.B.1.

[101] St.Pierre, *supra* note 88, at 267.

[102] *Id.*

[103] *See* discussion *supra* Part II.B.1.

[104] *See generally id.*; St. Pierre, *supra* note 88, at 263, 266.

[105] St. Pierre, *supra* note 88, at 263.

[106] *Id.*

[107] *Id.* at 266 (quoting *Genesis* 3:16).

[108] LAUREN KROHN ARNEST, CHILDREN, YOUNG ADULTS, AND THE LAW: A DICTIONARY 1 (ABC-CLIO, Inc. 1998). In 1874, the founder of the Society for the Prevention of Cruelty to Animals ("SPCA") recognized the cross connection between children and animals by bringing a suit against the adoptive parents of a child in the case of *In re Custody of a Child Called Mary Ellen*. *Id.* at 5-6. The founder of the SPCA successfully argued that since the child was "a member of the animal kingdom, the child was entitled to protection from cruel treatment." *Id.* at 6. In fact, child abuse laws were said to be modeled after animal abuse laws. *Id.* Nonetheless, the notion of children as property has long been abandoned and although animals once charged along right next to children, they have been unable to keep up with the pace.

[109] *Id.* at 2.

[110] *Id.* at 3.

his father, to sell or destroy at his whim."[111] Children were viewed as economic assets and fathers were entitled to employ their children for the benefit of the family while claiming the profits.[112] Furthermore, orphaned or abandoned children could legally be "disposed of" at the father's will "in exactly the same way as a horse or piece of furniture."[113]

Because established legal doctrine classifies companion animals as property, they are treated similarly to inanimate objects--"useful, yet fungible, replaceable, and solely for human use."[114] Dog breeder Sharon Coleman stated, "[i]t's better for a pet to be a piece of property because that way its owner has some legal basis for protecting it and asserting the owner's right to that animal."[115] On the contrary, an analysis of case law reveals that the property classification of companion animals hinders, rather than facilitates, the legal rights of animal guardians.

III. Legal Treatment of Companion Animals as Property Leads to Unjust Results

The conflicting views of companion animals between society and law manifests themselves in court opinions. As stated by Professor Wise, "[o]ne judge may be unable to imagine what it is like to love a ewe lamb as a daughter or even to imagine what it is like to love a daughter . . . [whereas] another judge might instinctively understand each."[116] Under such a view, judges accordingly apply property law to companion animals in a strict manner, resulting in unjust and unfair decisions. Other judges may embrace the social perspective of companion animals as family members; however, these judges are nonetheless, reluctant to depart from the established legal doctrine of companion animals as property due to the lack of precedent.

A. Tort Law

Because common law has "historically distrusted emotion," courts prefer to narrowly construe claims for emotional distress.[117] The majority view in tort is that property owners may not make an independent claim for emotional

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[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] Squires-Lee, *supra* note 11, at 1063.

[115] Schlesinger, *supra* note 44.

[116] Wise, *supra* note 14, at 73.

[117] *Id.* at 50 (quoting Bowen v. Lumbermans Mut. Cas. Co., 517 N.W.2d 432, 437 (Wis. 1994)).

distress for the loss or destruction of that property.[118] Animal guardians are often precluded from recovering non-economic damages when tortious acts are committed against their companion animals based on their legal classification as property.

1. Strict application of property law

The established legal doctrine of companion animals as property leads courts to render unjust and unfair decisions. For example, a New York appellate court published a two paragraph opinion, rejecting an animal guardian's emotional distress claim for the wrongful death of his companion animal as a result of veterinarian malpractice.[119] In *Jason v. Parks*,[120] despite the trial court's finding of negligence on behalf of the veterinarian, the court strictly considered the dog property and summed up its analysis in one sentence stating, "[i]t is well established that a pet owner in New York cannot recover damages for emotional distress caused by the negligent destruction of a dog." [121] The *Jason* court accordingly affirmed the lower court's decision to dismiss the plaintiff's claim.[122]

The reasoning applied in *Jason* is otherwise known as the "animals as property" syllogism.[123] According to Professor Wise, courts that invoke the "animals as property" syllogism treat companion animals as property relying "not upon modern scientific knowledge, public policy, or legal reasoning, but upon decisions that derive from scientific knowledge, public policy, and legal reasoning of *the nineteenth century or earlier*."[124] Professor Wise asserts that when courts award damages for property loss and deny the recovery of non-economic damages in companion animal tort cases, "these courts perversely authorize the award of damages for an economic loss that human companions of companion animals wrongfully killed do not suffer and fail to compensate human companions for the emotional distress and loss of society that they do."[125]

The court in *Jason* relied on *Gluckman v. American Airlines*,[126] where a New York District Court similarly dismissed an animal guardian's claim for

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[118] Jay M. Zitter, *Recovery of Damages for Emotional Distress Due to Treatment of Pets and Animals*, 91 A.L.R. 5th 545, § 4 (2001).

[119] Jason v. Parks, 638 N.Y.S.2d 170 (1996).

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] Wise, *supra* note 14, at 64.

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

[125] *Id.* at 64-65.

[126] 844 F. Supp. 151 (N.Y. 1994).

emotional distress based on the property status of companion animals.[127] In *Gluckman*, the plaintiff's flight was delayed and his companion animal, a two and a half-year old Golden Retriever, Floyd, was negligently left in an enclosed cargo section of an airplane at a temperature of 140 degrees Fahrenheit for over an hour.[128] When the plaintiff was forced to transfer planes, he requested that Floyd be returned to him.[129] But, by the time the airline company returned Floyd to the plaintiff, the dog was on its side, panting heavily with blood on its face and paws and on the cage, due to the dog's panicked response in attempt to escape the heat.[130] Gluckman was severely distraught as Floyd was forced to be euthenized as a result of severe brain damage caused by a heat stroke.[131]

In *Gluckman*, the plaintiff asserted claims that a parent would bring forth in the wrongful death of their child: intentional and negligent infliction of emotional distress, damages for loss of companionship, and pain and suffering (of the companion animal).[132] The trial court found that the company negligently caused the death of Floyd,[133] violated its own procedures of confining animals,[134] and violated the federal Animal Welfare Act.[135] Notwithstanding these findings, the *Gluckman* court dismissed each and every claim based solely on the property classification of Floyd.[136]

In its reasoning, the court first denied the plaintiff's claim for intentional infliction of emotional distress due to the lack of evidence showing that the defendant's conduct was directed intentionally at the plaintiff.[137] Moreover,

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[127] *Id.* at 157.

[128] *Id.* at 154.

[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] *Id.* at 157-59.

[133] *Id.* at 158. The court explained in finding no cause of action for intentional infliction of emotional distress on behalf of American Airlines that "[a]s deplorable as it may be for American to have caused the death of an innocent animal, the Court finds no allegation, and no evidence from the facts alleged, that American's conduct was directed intentionally at Gluckman." *Id.*

[134] *Id.* at 155 n.2. The court found that American's policy required that if ground time was to exceed forty-five minutes, pets were prohibited to be placed in the baggage compartment of an airplane in any temperature above eighty-five degrees or below forty-five degrees Fahrenheit. *Id.*

[135] *Id.* at 154, 157. The federal Animal Welfare Act prohibits the transportation of animals at any temperature above eighty-five degrees Fahrenheit. *Id.*

[136] *See id.* at 157-59. The only claim that was not dismissed by summary judgment in *Gluckman* was the plaintiff's claim that American breached its obligation to him by failing to return the dog in the same condition in which the dog was received, reflecting a contractual obligation owed by the company to a passenger's piece of luggage. *Id.* at 160-63.

[137] *Id.* at 158.

based on the property classification of Floyd, the court held that the plaintiff could not recover for intentional infliction of emotional distress as it was inapplicable to the loss or destruction of property.[138] Second, the plaintiff's claim for negligent infliction of emotional distress was denied because New York case law narrowly limited such a claim to instances where "the party suffers serious, verified emotional distress as a proximate result of observing the serious injury or death of a *family member*."[139] Lastly, the court denied plaintiff's claim for Floyd's pain and suffering, and explicated that there was not a cause of action recognized "for the pain and suffering of an animal."[140]

As to the loss of companionship, the *Gluckman* court denied plaintiff's claim notwithstanding a prior New York court that permitted a similar claim.[141] In *Corso v. Crawford Dog and Cat Hospital, Inc.*,[142] the animal guardian plaintiff planned to hold a funeral service for her deceased dog, and paid an animal hospital to deliver the casket containing her beloved companion animal.[143] The plaintiff in *Corso* sought damages for mental anguish as the animal hospital mistakenly delivered a casket containing a dead *cat*.[144] The court in *Corso* awarded damages for mental anguish and found that the plaintiff did suffer shock, emotional distress, and despondency due to the loss of her companion animal.[145] The court concluded by stating, "[t]his court now overrules prior precedent and holds that a pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property."[146]

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[138] *Id.*

[139] *Id.* at 157 (emphasis added).

[140] *Id.* at 159.

[141] *Id.* at 158. The cases plaintiff relied upon in contending that New York courts recognized a claim for loss of companionship of a pet were *Brousseau v. Rosenthal*, 443 N.Y.S.2d 285 (1980) and *Corso v. Crawford Dog and Cat Hospital, Inc.*, 415 N.Y.S.2d 182 (1979). In *Brousseau*, plaintiff was awarded damages for defendant animal hospital's negligence in causing the death of her dog while boarding at defendant's kennel. *Brousseau*, 443 N.Y.S.2d at 286. The court considered the plaintiff's loss of companionship in determining the amount of damages. *Id.* Moreover, the court noted that "[r]esisting the temptation to romanticize the virtues of a 'human's best friend', it would be wrong not to acknowledge the companionship and protection that Ms. Brousseau lost with the death of her canine companion of eight years." *Id.* at 286-87.

The *Gluckman* court declined to follow *Brousseau*, finding *Brousseau* distinguishable in that the court therein, did not allow the plaintiff an independent claim to loss of companionship, but merely considered the plaintiff's relationship to her dog in calculating the fair market value. *Gluckman*, 844 F. Supp. at 158.

[142] 415 N.Y.S.2d 182 (1979).

[143] *Id.* at 183.

[144] *Id.*

[145] *Id.*

[146] *Id.*

Despite the holding in *Corso*, the court in *Gluckman* interpreted the ruling in *Corso* as merely assessing the intrinsic value of the companion animal and it did not permit an independent claim for loss of companionship.[147] In *Gluckman*, the court not only criticized the *Corso* opinion, but also other courts that similarly viewed companion animals as more than property, reasoning that such decisions were "aberrations flying in the face of overwhelming authority to the contrary."[148] To further its contention, the court cited two cases decided in the late 1970s that affirmed the property classification of companion animals.[149] Moreover, the court in *Gluckman* claimed that the court in *Corso* failed to provide a legal reason for overruling prior precedent establishing companion animals as property.[150]

On the contrary, the court in *Corso* did provide a reason for overruling prior precedent, although not based on legal precedent per se. The court in *Corso* explained that as a matter of public policy,

> [t]his decision [to award damages for mental anguish due to the loss of a companion animal] is not to be construed to include an award for the loss of a family heirloom which would also cause great mental anguish. An heirloom while it might be the source of good feelings *is merely an inanimate object and is not capable of returning love and affection.* It does not respond to human stimulation; it has no brain capable of displaying emotion which in turn causes a human response. Losing the right to memorialize a pet rock, or a pet tree or losing a family picture album is not actionable. *But a dog that is something else.* To say it is a piece of personal property and no more is a repudiation of our humaneness. This I cannot accept.[151]

In addition to providing a public policy reason for overruling the established legal doctrine of companion animals as property, the court in *Corso* appropriately limited the scope of its decision to companion animals rather than including all forms of personal property.

The disagreement between *Gluckman* and *Corso* reflects the conflicting social and legal views of companion animals.[152] Although the court in *Gluckman* criticized the court in *Corso* for failing to provide a legal reason for

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[147] Gluckman v. Am. Airlines, Inc., 844 F. Supp. 151, 158 (N.Y. 1994).

[148] *Id.* at 158.

[149] *Id.* The two cases cited by the court are *Snyder v. Bio-Lab, Inc.*, 405 N.Y.S.2d 596 (1978) ("[a]s with personal property generally, the measure of damages for injury to, or destruction of, an animal is the amount which will compensate the owner for the loss and thus return him, monetarily, to the status he was in before the loss") and *Stettner v. Graubard*, 368 N.Y.S.2d 683 (1975) ("sentiment will not be considered in assessing market value for purposes of determining measure of damages for destruction of dog").

[150] *Id.*

[151] *Corso*, 415 N.Y.S.2d at 183 (alteration in original) (emphasis added).

[152] *See* discussion *supra* Part II.

departing from the established legal doctrine of companion animals as property, *Gluckman* itself failed to provide a public policy reason for continuing the archaic view of these animals.[153]

2. Judicial attempt to overrule the established legal doctrine

While some judges recognize the unjust and unfair consequences that result from a strict application of property law to companion animals, these judges are still reluctant to depart from the established legal doctrine. For example, in *Rabideau v. City of Racine*,[154] the Supreme Court of Wisconsin denied an animal guardian's claim for emotional distress when an off-duty police officer shot and killed her dog, Dakota.[155] The plaintiff returned home with Dakota and after parking her car, Dakota jumped out and crossed the street heading towards the defendant's property.[156] While the facts were in dispute as to what followed, the court found that the defendant shot Dakota three times and caused his death.[157]

Plaintiff claimed both intentional and negligent infliction of emotional distress for the wrongful death of Dakota.[158] The Wisconsin Supreme Court denied plaintiff's recovery of non-economic damages and emphasized that such claims were only available to a plaintiff legally related to the victim such as a parent, child, grandparent, grandchild, sibling, or spouse.[159] Because the relationship shared between the plaintiff and her companion animal did not fall within one of these categories, the court found that plaintiff could not maintain an independent claim for emotional distress.[160]

The court's opinion in *Rabideau* is inherently confusing and contradictory. First, although the court ultimately denied the plaintiff's claims for emotional distress, the opinion began with an elaborate discussion about the special relationship shared between humans and dogs.[161] It stated in pertinent part:

> At the outset, we note that we are uncomfortable with the law's cold characterization of a dog, such as Dakota, as mere "property." Labeling a dog "property" fails to describe the value human beings place upon the

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[153] *See generally* Gluckman v. Am. Airlines, Inc., 844 F. Supp. 151 (N.Y. 1994).

[154] 627 N.W.2d 795 (Wis. 2001).

[155] *Id.* at 797.

[156] *Id.* at 799.

[157] *Id.* at 799-800. Defendant claimed that Dakota was preparing to attack his dog, Jed, and fearing for the safety of Jed and his family, he fired the shots. *Id.* at 800. Conversely, plaintiff claimed that Dakota was not on the defendant's property and merely approached defendant's dog, sniffed him and at no time exhibited any aggressive behavior. *Id.*

[158] *Id.* at 798.

[159] *Id.*

[160] *Id.*

[161] *Id.*

> companionship that they enjoy with a dog. A companion dog is not a fungible item, equivalent to other items of personal property. A companion dog is not a living room sofa or dining room furniture. This term inadequately and inaccurately describes the relationship between a human and a dog.[162]

The court further provided a brief history of the relationship shared between dogs and humans, and even cited to the archaeological discovery in northern Israel of the human skeleton buried with a dog to illustrate the human-animal bond.[163] Additionally, the court praised the contribution dogs give to society by noting that "dogs work in law enforcement, assist the blind and disabled, perform traditional jobs such as herding animals and providing security, and, of course, dogs continue to provide humans with devoted friendship."[164] Despite the court's recognition of the significant contributions companion animals made to society, and acknowledgement of companion animals as more than property, it nonetheless denied plaintiff's claims for emotional distress based solely on the established legal doctrine of companion animals as property.[165]

Second, the court found that the categories of relationships "deeply embedded in the organization of our law and society" was limited to a victim and spouse, parent, child, grandparent, grandchild or sibling.[166] The court reasoned that only these limited categories of relationships allowed for the recovery of non-economic damages as they were serious, compelling, and deserving of special recognition.[167] Based on this premise, the court in *Rabideau* characterized the relationship between the plaintiff and her dog as a "best friend," which tort law does not recognize as one that allows recovery for non-economic damages.[168]

The *Rabideau* court's "best friend" analogy is unconvincing as it fails to articulate how or why the relationship between the plaintiff and her dog should be characterized as friendship, rather than as family.[169] Clearly, there are significant differences between friends and immediate family members. In general, friends do not: (1) depend on each other to survive; (2) provide for each other's basic living needs; (3) raise each other from birth to adulthood; and (4) share the same household from birth to adulthood. Furthermore, friends can neither be legally responsible for each other, nor do they bear any type of relationship recognized by law.

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[162] *Id.* (citations omitted).

[163] *Id.* (citations omitted); *see* discussion *supra* Part II.A.

[164] *Rabideau*, 627 N.W.2d at 798.

[165] *Id.*

[166] *Id.* at 801.

[167] *Id.*

[168] *Id.*

[169] *See id.*

In contrast, the relationship between family members does possess such characteristics. Therefore, the relationship between an animal guardian and a companion animal more closely resembles a family member than a "best friend." Nevertheless, the court justified its decision in denying plaintiff's independent claim for emotional distress based on its "best friend" analogy, when it could have reached a different outcome by characterizing the relationship between an animal guardian and a companion animal as equivalent to a family member.

3. Extension of emotional distress claims to property

The Hawai'i Supreme Court allowed a family to make an independent claim for emotional distress for the negligent loss of their dog in *Campbell v. Animal Quarantine Station*.[170] In *Campbell*, the local quarantine station negligently left the family's nine-year old Boxer, Princess, in a hot van with no ventilation for at least an hour.[171] Princess subsequently died due to heat prostration.[172] The family did not witness Princess's death, did not view the deceased body, nor did they seek medical treatment for the distress suffered.[173] Nonetheless, the court in *Campbell* awarded damages to the plaintiff animal guardians for emotional distress.[174]

The court in *Campbell* relied on *Rodrigues v. State*,[175] where a family was allowed to make an independent claim for emotional distress as a result of witnessing their house flood.[176] The *Campbell* court emphasized that an individual's interest to be free from negligent infliction of serious mental distress was an independent claim.[177] Moreover, the *Campbell* court concluded that awarding damages for Princess's death was proper because emotional distress claims could be extended to the loss of property pursuant to the holding in *Rodrigues*.[178]

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[170] 63 Haw. 557, 632 P.2d 1066 (1981).

[171] *Id.* at 559, 632 P.2d at 1067.

[172] *Id.*

[173] *Id.* at 564, 632 P.2d at 1071.

[174] *Id.*

[175] 52 Haw. 156, 472 P.2d 509 (1970).

[176] *Id.* at 174, 472 P.2d at 520.

[177] Campbell v. Animal Quarantine Station, 63 Haw. 557, 559-60, 632 P.2d 1066, 1068 (1981).

[178] *Id.* at 560, 632 P.2d at 1068. The court stated:

> We recognized that an individual's interest in freedom from negligent infliction of serious mental distress is entitled to independent legal protection . . . [i]n making such recognition, we did not distinguish between mental distress suffered as a consequence of witnessing injury to another and that resulting from the destruction of one's own property.

Id. at 559-60, 632 P.2d at 1068 (citations omitted).

Initially, *Campbell* appeared to be a breakthrough case as Alaska, Maryland, and Florida adopted its rule of extending emotional distress claims to property.[179] Still, the *Campbell* decision was not widely adopted. For example, in *Johnson v. Douglas*,[180] the court held that plaintiffs could not make an independent emotional distress claim for the wrongful death of their dog because "[t]he extension of such thinking would permit recovery for mental stress caused by the malicious or negligent destruction of other personal property; i.e., a family heirloom or prized school ring."[181] The court further denied the plaintiffs' claims for emotional distress as a bystander, even though plaintiffs were in the zone of danger and witnessed the death of the dog, reasoning that such a claim was only applicable to an immediate member of the family "who is a person."[182] Citing to the dissent of a prior New York state court, the court stated:

> While it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of this world. Every injury has ramifying consequences, like the ripplings of the waters, without end. The problem for the law is to limit the legal consequences of wrongs to a controllable degree . . . The court is unaware of any recent case law extending the rule to the loss of a family pet.[183]

According to Professor Wise, the reasons advanced by the court in *Johnson* and other courts that follow a similar line of reasoning are "unimpressive," as the extension of emotional distress claims to property can be limited.[184] Foreseeability is an essential element in determining emotional distress claims of a bystander as it appropriately limits the liability of a tortfeasor.[185] Professor Wise argues that extending emotional distress claims to companion animals as property can be limited, as tortious acts committed against a great majority of other personal property could not satisfy the element of foreseeability.[186] As Professor Wise states, "[p]encils, paper, paperclips, juice glasses, flatware, and numerous other items can be destroyed without the

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[179] *Id.* at 565, 632 P.2d at 1071 n.6 (citing Knowles Animal Hosp., Inc. v. Wills, 360 So. 2d 37 (Fla. App. 1978)).

[180] 723 N.Y.S.2d 627 (2001). In *Johnson*, a husband and wife sought emotional distress damages after their dog Coho was crushed by a speeding car driven by the defendant. *Id.* at 627. The court in *Johnson* stated, "[t]here is no doubt that some pet owners have become so attached to their family pets that the animals are considered members of the family . . . the court can empathize with the plaintiffs' alleged horrific viewing of the death of the family dog." *Id.* at 628.

[181] *Id.*

[182] *Id.*

[183] *Id.* (quoting Bovsun v. Sanperi, 473 N.Y.S.2d 357 (1984) (Kaye, J., dissenting)).

[184] Wise, *supra* note 14, at 69.

[185] *Id.*

[186] *Id.*

owner caring about anything but the cost of replacement."[187] Thus, Professor Wise asserts that the extension of emotional distress claims to companion animals as property has inherent limitations since humans do not create the same kind of relationships with all of their property.[188]

Professor Wise's contention is supported by *Campbell.* In *Campbell,* the court rejected the defendant's argument that extending emotional distress claims to property would "lead to a plethora of similar cases, many which would stretch the imagination and strain all bounds of credibility."[189] The court's rejection was based on its finding that no similar cases had emerged since the ten-year old ruling of *Rodrigues*; thus, "the fears of unlimited liability have not proved true."[190] Further, the court supported its finding by citing to other states that allowed similar claims without holding similar reservations.[191]

The decision in *Campbell* sparked a legal scholarly debate over whether emotional distress claims should be extended to property. Yet, amidst the discord, the *Campbell* case failed to challenge the property status of companion animals altogether. While the *Campbell* court virtuously expanded upon the *Rodrigues* decision to properly award damages for emotional distress to animal guardians, it also, perhaps inadvertently, created a set back for companion animals as it reaffirmed and maintained their legal status as property. Consequently, courts in other jurisdictions began citing to *Campbell* in support of denying emotional distress claims for the wrongful death of a companion animal, reasoning that such an extension to property was impermissible in their jurisdiction.[192]

B. Custody and Visitation Rights

Family law is another area of law where companion animals struggle to gain recognition as family members. More recently, companion animals have increasingly become the subject of custody and visitation disputes. Some courts reject considering the best interest of the companion animal when determining custody and visitation rights of an animal guardian.[193] These

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[187] *Id.*

[188] *Id.* at 70.

[189] Campbell v. Animal Quarantine Station, 63 Haw. 557, 565, 632 P.2d 1066, 1071 (1981).

[190] *Id.*

[191] *Id.* at 565, 632 P.2d at 1071.

[192] *See, e.g.*, Rabideau v. City of Racine, 627 N.W.2d 795, 798 n.2 (Wis. 2001).

[193] *See generally* Laura W. Morgan, *Who Gets Fluffy? Division of Pets In Divorce Cases,* 11 No. 6 DIVORCE LITIG. 113 (1999) (compiling various lower court decisions in various states that address companion animals in custody and visitation disputes); Barbara Newell, *Animal Custody Disputes: A Growing Crack in the 'Legal Thinghood' of Nonhuman Animals,* 6 ANIMAL L. 179, 180 (2000) (tracking recent case law, state legislation, local ordinances, and

courts ultimately award custody to the legal owner or purchaser of the companion animal, even if the legal owner or purchaser was not involved in the companion animal's life.[194]

Once custody is awarded, other courts deny visitation rights to the non-custodial guardian, even if the non-custodial guardian played a significant role in the companion animal's life.[195] Courts deem factors such as the emotional attachment to a particular guardian and the ability for that guardian to provide a comfortable and stable environment for the companion animal irrelevant.[196] As a result, the special relationship between animal guardians and their companion animals are not recognized as one deserving of protection.

In *Bennett v. Bennett*,[197] a husband appealed the final judgment in a dissolution of marriage that initially awarded increased visitation rights of the parties' dog, Roddy, to the wife.[198] The court remanded the case and instructed the trial court to apply the equitable distribution doctrine.[199] The court emphasized that custody and visitation rights could not be applied to a dog based on the established legal doctrine of animals as property.[200] In re-affirming the property status of companion animals, the court opined that while some courts award these animals special status as a family member, such a consideration is "unwise."[201]

The court in *Bennett* justified its decision by citing to concerns of judicial inefficiency.[202] It found that courts were already overwhelmed in managing child cases concerning custody, visitation, and support matters due to the continuing problems of enforcement and supervision.[203] Accordingly, the court concluded that, "[w]e cannot undertake the same responsibility as to animals."[204] However, the court ironically acknowledged in closing that those judges who had awarded custody and visitation of companion animals in other

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scientific support for the Animal Legal Defense Fund's position that the resolution of custody disputes must include consideration of the interests of the animal); discussion *infra* Part III.B.

[194] *See* Morgan, *supra* note 193; Newell, *supra* note 193; discussion *infra* Part III.B.

[195] *See* Morgan, *supra* note 193; Newell, *supra* note 193; discussion *infra* Part III.B.

[196] *See* Morgan, *supra* note 193; Newell, *supra* note 193; discussion *infra* Part III.B.

[197] Bennett v. Bennett, 655 So. 2d 109 (Fla. 1995).

[198] *Id.* at 110.

[199] *Id.* The equitable distribution doctrine authorizes courts to apportion marital assets between divorcing parties in a just and equitable manner regardless of ownership. 24 AM. JUR. 2d *Divorce and Separation* § 484 (2002). Equitable distribution can either be set forth by statute or judicial construction. *Id.*

[200] *Id.*

[201] *Id.*

[202] *Id.*

[203] *Id.* at 110.

[204] *Id.* at 111.

jurisdictions were "endeavoring to reach a *fair solution* under difficult circumstances."[205]

The court's affirmation of companion animals as property and refusal to consider the best interests of the companion animal denies that these animals are capable of developing special relationships with a particular animal guardian. By contrast, when children are the subject of a custody or visitation dispute, virtually all state courts apply the "best interests of the child" standard to determine what the child's welfare requires.[206] Despite the issue of vagueness in applying the "best interests of the child" standard, many statutes and most case law adopt it as the ultimate criterion for custody awards.[207]

There are several factors considered in determining the child's best interests.[208] One factor is the primary caretaker presumption, which considers who was primarily responsible for the "day to day and hour to hour care of the child," such as feeding, clothing, arranging for medical care, transporting to and from school, assisting in homework assignments, and providing discipline.[209] According to some scholars, the most important factor for a court to consider is the psychological relationship between the parent and the child.[210]

Because animal guardians can develop strong emotional bonds with their companion animals as intensely as parents do with children, the psychological relationship between an animal guardian and a companion animal ought to be an important factor for courts to consider when determining custody and visitation disputes. Further, if a particular animal guardian is the primary caretaker of the companion animal, the primary caretaker presumption should be another consideration. Nevertheless, courts that follow *Bennett* refuse to consider such factors deemed essential to the welfare of children, and similarly essential to the welfare of companion animals.

In the recent case of *Juelfs v. Gough*,[211] the Alaska Supreme Court ruled that a wife could not modify a divorce decree to gain physical custody and

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[205] *Id.* (emphasis added); *see* discussion *supra* Part III.B.

[206] HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES, § 20.4, at 494-95 (2d ed. 1987).

[207] *Id.*

[208] *Id.* at 494.

[209] *Id.* at 499.

[210] *Id.* at 501. According to Clark, the book written by Goldstein, Freud, and Solnit, *Beyond the Best Interests of the Child* (2d ed. 1979), was the most important contribution to custody litigation in its insistence that "the primary emphasis of the courts' inquiry should be the relationship, in particular the psychological relationship, between parents and children." *Id.* (citing J. Goldstein, A. Freud, A. Solnit, BEYOND THE BEST INTERESTS OF THE CHILD (2d ed. 1979)).

[211] 41 P.3d 593 (Alaska 2002).

increased visitation rights of a chocolate Labrador retriever, Coho.[212] The divorce decree awarded shared ownership of Coho to the parties.[213] After claiming that her husband failed to allow her time with Coho, the wife filed a motion to review the decree.[214] Consequently, the lower court issued a custody order and awarded physical custody to the husband with reasonable visitation rights to the wife because of apparent dog fights at the wife's home.[215] The court in *Juelfs*, however, stated that property settlements incorporated into divorce decrees were deemed final and because the dispute over Coho was considered a dispute over property, modification of the divorce decree was denied based on the law governing property division.[216]

The court correctly found that property settlements in divorce decrees are conclusive.[217] However, custody and visitation agreements in divorce decrees concerning a child may be modified pursuant to statute or common law.[218] But, because the court treated Coho as property rather than a child, it denied the wife's request for physical custody and increased visitation.[219]

While Coho was the subject of a property settlement pursuant to the divorce decree, a subsequent custody order was issued by the lower court and presumably in effect at the time of the current litigation. Custody orders concerning children may be modified by a court in all states to further their best interests, granted "a substantial change in circumstances affecting the welfare of the child has occurred since the original custody order was entered."[220] Although the court in *Juelfs* ruled that the divorce decree was final, it could have addressed the subsequent custody order as one similar to a child custody order and allowed for modification accordingly. However, based on the property status of Coho, the court seemingly refrained from analyzing the subsequent custody order issued by the trial court and instead focused on the divorce decree as a grounds for denial of modification.

The resulting effect of courts treating companion animals as property is that an independent claim for mental anguish is denied even when an animal

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[212] *Id.* at 594.

[213] *Id.*

[214] *Id.* at 595.

[215] *Id.*

[216] *Id.* at 596 ("the judgment that custody of Coho would be shared is final and can only be modified under Alaska Rule of Civil Procedure 60(b)").

[217] Clark, *supra* note 206, § 17.4, at 251. "Property rights based on the marital relationship are conclusively determined if actually litigated in the divorce action or if the decree makes a specific finding on property, and both parties are personally subject to the court's jurisdiction. This is an application of ordinary rules of res judicata." *Id.* (citation omitted).

[218] Clark, *supra* note 206, § 20.9, at 547.

[219] *Juelfs*, 41 P.3d at 596, 599.

[220] MARTIN GUGGENHEIM, ALEXANDRA DYLAN LOWE, & DIANE CURTIS, THE RIGHTS OF FAMILIES 15 (Southern Illinois University Press 1996).

guardian genuinely suffers psychological damage as a result of the tortious act committed against their companion animal. Further, the best interests of the companion animal are not considered in custody and visitation disputes. As Professor Francione stated:

> The problem is that as long as property is, as a matter of legal theory, regarded as that which cannot have interests or cannot have interests that transcend the rights of property owners to use their property, then there will probably always be a gap between what the law permits people to do with animals and what any acceptable moral theory and basic decency tell us is appropriate.[221]

Consequently, the relationship between animal guardian and companion animals are not recognized as one worth protecting and the welfare of these animals is deemed irrelevant.

IV. COMPANION ANIMALS GAIN LEGAL RECOGNITION AS MORE THAN PROPERTY

There is a trend for courts to recognize companion animals as family members, as seen by the growing number of courts that are overruling the anachronistic rule of treating companion animals as property.[222] The legal reasoning articulated in the opinions of these courts effectively utilizes modern scientific knowledge and public policy arguments to challenge the established legal doctrine. Despite the absence of statutes that abrogate the property status of companion animals, judges are increasingly playing visionary roles by writing compelling opinions that are both insightful and inspiring.

Various state legislatures, and even Congress, are taking similar action by enacting laws to promote the welfare of companion animals and protect the rights of animal guardians. Such action exemplifies legislative acknowledgment that companion animals deserve protection beyond what is afforded by property law. Thus, companion animals are progressively gaining legal recognition as family members rather than mere property.

A. Judicial Acknowledgment

1. Tort law

While some courts feel restricted by the legal status of companion animals as property,[223] other courts are boldly refusing to treat these animals as

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[221] Francione, *supra* note 85, at 14.

[222] *See* discussion *infra* Part IV.A.

[223] *See* discussion *supra* Part II.

property. In *Richardson v. Fairbanks North Star Borough*,[224] a married couple claimed intentional infliction of emotional distress for the wrongful death of their companion animal by a local animal shelter.[225] There, the court allowed the plaintiffs to make an independent claim for emotional distress despite the legal status of animals as property.[226] The court insightfully stated, "[w]e recognize that the loss of a beloved pet can be especially distressing in egregious situations . . . . Therefore, we are willing to recognize a cause of action for intentional infliction of emotional distress for the intentional or reckless killing of a pet animal in an appropriate case."[227]

Likewise, in *Bueckner v. Hamel*,[228] the defendant shot plaintiff's two dogs during a hunt.[229] The issue concerned actual damages awarded by the trial court for the death of one of the dogs.[230] While the court affirmed the trial court's award for damages, Judge Andell's concurrence elaborated on the majority's decision. Judge Andell's concurrence is instructive as he articulated a cogent argument driven by modern scientific knowledge and public policy in favor of recognizing companion animals as family members.[231]

Judge Andell clearly distinguished between real property and companion animals by arguing that real property lacked characteristics of a family member.[232] He emphasized that the loss of a highly valued heirloom did not constitute a similar loss of a living being, even if the being is non-human.[233] While he conceded that the "established principle of law," deemed animals as property, Judge Andell properly rejected this notion and claimed that companion animals belonged in a completely "unique category of 'property' that neither statutory law nor case law has yet recognized."[234]

Judge Andell's concurrence is strongly supported by modern science and public policy.[235] For instance, he recognized that companion animals were more than property by citing to scientific research indicating the similarities between the neurological and genetic make-up of humans and higher

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[224] Richardson v. Fairbanks North Star Borough, 705 P.2d 454 (Alaska 1985).

[225] *Id.* at 455.

[226] *Id.* at 456.

[227] *Id.* The court in *Richardson* ultimately ruled that plaintiffs could not recover more than $300 for emotional distress. *Id.* at 455-57. For a thorough examination on the issue of valuation of companion animals, see Wise, *supra* note 14.

[228] 886 S.W.2d 368 (Tex. App. 1994).

[229] *Id.* at 370.

[230] *Id.*

[231] *See id.* at 372-78.

[232] *Id.* at 376-78.

[233] *Id.* at 378.

[234] *Id.* at 377.

[235] *See id.*

primates.[236] Further, Judge Andell identified that "simplistic, ill-informed sentiment" based on the similar biological make-up between humans and higher primates was not the driving force in society's compassion for mammals.[237] Rather, this compassion reached across the boundaries of species.[238] In his closing paragraph, Judge Andell insightfully remarked:

> The law should reflect society's recognition that animals are sentient and emotive beings that are capable of providing companionship to the humans with whom they live. In doing so, courts should not hesitate to acknowledge that a great number of people in this country today treat their pets as family members. Indeed, for many people, pets are the *only* family members they have.[239]

Judge Andell's concurrence in Bueckner was commendable not only for his recognition of companion animals as sentient and emotive beings, but also for his visionary articulation of how the ever changing social atmosphere should be directly reflected in the law.

Recently, the Third Circuit Court of Appeals addressed a companion animal case and reversed a Pennsylvania District Court's decision that had denied a family's claim for intentional infliction of emotional distress for the wrongful killing of their 3-year old Rottweiler, Immi.[240] In *Brown v. Muhlenberg Township*, the Brown family lived in a residential area and was in the process of moving.[241] While one of the animal guardians, Kim, was packing upstairs at her house, her husband, David, was loading the car.[242] Unbeknownst to the Browns, their gate latch was open and Immi wandered into an adjacent parking lot.[243] A witness who was parked in the lot observed Immi casually sniffing the area, and then proceed to walk along the sidewalk on the street where the Browns lived.[244] As Immi approached the sidewalk, a police officer who was driving by pulled over, exited his vehicle, and attempted to call to her.[245] Immi barked several times and withdrew, and according to a witness, "did not display any aggressive behavior towards [the police officer] and never tried to attack him."[246]

Although the police officer was standing face to face with Immi approximately ten to twelve feet away from each other, he began to reach into

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[236] *Id.*
[237] *Id.*
[238] *Id.*
[239] *Id.* at 378 (emphasis in original).
[240] Brown v. Muhlenberg Township, 269 F.3d 205 (3rd Cir. 2001).
[241] *Id.* at 208.
[242] *Id.*
[243] *Id.* at 209.
[244] *Id.*
[245] *Id.*
[246] *Id.*

his holster to pull out his gun.[247] When Kim happened to look out of an open window of her house that was fifty feet away, she saw the police officer pointing his gun at Immi and screamed as loudly as she could, "That's my dog, don't shoot!"[248] Despite Kim's plea to stop the shooting, the police officer fired his gun five times.[249] One bullet entered Immi's right mid-neck, three or four bullets entered Immi's hind end.[250] For three years, Immi was the playmate of the Brown's pre-school aged children and had never exhibited violent or aggressive behavior towards anyone.[251]

The first issue examined by the court was the Brown's claim that the police officer violated their constitutional right to be free from unreasonable governmental seizures of their property.[252] Thus, the animal guardians in *Brown* utilized the property classification of Immi and successfully argued that the police officer's seizure was unreasonable.[253]

Additionally, the court reversed the Pennsylvania District Court's decision and ruled that the police officer was not entitled to sovereign immunity from state law as he acted intentionally in inflicting emotional distress upon the Brown family.[254] In *Brown*, the Third Circuit Court cited to *Bandsczek v. Kowalski*,[255] Pennsylvania's first case dealing with a claim for emotional distress as a result of the wrongful death of two dogs.[256] The *Brown* court, without any reservations, affirmed the ruling of *Banasczek* and stated:

> Given the strength of community sentiment against at least extreme forms of animal abuse and the substantial *emotional investment* that pet owners frequently make in their pets, we would not expect the Supreme Court of Pennsylvania to rule out all liability predicated on the killing of a pet.[257]

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[247] *Id.*

[248] *Id.*

[249] *Id.*

[250] *Id.*

[251] *Id.*

[252] *Id.*

[253] *Id.* at 210-11. The Browns also successfully proved that the officer was not entitled to qualified immunity. *Id.* at 212.

[254] *Id.* at 219.

[255] No. 9009 of 1978, 1979 WL 489 (C.P. Luzerne County Jan. 30, 1979). In *Banasczek*, the court ruled in favor of the animal guardian and concluded that, "the more enlightened view is to allow recovery for emotional distress in the instance of the malicious destruction of a pet." *Brown*, 269 F.3d at 217 (citing *Banasczek*, 1979 WL 289, at *2).

[256] *Brown*, 269 F.3d 217 (citing *Banasczek*, 1979 WL 289, at *2).

[257] *Id.* at 218 (emphasis added).

2. Family law

In the area of family law, courts have also rejected the notion of companion animals as property in custody and visitation disputes by adopting the "best interests of the pet" standard.[258] The "best interests of the pet" standard resembles the "best interests of the child" standard,[259] as the court determines custody and visitation awards by considering certain factors deemed essential in ensuring the welfare of a companion animal. For instance, in a custody dispute between two roommates over a cat named Lovey, a New York appellate court dismissed the application of property law to companion animals and adopted the "best interests of the pet" standard.[260] The plaintiff in *Raymond v. Lachmann*,[261] brought Lovey into a shared housing situation and after leaving the premises, sought to relocate Lovey to another home.[262] Initially, the trial court deferred to Lovey's best interests and ordered the parties to form a visitation schedule.[263] Subsequently, an appellate court treated Lovey as property and awarded the cat to the legal owner.[264] When the appellate court's decision was appealed, the court in *Raymond* reversed, and after applying the "best interests of the pet" standard, ruled in favor of the defendant.

The *Raymond* court reasoned that given the advanced age of the cat, it was in the best interest of the companion animal to remain at the home where he would be most comfortable.[265] In expressing its acknowledgment of the companion animal as more than property, the court stated:

> Cognizant of the *cherished status accorded to pets in our society*, the *strong emotions* engendered by disputes of this nature, and the *limited ability of the courts to resolve them satisfactorily*, on the record presented, we think it best for all concerned that, given his limited life expectancy, Lovey, who is now almost ten years old, *remain where he has lived, prospered, loved and been loved for the past four years*.[266]

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[258] *See generally* Morgan, *supra* note 193; Newell, *supra* note 193; discussion *supra* Part III.B.

[259] *See* HOMER, *supra* note 206; *see* discussion *supra* Part III.B.

[260] *See id.* at 308-09.

[261] Raymond v. Lachmann, 264 A.D.2d 340 (N.Y. 1999).

[262] Newell, *supra* note 193, at 180 (citing Raymond v. Lachmann, No.107990/97 (N.Y. Sup. Ct. Dec. 24, 1997)).

[263] *Raymond*, 264 A.D.2d at 340.

[264] *Id.* at 308.

[265] *Id.* at 341.

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

More recently, another court refused to treat a companion animal as property in a family law case. In *Zovko v. Gregory*,[267] two roommates entered into a custody dispute over a cat named Grady after deciding to live in separate housing.[268] The court in *Zovko* applied the "best interests of the pet" standard in reaching its decision and ruled against the original owner of Grady by awarding custody to the owner's roommate who shared a closer bond with the cat.[269]

3. Bankruptcy law

While family courts increasingly recognize companion animals as more than property, interestingly, bankruptcy courts adopt a similar recognition. The various local rules of bankruptcy law adopted in most states expressly exempt "household pets" from liquidation despite the general principle that bankruptcy trustees are required to aggressively collect assets to satisfy creditors' claims.[270] This exemption illustrates how even bankruptcy courts acknowledge that companion animals are more than just a valuable piece of property.

In the case of *In re Gallegos*,[271] a U.S. Bankruptcy Court in Idaho held that a pet horse, although residing outdoors, could qualify as a "household pet."[272] Accordingly, the court found that even if the companion animal does not reside within the home, this fact is not determinative.[273] Rather, the court stated:

> [i]t is more the fact that an animal is held primarily for the enjoyment and companionship of its owners, and not for some other reason, that makes the pet a member of a debtor's household. There is no dispute that a special bond exists between Debtor's family members and Mittens.[274]

Moreover, the fact that the horse lived outside the family's house was irrelevant in the court's determination of the horse as a member of the family.[275] In response to the trustee's objection to the debtors' exemption of Mittens as a "household pet," the court exclaimed, "[y]ou've never heard of

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[267] Newell, *supra* note 193, at 180 (citing Brooke A. Masters, *In Courtroom Tug of War Over Custody, Roommate Wins the Kitty*, WASH. POST, Sept. 13, 1997, at B1).

[268] *Id.*

[269] *Featured Articles, Case Studies: Zovko v. Gregory, 1997, Arlington, VA, at* http://www.petcustody.com/features/index.html (last visited Feb. 8, 2003).

[270] *See, e.g.*, IDAHO CODE § 11-605(1)(b)(2001).

[271] *In re Gallegos*, 226 B.R. 111 (Bankr. Idaho 1998).

[272] *Id.* at 112.

[273] *Id.*

[274] *Id.*

[275] *Id.*

a household horse? Well listen to this: Trustee's objection to Debtors' claim of exemption is hereby DENIED."[276]

These cases in the areas of tort, family, and bankruptcy law, illustrate the judicial trend to recognize companion animals as more than property. When courts permit animal guardians to make an independent claim for emotional distress due to the negligent loss of their companion animal, apply the "best interests of the pet" standard to determine custody and visitation disputes, and consider the manner in which a family treats its companion animal to determine whether the animal is a "household pet," courts properly acknowledge companion animals as members of the family, rather than mere property.

B. Legislative Acknowledgment

In addition to judicial acknowledgment, an examination of various state and congressional statutes reveals that legislatures also recognize companion animals as more than property. There are more than sixty federal animal protection statutes currently in effect.[277] In addition, all fifty states in this nation have adopted anti-cruelty laws to protect animals from inhumane treatment.[278] Further, various states are moving beyond the mere protection of a companion animal's welfare to the recognition of these animals as family members by enacting statutes that create honorary trusts for pets.

1. Anti-cruelty statutes

Both Congress and state legislatures acknowledge that companion animals are more than property through their enactment of laws that protect animals from cruelty.[279] The Federal Animal Welfare Act ("AWA") was passed in 1966 "to prevent companion animals from being stolen and placed into research facilities."[280] Following the enactment of the AWA, legislatures in

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[276] *Id.*

[277] *See* Henry Cohen, *Federal Animal Protection Statutes*, 1 ANIMAL L. 143 (1995) (summarizing federal statutes concerning animals).

[278] Squires-Lee, *supra* note 11, at 1071.

[279] *Id.* at 1071-72.

[280] Carole Lynn Nowicki, *The Animal Welfare Act: All Bark and No Bite*, 23 SETON HALL LEGIS. J. 443, 451 (1999). While the enactment of anti-cruelty laws signify the acknowledgment of companion animals as more than property, it is important to realize that such laws are often criticized by animal rights activists for being ineffective and inadequate in truly protecting animals. *See generally* FRANCIONE, *supra* note 85 (discussing state anti-cruelty laws against animals and the Animal Welfare Act of 1970, and its ineffectiveness in truly protecting animals from inhumane treatment). Some critics argue that both state and federal legislation lack strict enforcement of these laws, often leaving the aggrieved animal guardian

all fifty states enacted anti-cruelty laws to prevent human abuse of such animals.[281] The mere enactment of anti-cruelty laws demonstrates the government's recognition that companion animals are more than property as they require protection that ordinary property law fails to provide. As Debra Squires-Lee saliently observed with reference to tort law, "[i]f animals were truly property, there would be little reason for Congress to pass such a law protecting their interests and providing for some measure of comfort during transport . . . [l]egal precedent, therefore, does exist for tort to redefine companion animals as more than mere property."[282]

2. Honorary trusts for pets

A recent trend in recognizing companion animals as family members is the legislative enactment of honorary trusts for pets. Honorary trusts allow companion animals to benefit from the assets of an animal guardian's trust fund.[283] Between 12% and 27% of animal guardians include their companion animals in their wills.[284] In 1991, Harper's Index reported that over one million dogs were named as will beneficiaries.[285] A few examples of celebrity pets named as will beneficiaries include Doris Duke's dog who inherited $100,000 in trust; Betty White's pets will reportedly receive her entire five million dollar estate; Oprah Winfrey's will purportedly mandates that her dog live a luxurious life; and singer Dusty Springfield provided in her will that her cat, Nicolas, was to listen to Dusty's recordings each night at bedtime and was to be fed only imported baby food.[286]

Although the English common law looked favorably upon gifts for companion animals, in the United States, animal guardians are often precluded from ensuring the enforcement of wills and trusts benefiting companion animals. Two common issues that arise with companion animals as will beneficiaries are the rule against perpetuities and legal standing.[287] Because the rule against perpetuities requires that the measuring life be that of a

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to seek justice through tort law. Squires-Lee, *supra* note 11, at 1072. Nonetheless, the ineffectiveness and inadequacies of anti-cruelty laws exemplify the further importance in providing animal guardians an alternative recourse through civil law to ensure their protection from inhumane treatment as property.

[281] *Id.* at 1071-72.

[282] *Id.* at 1072.

[283] Jennifer R. Taylor, *A "Pet" Project for State Legislatures: The Movement Toward Enforceable Pet Trusts in the Twenty-First Century*, 13 QUINNIPIAC PROB. L.J. 419, 439 (1999).

[284] Gerry W. Beyer, *Estate Planning for Pets*, PROBATE & PROPERTY, July/Aug. 2001, at 7.

[285] Beyer, *supra* note 14, at n.12.

[286] *Id.* at 619.

[287] Beyer, *supra* note 283, at 7.

human, gifts in favor of companion animals fail to meet the legal definition of a "living being."[288]

For the same reason, companion animals lack standing to enforce trusts created on their behalf.[289] Like parents, animal guardians desire to ensure the continued care of their companion animal following their death. This desire exemplifies their consideration of their companion animals as members of the family. Consequently, in 1990, the National Conference of Commissioners on Uniform State Laws added a section to the Uniform Probate Code that acknowledged and validated trusts for the care of a companion animal.[290]

Following the adoption of the Uniform Probate Code's amendment, various state legislatures began enacting honorary trusts for pets to ensure that the wishes of animal guardians to financially support their companion animals following their death could rightfully be carried through.[291] Approximately eighteen states across the nation have enacted honorary trusts for pets including Alaska,[292] Arizona,[293] California,[294] Colorado,[295] Hawai'i,[296] Iowa,[297] Michigan,[298] Missouri,[299] Montana,[300] Nevada,[301] New Jersey,[302] New Mexico,[303] New York,[304] North Carolina,[305] Oregon,[306] Tennessee,[307] Utah,[308] and Wisconsin.[309]

During the Congressional Session of 2001 to 2002, the State of Oregon's Representative, Earl Blumenauer, introduced a "pet trust" bill named after his companion animal, Morgan.[310] The Morgan bill would allow an animal

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[288] *Id.*
[289] *Id.*
[290] *Id.*
[291] *Id.*
[292] ALASKA STAT. § 13.12.907 (Michie 2001).
[293] ARIZ. REV. STAT. § 14-2907 (2001).
[294] CAL. PROB. CODE § 15212 (West 2002).
[295] COLO. REV. STAT. ANN. § 15-11-901 (West 2002).
[296] HAW. REV. STAT. § 560:2-901 - 907 (2001).
[297] IOWA CODE ANN. § 633.2105 (West 2002).
[298] MICH. COMP. LAWS ANN. § 700.2722 (West 2002).
[299] MO. REV. STAT. § 456.055 (2001).
[300] MONT. CODE ANN. § 72-2-1017 (2001).
[301] NEV. REV. STAT. ANN 163.0075 (Michie 2002).
[302] N.J. STAT. ANN. § 3B:11-38 (West 2002).
[303] N.M. STAT. ANN. § 45-2-907 (Michie 2001).
[304] N.Y. EST. POWERS & TRUSTS LAW § 76.1 (McKinney 2001).
[305] N.C. GEN. STAT. § 36A-145 (2001).
[306] OR. REV. STAT. § 128.308 (2001).
[307] TENN. CODE ANN. § 35-50-118 (2001).
[308] UTAH CODE ANN. § 75-2-1001 (2001).
[309] WIS. STAT. ANN. § 701.11 (West 2002).
[310] H.R. 1796, 107th Cong. (2001).

guardian to create a trust fund for the benefit of a companion animal for the life of the animal, and any remaining funds in the trust after the death of the companion animal would be given to a pre-determined qualified charity.[311] On May 10, 2001, the Morgan Bill was referred to the House Committee on Ways and Means, but has not yet been received from the Government Printing Office for the upcoming Congressional Session of 2002 to 2003.[312]

There are several positive aspects of the Morgan bill. First, one of the provisions of the bill ensures that companion animals receive proper care as will beneficiaries for their entire life, as opposed to some state statutes which restrict a trust fund from existing beyond twenty-one years.[313] Second, if enacted, the Morgan bill will become federal law and applicable to all states.[314] Third, the Morgan bill represents Congress's acknowledgment that companion animals are family members rather than property.

3. Federal housing acts

In 1983, Congress recognized the value of companion animals to their elder and disabled animal guardians by enacting the National Housing Act.[315] Despite "no pet" provisions in leases and homeowners association or condominium bylaws, the National Housing Act provides a limited right for the elderly and disabled to keep their companion animals in federally-assisted housing specifically designated for the elderly or disabled.[316] Moreover, the 1988 amendments to the Fair Housing Act mandate that housing provide reasonable accommodations, which include permitting seeing-eye dogs to reside with their animal guardians.[317]

Clearly, there is both a judicial and legislative trend to reject companion animals as property. As stated by Professor Francione, "[t]o label something property, is, for all intents and purposes, to conclude that the entity so labeled possesses no interests that merit protection."[318] Accordingly, judicial and legislative acknowledgment that companion animals possess interests that

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[311] Kim Bressant-Kibwe, *Who Will Care for Your Pets When You're Gone?*, ANIMAL WATCH, Spring 2002, at 56.

[312] H.R. 1796, 107th Cong. (2001); H.R. 1796, 108th Cong. (2002).

[313] Bressant-Kibwe, *supra* note 311, at 56.

[314] *Id.*

[315] *See* 12 U.S.C. § 1701r-1 (1983); Henry Cohen, *Best Friends for Life: Your Right to Animals in "No Pet" Housing*, 43 FED. LAW. 55, 55 (1996) (book review).

[316] *See* 12 U.S.C. § 1701r-1 (1983). Section 227 of the Housing and Urban-Rural Recovery Act of 1983 does not provide this right for the elderly or disabled who merely reside in federally assisted housing not specified for the elderly or in housing not federally assisted. *Id.*

[317] *See* 42 U.S.C. § 3604 (1988).

[318] FRANCIONE, *supra* note 85, at 253.

merit protection indicate a legal motive to remove the property label of these animals.

V. DISMANTLING THE PROPERTY STATUS OF COMPANION ANIMALS BY STATUTE

Based on the legal recognition of companion animals as more than property, there is hope for these animals to gain full membership in the family. The property status of companion animals can be progressively dismantled by statute. Though not a revolutionary approach, codifying certain rights of animal guardians to ensure the protection of their companion animals can, at the very least, attempt to chip away at the legal view of companion animals as property and in essence, award these animals a higher legal status. Even a subtle change in terminology within the law can result in a vast change of perception. As stated by a representative of In Defense of Animals, "[w]ords do have power, and the way we speak reflects the way we act."[319]

A. Statutory Recognition of Tort Liability

Within the past few years, two states made impressive advancements in facilitating an animal guardian's recovery of non-economic damages for the wrongful death of their companion animal by statutorily recognizing tort liability. For example, the T-Bo Act, passed on May 10, 2000, was introduced to the Tennessee legislature by Senator Steve Cohen and named after his beloved Shitzu dog.[320] T-Bo was attacked and killed as a result of severe injuries caused by a loose dog.[321] When the animal guardians of the attacking dog failed to take responsibility and refused to pay for T-Bo's medical bills, Senator Cohen sued in small claims court.[322] While the court awarded Senator Cohen damages to recover for T-Bo's medical bills, Senator Cohen was prevented from making an independent claim for emotional distress since companion animals were deemed property.[323]

The T-Bo Act codifies an animal guardian's right to file claims for non-economic damages, such as mental anguish, for the loss or serious injury

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[319] *On July 11, 2000, the Boulder, Colorado City Council Voted 8-1 to Change the City's Municipal Code to Refer to People as the Guardian of their Companion Animals Instead of as Their "Owners."*, IN DEFENSE OF ANIMALS, July 12, 2000, *at* http://www.idausa.org/campaigns/property/boulder/boulder.html.

[320] *Tennessee—A Progressive State For Pets? You Bet!!*, *at* http://www.petcustody.com/features/tennessee_pets.html (last visited Feb. 8, 2003).

[321] *Id.*

[322] *Id.*

[323] *Id.*

inflicted upon their companion animal.[324] Tennessee courts may award up to a maximum of $4,000 in non-economic damages if a companion animal is killed or sustains serious injuries as a result of an intentional or negligent act by a human or other animal.[325] The T-Bo Act narrowly defines "pet" to include only domesticated dogs or cats that are "normally maintained in or near the household of its owner."[326] While the T-Bo Act limits the amount of recoverable damages to the "loss of the reasonably expected society, companionship, love and affection of the pet," it excluded the imposition of limits on intentional infliction of emotional distress claims and any other claims, provided they do not involve the sole loss of a pet.[327]

Several concessions to meet the concerns of insurance companies and farming industries were incorporated into the final form of the T-Bo Act.[328] For example, while the T-Bo Act originally proposed a maximum amount of recoverable damages at $5,000, the amount was lowered to $4,000 in its final form.[329] The T-Bo Act accommodates rural residents as such areas are excluded from enforcement of the Act due to the recognition of difficulty in regulating rural areas where roaming pets are commonplace.[330] Further, it also allows farmers to protect their livestock from attacking pets by imposing Marshall law.[331] Lastly, the T-Bo Act excluded the imposition of liability on veterinarians.[332]

More recently, Colorado lawmakers introduced a bill that would far exceed the maximum amount of recoverable non-economic damages for the loss of a companion animal as provided for by the T-Bo Act, and specifically includes the imposition of liability on veterinarians.[333] On January 31, 2003, primary sponsors, Representative Mark Cloer and Senator Ken Chlouber, introduced House Bill 03-1260, which would allow people in Colorado to sue veterinarians and animal abusers, and seek loss of companionship damages for

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[324] TENN. CODE ANN. § 44-17-403 (a) (2001).

[325] *Id.*

[326] *See id.* § 44-17-403 (b) (2001).

[327] *See id.* § 44-17-403 (c)-(d) (2001).

[328] *Tennessee—A Progressive State For Pets? You Bet!!*, *at* http://www.petcustody.com/features/tennessee_pets.html (last visited Feb. 8, 2003).

[329] *Id.*

[330] *Id.*

[331] *Id.*

[332] *Id.* Although the legislative intent to exclude veterinarians from liability pursuant to the T-Bo Act was not available, it was most likely due to the hesitance in discouraging the practice of veterinary medicine. *Id.* For a further discussion on the impacts to veterinarians in allowing mental anguish claims in torts, *see* Root, *supra* note 59, at 441-47.

[333] *Colorado May Make Pets 'Companions'*, *at* http://www.cnn.com/2003/LAW/02/10/pets.property.ap/index.html (Feb. 10, 2003); H.B. 03-1260, 64th General Assembly, 1st Regular Sess. (Co. 2003).

up to $100,000, plus reasonable attorney fees awarded to the prevailing party.[334] Further, the bill also requires veterinarians to obtain a signed informed consent document by the animal guardian prior to performing a service involving substantial risk to the companion animal.[335]

House Bill 03-1260 clearly recognizes companion animals as family members and deserving of the same safeguards afforded to their human animal guardians. Among the general assembly findings and determinations proposed in Section 13-21-1001 of House Bill 03-1260, subsection (b) states that, "[c]urrent laws fail to make the owner of the injured companion dog or cat whole, and they *do not accurately reflect society's favorable attitude toward companion dogs and cats.*"[336] In addition, subsection (e) of the same section proclaims that "[c]ompanion dogs and cats *often are treated as members of a family*, and an injury to or the death of a companion dog or cat is psychologically and emotionally significant and often devastating to the owner."[337]

Chief Justice Shirley S. Abrahamson of the Wisconsin Supreme Court, in her concurring opinion, suggested the enactment of a statute as an appropriate means to address the public policy concerns raised by the court in *Rabideau*.[338]

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[334] *Colorado May Make Pets 'Companions'*, *at* http://www.cnn.com/2003/LAW/02/10/pets.property.ap/index.html (Feb. 10, 2003); H.B. 03-1260, 64th General Assembly, 1st Regular Sess. (Co. 2003).

[335] H.B. 03-1260, 64th General Assembly, 1st Regular Sess. (Co. 2003).

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

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

[338] Rabideau v. City of Racine, 627 N.W.2d 795, 806-07 (Wis. 2001) (Abrahamson, J., concurring); *see* discussion *supra* Part IV.A. In ruling against the animal guardian for negligent infliction of emotional distress, the court in *Rabideau*, emphasized its reluctance to extend this claim to bystanders as allowing such claims violated inherent public policy concerns of narrowing the scope of negligent liability to prevent encompassing an endless, infinite field. *Rabideau*, 627 N.W.2d at 802. The court applied the public policy considerations outlined in *Bowen v. Lumbermens Mut. Cas. Co. Id.* (citing Bowen v. Lumbermens, 517 N.W.2d 432 (Wis. 1994)). Such considerations included:

> (1) Whether the injury is too remote from the negligence; (2) whether the injury is wholly out of proportion to the culpability of the negligent tortfeasor; (3) whether in retrospect it appears too extraordinary that the negligence should have brought about the harm; (4) whether allowance of recovery would place an unreasonable burden on the negligent tortfeasor; (5) whether allowance of recovery would be too likely to open the way to fraudulent claims; or (6) whether allowance of recovery would enter a field that has no sensible or just stopping point.

Id. (quoting *Bowen*, 517 N.W.2d at 432).

The plaintiff in *Rabideau* suggested that the courts limit the scope to "the human companion of a companion animal who is killed." *Id.* However, the court identified the difficulty in precisely defining the class of human companions as it could include every family member or even a roommate. *Id.* Further, the scope of the plaintiff's suggestion failed to specify whether "human companion" would constitute the owner of record or primary caretaker. *Id.*

In *Rabideau*, the court questioned the difficulty in limiting the definition of "companion animals," reasoning that humans are capable to form emotional bonds to "an enormous array of living creatures."[339] The court further emphasized the importance of distinguishing frivolous from genuine emotional distress claims and fairly imposing financial burdens upon tortfeasors.[340] Consequently, Judge Abrahamson acknowledged that the T-Bo Act defined a workable limited scope for emotional distress claims for the loss of a companion animal and stated, "[s]uch a statute allows the legislature to make a considered policy judgment regarding the societal value of pets as companions and to specify the nature of the damages to be awarded in a lawsuit."[341]

Both the T-Bo Act and House Bill 03-1260 meet the various public policy concerns raised by the court in *Rabideau*.[342] Accordingly, the T-Bo Act and House Bill 03-1260 include caps that specify the maximum amount an animal guardian may recover for non-economic damages.[343] Secondly, recovery of damages is narrowly limited to a wrongful or negligent act committed against a domesticated cat or dog.[344] Thus, both the T-Bo Act and House Bill 03-1260 avoid the possibility of sky rocketing awards for damages without limits and a wide range of claims made on behalf of various animal species.[345]

In addition to meeting public policy concerns, House Bill 03-1260 proposes to require all claims to initially be asserted through alternative dispute resolution to minimize the impact upon the Judicial Department.[346] Based on

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[339] *Id.* Although the court acknowledged that the ability to form emotional bonds with a wide spectrum of animals added to "the richness of life," it inevitably failed to meet the public policy concerns of adopting a narrowly drawn definition of "human companion" and "companion animal," and thus, the plaintiff's suggestions were deemed unsatisfactory. *Id.*; *see supra* text accompanying note 336.

[340] *Id.*

[341] *Id.* at 807.

[342] *See* discussion *supra* Part IV.A.

[343] TENN. CODE ANN. § 44-17-403(a) (West 2002) (allowing the trier of fact to find an unlawful, intentional, or negligent individual causing the death or owner of the animal causing the death liable for up to $4,000 in non-economic damages); H.B. 03-1260, 64th General Assembly, 1st Regular Sess. (Co. 2003) (limiting an award for loss of companionship damages to no more than $100,000).

[344] TENN. CODE ANN. § 44-17-403(b) (West 2002) (as used in section 44-17-403(a), "pet" means any domesticated dog or cat normally maintained in or near the household of its owner); H.B. 03-1260, 64th General Assembly, 1st Regular Sess. (Co. 2003) (proposed section 13-21-1002 defines "companion dog or cat" as an assistance dog, working dog, or other domesticated dog or cat that is owned or kept by a person for companionship, protection, or the sale to another for such purposes).

[345] *See* TENN. CODE ANN. § 44-17-403(a) (West 2002); H.B. 03-1260, 64th General Assembly, 1st Regular Sess. (Co. 2003).

[346] H.B. 03-1260, 64th General Assembly, 1st Regular Sess. (Co. 2003).

the alternative dispute resolution requirement, House Bill 03-1260 attempts to minimize the amount of civil cases since such claims can be absorbed within existing department resources.[347] As both the T-Bo Act and House Bill 03-1260 illustrate, the enactment of statutes can be utilized to resolve many of the issues raised by those courts that are unwilling to extend the recovery of non-economic damages to animal guardians. Moreover, both the T-Bo Act and House Bill 03-1260 exemplify the state legislature's recognition of companion animals as family members.

B. The "Best Interests of the Pet" Standard

The court's adoption of the "best interests of the pet" standard recognizes companion animals as more than property as it considers factors paramount to the welfare of the animal, rather than the rights of the legal "owner."[348] In child custody and visitation cases, the "best interests of the child" standard invariably considers that "the right of a child to a safe, wholesome, and caring environment takes precedence over the parents' rights."[349] Further, although other standards are occasionally adopted by courts to determine child custody and visitation,[350] the overarching principle demands that the child's welfare be the ultimate test.[351]

The "best interests of the child" standard is codified in many state statutes and adopted by most case law.[352] In contrast, the "best interests of the pet" standard is not codified. While the "best interests of the pet" standard evolved from case law, courts have failed to set a firm precedent.[353] Therefore, codifying the "best interests of the pet" standard in state statutes will require courts to apply this rule and set a precedent for other courts to follow. Considering the best interests of the companion animal when determining custody and visitation disputes acknowledges companion animals as family members rather than property. Further, it recognizes the need to ensure the welfare of companion animals and protect the relationship animal guardians share with their animals when determining custody and visitation disputes.

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[347] *Id.*

[348] *See* discussion *supra* Part III.B.

[349] ARNEST, *supra* note 108, at 52.

[350] CLARK, *supra* note 206, § 20.4, at 494. The law sometimes adopts other standards such as the "primary caretaker," however, the child's best interests is inescapable. *Id.*

[351] *Id.* at 495.

[352] *Id.*

[353] *See* discussion *supra* Part III.B.

C. Switzerland's Proposed Referendums

Switzerland has gained international attention as an animal loving nation. Animal-rights activists in Switzerland aggressively campaigned to raise the legal status of companion animals and successfully obtained over 100,000 signatures to put a referendum out for a national vote.[354] Currently, companion animals in Switzerland are deemed property, similar to the United States.[355] The referendums propose that companion animals be given similar legal rights to children in tort offenses and divorce proceedings.[356] One proposal attempts to resolve Switzerland's current law in tort that precludes animal guardians from recovering medical expenses when an animal is injured by a third party.[357] The second proposal requires Swiss courts to consider the best interest of the companion animal when deciding custody disputes.[358]

Another Swiss animal-rights organization is gathering signatures to place a third referendum that proposes even stronger rights for animals.[359] This proposal calls for "the respect of an animal's dignity, emotions and ability to feel pain" by amending the Swiss Constitution to enshrine animals' rights.[360] The constitutional amendment gives animals standing to sue as plaintiffs in Swiss courts by receiving the appointment of legal representation.[361]

The referendums suggested by Switzerland recognize companion animals as bonafide members of the family. Based on the current legal trend in the United States to acknowledge companion animals as more than property, the idea of awarding these animals rights similar to children in the United States may be within view. Should Switzerland succeed in adopting the proposed referendums into law, it will most certainly serve as an inspiring example for

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[354] Anne Marie, *Switzerland to Give Human Rights to Animals*, KURO5HIN, *at* http:www.kuro5hin.org/story/2001/1/4/173316/3956 (Jan. 4, 2001); Brian Carnell, *Swiss to Vote on Animal Rights Measure*, ANIMALRIGHTS.NET, *at* http://www.animal.rights.net/articles/2000/000063.html (Sept. 5, 2000); Claire Doole, *Swiss Ponder Animal Rights*, BBC NEWS, *at* http://news.bbc.co.uk/hi/english/world/europe/newsid.908000/08764.stm (Sept. 3, 2000).

[355] *Id.*

[356] Anne Marie, *Switzerland to Give Human Rights to Animals*, KURO5HIN, *at* http:www.kuro5hin.org/story/2001/1/4/173316/3956 (Jan. 4, 2001).

[357] *Id.*

[358] *Id.*

[359] Claire Doole, *Swiss Ponder Animal Rights*, BBC NEWS, http://news.bbc.uk/hi/english/world/europe/newsid.908000/908764.stm (Sept. 3, 2000).

[360] Anne Marie, *Switzerland to Give Human Rights to Animals*, KURO5HIN, *at* http:www.kuro5hin.org/story/2001/1/4/173316/3956 (Jan. 4, 2001); Claire Doole, *Swiss Ponder Animal Rights*, BBC NEWS, *at* http://news.bbc.co.ui/hi/english/world/europe/newsid.908000/908764.stm (Sept. 3, 2000).

[361] Anne Marie, *Switzerland to Give Human Rights to Animals*, KURO5HIN, *at* http:www.kuro5hin.org/story/2001/1/4/173316/3956 (Jan. 4, 2001).

other countries, such as the United States, to follow Switzerland's innovative lead.

In sum, the enactment of statutes can progressively lead to dismantling the property classification of companion animals. After all, the enactment of the Thirteenth Amendment marked the end of slavery and the treatment of Africans as property.[362] While women and children still struggle to gain recognition as equals with men, their fight to emancipate themselves from a similar property status also derived from the enactment of statutes.[363] For instance, the Married Women's Property Act, passed by various state legislatures, recognized women's rights as individuals and redefined the legal position of women within a marriage.[364] Moreover, Congress enacted the Fair Labor Standards Act banning all child labor in businesses pursuant to the Commerce Clause, which ultimately overruled laws that maintained the property status of children.[365]

The end of slavery and the recognition of women and children as more than property was not an overnight success, nor did it transpire through a profound declaration of independence. Rather, their recognition as living beings occurred piecemeal through the enactment of statutes that gradually eroded their legal classification as property. The history of slaves, women, and children optimistically illustrates how companion animals might gain similar recognition as more than property. As Harvard Constitutional Law Professor Laurence Tribe eloquently stated:

> Broadening the circle of rights-holders, or even broadening the definition of persons . . . is largely a matter of acculturation. It is not a matter of breaking through something, like a conceptual sound barrier. With the aid of statutes like those creating corporate persons, our legal system could surely recognize the personhood of chimpanzees, [and] bonobos . . . . Just as the Constitution itself recognizes the full equality of what it calls natural born citizens with naturalized citizens, *who acquire that status by virtue of Congressional enactment*, so the possible dependence of the legal personhood of non-human animals *on the enactment of suitable statutory measures* need not be cause to denigrate the moral significance and gravity of that sort of personhood.[366]

Because the enactment of statutes can create a particular legal status, analogously, it can also be utilized to dismantle them.

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[362] St. Pierre, *supra* note 88, at 264.

[363] *Id.* at 267-68; ARNEST, *supra* note 108, at 8-17.

[364] St. Pierre, *supra* note 88, at 267.

[365] ARNEST, *supra* note 108, at 10.

[366] Tribe, *supra* note 41, at 3.

V. CONCLUSION

While companion animals are proclaimed to be family members, the law fails to embrace this social value and thus, unjustly treats these animals as property. As Judge Andell stated in *Bueckner*, "[t]he law must be informed by evolving knowledge and attitudes . . . [o]therwise, it risks becoming irrelevant as a means of resolving conflicts."[367] There is, however, a judicial and legislative trend to acknowledge companion animals as more than property, and the enactment of both state and federal statutes are currently the strongest force in dismantling the property status of companion animals.

Companion animals, like all animals, deserve to be treated with dignity and respect as emotional and sentient beings. The property classification of all animals should be completely abrogated. According to Professor Francione, however, awarding all animals "rights" under our existing legal system is difficult because "an animal rights position requires a complete rethinking of the legal status of animals and portends significant economic and social consequences in light of the pervasive exploitation of animals for everything from sources of food, clothing, and entertainment to the primary 'model' for biomedical research."[368] Nevertheless, the notion of awarding all animals "rights" is an issue that must continue to be explored. Based on the progressive legal development surrounding companion animals, it may be just around the corner.

Elizabeth Paek[369]

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[367] Bueckner v. Hamel, 886 S.W.2d 368, 377 (Tex. 1994).

[368] Francione, *supra* note 85, at 253-54.

[369] J.D. Candidate, May 2003, William S. Richardson School of Law, University of Hawai'i. Special thanks to Professor Douglas A. Codiga for his relentless instruction and direction; Liann and Daisy Ebesugawa for their passion and belief in this paper; Sheree and Emi Nitta for their input and support; my sister Chanel Mia Paek for sharing her love for animals with me; and last but not least, to my two beloved companion animals, China and Kea, for their eternal inspiration.

No Endangered Species Left Behind: Correcting The Inequity In Critical Habitat Designation For Pre-1978-Amendment Listed Species

I. INTRODUCTION

The Hawaiian islands are located more than 2,000 miles from the closest continental land mass, making the archipelago the most isolated island chain in the world.[1] From this geographic isolation was born a unique array of endemic plant, animal, and insect species.[2] These species arrived and evolved over a span of twenty-seven million years before human colonization began to wreak havoc on the natural ecosystem.[3] Although Hawai'i has been regarded as "the evolutionary capitol of the world," the state additionally has the "unfortunate distinction of being the endangered species capitol of the world."[4] Unfortunately, "more species have been lost in Hawai'i during the past [200] years than in the whole of North America since Columbus."[5]

Although the process of extinction can be a natural one, conservationists estimate the "current [worldwide] extinction rate [to be] 1,000 to 10,000 times higher than it should be under natural conditions."[6] The Endangered Species Act[7] ("ESA") is a powerful tool to conserve endangered and threatened species, yet the full extent of its available protective measures are not available to all listed species. Ironically, the earliest listed species receive the least protection under the Act. The 1978 amendments to the ESA made the designation of critical habitat mandatory for species listed after the amendments, yet provided enormous discretion to the Secretary of the Interior

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[1] DAVID LITTSCHWAGER & SUSAN MIDDLETON, REMAINS OF A RAINBOW: RARE PLANTS AND ANIMALS OF HAWAI'I 28 (Nat'l Geographic Society, 2001).

[2] ATLAS OF HAWAI'I 107 (Sonia P. Juvik & James O. Juvik eds., 3d ed. 1998) (1973) (endemic refers to those species unique to Hawai'i).

[3] *Id.* at 105, 152. Scientists estimate that plant colonization occurred once every 98,000 years, insect colonization once every 68,000 years, and bird colonization once every million years. *Id.* at 105.

[4] LITTSCHWAGER & MIDDLETON, *supra* note 1, at 29.

[5] *Id.* at 23.

[6] Erica Bulman, *Many Plants and Animals are on Brink of Extinction*, HONOLULU STAR BULLETIN, Oct. 8, 2002, at C7.

[7] Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-44 (2000)).

to designate critical habitat for species listed before the amendments.[8] Currently, there are 1,262 U.S. plant and animal species listed as either endangered or threatened under the ESA.[9] Of these listed species, only 405 species (32.1%) have designated critical habitat.[10]

The lack of designated critical habitat for endangered species has been on the national forefront for multiple years, yet the disproportionately high number of listed plant and animal species in Hawai'i makes this issue even more important locally. Currently, Hawai'i is home to 317 listed plant and animal species,[11] 25.1% of the 1,262 U.S. listed species.[12] Although 78.9% (250) of Hawaiian plant and animal species presently have designated critical habitat, only 12.8% (five) of the Hawaiian species listed prior to the 1978 ESA amendments have designated critical habitat.[13] In stark contrast, 88.1% (245) of the Hawaiian species listed after the 1978 ESA amendments have designated critical habitat.[14] As these numbers indicate, the discretionary nature of critical habitat designation for species listed prior to the 1978 ESA amendments has left the majority of these species lacking critical habitat.

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[8] Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (1978) (codified as amended at 16 U.S.C. § 1533(a)(3)) (mandatory designation of critical habitat concurrent with species listing); Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (1978) (codified as amended at 16 U.S.C. § 1532(5)(B)) (discretionary designation of critical habitat for species listed prior to the 1978 amendments).

[9] Endangered and Threatened Wildlife, 50 C.F.R. § 17.11 (1999); Endangered and Threatened Plants, 50 C.F.R. § 17.12 (1999); *General Statistics for Endangered Species, at* http://ecos.fws.gov/servlet/TessStatReport (last visited Jan. 27, 2003).

[10] Endangered and Threatened Wildlife, 50 C.F.R. § 17.11; Endangered and Threatened Plants, 50 C.F.R. § 17.12; *General Statistics for Endangered Species, at* http://ecos.fws.gov/servlet/TessStatReport (last visited Jan. 27, 2003); 16 U.S.C. § 1532(5)(A)(i). Critical habitat refers to the specific geographic areas "on which are found those physical or biological features essential to the conservation of [a listed] species." 16 U.S.C. § 1532(5)(A)(i).

[11] *Listings by State and Territory as of 01/26/2003, at* http://ecos.fws.gov/servlet/TESSWebpageUsaLists?state=HI (last visited Jan. 26, 2003).

[12] *General Statistics for Endangered Species, at* http://ecos.fws.gov/servlet/TessStatReport (last visited Jan. 27, 2003). There are 517 U.S. animal species and 745 U.S. plant species listed under the ESA. *Id.*

[13] *See generally* Endangered and Threatened Wildlife, 50 C.F.R. § 17.11; Endangered and Threatened Plants, 50 C.F.R. § 17.12; *Listed Species with Critical Habitat as of 01/26/2003, at* http://ecos.fws.gov/servlet/TESSWebpageCrithab?listings=0&nmfs=1 (last visited Jan. 26, 2003); *Listings by State and Territory as of 01/26/2003, at* http://ecos.fws.gov/servlet/TESSWEbpageUsaLists?state=HI (last visited Jan. 26, 2003) (the number of Hawaiian species with critical habitat is based on an analysis of the lists of all endangered and threatened species found in sections 17.11 - 17.12, C.F.R., supplemented by the updated lists of species with critical habitat and species listed in Hawai'i found on the FWS website).

[14] *See supra* note 13 and accompanying text.

The destruction of a species' habitat can greatly impact the species' ability to survive. For example, seven endangered species have been removed from the endangered species list due to extinction.[15] The destruction or adverse modification of these species' habitat was cited as the sole reason for extinction for four species,[16] and a contributing reason for two additional species.[17] Only one of these extinct species, the dusky seaside sparrow (*Ammodramus maritimus nigrescens*), had designated critical habitat when the species became extinct.[18]

This paper argues that the designation of critical habitat benefits an endangered species significantly beyond mere species listing, and is critical to insuring the conservation and recovery of imperiled species. Because the 1978 ESA amendments do not require the designation of critical habitat for species listed prior to the amendments, the amendments almost completely deny a

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[15] *Delisted Species Report, at* http://ecos.fws.gov/servlet/TESSWebpageDelisted?listings=0 (last visited Jan. 28, 2003) (the extinct species include: longjaw Cisco (*Coregonus alpenae*); Amistad Gambusia (*Gambusia amistadensis*); Sampson's Pearlymussel (*Epioblasma sampsoni*); blue Pike (*Stizostedion vitreum glaucum*); Tecopa Pupfish (*Cyprinodon nevadensis calidae*); dusky seaside Sparrow (*Ammodramus martimus nigrescens*); and Santa Barbara song Sparrow (*Melospiza melodia graminea*)).

[16] Endangered and Threatened Wildlife and Plants; Removal of Gambusia amistadensis, the Amistad Gambusia, From the List of Endangered and Threatened Wildlife, 52 Fed. Reg. 46,083, 46,084 (Dec. 4, 1987) (to be codified at 50 C.F.R. § 17.11(h)) (the Amistad Reservoir permanently flooded the Amistad Gambusia's habitat); Endangered and Threatened Wildlife and Plants; Removal of Epioblasma (Dysnomia) sampsoni, Sampson's Pearly Mussel, From the List of Endangered and Threatened Wildlife, 49 Fed. Reg. 1057, 1057 (Jan. 9, 1984) (to be codified at 50 C.F.R. § 17.11(h)) (siltation resulting from the construction of dams destroyed the gravel and sand bar habitat of the Sampson's Pearlymussel); Endangered and Threatened Wildlife and Plants; Final Rule to Delist the Dusky Seaside Sparrow and Remove its Critical Habitat Designation, 55 Fed. Reg. 51,112, 51,113 (Dec. 12, 1990) (to be codified at 50 C.F.R. §§ 17.11(h), 17.95(b)) (flooding marshes for mosquito control, drainage, development, and fire destroyed the marsh habitat of the dusky seaside sparrow); Removal of the Santa Barbara Song Sparrow From the List of Endangered Species, 48 Fed. Reg. 46,336, 46,337 (Oct. 12, 1983) (to be codified at 50 C.F.R. § 17.11(h)) (the Santa Barbara Song Sparrow's habitat was destroyed by fire).

[17] Endangered and Threatened Wildlife and Plants; Deregulation of the Longjaw Cisco and the Blue Pike, 48 Fed. Reg. 39,941, 39,942-43 (Sept. 2, 1983) (to be codified at 50 C.F.R. § 17.11(h)) (cited reasons for the extinction of the longjaw cisco and blue pike include: destruction or adverse modification of its habitat; overutilization; disease or predation; the inadequacy of existing regulatory mechanisms; and other natural or manmade factors).

[18] Determination of Critical Habitat for Six Endangered Species Including Palila, 42 Fed. Reg. 40,685 (Aug. 11, 1977) (to be codified at 50 C.F.R. § 17.95(b)). Although the dusky seaside sparrow had designated critical habitat, the destruction or adverse modification of its habitat was the sole reason leading to its extinction. Endangered and Threatened Wildlife and Plants; Final Rule to Delist the Dusky Seaside Sparrow and Remove its Critical Habitat Designation, 55 Fed. Reg. 51,112, 51,113 (Dec. 12, 1990) (to be codified at 50 C.F.R. §§ 17.11(h), 17.95(b)).

crucial means available to recover these early-listed species. Accordingly, the current statutory framework unfairly affords vastly varying levels of protection to listed species depending on an arbitrary chronological distinction.

The legislative history for the 1978 ESA amendments does not explain why Congress mandated the designation of critical habitat only for species listed after the amendments.[19] This distinction cannot be based on differing biological needs, as preserving the habitat that is critical to a listed species' existence can benefit all imperiled species. Instead, Congress likely made this distinction for political and economic reasons. At the time of the 1978 ESA amendments, there were 212 listed U.S. plant and animal species.[20] Of these species, only thirty-two had designated critical habitat on the date of enacting the amendments.[21] Congress likely viewed the task of mandating the proposal and designation of critical habitat for the remaining 181 species too economically burdensome.

This paper proposes equity for all listed species, mandating the designation of critical habitat independent of the date when a species was listed. Section II of this paper presents an overview of the ESA and describes the protective measures afforded to all listed species. Section III analyzes the competing arguments for designating critical habitat for all listed species, highlighting the differing levels of protection the Act presently affords species depending on the date a species was listed. Finally, Section IV proposes two modest amendments to the ESA to better accomplish the enumerated purpose of conserving all endangered species and the ecosystems upon which they depend for survival.[22]

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[19] *See generally* H.R. REP. NO. 95-1625 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453; H.R. CONF. REP. NO. 95-1804 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9484.

[20] *See generally* Endangered and Threatened Wildlife, 50 C.F.R. § 17.11 (1999); Endangered and Threatened Plants, 50 C.F.R. § 17.12 (1999) (the number of species listed prior to the 1978 ESA amendments is based on an analysis of the lists of all endangered and threatened species found in sections 17.11 - 17.12, C.F.R.).

[21] H.R. REP. NO. 95-1625, at 8 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9458.

[22] 16 U.S.C. § 1531(b) (2000).

II. BACKGROUND

A. The Endangered Species Act of 1973

The Endangered Species Preservation Act of 1966[23] and the Endangered Species Conservation Act of 1969[24] represent the first comprehensive U.S. efforts to prevent extinction of the world's imperiled animal species. These companion acts set out the framework to conserve endangered species, yet practical shortcomings hindered attaining the spirit of the original legislation.[25] As President Nixon stated in his 1972 Environmental Message, the existing law "simply [did] not provide the kind of management tools needed to act early enough to save vanishing species."[26]

Congress enacted the Endangered Species Act of 1973[27] to remedy the shortcomings of the 1966 and 1969 Acts, and to address the apparent need "to

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[23] Endangered Species Preservation Act of 1966, Pub. L. No. 89-669, 80 Stat. 926 (codified at 16 U.S.C. §§ 668aa-668cc) (repealed by Pub. L. No. 93-205, § 14, 87 Stat. 884, 903 (1973)). The 1966 Act "authorized and directed the Secretary of the Interior to initiate and carry out a comprehensive program to conserve, restore, and where necessary to bolster wild populations to propagate selected species of native fish and wildlife . . . threatened with extinction." S. REP. NO. 93-307 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2990.

[24] Endangered Species Conservation Act of 1969, Pub. L. No. 91-135, 83 Stat. 275 (codified at 16 U.S.C. §§ 668cc-1 to 668cc-66) (repealed by Pub. L. No. 93-205, § 14, 87 Stat. 884, 903 (1973)). The 1969 Act expanded on the Endangered Species Preservation Act of 1966 in three major ways. S. REP. NO. 93-307 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2898, 2890-91. First, the Act permitted the Secretary of the Interior to prohibit the importation of any animal threatened with extinction worldwide. *Id.* Second, the Act made the sale or purchase of any endangered animal by any person illegal. *Id.* Third, the Act increased the funds appropriated to acquire lands to conserve endangered species. *Id.*

[25] S. REP. NO. 93-307 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2991. The report stated that:

> [T]he following four requirements must be satisfied if [endangered species legislation] is to be effective: (1) The bill must provide the Secretary with sufficient discretion in listing and delisting animals so that he may afford present protection to those species which are either in present danger of extinction or likely within the foreseeable future to become so endangered; (2) the bill must provide protection throughout the nation for animals which are either endangered or threatened; (3) the bill must lift the statutory restrictions that existing law places on authorization of monies for habitat aquisistion from the Land and Water Conservation Fund Act, and extend to the Secretary land acquisition powers for such purposes from other existing legislation; and (4) finally, it became apparent in hearings that many established State agencies could in the future, or do now provide efficient management programs for the benefit of endangered species.

Id.

[26] 8 Weekly Comp. Pres. Doc. 218, 223-224 (Feb. 14, 1972); S. REP. NO. 93-307 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2991.

[27] Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531-44 (2000)).

prevent the further extinction of many of the world's animal species."[28] The stated purposes in section 2 of the ESA are to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species."[29] According to the Merchant Marine and Fisheries Committee, "[t]he primary purpose of the Endangered Species Act of 1973 [was] to prevent animal and plant species endangerment and extinction caused by man's influence on the ecosystems, and to return the species to the point where they are viable components of their ecosystems."[30]

The listing of a species as either endangered[31] or threatened[32] under section 4[33] triggers protection under the two most important provisions of the Act: section 7[34] and section 9.[35] Under section 9, the "taking" of any listed species by any person is prohibited.[36] Accordingly, the ESA generally prohibits any individual from harassing or killing a listed species.[37] Section 7 applies only to federal agencies. Section 7(a)(1) requires agency consultation with either the Secretary of the Interior or the Secretary of Commerce[38] ("Secretary") to insure the "conservation"[39] of all listed endangered and threatened species,[40]

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[28] S. REP. NO. 93-307 (1973), *reprinted in* (1973) U.S.C.C.A.N. 2989, 2990.

[29] 16 U.S.C. § 1531(b).

[30] H.R. REP. 95-1625, at 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9455.

[31] 16 U.S.C. § 1532(6). The term "'endangered species' means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this Act would present an overwhelming and overriding risk to man." *Id.*

[32] 16 U.S.C. § 1532(20). The term "'threatened species' means any species which is likely to become an endangered species within the forseeable future throughout all or a significant portion of its range." *Id.*

[33] 16 U.S.C. § 1533 (2000).

[34] 16 U.S.C. § 1536 (2000).

[35] 16 U.S.C. § 1538 (2000).

[36] *Id.* "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19).

[37] 16 U.S.C. § 1538(a). This prohibition will not be discussed in detail because it applies to all individuals regardless of whether critical habitat has been designated.

[38] 16 U.S.C. § 1532(15). The Secretary of the Interior is responsible for freshwater and terrestrial species, and has delegated its authority to the Fish and Wildlife Service. *Endangered Species Fact Sheet, at* http://species.fws.gov/#endangered (last visited Jan. 26, 2003). The Secretary of Commerce is responsible for marine and anadromous species, and has delegated its authority to the National Marine Fisheries Service. *Id.*

[39] 16 U.S.C. § 1532(3). The Act defines "conserve" as:

> the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and

whereas section 7(a)(2) requires consultation with the Secretary when a federal action is likely to jeopardize a listed species or modify its critical habitat.[41]

Section 7 consultation has two substantive prongs. First, section 7(a)(2) requires federal agencies to consult with the Secretary to insure that their actions do not jeopardize the continued existence of a listed species.[42] According to regulations, federal agencies are prohibited from pursuing any action that will "reduc[e] the reproduction, numbers or distribution of [a listed] species."[43] The plain language of the statute therefore mandates that federal agencies must not pursue actions that are likely to cause the extinction of a listed species. This "no jeopardy" standard applies to all listed species, independent of whether the agency has designated critical habitat.[44]

The second substantive prong of the section 7 consultation prohibits federal actions that will likely destroy or adversely modify a species' critical habitat.[45] Critical habitat is statutorily defined to mean "the specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features (I) essential to the *conservation* of the species and (II) which may require special management considerations or protection."[46]

Because critical habitat is statutorily defined in terms of conservation, the requirement to not adversely modify critical habitat is distinct from the "no

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transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

Id.

[40] 16 U.S.C. § 1536(a)(1) (2000). "All . . . Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act." *Id.*

[41] 16 U.S.C. § 1536(a)(2). "Each Federal agency shall . . . insure that any action authorized, funded, or carried out . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical." *Id.*

[42] 16 U.S.C. § 1536(a)(2). "'Jeopardize the continued existence of' means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02 (2002).

[43] 50 C.F.R. § 402.02.

[44] *See* 16 U.S.C. § 1536(a)(2).

[45] 16 U.S.C. § 1536(a)(2). Accompanying regulations define "[d]estruction or adverse modification" as:

a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical.

50 C.F.R. § 402.02.

[46] 16 U.S.C. § 1532(5)(a)(i) (2000) (emphasis added).

jeopardy" determination. In addition to insuring that a federal agency does not cause the extinction of a listed species, an agency must avoid any action that section 7 consultation has determined will inhibit the "conservation" of a species.[47] Accordingly, when critical habitat is designated, a federal agency is prohibited from taking any action that will inhibit a species' recovery.[48] In contrast, when the Secretary has not designated critical habitat, only those federal actions that may lead to the extinction of a listed species are prohibited.[49]

One of the central purposes of the ESA is to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."[50] The term "conserve" is statutorily defined to mean "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary."[51] Therefore, a central purpose of the ESA is to recover a species to the point at which it may be delisted, not to merely insure a species' survival.[52] To simply stave off extinction is not an objective in accordance with the purpose of the ESA.[53]

Protecting the natural habitat of listed endangered and threatened species is crucial to enabling future recovery of the species.[54] Congress has historically acknowledged the crucial link between species conservation and natural habitat preservation.[55] When enacting the ESA, Congress found that "[t]he two major causes of extinction [were] hunting and destruction of natural habitat."[56] Furthermore, the legislative history of the 1978 ESA amendments states, "[i]n many cases the process of extinction has been associated with an increase in man's ability to alter natural habitats for his own devices. The loss of habitat for many species is universally cited as the major cause for extinction of species worldwide."[57]

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[47] *See* 16 U.S.C. § 1536(a)(2).

[48] *See id.*

[49] *Id.*

[50] 16 U.S.C. § 1531(b) (2000).

[51] 16 U.S.C. § 1532(3).

[52] *See* 16 U.S.C. § 1531(b); 16 U.S.C. § 1536(a)(1).

[53] *See* 16 U.S.C. § 1531(b). "The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species." *Id.*

[54] S. REP. NO. 106-126 (1999), *available at* 1999 WL 33592886 (speaking on Senate Bill 1100, a bill to amend the ESA's critical habitat requirements). "When Congress enacted the 1978 amendments relating to critical habitat, it . . . observed that protection of the habitat of listed species was the key to protection of the species themselves." *Id.*

[55] *See* S. REP. NO. 93-307 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2990.

[56] *Id.*

[57] H.R. REP. NO. 95-1625, at 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9455.

B. The Endangered Species Act Amendments of 1978

The ESA amendments of 1978[58] were prompted by the landmark 1978 Supreme Court decision in *Tennessee Valley Authority v. Hill* ("*TVA*").[59] On June 15, 1978, the court enjoined the completion of the virtually completed multi-million dollar Tellico Dam on the Little Tennessee River.[60] The Court halted construction of this dam because of its location within the habitat of the snail darter, a "three-inch, tannish-colored fish."[61] A University of Tennessee ichtyologist discovered the snail darter within months of enacting the 1973 ESA, and the Secretary formally listed the darter as endangered in 1975.[62] The Secretary determined that the snail darter lived only within the portion of the Little Tennessee River that would be completely inundated by completion of the dam, and found that "*[t]he proposed impoundment of water behind the proposed Tellico Dam would result in total destruction of the snail darter's habitat.*"[63] As a result of this finding, the Secretary declared in 1976 that this area was considered "critical habitat" of the snail darter.[64] Although the concept of critical habitat was only briefly mentioned in section 7 of the 1973 ESA,[65] the term was administratively defined as:

> any air, land, or water area (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population.[66]

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[58] Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (1978).

[59] Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978); MICHAEL J. BEAN & MELANIE J. ROWLAND, THE EVOLUTION OF NATIONAL WILDLIFE LAW 242 (3d ed. 1997).

[60] *Tenn. Valley Auth.*, 437 U.S. at 157-58, 168, 195.

[61] *Id.* at 158.

[62] *Id.* at 158, 161 (citing Amendment Listing the Snail Darter as an Endangered Species, 40 Fed. Reg. 47,505 (Oct. 9, 1975) (to be codified at 50 C.F.R. § 17.11(i))).

[63] *Id.* at 161 (quoting Amendment Listing the Snail Darter as an Endangered Species, 40 Fed. Reg. 47,505, 47,506 (Oct. 9, 1975) (to be codified at 50 C.F.R. § 117.11(i))).

[64] *Id.* at 162 (citing Snail Darter Critical Habitat, 41 Fed. Reg. 13,926 (1976) (to be codified at 50 C.F.R. § 17.81))).

[65] Endangered Species Act of 1973, § 7 (codified as amended at 16 U.S.C. § 1536(a)(2) (2000)). All Federal Departments and Agencies shall "insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary . . . to be critical." *Id.*

[66] Definitions, 43 Fed. Reg. 874 (Jan. 4, 1978) (to be codified at 50 C.F.R. § 402.02). The administrative definition of "critical habitat" continued as follows:

> The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and the quality and chemical

Pursuant to section 7 of the 1973 ESA,[67] the Secretary declared that "all [f]ederal agencies must take such action as is necessary to insure that actions authorized, funded, or carried out by them do not result in the destruction or modification of this critical habitat area."[68]

The *TVA* Court found the plain language and legislative history of the ESA to show that "Congress viewed the value of endangered species as 'incalculable.'"[69] Although Congress had expended nearly $100 million in construction costs,[70] the ESA was enacted to "halt and reverse the trend toward species extinction, whatever the cost."[71] The Court therefore enjoined completion of the dam despite the economic ramifications of such action.[72]

Congress disagreed with the Supreme Court's rigid application of the ESA to halt development, and enacted the Endangered Species Act Amendments of 1978 within four months of the *TVA* decision.[73] The amendments statutorily defined "critical habitat" as specific geographical areas "essential to the conservation of the species,"[74] and mandated that such critical habitat be designated concurrent with species listing "to the maximum extent prudent."[75]

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content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species and may include additional areas for reasonable population expansion.

Id.

[67] 16 U.S.C. § 1536 (2000).

[68] *Tenn. Valley Auth.*, 437 U.S. at 162 (citing Snail Darter Critical Habitat, 41 Fed. Reg. 13,928 (April 1, 1976) (to be codified at 50 C.F.R. § 17.81(b))).

[69] *Id.* at 187.

[70] *Id.* at 172.

[71] *Id.* at 184.

[72] *Id.* at 174. The court stated:

Concededly, this view of the Act will produce results requiring the sacrifice of the anticipated benefits of the project and of many millions of dollars in public funds. But examination of the language, history, and structure of the legislation under review here indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.

Id.

[73] Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (1978) (the amendment was approved on November 10, 1978); *see* BEAN & ROWLAND, *supra* note 59, at 242-43.

[74] 16 U.S.C. § 1532(5)(a) (2000). The term "critical habitat" is statutorily defined to mean:

[T]he specific areas within the geographical area occupied by the species, at the time it is listed . . . , on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection; and specific areas outside the geographical area occupied by the species at the time it is listed . . . , upon a determination by the Secretary that such areas are essential for the conservation of the species.

Id.

[75] Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 11, 92 Stat. 3751 (1978). The amendment provided:

Largely in reaction to the *TVA* decision, Congress added a provision requiring an economic analysis of critical habitat designation, stating that critical habitat may be designated only "on the basis of the best scientific data available . . . after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat."[76]

Although the new statutory mandate to designate critical habitat concurrent with species listing may appear to have improved the ESA's ability to protect endangered and threatened species, the added cost-benefit analysis replaced the amendments' teeth with dentures. The decision to list a species as either endangered or threatened is a purely biological determination,[77] yet the 1978 amendments required a cost-benefit analysis before the concurrent designation of critical habitat.[78] Because the ESA required designation of critical habitat concurrently with listing, and required the economic evaluation of any critical habitat designation, the 1978 amendments "converted the judgment of whether a species [was] endangered from a biological to an economic one."[79]

At the time the 1978 ESA amendments were enacted, FWS had published over 2,000 formal listing proposals.[80] Because the Act required critical habitat designation and an economic analysis of such designation concurrent with species listing, fewer than five percent of these species were listed three-and-a-half years later.[81] The Service withdrew the remaining listing proposals because "the new deadlines rendered [concurrent] listing and designation impracticable."[82] Although these numbers indicate an obvious problem with the application of the 1978 amendments, the amended text specifying the mandatory designation of critical habitat created an even larger problem.

For instance, the 1978 ESA amendments added the following language to section 4:

> At the time any such regulation is proposed, the Secretary shall also by regulation, to the maximum extent prudent, specify any habitat of such species which is then considered to be critical habitat. The requirement of the preceding sentence shall not apply with respect to any species which was listed prior to enactment of the Endangered Species Act Amendments of 1978.

Id.

[76] 16 U.S.C. § 1533(b)(2) (2000). *See also* BEAN & ROWLAND, *supra* note 59, at 254-58 (discussion of the origin of the economic impact analysis requirement).

[77] 16 U.S.C. § 1533(b)(1)(A). "The Secretary shall make determinations [whether any species is endangered or threatened] solely on the basis of the best scientific and commercial data available to him . . . ." *Id.*

[78] 16 U.S.C. § 1533(b)(2).

[79] James Salzman, *Evolution and Application of Critical Habitat Under the Endangered Species Act*, 14 HARV. ENVTL. L. REV. 311, 322 (1990).

[80] *Id.*

[81] *Id.*

[82] *Id.* (citing MICHAEL J. BEAN, THE EVOLUTION OF NATIONAL WILDLIFE LAW 335 (1983)).

> At the time any such regulation is proposed, the Secretary shall also by regulation, to the maximum extent prudent, specify any habitat of such species which is then considered to be critical habitat. *The requirement of the preceding sentence shall not apply with respect to any species which was listed prior to enactment of the Endangered Species Act Amendments of 1978.*[83]

Additionally, statutory language inserted following the definition of "critical habitat" in section 3[84] stated that "critical habitat *may* be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established."[85] Because the ESA of 1973 did not contain a mandatory provision to designate critical habitat, endangered and threatened species listed before the 1978 amendments are not therefore statutorily guaranteed critical habitat and consequently receive substantially less protection than species listed after the 1978 amendments.

Prior to the ESA Amendments of 1978, there were 212 U.S. plant and animal species listed within the United States.[86] At the time of the 1978 amendments, only thirty-two species had designated critical habitat.[87] As of January 26, 2003, only forty of these early-listed species (18.9%) have designated critical habitat.[88] Therefore, in the twenty-five years since the 1978 amendments, critical habitat has been designated for only eight additional species.[89] The remaining 172 endangered and threatened species (81.1%) listed prior to the 1978 amendments still lack critical habitat.[90] The percentages are strikingly similar for Hawaiian species listed prior to the 1978 amendments. Accordingly, critical habitat has been designated for only five early-listed Hawaiian species (12.8%), leaving thirty-four species (87.2%) lacking critical habitat.[91] In contrast, while 87.2% of Hawaiian species listed

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[83] Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 11, 92 Stat. 3751 (1978) (emphasis added) (amended 1982).

[84] 16 U.S.C. § 1532(5)(A) (2000).

[85] Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751 (1978) (codified as amended at 16 U.S.C. § 1532(5)(B)) (emphasis added).

[86] *See supra* note 20 and accompanying text. *See* table 1: Pre-78 Species.

[87] H.R. REP. NO. 95-1625 (1978), at 8, *reprinted in* 1978 U.S.C.C.A.N. 9453, 9458.

[88] *See generally* Endangered and Threatened Wildlife, 50 C.F.R. § 17.11 (1999); Endangered and Threatened Plants, 50 C.F.R. § 17.12 (1999); *Listed Species with Critical Habitat as of 01/26/2003*, at http://ecos.fws.gov/servlet/TESSWebpageCrithab?listing=0&nmfs=1 (last visited Jan. 26, 2003) (the number of species listed prior to the 1978 ESA amendments with designated critical habitat is based on an analysis of the lists of all endangered and threatened species found in sections 17.11 - 17.12, C.F.R. supplemented with the updated list of species with critical habitat on the FWS website). *See* Table 1: Pre-78 Species.

[89] *See supra* note 88 and accompanying text.

[90] *See supra* note 88 and accompanying text.

[91] *See supra* note 88 and accompanying text.

before the 1978 ESA amendment lack critical habitat, only 11.9% of Hawaiian species listed after the 1978 amendments lack critical habitat.[92] Hawaiian species listed after the 1978 amendments therefore have critical habitat designated significantly more often than the species listed prior to the amendments.

C. The Process To Designate Critical Habitat

Although the process to list a species under section 4 is a purely biological determination, the Secretary has a limited amount of discretion in section 4(b)(2) regarding the designation of critical habitat.[93] Pursuant to section 4(a)(3) of the ESA, designation of critical habitat must be made concurrent with the listing of a species "to the maximum extent prudent and determinable."[94] Although prudency is not statutorily defined, the Fish and Wildlife Service ("FWS") regulations enumerate two situations when designation of critical habitat is imprudent:[95] when it would increase the threat of "taking or other human activity"[96] or when it "would not be beneficial to the species."[97]

Furthermore, the Secretary may postpone the designation of critical habitat concurrently with species listing if such habitat is deemed "not determinable" at the time of species listing.[98] In these exceptional circumstances, the

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[92] *See generally* Endangered and Threatened Wildlife, 50 C.F.R. § 17.11; Endangered and Threatened Plants, 50 C.F.R. § 17.12; *Listed Species with Critical Habitat as of 01/26/2003*, *at* http://ecos.fws.gov/servlet/TESSWebpageCrithab?listing=0&nmfs=1 (last visited Jan. 26, 2003) (the number of species listed after the 1978 ESA amendments with designated critical habitat is based on an analysis of the lists of all endangered and threatened species found in sections 17.11 - 17.12, C.F.R. supplemented with the updated list of species with critical habitat on the FWS website). *See* Table 2: Post-78 Species.

[93] 16 U.S.C. § 1533(b)(2) (2000). It states in pertinent part:

> The Secretary shall designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

Id.

[94] 16 U.S.C. § 1533(a)(3). "The Secretary . . . shall, concurrently with making a determination . . . that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat." *Id.*

[95] 50 C.F.R. § 424.12(a)(1) (2002).

[96] 50 C.F.R. § 424.12(a)(1)(i).

[97] 50 C.F.R. § 424.12(a)(1)(ii).

[98] 16 U.S.C. § 1533(a)(3).

Secretary may defer designating critical habitat for up to two years.[99] FWS regulations specify only two situations when the designation of critical habitat would not be determinable:[100] when "[i]nformation sufficient to perform required analyses of the impacts of the designation is lacking, or [t]he biological needs of the species are not sufficiently well known."[101] Unlike the prudency exception, the not-determinable exception may only temporarily delay critical habitat designation to provide sufficient time to determine appropriate critical habitat.[102] Once the two-year extension has expired, the Secretary must either designate critical habitat or find such habitat designation imprudent.

The legislative history of the 1978 ESA amendment indicates that Congress intended concurrent designation of critical habitat with species listing "in most situations . . . . *It is only in rare circumstances where the specification of critical habitat concurrently with the listing would not be beneficial to the species.*"[103] Noted ESA commentator Oliver Houck observed that contrary to stated congressional intent, the "Interior's use of 'prudency' in the designation process [has been] nothing short of remarkable."[104] As of January 26, 2003, only 34.8% of the species listed since the 1978 ESA amendments have designated critical habitat.[105] The Secretary has deemed critical habitat to be imprudent for the majority of the remaining 65.2% of listed species.[106]

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[99] 16 U.S.C. § 1533(b)(6)(C)(ii) (the Secretary is permitted to defer designation for one year so that a species with undeterminable habitat may be listed without undue delay); § 1533(b)(6)(A)(ii)(II), (C)(ii) (the Secretary is permitted to extend for up to a second year, at which point critical habitat must be designated to the maximum extent prudent).

[100] 50 C.F.R. § 424.12(a)(2).

[101] 50 C.F.R. §§ 424.12(a)(2)(i), (ii).

[102] 16 U.S.C. § 1533(b)(6)(C)(ii) (after delaying critical habitat designation for two years, the "Secretary must publish a final regulation, based on such data as may be available at the time, designating, to the maximum extent prudent, such habitat").

[103] H.R. REP. NO. 95-1625, at 17 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9467 (emphasis added).

[104] Oliver A. Houck, *The Endangered Species Act and Its Implementation by the U.S. Departments of Interior and Commerce*, 64 U. COLO. L. REV. 277, 303 (1993).

[105] *See supra* note 92 and accompanying text.

[106] Jeffrey Slaton, *Natural Resources Defense Council v. United States Department of Interior: Making Critical Habitat Critical?*, 21-JUN ENVIRONS ENVTL. L. & POL'Y J. 75, 83 (1998) (stating that nearly all the cases when the Secretary declined to designate critical habitat involved the determination that such designation would not be prudent); *see also* Salzman, *supra* note 79, at 332 (stating that from 1980 to 1988, FWS declined to designate critical habitat as imprudent for 317 of 320 cases); Houck, *supra* note 104, at 307 (stating that FWS has made the practice of not designating critical habitat as imprudent the norm); Jean M. Emery, *Environmental Impact Statements and Critical Habitat: Does NEPA Apply to the Designation of Critical Habitat Under the Endangered Species Act?*, 28 ARIZ. ST. L. J. 973, 984 (1996) (stating that from 1980 to 1992, FWS denied critical habitat on 494 occasions, 476 times for imprudence).

D. Remedies for Non-Designation of Critical Habitat

Concerned citizens may challenge the Secretary's decision to deny critical habitat for post-78[107] species by invoking the ESA's section 11(g)(1)(C) citizen suit provision. Section 11(g)(1)(C) provides for the commencement of a civil action when the Secretary has failed to perform any non-discretionary act under section 4.[108] Unfortunately, the citizen suit provision is unavailable to compel the designation of critical habitat for species listed prior to the 1978 ESA amendments. Although the section 11(g)(1)(C) citizen suit provision may be utilized to compel the mandatory designation of critical habitat for post-78 species, the citizen suit provision may not be utilized to challenge the discretionary designation of critical habitat for pre-78 species.[109]

The section 11(g)(1)(C) citizen suit provision of the ESA states that "any person may commence a civil suit . . . against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 4 . . . which is not discretionary with the Secretary."[110] Section 4 requires the Secretary to designate critical habitat concurrent with species listing to the "maximum extent prudent and determinable"[111] after analyzing the economic impact of such designation.[112] Although the statute does grant some final discretion to the Secretary, the U.S. Supreme Court stated in 1997, in *Bennett v. Spear*, that "the terms of [section 4(b)(2)] are plainly those of obligation rather than discretion."[113] Therefore, although the FWS is provided minor final discretion when designating critical habitat for post-78 species, the court has stated that this is a non-discretionary act with regard to the section 11(g)(1)(C) citizen suit provision. Accordingly, section 11(g)(1)(C) may be useful to challenge the non-designation of critical habitat for post-78 species.

When reviewing an agency action under the section 11(g)(1)(C) citizen suit provision, the Administrative Procedure Act[114] ("APA") provides the standard

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[107] "Post-78" refers to all species listed after the ESA Amendments of 1978, enacted on November 10, 1978. "Pre-78" refers to all species listed prior to the ESA Amendments of 1978.

[108] 16 U.S.C. § 1540(g)(1)(C) (2000). Section 4 of the ESA requires concurrent designation of critical habitat with species listing to the "maximum extent prudent and determinable". 16 U.S.C. § 1533(a)(3) (2000).

[109] 16 U.S.C. § 1540(g)(1)(C).

[110] *Id.*

[111] 16 U.S.C. § 1533(a)(3). *See* discussion *supra* Part II.C.

[112] 16 U.S.C. § 1533(b)(2).

[113] Bennett v. Spear, 520 U.S. 154, 172 (1997). "The Secretary *shall* designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2) (emphasis added).

[114] The Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (2000).

utilized by the court. In general, the APA states that a court shall overturn an administrative decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[115] When reviewing an agency's construction of a statute, the Court held in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[116] that a court is confronted with two questions.[117] First, a court must determine "whether Congress has directly spoken to the precise question at issue."[118] Secondly, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[119] Accordingly, the judiciary must defer to an agency decision if it is a "reasonable" interpretation of a silent or ambiguous statutory provision.[120]

In *Conservation Council for Hawai'i v. Babbitt*[121] in 1998, environmental groups successfully utilized the ESA citizen suit provision to challenge the FWS decision to deny critical habitat to 245 listed Hawaiian endangered and threatened plant species statewide.[122] The FWS claimed that the designation of critical habitat would not be prudent for all these plant species, but the federal district court of Hawai'i found that the agency "failed to articulate a rational basis for invoking the imprudence exception."[123] Judge Kay held that the agency decision was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."[124]

The section 11(g)(1)(C) citizen suit provision may not be utilized to compel the designation of critical habitat for pre-78 species. Section 3(5)(B) states that "[c]ritical habitat *may* be established" for listed species without critical habitat.[125] Pre-78 species were never guaranteed critical habitat, and the

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[115] 5 U.S.C. § 706(2)(A) (2000).

[116] 467 U.S. 837 (1984).

[117] *Id.* at 842.

[118] *Id.* "If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43.

[119] *Id.* at 843.

[120] *Id.* at 843, 845.

[121] 2 F. Supp. 2d 1280 (D. Haw. 1998).

[122] *Id.*

[123] *Id.* at 1288. Fish and Wildlife Service based the imprudence determination on one or more of the following three reasons:

> First, designation would increase the likelihood of illegal taking and vandalism. Second, little benefit would result from designation because the plant species is located on private land. And, third, little benefit would result from designation because the plant species is on federal land and designation of a critical habitat would not increase the precautions that the government must already take.

Id. at 1283.

[124] *Id.* at 1288.

[125] 16 U.S.C. § 1532(5)(B) (2000) (emphasis added).

statute plainly affords discretion to the Secretary to designate such habitat.[126] Because the citizen suit provision is effective to challenge only non-discretionary acts, concerned citizens appear to be left without a legal remedy to challenge the denial of critical habitat for pre-78 species.

The ESA is powerful legislation to reverse the trend towards extinction for endangered and threatened plant and animal species. Although the mere listing of a species provides significant power to halt further reduction of endangered populations, the designation of critical habitat better insures the recovery and eventual delisting of listed species. The current statutory text mandates the designation of critical habitat for species listed after the 1978 ESA amendments, but affords near complete discretion to the Secretary to designate such habitat for species listed prior to the amendments. A legal avenue does exist to compel the designation of critical habitat for post-78 species, yet this remedy is unavailable to challenge the denial of critical habitat for pre-1978 listed species.

III. ANALYSIS

"[W]hen Congress enacted the 1978 amendments relating to critical habitat, it . . . observed that protection of the habitat of listed species was the key to protection of the species themselves."[127] Although the Senate Committee Report included this finding, Congress did not mandate the designation of critical habitat for species listed prior to the amendments. The designation of critical habitat benefits a listed species by providing additional protective measures beyond those accompanying species listing. Consequently, the 1978 ESA amendments affect a near complete denial of a crucial means available to recover species listed prior to the amendments. The current statutory framework arbitrarily affords varying levels of protection depending on the date a species was listed. Ironically, the species listed prior to the 1978 ESA amendments have been on the verge of extinction for the longest period of time.

The competing arguments on the benefits of critical habitat illustrate the conflicting views that critical habitat is either redundant to the ESA, or highly beneficial to conserve a listed species. This paper argues that the designation of critical habitat benefits a species by educating the public and the government about the habitat needs of listed species.[128] Furthermore, designated critical habitat affects the consultation for, or judicial review of,

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[126] *See id.*

[127] S. REP. NO. 106-126 (1999), *available at* 1999 WL 33592886.

[128] *See* discussion *infra* Part III.B.

federal actions within such habitat.[129] Finally, the available legal avenue to challenge the denial of critical habitat is inadequate to compel the designation of critical habitat for pre-78 species.[130]

A. Conflicting Perspectives On Designated Critical Habitat

There are starkly contrasting views on the benefits of designating critical habitat. Proponents believe listed species receive meaningful additional protection with designated critical habitat, while opponents claim that "the ESA is just as effective without the designation of a critical habitat."[131] This section addresses these competing views, and presents evidence in favor of each argument.

The ESA mandates that federal agencies must insure that their actions will not likely "jeopardize the continued existence" of any listed species or destroy or adversely modify its critical habitat.[132] Notwithstanding the ESA mandate, there are additional protections that accompany critical habitat designation. When the Secretary has designated critical habitat, federal agencies must consult with the Secretary to insure that their actions do not destroy or adversely modify this critical habitat.[133] Without critical habitat, section 7 consultation may permit an action that destroys or adversely modifies a listed species habitat so long as the action does not jeopardize the species' continued existence.[134] The plain language of the statute therefore affords greater protection to those species with designated critical habitat.

Opponents of critical habitat claim that listed species receive adequate protection under the Act without the designation of critical habitat.[135] This argument is largely due to the FWS regulatory definitions of "jeopardize the continued existence of" and "destruction or adverse modification."[136] According to the FWS regulations, "'[j]eopardize the continued existence of' means to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the *survival and recovery* of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species."[137] Furthermore, "'[d]estruction or adverse

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[129] *See* discussion *infra* Part III.C.

[130] *See* discussion *infra* Part III.D.

[131] Shawn E. Smith, *How "Critical" Is A Critical Habitat?: The United States Fish and Wildlife Service's Duty Under the Endangered Species Act*, 8 DICK. J. ENVTL. L. & POL'Y 343, 344 (1999).

[132] 16 U.S.C. § 1536(a)(2) (2000).

[133] *Id.*

[134] *See id.*

[135] *See* Smith, *supra* note 131.

[136] 50 C.F.R. § 402.02 (2002).

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

modification' means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the *survival and recovery* of a listed species."[138] Defining both phrases in terms of "the survival and recovery" of a listed species has removed any "independent legal meaning for the term 'critical habitat.'"[139]

These definitions violate a cardinal principle of statutory construction.[140] By defining both phrases in terms of "survival and recovery," the FWS has interpreted section 7 in a way that one portion of the ESA has rendered another portion "inoperative or superfluous, [and] void or insignificant."[141] Furthermore, the FWS regulations "'set[] the bar too high' for the destruction/adverse modification standard,"[142] as the statutory language plainly requires a section 7 consultation when an action merely "affects recovery alone."[143] In 2001, the Fifth Circuit Court of Appeals agreed with this argument in *Sierra Club v. United States Fish and Wildlife Service*,[144] by stating that "'[c]onservation' is a much broader concept than mere survival."[145] The court held that the FWS regulation defining these terms was "facially invalid."[146] The court of appeals criticized the FWS's logic by stating:

> Admittedly, survival is a necessary condition for recovery; a species cannot recover without survival. The mere fact that a concept such as survival is a precondition of or implicit in a statutory term does not grant it independent significance. Consider a hypothetical law protecting the rights of individuals to swim in rivers and streams of their choosing. One who prevents such activity violates the ordinance. Although the concept of "swimming" implies action by a live human being, one does not need to have to both stop the swimming *and*

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

[139] Houck, *supra* note 104, at 300. *See* BEAN & ROWLAND, *supra* note 59, at 254.

[140] *See* Houck, *supra* note 104, at 300. *See also* Sierra Club v. United States Fish and Wildlife Serv., 245 F.3d 434, 441 (5th Cir. 2001) (unsuccessfully argued by the Sierra Club); Bennett v. Spear, 520 U.S. 154, 173 (1997). "It is the cardinal principle of statutory construction . . . to give effect, if possible, to every clause and word of a statute . . . rather than to emasculate an entire section." *Id.* (quoting United States v Menasche, 348 U.S. 528, 538 (1955) (internal quotations omitted)).

[141] NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (6th ed. 2000). *See also* Houck, *supra* note 104, at 300.

[142] *Sierra Club*, 245 F.3d at 441.

[143] *Id.*; *see* 16 U.S.C. § 1536(a)(2) (2000) (critical habitat is designed to conserve, or recover a species' population, and a section 7 consultation is statutorily required when a federal action destroys or adversely modifies this critical habitat).

[144] 245 F.3d 434 (5th Cir. 2001).

[145] *Id.* at 441. "Requiring consultation only where an action affects the value of critical habitat to both the recovery *and* survival of a species imposes a higher threshold than the statutory language permits." *Id.* at 442.

[146] *Id.* at 443.

> terminate the life of the swimmer to violate the statute. Yet this is the logic employed by the Service in interpreting the ESA.[147]

Although the regulation is now invalid in the Fifth Circuit, the FWS has not rewritten the rule.[148] Accordingly, the definitions that the court of appeals so heavily criticized remain valid throughout the remaining circuits.

Few can argue that Congress intended critical habitat to be designated only for the minority of listed species, yet some legal commentators believe "the requirement that a critical habitat be separately identified and protected is redundant to the ESA."[149] Pursuant to section 7(a)(3) of the ESA, "a Federal agency shall consult with the Secretary on any prospective agency action . . . if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species."[150] Section 7 consultation is triggered without the adverse modification of designated critical habitat, and therefore will safeguard all listed plant and animal species from threatened jeopardy.[151] The key issue ignored by this argument is the benefits of protecting unoccupied critical habitat. Although these geographic areas are not occupied by the species at the time it is listed, they "are essential for the conservation of the species"[152] and will receive consideration during section 7 consultation if designated as critical habitat.[153]

When critical habitat has not been designated, section 7 consultation depends upon the presence of listed species within the action area. Before the commencement of any federal agency action, section 7(c)(1) requires an inquiry with the Secretary as to whether any listed species, or proposed species, are present within the action area.[154] If the "best scientific and commercial data available" leads the Secretary to believe that a listed or proposed species may be present within the action area, the federal agency must conduct a biological assessment to determine whether any endangered species "is likely to be affected by such action."[155] This biological assessment is utilized to insure compliance with the section 7 consultation requirement.

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[147] *Id.* at 442, n.50.

[148] *See* 50 C.F.R. § 402.02 (2002).

[149] Smith, *supra* note 131, at 344 (citing Houck, *supra* note 104, at 303); *see* 50 C.F.R. § 402.02.

[150] 16 U.S.C. § 1536(a)(3) (2000).

[151] *See* 16 U.S.C. § 1536(a)(2) (section 7 consultation is triggered when a federal action may jeopardize the continued existence of a listed species, regardless of designated critical habitat).

[152] 16 U.S.C. § 1532(5)(a)(ii) (2000).

[153] 16 U.S.C. § 1536(a)(2).

[154] 16 U.S.C. § 1536(c)(1).

[155] *Id.*

The determination of whether a listed species may be present in the action area and whether it may be jeopardized by the proposed action is simplified if the proposed action is within designated critical habitat. The section 7(c)(1) biological assessment nonetheless enables the Secretary to determine if endangered species are present and whether these species may be jeopardized by the proposed action.[156] Designated critical habitat may speed up the consultation process, but it is not required to initiate the process.

Section 9 of the ESA prohibits the take of any listed species by any person.[157] The term "take" is statutorily defined to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[158] Similar to the section 7 consultation requirement, the section 9 take prohibition applies to all listed species, independent of designated critical habitat. This baseline protection is afforded to all listed endangered and threatened species.

Although the section 7 consultation and the section 9 take prohibition are triggered regardless of designated critical habitat, the United States District Court for the District of Hawai'i held in 1998 in *Conservation Council for Hawai'i v. Babbitt*[159] that there are "significant substantive and procedural protections that result from the designation of a critical habitat outside of the consultation requirements of [s]ection 7."[160] Foremost, the court stressed the important function of establishing a uniform protection plan prior to section 7 consultation.[161] "In the absence of such designation, the determination of the importance of a species' environment will be made piecemeal, as individual federal projects arise and agencies consult with the FWS. This may create an inconsistent or short-sighted recovery plan."[162] This ad hoc determination may permit a small portion of a listed species habitat to be viewed as expendable if it is not deemed critical to the species existence.

Additionally, designated critical habitat can include habitat that is currently unoccupied by the species.[163] If this unoccupied habitat is not designated as

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[156] *Id.*

[157] 16 U.S.C. § 1538(a)(1) (2000). "[I]t is unlawful for any person subject to the jurisdiction of the United States to . . . (B) take any such species within the United States or the territorial sea of the United States; (C) take any such species upon the high seas." *Id.*

[158] 16 U.S.C. § 1532(19) (2000).

[159] 2 F. Supp. 2d 1280 (D. Haw. 1998).

[160] *Id.* at 1288.

[161] *Id.*

[162] *Id.*

[163] *See* 16 U.S.C. § 1532(5). The term "critical habitat" is statutorily defined to mean:

> [T]he specific areas within the geographical area occupied by the species, at the time it is listed . . . , on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection; and specific areas outside the geographical area occupied by the species at

critical, little if any consideration will be given to the effects of the project on the habitat. Although the destruction of unoccupied habitat will likely impede recovery, it will unlikely jeopardize the species in the section 7(a)(2) context.[164]

Furthermore, "designation of critical habitat plays a critical role in identifying those areas in which a section 7 consultation will be triggered."[165] A project planned within critical habitat will automatically require consultation because listed species are known to be present. Outside of critical habitat, an agency must likely first expend resources to determine if endangered species are present. This additional step not only slows down the consultation process, but requires federal agencies to expend more resources before knowing if development will be permitted at the specific site.

Finally, prohibiting the adverse modification or destruction of critical habitat for a listed species may benefit the surrounding listed and non-listed species within the designated habitat.[166] Approximately 250 listed species lack an implemented long-term recovery plan.[167] Furthermore, because non-listed species are more likely to become endangered and subsequently listed if their habitat is lost, these species can be significantly benefited when located within the critical habitat of another species.[168] Critical habitat can therefore enable ecosystem protection to conserve many more species than the single species it was designated to benefit. This is one of the greatest side benefits of designating critical habitat, as the habitat of nearby plants and animals can be conserved solely by preserving the habitat of a listed species.

B. Public Perception of Critical Habitat

The designation of critical habitat plays an important procedural function by educating the public, including state and local government, about the specific environmental elements crucial to a species for its survival and

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> the time it is listed . . . , upon a determination by the Secretary that such areas are essential for the conservation of the species.

Id.

[164] *See* 16 U.S.C. § 1536(a)(2) (2000).

[165] *Conservation Council for Haw.*, 2 F. Supp. 2d at 1288 (citing Am. Rivers v. Nat'l Marine Fisheries Serv., Civ. No. 96-384-MA, slip op. at 7 (D. Or. Oct. 17, 1997)); *see* NATIONAL RESEARCH COUNCIL, SCIENCE AND THE ENDANGERED SPECIES ACT 76 (National Academy Press 1995) (critical habitat provides "'early warning' . . . that such areas are to be treated with particular caution.").

[166] NATIONAL RESEARCH COUNCIL, *supra* note 165, at 76.

[167] *See General Statistics for Endangered Species*, *at* http://ecos.fws.gov/servlet/TessStatReport (one thousand species have approved recovery plans) (last visited Jan. 27, 2003).

[168] NATIONAL RESEARCH COUNCIL, *supra* note 165, at 76.

recovery.[169] Although the public is notified when a species is listed, publicizing critical habitat conveys additional information regarding the habitat needs of a listed species,[170] and it promotes participation in species protection and land development issues.[171] The ESA requires that critical habitat designations be published in the *Federal Register* and in local newspapers.[172] Furthermore, once critical habitat is proposed, the Service is required to receive public testimony during a public comment period.[173] "Congress [therefore] envisioned a process in which the public is informed and participates in the designation of a critical habitat."[174] However, the public is not similarly notified of, or able to participate in, section 7 consultation, as there is no requirement to publish these consultations or allow for public comment.[175]

"The educational value of critical habitat designation should not be underestimated, since public opinion polls consistently show that most people want to help conserve threatened and endangered species and the native ecosystems on which they depend."[176] Admittedly, there are rare occasions when publicizing the location of a species may not be beneficial to the species. For example, "[i]n some instances, a critical habitat map provides the equivalent of a treasure map for a collector or vandal."[177] This is true for some listed plant species, as their rarity may lead to increased human take or vandalism.[178] Furthermore, landowners and developers may occasionally destroy endangered species habitat to avoid having their land designated as

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[169] *Conservation Council for Haw.*, 2 F. Supp. 2d at 1286, n.8.; Letter from David L. Henkin, *Re: Comments Regarding Notice of Intent to Clarify the Role of Habitat in Endangered Species Conservation*, to United States Fish and Wildlife Service (Aug. 13, 1999), *available at* http://www.stopextinction.org/ESA/ESA.cfm?ID=457&c=21 (last visited Jan. 27, 2003).

[170] *See Conservation Council for Haw.*, 2 F. Supp. 2d at 1288; Henkin, *supra* note 169.

[171] Henkin, *supra* note 169.

[172] 16 U.S.C. § 1533(b)(5) (2000); *Conservation Council for Haw.*, 2 F. Supp. 2d at 1288.

[173] 5 U.S.C. § 553(c) (2000). "After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." *Id.*

[174] *Conservation Council for Haw.*, 2 F. Supp. 2d at 1288.

[175] *Id.* at 1288.

[176] Henkin, *supra* note 169. For example, the public has taken an active role to protect *Stenogyne kanehoana*, an endangered Hawaiian plant. *Id.* The FWS stated that "the single greatest threat to the species" was competition from Koster's curse (*Clidemia hirta*), an invasive weed species. *Id.* Because hikers were aware of this threat, they often removed the weed from the habitat of the sole remaining Stenogyne population. *Id.*

[177] Salzman, *supra* note 79, at 333.

[178] *Id.* at 333, n.97 (endangered cacti have "become the plant equivalent of big game" because of high black market prices); *see Conservation Council for Haw.*, 2 F. Supp. 2d at 1283–84.

critical habitat.[179] On the other hand, publicizing the location and habitat needs of endangered species may prevent the inadvertent act of destroying the species or its habitat.[180] Therefore, educating the public about the habitat needs of listed species may likely result in a "net reduction in threats to these species."[181]

For example, in *Natural Resources Defense Council v. U.S. Department of the Interior*[182] in 1997, the FWS's scientific and commercial data led to the conclusion that designating critical habitat for the coastal California gnatcatcher (*Polioptila californica californica*) would increase the threat of human take and vandalism.[183] The FWS cited at least eleven occasions when landowners or developers had destroyed the habitat of the gnatcatcher, two incidents occurring after the agency had notified local authorities of the species' presence.[184] The agency had determined that designating critical habitat would likely lead to further illegal taking.[185] The Ninth Circuit Court of Appeals rejected this claim.[186] Although FWS referred to eleven cases of gnatcatcher habitat destruction, the court took issue with the absence of any explanation of "how such evidence shows that designation would cause more landowners to destroy, rather than protect, gnatcatcher sites."[187] The court concluded that the "'increased threat' rationale fails to balance the pros and cons of designation as Congress expressly required under section 4 of the Act."[188]

Furthermore, in the 1998 district court of Hawai'i case, *Conservation Council for Hawaii v. Babbitt*,[189] the FWS determined that for 244 of the 245 plants in question, "critical habitat would increase the likelihood of illegal taking or vandalism."[190] This claim was almost entirely unfounded, as the FWS "had no evidence of prior taking or vandalism" in most cases.[191] Even while the court agreed that designating critical habitat may increase the risk of human threat under certain circumstances, it stated that the FWS "must

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[179] *See* Natural Res. Def. Council v. United States Dep't of the Interior, 113 F.3d 1121, 1123, 1125 (9th Cir. 1997).

[180] *Conservation Council for Haw.*, 2 F. Supp. 2d at 1285.

[181] Henkin, *supra* note 169.

[182] 113 F.3d 1121 (9th Cir. 1997).

[183] *Id.* at 1123, 1125.

[184] *Id.* at 1125.

[185] *Id.*

[186] *Id.* at 1127.

[187] *Id.* at 1125.

[188] *Id.*

[189] 2 F. Supp. 2d 1280 (D. Haw. 1998).

[190] *Id.* at 1282.

[191] *Id.* at 1283.

consider evidence specific to each species regarding the increased likelihood of taking caused by [critical habitat designation]."[192]

Although the threat of vandalism or taking was discussed in the legislative history of the 1978 ESA amendments, Congress still intended that only rare circumstances would permit the denial of critical habitat to listed species.[193] Congress therefore believed that publicizing the habitat needs and environmental factors necessary to a species for survival produced benefits that outweigh the unfounded risk of an increased human take or vandalism threat.[194]

C. Scrutiny Of Federal Actions Within Designated Critical Habitat

Although the ESA is intended to prohibit all federal actions that inhibit a listed species' survival or recovery, designated critical habitat may more likely convince a court to enjoin federal actions with harmful effects on a listed species. For example, in TVA, one of the most well known and controversial critical habitat cases, the Supreme Court enjoined completion of the virtually completed Tellico Dam and Reservoir Project because its operation would destroy the "critical habitat"[195] of the endangered snail darter, and therefore jeopardize the existence of the species.[196] Congress had expended millions of dollars in construction costs,[197] yet the ESA was enacted to "halt and reverse the trend toward species extinction, whatever the cost."[198] Chief Justice Burger found that "[o]ne would be hard pressed to find a statutory provision whose terms were any plainer than those in [section] 7 of the [ESA]. . . . This language admits of no exception."[199]

Chief Justice Burger relied on the findings of the Secretary of the Interior, who stated that the "critical habitat" of the snail darter would be destroyed by completion of the dam and reservoir project.[200] The Supreme Court found the

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[192] *Id.* at 1284.

[193] H.R. REP. NO. 95-1625, at 17 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9467 (Congress envisioned only the rare situation when the designation of critical habitat would increase the threat of human take and therefore not be beneficial to the species).

[194] *See id.*

[195] Tenn. Valley Auth. v. Hill, 437 U.S. 153, 162 (1978) (the Secretary determined the action area contained the critical habitat of the snail darter, but did not formally designate it as such).

[196] *Id.*; *see* discussion *supra* Part II.B.

[197] *Id.* at 172.

[198] *Id.* at 184.

[199] *Id.* at 173.

[200] *Id.* at 172. Chief Justice Burger stated:

> As we have seen, the Secretary promulgated regulations which declared the snail darter an endangered species whose critical habitat would be destroyed by creation of the Tellico Dam. Doubtless petitioner would prefer not to have these regulations on the

destruction of a species' critical habitat a sufficient violation of the Act to necessitate the injunction of a project that had cost taxpayers approximately $100 million and was virtually completed before the snail darter was even listed as an endangered species.[201]

Although the Supreme Court has not ruled on whether a federal action should be enjoined in the absence of designated critical habitat, the Eight Circuit Court of Appeals in *Sierra Club v. Froehlke*[202] has decided this issue. In 1976, the court affirmed a district court decision allowing the Meramec Park Lake Dam project to progress, even though the resulting reservoir would adversely modify or destroy the habitat of the endangered Indiana Bat, *Myotis sodalis*.[203] The court highlighted that the dam project would negatively affect only proposed critical habitat,[204] yet hinted that it might have decided the issue differently had the proposed habitat been finalized by FWS.[205]

Furthermore, designated critical habitat may require mitigation to alleviate the destruction or adverse modification of unoccupied critical habitat. The Palila, *Loxioides bailleui*, a six-inch-long finch-billed Hawaiian honeycreeper, was listed as an endangered species in 1967.[206] Presently, its population is confined to the upper slopes of Mauna Kea on the Big Island of Hawai'i, within 200 square kilometers of designated critical habitat.[207] In 1996, the U.S. Army and U.S. Department of Transportation embarked on the Saddle Road realignment project.[208] This federal project planned to pave

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books, but there is no suggestion that the Secretary exceeded his authority or abused his discretion in issuing the regulations.

Id.

[201] *Id.* at 165. The project "was over 50% finished by the time the Act became effective and some 70% to 80% complete when the snail darter was officially listed as endangered." *Id.*

[202] 534 F.2d 1289 (8th Cir. 1976).

[203] *Id.* at 1305. The parties did not dispute the fact that ten to fifteen thousand endangered bats would be "affected by the waters of the reservoir." *Id.* at 1303. Furthermore, an expert witness testified that the "hibernating areas for about 5000 bats [would] be inundated periodically and could become a trap for hibernating bats." *Id.*

[204] *Id.* at 1302, n.37.

[205] *Id.* "[E]ven if these caves were presently designated 'critical habitat,' we could not say that trial court determination, namely that [section] 7 is not being violated, is clearly erroneous." *Id.*

[206] Palila v. Haw. Dep't of Land and Natural Res., 649 F. Supp. 1070, 1072 (D. Haw. 1986). The Palila was listed as an endangered species in 1967. Endangered Species List – 1967, 32 Fed. Reg. 4001 (1967) (to be codified at 50 C.F.R. § 17.11 (1985)).

[207] *Palila*, 649 F. Supp. at 1072, 1073. "This area contains the entire known population of Palila and essentially encompasses the existing mamane and mamane-naio forests on Mauna Kea and coincides with the remaining ten percent of the Palila range. Because of the Palila's various habitat requirements, however, the bird is not spread evenly throughout the critical habitat." *Id.* at 1073-74 (citations omitted).

[208] Telephone interview with Reggie David, Consultant to Federal Highways for the Saddle Road realignment project (Jan. 17, 2003) (on file with author); Henkin, *supra* note 169.

approximately 120 acres of unoccupied Palila critical habitat.[209] Because this action would destroy only unoccupied critical habitat, this project would unlikely jeopardize the Palila's continued existence. This project would interfere with the conservation of the species, as unoccupied critical habitat is often necessary for the recovery of a species. Therefore, section 7 consultation with the FWS required extensive mitigation measures to compensate for the destruction of this critical habitat.[210] The federal agencies will spend an estimated $15 million to fence approximately 13,000 acres of mamane and manane-naio forest, construct a fire-break along fourteen miles of the project, produce a fire-management plan, and perform translocation experiments.[211]

Furthermore, the realignment project will negatively affect the habitat of other listed species that presently lack designated critical habitat.[212] These species include the Hawaiian goose (*Branta (Nesochen) sandvicensis*), Hawaiian hawk (*Buteo solitarius*), Hawaiian hoary bat (*Lasiurus cinereus semotus*), Hawaiian dark-rumped petrel (*Pterodroma phaeopygia sandwichensis*), Newell's Townsend's shearwater (*Puffinus auricularis newelli*), and several listed plants.[213] Although the project's impact on these species was examined, no mitigation measures are being proposed to alleviate any degradation of their habitat.[214]

Reggie David, a biological consultant reviewing the realignment project, has indicated that the lack of required mitigation for certain plant species may soon change.[215] Because the realignment project destroys or adversely modifies the proposed unoccupied critical habitat for various plant species, further mitigation may be required when the proposed habitats are finalized.[216] Similar to the Palila, mitigation measures will likely be required for destroying or adversely modifying the plant species' unoccupied critical habitat, even though the project will not destroy any habitat presently occupied by these species.[217]

Finally, the designation of critical habitat places federal agencies on notice that an area may be off limits prior to making any financial or contractual

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[209] Telephone interview with Reggie David, *supra* note 208.

[210] *Id.*

[211] *Id.*

[212] Henkin, *supra* note 169.

[213] *Id.*

[214] Telephone interview with Reggie David, *supra* note 208.

[215] *Id.*

[216] *Id.*

[217] Note that the biological habitat needs of these species did not change. The only difference is that the action area will become designated unoccupied critical habitat. Because the land was recharacterized, mitigation may be required.

commitments.[218] Since *TVA*,[219] a Federal project is more likely to be enjoined before vast resources have been expended.[220] In many cases, there will be less of an economic burden to relocate a project outside of critical habitat when the project is in its infancy.[221] Therefore, critical habitat promotes the economic efficiency of federal development projects, by notifying federal agencies of geographic areas where development is unlikely permitted.

D. Remedies for Agency Non-Action

The majority of species listed both before and after the 1978 ESA amendments lack designated critical habitat.[222] Although this indicates problems with the overall application of the ESA, an individual is more likely to succeed in a legal action to compel the Secretary to designate critical habitat for post-78 species than for pre-78 species. For instance, the citizen suit provision in section 11 of the ESA may be utilized to compel the non-discretionary designation of critical habitat for post-78 species, but is not available to challenge the discretionary denial of critical habitat for pre-78 species.[223]

The 1978 ESA amendment that mandated the designation of critical habitat is problematic because it added text specifically providing that the Secretary *may* designate critical habitat for species listed prior to the amendment.[224] This provision is neither ambiguous, nor silent. The Secretary is free to somewhat

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[218] Henkin, *supra* note 169 ("Agencies would know [which areas are off limits] before making any financial or contractual commitments to carry out, authorize, or fund projects in the area, so that potential conflicts can be avoided."); *see also* NATIONAL RESEARCH COUNCIL, *supra* note 165, at 76.

[219] Tenn. Valley Auth. v. Hill, 437 U.S. 153 (1978).

[220] *See id.*; BEAN & ROWLAND, *supra* note 59, at 240-44 (enjoining the nearly complete Tellico Dam upset Congress and sparked the Endangered Species Act Amendments of 1978, which mandated an economic analysis before the designation of critical habitat).

[221] Henkin, *supra* note 169. Placing "federal agencies on notice . . . would enable resources from both the public and private sectors to be better spent on conservation, rather than fighting court battles over proposed harmful federal actions." *Id.*

[222] *See generally* Endangered and Threatened Wildlife, 50 C.F.R. § 17.11 (1999); Endangered and Threatened Plants, 50 C.F.R. § 17.12 (1999); *Listed Species with Critical Habitat as of 01/26/2003*, at http://ecos.fws.gov/servlet/TESSWebpageCrithab?listings=0&nmfs=1 (last visited Jan. 26, 2003) (81.1% of species listed prior to the 1978 amendments are lacking critical habitat, compared to 65.2% of species listed after the amendments).

[223] *See* discussion *supra* Part II.D.

[224] 16 U.S.C. § 1532(5)(B) (2000). "Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established." *Id.*

arbitrarily chose to designate critical habitat without fearing substantial judicial intervention.

This high degree of agency discretion is best exemplified by the D.C. District Court's denial of a petition to designate critical habitat for the threatened grizzly bear (*Ursus arctos*) in *Fund for Animals v. Babbitt*.[225] In *Fund for Animals*, environmental and conservation organizations disputed the legality of FWS's denial of a petition to designate critical habitat without the opportunity for public comment.[226] The FWS had originally proposed critical habitat for the grizzlies in 1976.[227] However, "[i]n 1979 the FWS withdrew its proposal because the 1978 amendments to the ESA had imposed additional obligations on the FWS before it designated critical habitat."[228] The court highlighted the discretionary nature of critical habitat designation for species listed before the amendment,[229] including the lack of a stated procedure to petition for the designation of critical habitat under the regulations issued by the Secretary.[230]

Critical habitat for the grizzly bear had been previously proposed by the FWS, and rescinded only because of additional obligations and time restrictions imposed by the 1978 amendment.[231] The court, however, was unwilling to force designation of critical habitat for a pre-1978 listed species.[232] Consequently, this case indicates that it is nearly impossible to guarantee these species the habitat necessary for recovery. *Fund for Animals* is the only case on point, and is merely persuasive authority for courts outside of the D.C. Circuit. Because the Supreme Court has not spoken on this issue, it is possible that a court in a different circuit would decide the issue differently.

The ESA contains a clear mandate to designate critical habitat for species listed after the 1978 ESA amendments, providing for increased judicial intervention when the Secretary denies critical habitat to these species.[233] As discussed above, the Hawai'i District Court reviewed and rejected FWS's

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[225] 903 F. Supp. 96 (D.C. 1995).

[226] *Id.* at 103.

[227] *Id.*

[228] *Id.*; Withdrawal of Proposals, 44 Fed. Reg. 12,382 (March 6, 1979).

[229] *Fund for Animals*, 903 F. Supp. at 115, n.8.

[230] *Id.* at 115 (regulations issued by the Secretary of the Interior permit any "interested person" to petition the Secretary requesting designation of critical habitat. Neither the ESA nor the regulations prescribe a procedure for such petitions. Rather, they are considered under the provisions of the APA).

[231] *Id.* at 103.

[232] *See id.*

[233] 16 U.S.C. § 1533(a)(3)(A) (2000); 5 U.S.C. § 706(2)(A) (2000) (a court may overturn an administrative decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

denial of critical habitat for 245 listed plant species in *Conservation Council for Hawai'i*.[234] The Court required the agency to "articulate a rational basis for invoking the imprudence exception."[235] Because the agency could not provide this rational basis, FWS is currently finalizing critical habitat designations for most of these plant species.[236]

The current statutory framework provides for varied levels of protection depending on the date a species was listed as endangered or threatened. At present, the ESA affords less protection to those species that have been near extinction for the longest period of time. As of January 26, 2003, 81.1% of the U.S. species listed prior to the 1978 ESA amendments lack critical habitat.[237] Furthermore, 87.2% of the Hawaiian species listed prior to the 1978 amendments lack critical habitat.[238] In comparison, a mere 11.9% of the Hawaiian species listed after the 1978 ESA amendments lack critical habitat.[239] Accordingly, the ESA is not providing an equitable means to recover all imperiled species.

Critical habitat designation does confer additional benefits to listed species beyond section 7 consultation and the section 9 take prohibition, and is highly beneficial to recover endangered and threatened species.[240] For example, critical habitat may more likely convince a court to enjoin federal actions that negatively affect the habitat of a listed species, or may more likely require mitigation when the destruction of a species habitat is unavoidable.[241] Moreover, the designation of critical habitat educates the public about the environmental elements crucial to the species for survival, and enables broad public participation in the recovery of a species.[242]

Because the available legal remedy is insufficient to compel the designation of critical habitat when denied to species listed prior to the 1978 ESA amendment,[243] the statutory text of the ESA should be amended to guarantee

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[234] Conservation Council for Haw. v. Babbitt, 2 F. Supp. 2d 1280 (D. Haw. 1998).

[235] *Id.* at 1288.

[236] *Pacific Islands Critical Habitat Update* (U.S. Fish and Wildlife Service, Honolulu, HI) Oct. 2002 (final rules for the following plant species will be submitted to the federal register on: Kauai/Niihau – Jan. 31, 2003; Molokai – Feb. 28, 2003; Maui/Kahoolawe – April 18, 2003; Oahu – April 30, 2003; and the Big Island – May 30, 2003). Final rules issued for Lanai plant species were published on January 9, 2003. Endangered and Threatened Wildlife and Plants; Final Designation of Critical Habitat for Three Plant Species From the Island of Lanai, Hawaii, 68 Fed. Reg. 1219 (Jan. 9, 2003) (to be codified at 50 C.F.R. pt. 17).

[237] *See supra* note 88 and accompanying text.

[238] *See supra* note 88 and accompanying text.

[239] *See supra* note 92 and accompanying text.

[240] *See* discussion *supra* Part III.A.

[241] *See* discussion *supra* Part III.C.

[242] *See* discussion *supra* Part III.B.

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

all listed species the designation of habitat critical to their survival and recovery. It makes no sense to afford significantly more discretion to the Secretary to designate critical habitat for a subset of endangered species merely because of the date that they were listed. The loophole in critical habitat designation for species listed before the 1978 amendment should be eliminated to afford equity to all listed endangered and threatened species.

IV. A PROPOSAL TO AMEND THE ENDANGERED SPECIES ACT TO RECOVER PRE-78 SPECIES

Any amendment to the ESA should be made based on the following criterion: legislative intent, biological necessity, agency efficiency, and economic impact. Accordingly, any amendment should conform to the original purpose of the ESA, as stated in the text and the legislative history. Moreover, the amendment should be mandated by a compelling biological need of listed species. Furthermore, it should not decrease the efficiency of the implementing agency, as both money and manpower are often in short supply in present-day federal agencies. Finally, any alteration to the ESA should not substantially increase the operating costs of implementing the Act or cause substantial economic hardship to the economy in general. Utilizing these criterion, this paper proposes two modest amendments to the ESA: (1) extend the mandatory designation of critical habitat to species listed prior to the 1978 ESA amendments; and (2) implement "survival habitat" for all listed species until critical habitat is formally designated.[244]

A. Mandatory Critical Habitat Designation for Pre-78 Species

To remedy shortcomings in the existing statutory framework, and to afford equity to all listed species, the section 3(5)(B) definition of critical habitat should be amended. The provision currently states that "[c]ritical habitat *may* be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established."[245] The italicized "may" should be replaced by "shall." This minor amendment would extend the mandatory nature of critical habitat designation to all species, regardless of whether the species was listed prior to the 1978 amendments.

This proposed amendment would conform to the overall purpose and intent of the ESA. Section 2(b) states that one purpose of the ESA is "to provide a means whereby the ecosystems upon which endangered species and threatened

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[244] NATIONAL RESEARCH COUNCIL, *supra* note 165, at 8.

[245] 16 U.S.C. § 1532(5)(B) (2000) (emphasis added); *see* discussion *supra* Part II.B.

species depend may be conserved."[246] Furthermore, the legislative history of the ESA states that the purpose is to prevent species endangerment and extinction "caused by man's influence on the ecosystems."[247] Although a critic could argue that the ESA in its present form is the best indication of congressional intent, it nevertheless does not conform to the spirit of the original legislation, or the stated purpose of the ESA.

This proposed amendment would similarly serve a compelling biological need of listed species, as imperilled species depend on an intact and healthy ecosystem to survive. The biological needs of listed species did not magically change on November 10, 1978, when Congress mandated that all future listed species must receive critical habitat. Furthermore, if a specific species does not have a compelling need for designated critical habitat, the Secretary can determine that such area is not "essential to the conservation of the species."[248] Extending the mandatory designation of critical habitat would merely insure that all listed species are equally provided all available means to survive and recover.

This proposed amendment would admittedly place an increased burden on the implementing agencies, and may therefore negatively affect agency efficiency. The agencies would need to determine, propose, and then finalize critical habitat for the 173 pre-78 species currently lacking critical habitat, in addition to the 684 post-78 species that also lack critical habitat. This increased backlog may further inhibit other duties normally carried out by these agencies, but should not outweigh the biological needs of listed species.[249]

Finally, this proposed amendment should not significantly increase the operating costs of implementing the ESA, or burden the economy in general. The Secretary is already required to designate critical habitat for the majority of listed species. Adding 173 species to the critical habitat backlog would not significantly increase the economic burden. It may actually decrease the economic burden of implementing the ESA, as designating critical habitat for all listed species should decrease the frequency of litigating the denial of critical habitat. Furthermore, this alteration would not change the section 4(b)(2) requirement that all critical habitat be designated "on the basis of the best scientific data available . . . after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat."[250] The Secretary would therefore maintain the present ability

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[246] 16 U.S.C. § 1531(b) (2000).

[247] H.R. REP. NO. 95-1625 (1975), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9455.

[248] 16 U.S.C. § 1532(5)(A)(i) (defining critical habitat).

[249] The solution to this problem likely involves increased agency funding and manpower, and is therefore outside the scope of this paper.

[250] 16 U.S.C. § 1533(b)(2) (2000).

to deny critical habitat if its resulting economic or other burdens outweigh its benefits.

B. Implementation of "Survival Habitat"

In 1995, the National Research Council published a book that recommended the implementation of "survival habitat."[251] According to these scientists, this habitat would be composed of "some core amount of essential habitat . . . designated for protection at the time of listing a species as endangered as an emergency, stop-gap measure."[252] Unlike critical habitat, survival habitat would be designated without an economic impact analysis, [253] and would be temporary in nature, expiring with the adoption of a traditional critical habitat.[254] This measure would insure that all species would receive some amount of core habitat, regardless of the economic impacts of preserving that habitat.

This proposed amendment would similarly comply with the stated purpose and legislative history of the ESA. Although Section 4(b)(2) clearly states that an economic analysis is required before the designation of critical habitat, this proposed amendment would not excuse the Secretary from performing this function.[255] The proposed amendment would provide for immediate habitat protection while an economic analysis was being performed.

Additionally, the proposed amendment would serve a compelling biological need of listed species by immediately providing for the core amount of habitat necessary for survival. Admittedly, one may conceive of rare situations when a listed species would not have a compelling biological need for "survival habitat." In these situations, the habitat protection would expire when the Secretary deemed traditional critical habitat imprudent. This is a small price to pay to insure that those species that do have a compelling biological need for habitat protection receive it immediately.

Providing for "survival habitat" will unlikely affect agency efficiency. It would not require any additional procedural steps or public comment periods. Similar to species listing, the designation of survival habitat would be a purely

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[251] NATIONAL RESEARCH COUNCIL, *supra* note 165, at 8. *Survival habitat* would be designated at the time of listing of an endangered species, unless insufficient information were available or harm to the species would occur. *Id.* For this purpose, survival habitat would mean the habitat necessary to support either current populations of a species or populations that are necessary to insure short-term (25-50 yrs) survival, whichever is larger; survival habitat would receive the full protection that the ESA accords to critical habitat. *Id.* Because of its emergency nature, no economic evaluation would be conducted before designating survival habitat. *Id.*

[252] *Id.* at 7.

[253] *Id.*

[254] *Id.* at 8.

[255] 16 U.S.C. § 1533(b)(2).

biological determination. This requirement should not require any additional scientific studies, or delay the procedural steps involved in designating traditional critical habitat.

It is highly possible that this proposed amendment may produce short-term economic hardship. It is not difficult to conceive of situations when survival habitat would prevent federal projects or interfere with the use of one's private land. Because this habitat is temporary in nature and expires with the designation, or denial, of critical habitat, any economic burden should be temporary as well.

These two modest amendments would not dramatically alter the procedural application of the ESA, yet they would provide for equitable habitat protection under the ESA. These amendments, in tandem, would provide all listed species with immediate protection of the habitat necessary for a species' survival, while simultaneously guaranteeing the designation of traditional critical habitat to species listed prior to the 1978 ESA amendments.

V. CONCLUSION

The ESA is a powerful tool to conserve endangered and threatened species and the ecosystems upon which they depend, yet the full extent of its available protective measures are not equally available to all listed species. The ESA is designed to provide the means to recover endangered species to the point when their continued existence is no longer in question.[256] This concept of conservation is paramount to the ESA's effectiveness. The 1978 ESA amendments required the designation of critical habitat concurrent with species listing, but did not mandate this habitat protection for species listed prior to the amendments.[257] As such, the ESA is broken and badly in need of repair. Critical habitat designation is integral to the conservation of listed species, and oftentimes necessary to recover and delist a species. Accordingly, the ESA should be amended to mandate the designation of critical habitat to all imperilled species, regardless of an arbitrary chronological distinction. Only then can we begin to insure that all listed species are extended the protection envisioned by the authors of the ESA.

David A. Paulson[258]

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[256] *See* discussion *supra* Part II.A.

[257] *See* discussion *supra* Part II.B.

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APPENDIX A: TABLES

Table 1: Pre-78 Species	Total Species	CH Designated at 1978 Amendment	CH Designations Since 1978 Amendment	CH Designated Presently	Species Lacking CH	Percent Species With CH	Percent Species Lacking CH
National	212	32	8	40	172	18.9%	81.1%
Hawai'i	39	2	3	5	34	12.8%	87.2%
Outside Hawai'i	173	30	5	35	138	20.2%	79.8%

Table 2: Post-78 Species	Total Species	CH Designated Presently	Species Lacking CH	Percent Species With CH	Percent Species Lacking CH
National	1050	365	685	34.8%	65.2%
Hawai'i	278	245	33	88.1%	11.9%
Outside Hawai'i	772	120	652	15.5%	84.5%

The Constitutionality of a Naked Transfer: Mandatory Lease-to-Fee Conversion's Failure To Satisfy a Requisite Public Purpose in Hawai'i Condominiums

"Property in a thing consists not merely in its ownership and possession but in the *unrestricted right of use, enjoyment and disposal.* Anything which destroys any of these elements of property, to that extent destroys property itself."[1]

I. INTRODUCTION

The United States Constitution guarantees every individual the fundamental protections of "life, liberty, [and] property."[2] It further assures that private property will not be taken but for "public use."[3] For decades, state legislatures enjoyed great discretion in determining what constitutes a "public use" in their exercise of eminent domain.[4] Recently, however, broad application of the public use doctrine generated sizzling debate in highly publicized decisions.[5] This liberal application further brought to light potential and apparent misuses of state's eminent domain powers in transfers of property to private entities.[6]

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[1] Manufactured Hous. Communities of Wash. v. State, 13 P.3d 183, 191 (Wash. 2000) (emphasis in original) (internal quotes omitted).

[2] U.S. CONST. amend. V ("nor shall any person . . . be deprived of life, liberty, or property, without due process of law").

[3] *Id.* ("nor shall private property be taken for public use, without just compensation"). The Fifth Amendment applies to the states through the Fourteenth Amendment. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 231 (1984).

[4] *See* David L. Callies, *Compulsory Purchase in Hawaii: What's a Public Purpose?*, HAW. B.J. 6, 11 (June 2002); *see also infra* Section II.B.

[5] *See id.*; *see also infra* note 6 and accompanying text.

[6] Robert G. Klein, *Twenty-First Century Condemnation: Say Aloha to "Public Purpose,"* HAW. B.J. 7, 7 (June 2002) ("What has now developed across the country is the unrestrained utilization of government condemnation to take property from mostly small landowners and provide it to the politically well-connected to further their business aspirations."); *see also* Gideon Kanner, *That Was The Year That Was: Recent Developments In Eminent Domain Law*, A.L.I.-A.B.A CONTINUING LEGAL EDUC. 87, 96 (2000) ("[W]hat is going on in many American cities is wholesale looting of both private resources and public funds to benefit small groups of wealthy, well-connected insiders who are able to borrow the government's power of eminent domain . . . to enrich themselves at public expense."); David L. Callies, *Takings: An Introduction and Overview*, 24 U. HAW. L. REV. 441, 442 (2002) [hereinafter *Takings*] ("There is increasing public concern of late that government has run amuck in taking property for barely conceivable public purposes, such as casinos, automobile plants, and even a football franchise.")

As a result, courts are slowly beginning to curb the governmental use of eminent domain.[7]

The 2002 Honolulu City Council controversy surrounding proposed Bill 53[8] highlights the current debate over the use of eminent domain powers to mandate lease-to-fee conversion[9] of condominium units.[10] Bill 53 added fuel to an ongoing debate and "extensive litigation" regarding whether these conversions do, in fact, satisfy public use requirements set forth by the United States and Hawai'i State Constitutions.[11]

The Hawai'i Legislature enacted the Hawai'i Land Reform Act ("HLRA") of 1967[12] to address the problems presented by a skewed fee simple land market.[13] HLRA was also a means to facilitate home ownership amongst

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[7] Kanner, *supra* note 6, at 108; Lara Womack, *Private Property and the Role of Eminent Domain*, REAL ESTATE L.J. 307, 316 (2000); *see* Dean Starkman, *More Courts Rule Cities Misapply Eminent Domain*, WALL STREET J., July 23, 2001, at B1; Dean Starkman, *State Court Sides With Property Owner In Another Eminent-Domain Contest*, WALL STREET J., Feb. 15, 2001, at B14.

[8] Bill 53 was a City & County of Honolulu proposed ordinance. In 2002, the Honolulu City Council passed the first two readings of Bill 53. B. 53, 2002 City Council, 11th Sess. (Honolulu 2002). *See* discussion *infra* Section III.A.

[9] Under the Hawai'i Revised Statutes ("HRS"), a lease is a "conveyance of land or an interest in land, by a fee simple owner as lessor . . . to any person, in consideration of a return of rent . . . for a term, . . . [of] twenty years or more." HAW. REV. STAT. § 516-1 (1993). Accordingly, a lessee is one who owns a leased interest in the land upon which he lives; a lessor is an owner of the fee simple lands upon which the lessee lives. *Id.* Under HRS, "fee," or fee simple land ownership is defined as "absolute ownership of land for an indefinite duration[.]" *Id.*

[10] For purposes of this paper, "condominium" refers to condominiums, cooperatives and planned developments.

[11] Coon v. City & County of Honolulu, 98 Hawai'i 233, 240, 47 P.3d 348, 355 n.8 (2002). The public use requirement of the Fifth Amendment of the U.S. Constitution provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. The Hawai'i Constitution provides that "[p]rivate property shall not be taken or damaged for public use without just compensation.") HAW. CONST. art. I § 20. For other Hawai'i cases litigated on the issue of leasehold conversion, see, for example, *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984); *Richardson v. City & County of Honolulu*, 124 F.3d 1150 (9th Cir. 1997), *cert. denied*, (*"Richardson II"*); *Small Landowners of Oahu v. City & County of Honolulu*, 832 F. Supp. 1404 (D. Haw. 1993); Midkiff v. Tom, 483 F. Supp. 62 (D. Haw. 1979); *Takabuki v. Ching*, 67 Haw. 515, 695 P.2d 319 (1985); *Uffman v. Hous. Fin. & Dev. Corp.*, 70 Haw. 64, 760 P.2d 1115 (1988); Richardson v. City & County of Honolulu, 38 Haw. 329 (1940); Hous. Fin. & Dev. Corp. v. Castle, 79 Hawai'i 64, 898 P.2d 576 (1995); Hous. Fin. & Dev. Corp. v. Takabuki, 82 Hawai'i 172, 921 P.2d 92 (1996); Hous. Fin. & Dev. Corp. v. Ferguson, 91 Hawai'i 81, 979 P.2d 1107 (1999); Richardson v. City & County of Honolulu, 76 Hawai'i 46, 898 P.2d 1193 (1994), *recons. denied.*

[12] HAW. REV. STAT. § 516 (1993).

[13] HAW. REV. STAT. § 516-83(a)(9)(1993). *See infra* Section II.A.

Hawai'i's people by compelling large landowners to sell their estates.[14] As enacted, HLRA allowed qualified lessees to convert single family residential leasehold lots into fee simple interests.[15] Two decades later, the United States Supreme Court's decision in *Hawaii Housing Authority v. Midkiff*[16] upheld the constitutionality of HLRA as a "rational exercise of the eminent domain power . . . pass[ing] the scrutiny of the Public Use Clause."[17] Notably, however, *Midkiff* addressed only mandatory conversion of single family residential lots.[18] Seven years later, the Honolulu City Council enacted Revised Ordinances of Honolulu Chapter 38 ("Chapter 38"),[19] enabling condominium lease owners to convert their leased fee interests to fee simple interests.[20] Soon after, in *Richardson v. City and County of Honolulu*,[21] the Ninth Circuit Court of Appeals upheld a district court ruling that extended the constitutionality of mandatory conversion to condominium properties.[22] In so doing, the Ninth Circuit established the constitutionality of Chapter 38, relying heavily on the Supreme Court's *Midkiff* decision.[23]

This Recent Development argues that HLRA and subsequent *Midkiff* rationale are inapplicable to leasehold condominium conversion in Hawai'i, because the Honolulu City Council enacted Chapter 38 on flawed grounds, and because that these conversions fail to satisfy a requisite public purpose. Section II provides a background of Hawai'i laws and case holdings relating to land ownership and leasehold reform. It articulates the reasoning behind such measures and describes Hawai'i's unique land situation. This section further presents the Honolulu City Council's response to leasehold debate through proposed legislative bills, measures, and decisions, detailing the status and outcome of various legislative proposals. Section III describes the current state of condominium ownership in Hawai'i and sets forth the compelling arguments of both proponents and opponents of condominium leasehold

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[14] *Midkiff*, 467 U.S. at 233; *see* HAW. REV. STAT. §§ 516(a)(1), (a)(9) (1967); *see also infra* Section II.B; *Richardson II*, 124 F.3d at 1156 n.4.

[15] *See* HAW. REV. STAT. § 516-83(a)(5).

[16] 467 U.S. 229 (1984).

[17] *Id.* at 243.

[18] *Id.* at 233. Notably, the *Midkiff* court did not address or certify the constitutionality of mandatory conversion of condominium units. *Id.*

[19] HONOLULU, HAW., REV. ORDINANCES ch. 38 (1991). This chapter, enacted on Dec. 18, 1991, encompasses Ordinance 91-95, which mandated condominium fee conversion for qualified lessees. *See* Richardson v. City & County of Honolulu, 802 F. Supp. 326 (1992) ("*Richardson I*").

[20] Coon v. City & County of Honolulu, 98 Hawai'i 233, 237 n.1, 47 P.3d 348, 352 n.1 (2002).

[21] 802 F. Supp. 326 (D. Haw. 1992).

[22] *Id.*

[23] *See infra* Section II.D.

conversion. Section IV examines the Public Use Clause's application in both Hawai'i and other jurisdictions. Moreover, this section presents the basic elements of the public use doctrine and details specific findings of public use in Hawai'i as well as other states. Section V concludes that mandatory leasehold condominium conversion fails to satisfy a public purpose and that erosion of the public use doctrine necessitates an intensified judicial standard of scrutiny for governmental eminent domain actions. This section concludes with possible solutions and alternatives to remedy and prevent problems caused by the exceptionally deferential standard set forth by *Midkiff*.

II. BACKGROUND OF HAWAI'I LEASEHOLD REFORM

A. Hawai'i Land Reform Act

In 1967, the Hawai'i State Legislature enacted HLRA,[24] as a remedial measure to redress problems caused by concentrated land ownership.[25] The Legislature found that this oligopoly resulted in severe shortages of fee simple residential land as well as artificial inflation of land values across the state, and deprived people of an opportunity to own the lands underlying their homes.[26] The Legislature validated HLRA with findings of a "concentration of land ownership . . . in the hands of a few landowners who have refused to sell the fee simple titles to their lands."[27] The Legislature furthermore found that "the public interest, health, welfare, security, and happiness of the people of the State [were] adversely affected" by the unavailability of fee simple residential lands.[28] The HLRA attempted to remedy these problems by allowing lessees to invoke the State's condemnation powers to own their single family residential homes in fee simple.[29]

The HLRA allowed lessees to commence condemnation proceedings if:

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[24] HAW. REV. STAT. § 516 (1993). The Hawai'i Land Reform Act was codified in 1967 as HAW. REV. STAT. § 516.

[25] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 232-33 (1984).

[26] HAW. REV. STAT. § 516-83 (1993).

[27] HAW. REV. STAT. § 516-83 (a)(1). In 1965, the seven largest landowners were, in descending order: Bernice P. Bishop Estate, Richard S. Smart (Parker Ranch), Dole Food Company, Inc., Samuel M. Damon Estate, Alexander and Baldwin, Inc., C. Brewer and Company, Ltd., and the James Campbell Estate. HAWAI'I DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM, ANNUAL SURVEY OF MAJOR LANDOWNERS, *available at* http://www.hawaii.gov/dbedt.db96/06/069608 (last visited Oct. 26, 2002). These seven landowners owned 29.3% of the total land area in Hawai'i. *Id.*

[28] HAW. REV. STAT. § 516-83(a)(4).

[29] HAW. REV. STAT. § 516-83 (a)(5). This provision applied to leased fee residential houselots. HAW. REV. STAT. §§ 516-2 (1993). *See Midkiff*, 467 U.S. at 233.

> twenty-five or more lessees or the lessees of more than fifty per cent of the residential lease lots within the development tract, whichever number is the lesser, have applied . . . to purchase the leased fee interest . . . and if, after due public notice and public hearing . . . the corporation finds that the acquisition of the leased fee interest in residential houselots . . . through exercise of the power of eminent domain or . . . threat of eminent domain . . . will effectuate the public purposes of this chapter.[30]

The Legislature presumably viewed HLRA's public purpose of diversifying land ownership and providing a landless majority with opportunities to own fee simple housing as meeting the constitutional public use requirement. Landowners, however, expectedly felt otherwise.

B. Hawaii Housing Authority v. Midkiff

In 1979, Bishop Estate, Hawai'i's largest landowner, brought the first constitutional challenge to HLRA in *Midkiff v. Tom*.[31] The United States District Court for the District of Hawai'i found HLRA constitutional.[32] The Ninth Circuit reversed, characterizing HLRA as a "naked attempt on the part of the state of Hawaii to take the private property of *A* and transfer it to *B* solely for *B*'s private use and benefit."[33] In its 1984 decision, *Hawaii Housing Authority v. Midkiff*,[34] the United States Supreme Court reversed the Ninth Circuit, and unanimously upheld HLRA's constitutionality.[35] The Court concluded that redistribution of land in fee simple would help to cure

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[30] HAW. REV. STAT. § 516-22 (1993 & Supp. 2002). In addition to these requirements, a petitioner must also: (1) be at least eighteen years of age; (2) be a bona fide resident of the state residing on the lot, except in specified circumstances; (3) have legal title or an equitable interest in the property not including eligibility to purchase that lot; (4) demonstrate an ability to promptly pay for the interest; (5) submit an acceptable application to the housing and community development corporation of Hawai'i in good faith; (6) execute a contract for the purchase of the fee interest; (7) not have title to any fee simple lands in the County and near his workplace that are suitable for residential purposes, including the applicant's spouse. HAW. REV. STAT. § 516-33 (1993 & Supp. 2002).

[31] 483 F. Supp. 62 (D. Haw. 1979). In 1965, the Kamehameha Schools Bishop Estate was the State's largest private landowner in fee simple property, owning 369,700 acres. DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM, *STATE OF HAWAII DATA BOOK: A STATISTICAL ABSTRACT* tbl.6.08 *available at* http://www.hawaii.gov/dbedt/db96/06/069608 (last visited Oct. 26, 2002). Kamehameha Schools Bishop Estate continues to be the State's largest landowner. DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM, *STATE OF HAWAII DATA BOOK: A STATISTICAL ABSTRACT* tbl.6.07 (2001).

[32] Midkiff v. Tom, 483 F. Supp. 62, 70 (D. Haw. 1979).

[33] Midkiff v. Tom, 702 F.2d 788, 798 (9th Cir. 1983).

[34] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

[35] *Id.* at 245.

economic and social ills generated by a land oligopoly.[36] The Court furthermore found that HLRA was a rational exercise of state power that would have failed judicial scrutiny, if it had been purely private, as landowners alleged.[37] The Court relied heavily on legislative findings that 47% of land in Hawai'i rested in the hands of only 72 private landowners, with 18 landowners owning more than 40% of the land on Oahu, and 22 landowners owning 72.5% of all fee simple titles across the State.[38] It further explained: "[i]t is not essential that the entire community, nor even a considerable portion . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use . . . ."[39] "[W]hat in its immediate aspect is only a private transaction may be raised by its class or character to a public affair."[40]

In the *Midkiff* decision, the Court extended its broad interpretation of the public use doctrine initiated in *Berman v. Parker*[41] and further propagated a trend of judicial deference to state legislatures.[42] The *Midkiff* Court explained that a compensated taking will not violate the Public Use Clause where it is rationally related to a conceivable public purpose.[43] Here, the Supreme Court concluded that regulating oligopoly and the evils associated with it was a classic exercise of a state's eminent domain powers.[44]

C. *Revised Ordinances of Honolulu Chapter 38*

After the Supreme Court affirmed the public purpose and thus the constitutionality of HLRA, the Hawai'i Legislature contemplated extending HLRA to multi-family condominium leaseholds.[45] However, a 1987 study

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[36] *Id.* at 243.

[37] *Id.* at 244.

[38] *Id.* at 232.

[39] *Id.* at 244 (quoting Rindge Co. v. Los Angeles, 262 U.S. 700, 707 (1923)).

[40] *Id.* (quoting Block v. Hirsh, 256 U.S. 135, 155 (1921)).

[41] 348 U.S. 26 (1954). *Berman v. Parker* is the seminal case supporting judicial deference in legislative public use determinations. *See* Thomas J. Coyne, *Hawaii Housing Authority v. Midkiff: A Final Requiem for the Public Use Limitation on Eminent Domain?* 60 NOTRE DAME L. REV 338, 391 (1985). In *Berman*, the U.S. Supreme Court found that elimination of substandard housing and promotion of a redevelopment project satisfied a public purpose. *Id.* at 35. The *Berman* court set forth the standard of broad deference to the legislature which most courts use today. *See Midkiff*, 467 U.S. at 243.

[42] *See* Kanner, *supra* note 6 at 90.

[43] *Midkiff*, 467 U.S. at 241.

[44] *Id.* at 242.

[45] During the 1986 legislative session, the Hawai'i State Senate and House of Representatives adopted resolutions to direct the Legislative Reference Bureau to analyze patterns of ownership of lands beneath Hawai'i's condominium properties. COLLEEN C. SAKAI, LEGISLATIVE REFERENCE BUREAU, REPORT NO. 6: OWNERSHIP PATTERNS OF LAND BENEATH HAWAI'I'S CONDOMINIUMS & COOPERATIVE HOUSING PROJECTS 1, 1 (1987). The Legislature

conducted by the Hawai'i Legislative Reference Bureau indicated that mandatory conversion of condominium leaseholds would not comply with the permissible public purpose of fragmenting a land oligopoly.[46] Alternatively, the study emphasized that small "single-parcel" landowners and investor-owners dominated the multi-family condominium leasehold market, as opposed to owner-occupants.[47] Moreover, the study concluded that the "concept of redistribution of land, the goal under the [HLRA], is not automatically transferable to land under condominiums . . . [t]he [HLRA] applies to single-family residential lots which are *inherently different* from condominiums."[48] Accordingly, the study silenced further consideration of condominium leasehold conversion at the state level.[49]

Nevertheless, the Honolulu City Council extended its eminent domain powers in 1991 by enacting Chapter 38.[50] Essentially, Chapter 38 extended HLRA's mandatory leasehold conversion process to multi-family leaseholds, allowing condominium lessees to invoke the city's condemnation powers for fee simple condominium ownership.[51] The Honolulu City Council expressly modeled Chapter 38 after HLRA.[52] Like HLRA, Chapter 38's stated purpose was "to provide to the leasehold owners of condominium properties the same right to purchase the land under their homes as is currently provided the owners of single family dwellings."[53] The City found that the fee simple owners of the existing 16,000-17,000 residential condominium leased units "generally refused" to sell the land underlying their property.[54] The City determined that this refusal caused a severe undersupply of fee simple

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sought to determine whether HLRA should be extended to condominium developments. *Id.*

[46] *See id.* at 35.

[47] *Id.* at 34. On average, owners comprise only thirty percent of condominium occupants. Treena Shapiro, *Condo Land Sale Dispute Heats Up,* HONOLULU ADVERTISER, Sept. 26, 2002, at B1 [hereinafter *Dispute*]; *see also* SAKAI, supra note 44, at 35; *The Living Nation: Bill 53* (Oceanic Cable Television Broadcast, Oct. 11, 2002) [hereinafter *The Living Nation: Bill 53*].

[48] SAKAI, *supra* note 45, at 35 (emphasis added). Similarly, the study noted that "[w]hile land area is easily correlated to single-family residential lots, it does not necessarily correlate for condominiums." *Id.*

[49] *The Living Nation: Bill 53*, *supra* note 47; *see generally* SAKAI, *supra* note 44.

[50] HONOLULU, HAW., REV. ORDINANCES ch. 38 (1991).

[51] *See* HONOLULU, HAW., REV. ORDINANCES ch. 38 (1991).

[52] Richardson v. City & County of Honolulu, 802 F. Supp. 326, 340 (D. Haw. 1992); *see also* Coon v. City & County of Honolulu, 98 Hawai'i 233, 251, 47 P.3d 348, 366 (2002) (stating that the Honolulu City Council modeled Chapter 38's threshold requirements for conversion after those promulgated in HLRA).

[53] *Coon*, 98 Hawai'i at 251 n.27, 47 P.2d at 366 n.27.

[54] *Id.* at 339; *see also* Richardson v. City & County of Honolulu, 124 F.3d 1150, 1155 (9th Cir. 1997).

condominium units and consequential "artificial inflation" of land values on the island of Oahu.[55]

Chapter 38 requires a minimum threshold number of qualified lessees to submit an application to the Department of Housing and Community Development.[56] Upon receiving a valid application, the department must hold a public hearing to verify that the use of the City's condemnation power will give effect to Chapter 38's expressed purposes.[57] Chapter 38 further provides that confirmation of the public purpose finding enables the City to begin condemnation proceedings and ultimately acquire the designated parcel from the fee simple landowner, paying a "fair and reasonable price"[58] in exchange for the parcel.[59] The approved lessee[60] must then purchase the fee simple interest from the City "within sixty days of acquisition."[61] Immediately after the passage of Chapter 38, a number of Hawai'i landowners brought suit against the city.[62]

D. Richardson v. City and County of Honolulu

The relatively recent *Richardson v. City & County of Honolulu* cases in the Hawai'i federal district court and Ninth Circuit addressed the constitutionality of Chapter 38.[63] Like *Midkiff*, *Richardson I* and *Richardson II* addressed whether the use of eminent domain powers to convert a leased fee interest to that in fee simple satisfied a valid public purpose.[64] Hastily adopting the United States Supreme Court's decision and rationale in *Midkiff*, the federal District Court for the District of Hawai'i in *Richardson I* found that the issue of *condominium* mandatory leasehold conversion by use of eminent domain

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[55] *Richardson I*, 802 F. Supp. at 339.

[56] HONOLULU, HAW., REV. ORDINANCES ch. 38 §§ 1.1, 2.2 (1991).

[57] *Id.* § 2.2. Specifically, Chapter 38 requires "at least 25 of all the condominium owners within the development or at least owners of 50 percent of the condominium units, whichever number is less" to trigger condemnation action. *Id.*

[58] HONOLULU, HAW., REV. ORDINANCES ch. 38, § 1.1 (1991).

[59] HONOLULU, HAW., REV. ORDINANCES ch. 38, § 2.2 (1991).

[60] In order to qualify for fee simple purchase, the lessee must be a bona fide resident of the City & County of Honolulu, at least 18 years of age, an owner-occupant of the unit in issue, have legal or equitable title to the leased property, not own any property in fee simple suitable for residential purposes in the City & County of Honolulu, and submit the application in good faith to the Hawai'i Housing Authority. *Id.* § 2.4 (1991).

[61] *Id.* § 2.3.

[62] Richardson v. City & County of Honolulu, 802 F. Supp. 326, 328 (D. Haw. 1992).

[63] *Id.* at 341; Richardson v. City & County of Honolulu, 124 F.3d 1150, 1156 (9th Cir. 1997).

[64] *Richardson I*, 802 F. Supp. at 339; *Richardson II*, 124 F.3d at 1156-58.

was "thoroughly addressed" in *Midkiff*.[65] The court thus noted that no further discussion was necessary.[66] Similarly, the court dismissed the landowners' "public use" arguments as meritless, based on the ordinance's striking resemblance to HLRA, which the *Midkiff* Court deemed constitutional.[67] Despite its use of this rationale, the district court failed to produce any findings that the condominium market was, in fact, dominated by large landowners to justify its holding, unlike the *Midkiff* Court.[68]

In upholding the constitutionality of HLRA, the district court reiterated and emphasized the "substantial deference which should be accorded to the relevant legislative body in the area of public use."[69] The court rebuffed the Bishop Estate's attempts to distinguish application of HLRA in the single family residential versus condominium settings.[70] Even though the court conceded that the concentration of ownership in leasehold condominiums "may not be as drastic as the land oligopoly which prompted the Land Reform Act,"[71] it nevertheless concluded that "this contention does not undermine the City's determination that permitting leasehold condominium owners to purchase the underlying property serves a legitimate public purpose."[72]

Five years later, in *Richardson II*, the Ninth Circuit addressed whether mandatory leasehold conversion for condominiums satisfied a valid public purpose as mandated by the Public Use Clauses of the U.S. and Hawai'i

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[65] *Richardson I*, 802 F. Supp. at 339. Specifically, the court relied upon HLRA's purpose of dismantling Hawai'i's existing land oligopoly in its decision to uphold the constitutionality and public purpose finding in mandatory condominium conversions. *Id.* at 340.

[66] *Id.* at 340-41.

[67] *Richardson I*, 802 F. Supp. at 339-41. Landowners argued that the public purpose behind Chapter 38 was without reasonable foundation, based on a faulty assumption that a concentration of land ownership underlying condominiums reflected that which justified HLRA. *Id.* at 340-41; *see also Richardson II*, 124 F.3d at 1157.

[68] *Richardson I*, 802 F. Supp. at 339-41. The *Richardson I* court did note that "in 1987 the land underlying 45% of the condominium projects in the state was owned by only 51 lessors," based on statistics provided by Kamehameha Schools Bishop Estate. Id. at 339, n.24. However, the court failed to consider that in 1987, "[f]ourteen of the top 39 owners h[e]ld fee title to lands under only one condominium project" and that "only twenty entities . . . h[e]ld individually the fee simple title to lands under more than .5 per cent of condominium projects." *Sakai*, supra note 45 at 18; *see also* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 232 (1984).

[69] *Richardson I*, 802 F. Supp. at 341 (citing *Midkiff*, 467 U.S. at 239-43). Substantial differences exist between multi-family (condominium) and single family residential lots. SAKAI, *supra* note 45 at 35; *see supra* note 48 and accompanying text. In *Midkiff*, the Court upheld HLRA's application of mandatory conversion only to single family residential houselots. *Richardson I*, 802 F. Supp. at 341.

[70] *Richardson I*, 802 F. Supp. at 340-41.

[71] *Id.* at 341.

[72] *Id.*

Constitutions.[73] The court rejected landowners' arguments that the public purpose of Chapter 38 was not satisfied, maintaining that the City's purpose in enacting Chapter 38 was not to dismantle a land oligopoly.[74] Rather, its goal was to redress problems in the real estate market and prevent potential causes of "economic instability and disruption."[75] The court supported its decision by relying primarily on the City's findings that a close relationship between monetary land values and the strength of the economy existed, and that "residential condominium . . . development land values, artificially inflated by concentrated or single ownership, market conditions or other factors, skew[ed] Oahu's economy towards unnecessarily high levels."[76] The court further substantiated its holding by relying on a legislative study which indicated that "the concentration of ownership of land underneath condominiums is greater than the concentration of land ownership throughout the state at the time *Midkiff* was decided."[77] However, in drawing this strong conclusion on which it based the dismissal of the plaintiff-landowners' claims, the court ignored the researcher's crucial notation that "[HLRA] . . . is "*not automatically transferable* to land under condominiums . . . [l]and area for condominiums . . . is less likely to be important than for single-family residences due simply to their different natures."[78] Accordingly, the *Richardson* cases suggest courts' unwillingness to deviate from the *Midkiff* model, regardless of circumstances or effect.[79]

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[73] *Richardson v. City & County of Honolulu*, 124 F. 3d 1150, 1156; U.S. CONST. amend V; HAW. CONST. art. I, § 20.

[74] *Richardson II*, 124 F.3d at 1158.

[75] *Id.* at 1156. The Honolulu City Council determined that landowners who had "generally refused" to sell their fee simple interests were responsible for causing a state of concentrated land ownership and creating market conditions, thereby inflating land values. *Id.*

[76] *Id.* at 1158.

[77] *Id.*; *see* SAKAI, *supra* note 45, at 35. This study, which the Honolulu City Council relied upon, was the same study as the Hawai'i Legislature did in their refusal to extend HLRA to condominium properties. SAKAI, *supra* note 45, at 1; *Richardson II*, 124 F.3d at 1159.

[78] SAKAI, *supra* note 45, at 35 (emphasis added); *see also supra* Section II.C. Sakai also advised those who viewed condominium statistics to keep such differing factors in mind. SAKAI, *supra* note 45, at 6.

[79] *See Richardson II*, 124 F.3d at 1158-59; *see also* Thomas W. Merrill, Article, *The Economics of Public Use*, 72 CORNELL L. REV 61 (1986). A survey conducted by Professor Merrill rendered findings that on average, 84.7% of public use determinations are found to satisfy a public use, "[g]iven *Berman*'s and *Midkiff*'s assertion that a legislative public use determination is virtually dispositive of the issue." *Id.* at 96; *see also Takings*, *supra* note 6 at 442-43 ("[s]o far . . . successful challenges to physical takings claims based on public use or purpose grounds have been few and far between").

E. Coon v. City and County of Honolulu

Even after the *Richardson* cases, landowners' challenges to Chapter 38 continued to surface.[80] In 2002, the Hawai'i Supreme Court addressed the Honolulu City Council's flawed interpretation of Chapter 38's threshold condemnation requirement in *Coon v. City & County of Honolulu*.[81] It recognized disparate numbers of lessees eligible under Chapter 38, depending on word construction.[82] Chapter 38 "allows the City to exercise [its] eminent domain powers to condemn property once the lesser of 25 owners of a condominium or 50% of the owners of a condominium development have applied."[83] The Hawai'i Supreme Court reversed an earlier circuit court ruling, explaining that the circuit court had misconstrued Chapter 38 in determining the minimum number of applicants necessary to commence the ordinance's conversion process.[84] Consequently, the court declared that Chapter 38 "impermissibly lowers" the minimum number of applicants necessary to initiate condominium condemnation proceedings.[85] The court acknowledged Chapter 38's objective of allowing only *in bulk* condemnations.[86]

Although not at issue, the Hawai'i Supreme Court seemingly accepted the constitutionality of Chapter 38 on public purpose grounds.[87] It noted that if condemnations were allowed on an *ad hoc* unit-by-unit basis, "incremental benefit to the public of the expenditure of public resources would be marginal."[88] The court added that condemnation in bulk was intended to further the HLRA's "public purposes."[89] This suggests the court's belief that condominium condemnation in bulk *would* satisfy a public purpose. Even so,

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[80] *See, e.g.*, Small Landowners of Oahu v. City & County of Honolulu, 832 F. Supp. 1404 (D. Haw. 1993); Coon v. City & County of Honolulu, 98 Hawai'i 233; 47 P.3d 348 (2002).

[81] *See Coon*, 98 Hawai'i 233, 246-47; 47 P.3d 348, 361-62.

[82] *Id.* at 247, 47 P.3d at 362.

[83] *Id.* at 248, 47 P.3d at 363.

[84] *Id.* at 239, 47 P.3d at 354.

[85] *Id.* at 247, 47 P.3d at 362. The circuit court held Chapter 38 to be constitutional as applied using the definition of "owner-occupants." *Id.* at 248, 47 P.3d at 363. The city misapplied their eminent domain powers by allowing a lesser threshold to begin condemnation proceedings than was originally intended. *See id.* at 251, 47 P.3d at 366.

[86] *Coon* provided for condemnation in bulk, as opposed to an ad hoc, unit-by-unit basis. *Id.* at 249, 47 P.3d at 364. Although "in bulk" is not specifically defined, the Hawai'i Supreme Court acknowledged the city council's reluctance to extend Chapter 38 to condominium developments of under ten units and to fewer than twenty-five owner occupants. *Id.* at 364-65, 47 P.3d at 249-50.

[87] *Id.* at 250-51, 47 P.3d at 365-66.

[88] *See id.* at 250, 47 P.3d at 365; *see also* Hous. Fin. & Dev. Corp. v. Takabuki, 82 Hawai'i 172, 178, 921 P.2d 92, 98 (1996) (explaining that conversion of a single houselot by use of HLRA would be in "complete disharmony" with the statutory scheme).

[89] *Coon*, 98 Hawai'i at 251, 47 P.3d at 366.

the court's analysis failed to consider the dissimilar state of single family residential and condominium ownership and how, if at all, *condominium* lease-to-fee conversion furthers any unique public purpose.

III. Recent City Council Action and Public Response

A. Bill 53 and Public Response

In 2002, City and County of Honolulu Councilman John Henry Felix, a longtime advocate of mandatory leasehold conversion for condominiums, proposed Bill 53. Bill 53 sought to clarify the city's intent behind Chapter 38 and justify the city's "relaxed" application and misinterpretation of the 1991 law.[90] If enacted, Bill 53 allowed "the owner-occupants of at least 50 percent of the owner-occupied units" or "[t]wenty-five of all the condominium owners" to initiate mandatory fee sale of the land underlying their condominiums.[91] In effect, Bill 53 relaxed condemnation requirements in favor of lessees.

Bill 53 caused widespread controversy and generated overwhelming public opposition.[92] At the heart of the controversy was whether eight of fourteen owner-occupants qualified for mandatory conversion in Foster Towers, a 141-unit Waikiki condominium.[93] The governing ordinance required either twenty-

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[90] *See* B. 53, 2002 City Council, 11th Sess. (Honolulu 2002); Gordon Y.K. Pang, *Bill Aims to Ease Lease Conversions*, Honolulu Star-Bull., July 4, 2002, *available at* http://starbulletin.com/2002/07/04/news/story15.html (last visited Oct. 24, 2002); Vicki Viotti & Treena Shapiro, *Lease-to-Fee Suffers Setback*, Honolulu Advertiser, Oct. 9, 2002, at B1. According to the *Coon* decision, the city misinterpreted the condominium conversion law. *Coon*, 98 Hawai'i 233, 47 P.3d 348.

[91] B. 53, 2002 City Council, 11th Sess. (Honolulu 2002).

[92] *See* Treena Shapiro, *Repeal of Leasehold Law Likely to Fail*, Honolulu Advertiser, Oct. 16, 2002, at B1. On October 15, 2002, Councilman DeSoto recieved a petition from Kupa'a, a task force organized to defeat Bill 53, signed by 3,700 individuals who opposed mandatory leasehold conversion. *Id.* On a hearing for Bill 53 held on October 9, 2002, "more than three-quarters of the 121 who signed up to testify opposed the legislation." Treena Shapiro, *Condo Bill Placed on Hold*, Honolulu Advertiser, Oct. 10, 2002, at B1 [hereinafter *Condo Bill*]. At the July 17, 2002 hearing, "nearly all" of the more than ninety people who testified opposed the bill. Gordon Y.K. Pang, *Council Votes to Advance Leasehold Conversion Bill*, Honolulu Star-Bull., July 18, 2002 at A1.

[93] Gordon Y.K. Pang, *Property Battle Lines*, Honolulu Star-Bull., Oct. 6, 2002 at A1 [hereinafter *Battle Lines*]. Foster Towers, and its underlying land, is owned in fee simple by the Queen Lili'uokalani Trust ("QLT") a charitable organization. *The Living Nation: Bill 53*, *supra* note 47. QLT owns four leasehold towers in Waikiki, bringing in annual revenue of $15 million, which comprises fifteen percent of QLT's total revenue. *Id.* This income funds over 300 social service programs. The QLT also provides assistance to over 9,000 orphaned and destitute children in Hawai'i. *Id.* Queen Lili'uokalani owned the Waikiki parcel on which Foster Towers now sits. *Id.*

five owners or fifty percent of the units to initiate condemnation proceedings.[94] On October 9, 2002, the City Council deferred Bill 53 "indefinitely," due to a lack of support for the measure.[95]

B. Condominium Conversion Allowed

In one of the final Honolulu City Council meetings of 2002, held on December 4, 2002, council members voted on whether to initiate condemnation proceedings for three Honolulu condominiums.[96] Lessees petitioned the council to begin the condemnation process on the Kahala Beach, Admiral Thomas, and Camelot condominium projects, owned by Kamehameha Schools Bishop Estate, the First United Methodist Church, the Kekuku family estate, and the Catholic Church's Sisters of the Sacred Heart.[97] Although they faced "a firestorm of emotional opposition" to the conversions, council members voted 5-4 in favor of mandatory conversion for these Honolulu condominiums.[98]

The Honolulu City Council has thus demonstrated its willingness to allow condemnation proceedings for these condominiums. Notwithstanding this position, however, mandatory leasehold conversion for condominiums will likely continue to be an issue of controversy and concern in the coming years.[99]

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[94] HONOLULU, HAW., REV. ORDINANCES ch. 38 § 2.2 (1991).

[95] Viotti & Shapiro, *supra* note 90. Although council members supporting passage of the bill had a slight majority 5-4, on October 9, 2002, Councilman Gary Okino, the "swing vote," withdrew his support for Bill 53. *Id.* Thus, the Bill's author, Councilman John Henry Felix, declared that it would be "deferred indefinitely." *Id.* Just two weeks after the council voted to defer Bill 53, Councilman John DeSoto, a vocal opponent of mandatory condominium conversion, proposed Bill 82. *See Condo Bill, supra* note 92. If passed, Bill 82 would have repealed Chapter 38, the existing condominium conversion law. B. 82, 2002 City Council, 11th Sess. (Honolulu 2002). The council immediately defeated this bill upon introduction in a 5-4 decision. Gordon Y.K. Pang, *Council Lets Conversion Law Stand,* HONOLULU STAR-BULL., Oct. 17, 2002, at A3.

[96] Crystal Kua, *Council OKs Leasehold Conversion at 3 Condos.* HONOLULU STAR-BULL., Dec. 5, 2002, at A1.

[97] *See* Kua, *supra* note 96. The First United Methodist Church operates a food bank and preschool while Kamehameha Schools Bishop Estate provides educational programs. *Id.*

[98] Kua, *supra* note 96; *Council Should Move on Leasehold Conversions,* HONOLULU ADVERTISER, Dec. 4, 2002, at A16 [hereinafter *Council Should Move*]. The majority, consisting of over 100 speakers, advocated against the measures in a nine hour meeting with city council members. Treena Shapiro, *Council Approves Forced Conversion of Condo Leaseholds,* HONOLULU ADVERTISER, Dec. 5, 2002, at A1 [hereinafter *Forced Conversion*]. The mass of opponents of leasehold conversion allowed "standing room only" and carried signs reading "No condemnation. Keep the Land." and "Our land, Our legacy." *Id.*

[99] Notably, Duke Bainum, John Henry Felix, Steve Holmes, and Jon Yoshimura, four of the five advocates of leasehold conversion, have left the City Council as of December 2002 due

IV. ANALYSIS

A. State of Condominium Ownership in Hawai'i

The state of condominium fee simple land ownership in Hawai'i differs greatly from the residential fee simple properties in *Midkiff*.[100] In *Midkiff*, the Court found that 22 landowners owned 72.5% of all residential fee simple titles on Oahu.[101] Conversely, in the fee simple condominium market, two large landowners hold only twenty-one percent of fee simple Hawai'i condominium titles.[102] The remainder is owned by small landowners, rather than large landowners or estates.[103] Transferring land from these small landowners to other small landowners severely undermines the legislature's stated and City Council's adopted purpose of diluting land ownership.[104]

The Honolulu City Council determined that there was a "serious shortage" of fee simple residential condominium land, which led to inflation and decreased the public's ability to afford housing.[105] This finding provided grounds for the city council's passage of Chapter 38 in 1991.[106] Since then, however, the condominium ownership situation has changed substantially. For example, in 1991, Kamehameha Schools Bishop Estate instituted a voluntary sales program in which it made 12,000 fee simple condominium units available for purchase.[107] By 2002, eleven years later, 7,000 of those units

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to expired terms. Treena Shapiro, *Convictions May Taint City Council's Legacy*, HONOLULU ADVERTISER, Dec. 27, 2002, at A1. Council chairman John DeSoto, a staunch opponent of condominium mandatory lease-to-fee conversion, has also left due to an expired term. *Id.*

[100] *See* SAKAI, supra note 45, at 6 (emphasizing that condominiums "inherently differ greatly from single family residences for purposes of land reform").

[101] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 232 (1984).

[102] *See* SAKAI, supra note 45, at 34. Specifically, 18.5% of the fee simple land is owned by Kamehameha Schools Bishop Estate, followed by the Magoon Estate, which owns 2.5% of fee simple lands underlying condominiums. *Id.* In contrast to the *Midkiff* finding, the 1987 legislative study determined that 26,111 individuals or entities hold fee simple title to the lands beneath leasehold condominium units. *Id.* at 35. Of these owners, the top thirty-nine own thirty-five percent of all leasehold and fee simple units across the state, a striking dissimilarity to the *Midkiff* findings. *Id.*

[103] Ezra, O'Connor, Moon & Tam, *Leasehold Conversion of Condominiums and Cooperative Housing Projects Phase I* 47 (1987) (indicating that eighty-nine percent of condominium and co-op landowners own land under only one project).

[104] See generally The Living Nation: Bill 53, supra note 47.

[105] Coon v. City & County of Honolulu, 98 Hawai'i at 249, 47 P.3d at 364; *see supra* Section II.C.

[106] *Id.*

[107] *The Living Nation: Bill 53*, *supra* note 47; *see also* Shapiro, *Dispute*, *supra* note 47 (verifying that Kamehameha Schools Bishop Estate has voluntarily offered condominium units

were purchased, while 5,000 remained available.[108] Likewise, according to the 2001 *State of Hawaii Data Book*, 6,179 condominium properties were listed for sale in 2001.[109] These figures suggest an availability of fee simple condominium ownership and that large estates do not dominate land ownership.

Governor Linda Lingle also recognized the different circumstances which produced HLRA and those which currently exist in mandatory condominium lease-to-fee conversion.[110] On December 5, 2002, in response to the Honolulu City Council's decision to initiative condemnation proceedings for the Kahala Beach, Admiral Thomas, and Camelot Condominiums, the Governor issued a statement reading:

> [t]he original intent of land reform legislation was to break up land holdings of large landowners and increase market competition to make housing more affordable for Hawaii's families. Our state's social and economic landscape has evolved dramatically, and I am extremely concerned about the impact mandatory lease-to-fee conversion could have on small landowners, charitable trusts, and Hawaii's already anti-business reputation.[111]

In addition, Governor Lingle urged the Honolulu City Council to "examine this issue in more detail before any further action is taken that could result in irreparable consequences for the public at large."[112] Likewise, Council Member Gary Okino promised to create a task force to review whether Chapter 38 is flawed.[113] These expressed uncertainties of Hawa'i's leaders indicates Hawai'i's pressing need to reexamine Chapter 38's necessity and constitutionality.[114]

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for sale).

[108] *The Living Nation: Bill 53*, *supra* note 47.

[109] DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM, *STATE OF HAWAII DATA BOOK: A STATISTICAL ABSTRACT* tbl.21.25 (2001).

[110] Treena Shapiro, *Forced Leasehold Conversion Passes*, HONOLULU ADVERTISER, Dec. 5, 2002, at A1 [hereinafter *Conversion Passes*].

[111] *Id.*

[112] Kua, *supra* note 96.

[113] *Conversion Passes*, *supra* note 110.

[114] *See also infra* note 235 and accompanying text. In the 2003 legislative session, Senator Brian Taniguchi proposed a bill that would amend HRS § 46-1.5. The statute provided that "Each county shall have the power of condemnation by eminent domain when it is in the public interest to do so." HAW. REV. STAT. § 46-1.5 (1991). Proposed Senate Bill 1468 placed a limitation on that power, providing that "the power shall not be exercised to assist any owner of a residential condominium leasehold in acquiring the leased fee interest appurtenant to the leasehold interest." S.B. 1468, 22nd Leg., Reg. Sess. (Haw. 2003). Thus, S.B. 1468 would have essentially repealed Chapter 38. However, despite passage in the Senate, the measure failed to secure a public hearing after Second Reading in the House.

B. Arguments For and Against Condominium Leasehold Conversion

1. Valid public purpose

The apparent availability of fee simple condominium units fails to quell the condominium leasehold conversion fire. Armed with persuasive arguments, advocates from both sides have vehemently urged the city council to rule in their favor. Proponents of condominium leasehold conversion emphasize that both state and federal courts have upheld mandatory leasehold conversion's valid public purpose finding for both single family residential and condominium properties as a proper use of the state's condemnation power.[115] More specifically, the "[r]edistribution of fees simple to correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly is a rational exercise of the eminent domain power."[116] Further, the Hawai'i Legislature found that allowing for the sale of property to lessees fulfills a valid public purpose.[117]

Alternatively, condominium lessors maintain that despite the apparent constitutionality of single-family residential leasehold conversion, no corresponding public purpose exists in the condominium setting as essentially no land oligopoly exists.[118] Opponents of mandatory conversion characterize the transfer as one for a purely private benefit.[119] Chapter 38 enables lessees to purchase their condominium units in fee simple, for their private benefit and use. As stated by the Hawai'i Supreme Court in 1985:

> Article 1, section 20, vests the state with the right of eminent domain empowering it to take private property for public use with payment of just compensation, but the provision may not be read to justify expropriation for a strictly private use or purpose. Legislative enactments authorizing such takings cannot pass constitutional muster and must be struck down.[120]

Considering this, opponents of condominium leasehold conversion argue that no requisite "public use" is met because the converted properties confer

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[115] *See, e.g.*, Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984). Small Landowners of Oahu v. City & County of Honolulu, 832 F. Supp. 1404 (D. Haw. 1993); Richardson v. City & County of Honolulu, 802 F. Supp. 326 (D. Haw. 1992). *Id.*; *see also* Richardson v. City & County of Honolulu, 124 F.3d 1150 (9th Cir. 1997).

[116] Hous. Fin. & Dev. Corp. v. Castle, 79 Hawai'i 64, 83, 898 P.2d 576, 595 (1995).

[117] *Midkiff*, 467 U.S. at 245.

[118] *See Richardson II*, 124 F.3d at 1158; *supra* Section IV.A.

[119] *Castle*, 79 Hawai'i at 84, 898 P.2d at 596; Haw. Hous. Auth. v. Lyman, 68 Haw. 55, 67, 704 P.2d 888, 895 (1985). Landowners characterized HLRA as a "thinly veiled attempt to divest large private landowners without an appreciable public benefit." *Id.*

[120] *Lyman*, 68 Haw. at 67, 704 P.2d at 895 (1985). *See* HAW. CONST. art. I, § 20 ("[p]rivate property shall not be taken or damaged for public use without just compensation").

no concrete use upon the public.[121] Although *Midkiff* approved such transfers despite an apparent private use, the *Midkiff*'s rationale should not be applicable in the condominium setting.[122] The facts in *Midkiff* differ greatly from those that supported passage of Chapter 38.[123] Chapter 38 was thus enacted on flawed grounds. Furthermore, even if legitimate, the reasons for which Chapter 38 was enacted no longer remain--fee simple housing options are widely available.[124] Moreover, allowing lessees to purchase the land in fee simple from a small landowner by condemnation frustrates the purposes behind Chapter 38.[125]

Also, it appears that developers are now wary of offering leased properties for fear that the land will later undergo condemnation.[126] In consequence, a predominantly fee simple condominium market emerges, which forces a staggering portion of the public to rent their homes.[127] In addition, the Bank of Hawai'i predicted in its 1998 annual report that, due to the uncertainty of lease-to-fee conversions, it is likely that in the future, developers and landowners will build only fee simple condominiums in Hawai'i.[128] It thus appears that Chapter 38 has, at least indirectly, significantly decreased home ownership opportunities.[129] The people of Hawai'i must either rent their

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[121] *See, e.g.*, Small Landowners of Oahu v. City & County of Honolulu, 832 F. Supp. 1404, 1411 (D. Haw. 1993).

[122] *Midkiff*, 467 U.S. at 243-44.

[123] *See supra* note 48 and accompanying text.

[124] *See supra* 107-09 and accompanying text.

[125] *See* Richardson v. City & County of Honolulu, 802 F. Supp. 326, 340 (D. Haw. 1992). *See also supra* discussion Section II.C.

[126] *See* Bank of Hawaii, *Hawaii Annual Economic Report*, *available at* http://www.boh.com/econ/aer/1998/aer_nav3.asp (last visited Feb. 5, 2003) [hereinafter *Economic Report*].

[127] Interview with Benjamin A. Kudo, Partner, Imanaka Kudo & Fujimoto, in Honolulu, Haw. (Oct. 15, 2002). Across the state, in 2000, 175,352 of 403,240 occupied housing units were occupied by renters. DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM, *STATE OF HAWAII DATA BOOK: A STATISTICAL ABSTRACT* tbl.21.15 (2001).

[128] *Economic Report*, *supra* note 126 ("land tenure uncertainties in the wake of court decisions supporting mandatory lease-to-fee conversion of leasehold condominiums makes it likely that only fee-simple condominiums will be built in any construction recovery"). This is validated by 2001 *Hawai'i Data Book* statistics which showed that of condominium units sold in 2001, 3,063 were fee simple and 1,198 were leasehold. DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM, *STATE OF HAWAII DATA BOOK: A STATISTICAL ABSTRACT* tbl.21.27 (2001).

[129] *See, e.g.*, James Mee, Editorial, *This Land is My Land: Mandatory Lease-to-Fee Conversion is Obsolete*, HONOLULU STAR-BULL., Oct. 20, 2002, at D1 ("Does mandatory conversion really achieve its public purpose to provide affordable fee-simple housing? The empirical evidence indicates the opposite. For example, forced fee conversion in Kahala created a speculative market, which contributed in significant part to the Japanese investment bubble.").

homes or purchase property in fee simple, visibly frustrating Chapter 38's purpose.

2. Rent renegotiation and disproportionate increases

Lessees cling to the argument that mandatory condominium leasehold conversion is instrumental in remedying the problem associated with endless rent negotiation and allows them to keep the value of their improvements to the property.[130] Chapter 38 allows lessees to avoid paying disproportionate rent increases, which often skyrocket exponentially when lease terms expire.[131] In many instances, rent increases are substantial.[132] Yet, many lessees have for years enjoyed reduced lease rents, which have remained at rates as low as $1 per month despite the "rapid rise in Hawaiian land prices."[133] Phyllis Zerbe, representative for the Small Landowners Association of Hawaii, explained that "[l]andowners . . . did not complain about being locked into 'miniscule' lease rents 'even if we saw inflation make our lease rents worth next to nothing."[134] Thus, lessees "should not complain about abiding by their contracts."[135]

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[130] The City Council found that the leasehold condominium system allowing lessors to renegotiate large rent increases and avoid surrendering improvements on their land constituted a valid public purpose. More precisely, the City Council determined that the Ordinance passed the rational basis test, as "[t]ransferring the fee simple title to the lessees will end the problem of gouging lessees on lease rent negotiations . . . will force sales by unwilling lessors . . . [and] will allow lessees to keep the value of their improvements on the land." Small Landowners of Oahu v. City & County of Honolulu, 832 F. Supp. 1404, 1410 (D. Haw. 1993).

[131] Lessees say that such increases come at a time in their life when they can least afford rising lease rents and renegotiation of rents, making purchase in fee a better alternative. *See* Treena Shapiro, *Council Takes Final Vote on Leasehold Conversions*, HONOLULU ADVERTISER, Dec. 1, 2002, at A25 [hereinafter *Final Vote*].

[132] Often, rent increases rise to "several hundred times greater than the initial fixed rent." Richardson v. City & County of Honolulu, 124 F.3d 1150, 1163 (9th Cir. 1997). In "some instances, renegotiations have resulted in lease rents that have increased over 1,000 percent." *Id.* at 1155.

[133] *Id.* at 1163. *See, e.g.*, Gordon Y.K. Pang, *City May Sell Leased-Fee Interest in Kukui Plaza*, HONOLULU STAR-BULL., Jan. 10, 2000 *available at* http://starbulletin.com/2000/01/10/news/story1.html (last visited Oct. 22, 2002). In 2000, lessees in Kukui Plaza, a city-owned downtown condominium, enjoyed a fixed lease rent at $1 a month. *Id.* Similarly, as of October 2002, lessors of the forty-five unit Alika condominium in Makiki collected, for some units, $42 in monthly rent. *Battle Lines*, *supra* note 93. The median rent in Honolulu for renter-occupied units in was $615 in 1990 and $802 in 2000. DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM, *STATE OF HAWAII DATA BOOK: A STATISTICAL ABSTRACT* 528 (1991); DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM, *STATE OF HAWAII DATA BOOK: A STATISTICAL ABSTRACT* tbl.21.16 (2001)

[134] *Battle Lines*, *supra* note 93.

[135] *Id.*

Lessors maintain that during the lease period, lessees should have prepared to move elsewhere.[136]

Additionally, *Richardson I* and *II* addressed the constitutionality of a 1991 ordinance which sought to maintain affordable owner-occupied housing.[137] However, the Ninth Circuit, despite upholding Chapter 38's constitutionality, struck down rent control Ordinance 91-96.[138] If upheld, Ordinance 91-96 would have restricted renegotiated lease rents to the initial rent multiplied by a "rent factor."[139] Since then, the Hawai'i Legislature and Honolulu City Council have failed to protect lessees from rising lease rent. If the concern were considerable enough, and the need justified, the Hawai'i Legislature or City Council would have probably passed such protective measures.

Realtor Michael Pang has represented lessees in more than 150 condominium conversion actions.[140] Pang asserts that the leasehold problems today are directly attributable to a shortsightedness, years ago, on the part of both lessees and lessors.[141] The lessors did not foresee the social ramifications of people being displaced from homes at the end of lease terms.[142] In addition, they chose to continue to offer their properties in leased fee interests despite their awareness of HLRA and Chapter 38.[143] However, lessees failed to foresee what would follow after their lease term expired, as well as the possibility of lease rent renegotiation, and the problems associated with affording increased rent when living on fixed incomes.[144] Many lessees further failed to consider the possibility of relocation in their final years.[145]

3. Just compensation and reinvestment opportunities

Lessees maintain that, in purchasing title in fee simple, condominium lessor-landowners receive, as required by the Constitution, "just compensation"–fair market value for their property, which can be used to reinvest in more

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[136] Gordon Y.K. Pang, *Pro and Con*, HONOLULU STAR-BULL., Oct. 6, 2002, at A1.

[137] *See* Richardson v. City & County of Honolulu, 124 F.3d 1150, 1163-64 (9th Cir. 1997); Richardson v. City & County of Honolulu, 802 F. Supp. 326, 339 (D. Haw. 1992).

[138] *Richardson II*, 124 F.3d at 1164-66 (holding that Ordinance 91-96 failed to "substantially advance" the legitimate state interest of maintaining affordable owner occupied housing).

[139] *Id.* at 1163. The rent factor is the number obtained by dividing the average consumer price index ("CPI") from the date of the initial lease by the average CPI at the time of renegotiation. *Id.*

[140] Michael Pang, Editorial, *This Land is My Land: Leasehold Conversion is Difficult But Necessary*, HONOLULU STAR-BULL., Oct. 20, 2002, at D1 [hereinafter *Difficult but Necessary*].

[141] Id.

[142] *Id.*

[143] *Id.*

[144] *See Forced Conversion*, supra note 98; *Battle Lines*, *supra* note 93.

[145] *See Forced Conversion*, *supra* note 98; *Final Vote*, *supra* note 131.

productive assets.[146] Because of rising property values, landowners often receive more than what they paid for the same parcel.[147] In fact, lessees argue that many condominium lessors voluntarily sell leased fee investments for this very reason.[148] Conversely, lessors reject these arguments, explaining that their decision to voluntarily sell condominium fee interests came as a result of the "tremendous" legal and time costs in addition to heavy emotional strain.[149] Moreover, lessors contend that leasehold conversion is "akin to stealing," because amounts offered for purchase of fee simple lands are "nowhere near" the fair market value of the property."[150]

4. Emotional ties to the land

Proponents of condominium leasehold conversion argue that property is fungible and that landowners should accept monetary compensation and reinvest in another parcel.[151] Opponents, however, emphasize Hawai'i's unique land situation.[152] Because all lands trace back to the Hawaiian monarchy, strong emotional ties to the land underlying the property often exist.[153] To Hawaiians, dispossessing them of the land passed down by ancestors severs the unique "umbilical cord" between their land, ancestors and future generations—an "irreparable injury."[154] Haunani Apoliona, chairwoman of the Office of Hawaiian Affairs explained, "[t]he legacy of the land is something that does not translate into dollars."[155] This emotional connection of landowners to their parcels often runs strong in non-Hawaiians as well.[156] In many instances, arguably the majority of O'ahu's condominiums, grandparents and great-grandparents invested in the properties,

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[146] Michael Pang, Editorial, *Fee Conversion Allows for Wiser Investments*, HONOLULU STAR-BULL., Sept. 29, 2002, at D1; *see also Difficult But Necessary*, *supra* note 140.

[147] *See id.*

[148] *Id.*

[149] *The Living Nation: Bill 53*, *supra* note 47.

[150] *Final Vote*, *supra* note 131. For example, First United Methodist Church, the owner of the Admiral Thomas Apartments, states that the $1.2 million offered for the twenty-seven units seeking to convert pales in comparison to the property's actual worth. *Id.*

[151] *See supra* note 146 and accompanying text.

[152] *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 231-233 (1984).

[153] *Id.*

[154] Powerpoint Presentation: *Onipa'a: Preserving Queen Lili'uokalani's Legacy: The Social and Economic Impacts of Mandatory Leasehold Conversion* (Queen Lili'uokalani Trust 2002) (on file with the author).

[155] *Condo Bill*, *supra* note 92.

[156] *See, e.g.*, Estelle E. Kaya, Letters and Commentary, *Lease-Fee Conversion was Win-Win Situation*, HONOLULU ADVERTISER, Nov. 27, 2002, at A17.

intending for them to be a continuous source of income for later generations.[157] In these cases, a lump sum monetary award of any amount is wholly insufficient.[158]

5. Mandatory conversion limits future development

An equally compelling argument against mandatory conversion is that it severely limits a landowner's right to fully enjoy his property. The concept of "property" encompasses not only its ownership and possession, but the unrestricted right to use, enjoy, and dispose of it.[159] Specifically, mandatory conversion restricts future development and the right to alienate, thus removing a large stick in the "bundle" of property rights.[160] Once a condominium unit is sold to a lessee in fee simple, the landowner is forced to enter into a forced cotenancy and business partnership with that lessee.[161] As cotenants and business partners, the new minority holders obtain the right to "block" future development, because they must approve any proposed modifications to or sale of the property.[162] Although paid the fair market value, landowners' exercise of control over their land is thus severely limited by others' interests in the property whether it be substantial or marginal.[163] "Market value is not limited to the value for the use to which the land is actually devoted, but it may have a potential use value . . . [which] may be considered . . . ."[164] In this respect, condominium lessors who are later forced to negotiate and sell the units to lessees may receive a far less amount as a result of condemnation than what the property's actual or potential future worth could otherwise render.

6. Tax consequences

Notwithstanding landowners' emotional ties to their land, they may not wish to sell their property, which would force them to relinquish steady income in an unstable investment world. For landowners, the lease rent is "stable and

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[157] *See, e.g.*, Editorial, *Council Should Move*, *supra* note 98; *see also* Kaya, *supra* note 152; *Battle Lines*, *supra* note 93.

[158] *See supra* notes 154-55 and accompanying text.

[159] Manufactured Hous. Communities of Wash. v. State, 13 P.3d 183, 191 (Wash. 2000) (citations omitted).

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

[161] Telephone Interview with James Mee, Partner, Ashford & Wriston (Nov. 19, 2002); Interview with Benjamin A. Kudo, Partner, Imanaka Kudo & Fujimoto, in Honolulu, Haw. (Oct. 15, 2002).

[162] *See Battle Lines*, *supra* note 93.

[163] Telephone Interview with James Mee, Partner, Ashford & Wriston (Nov. 19, 2002).

[164] Haw. Hous. Auth. v. Rodrigues, 43 Haw. 195, 197 (1959).

predictable revenue."[165] Furthermore, landowners whose property transfers by mandatory conversion must reinvest in a "like" property, within a specified period of time, or face severe tax consequences.[166] Notably, however, when promulgating HLRA, the Hawai'i Legislature was concerned about the federal tax consequences landowners would face under both voluntary and involuntary transfers.[167] After concluding that federal tax consequences would be less harsh upon landowners if transfers of their property were involuntary, the Legislature mandated involuntary lease-to-fee conversion.[168] This demonstrates the Legislature's reluctance to place additional tax penalties on landowners whose properties are condemned. Thus, the likely tax consequences of forced leasehold conversion would seemingly contradict legislative intent behind HLRA.

7. Fundamental fairness

Perhaps condominium landowners' most compelling argument is that mandatory conversion is fundamentally unfair. In 2002, City Council Member Ann Kobayashi, recognized this position, pointing out that "for years [opponents of condominium leasehold conversion have] been coming out . . . there must be something wrong with this law that every time we discuss it so many people come out. There must be something unfair."[169]

More significantly, however, the importance of fairness was noted in *Midkiff* and echoed by the Ninth Circuit in *Richardson II*.[170] "[T]he requirement of just compensation ensures that individuals will not be forced to bear public burdens, which in all fairness should be borne by the public as a whole."[171] The condominium fee simple market in Hawai'i is dominated by small landowners, unlike the *Midkiff* landowners.[172] As stated by the Ninth Circuit

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[165] *Conversion Passes*, *supra* note 110.

[166] 26 U.S.C. § 1033 (a)(1) (2000); Telephone Interview with James Mee, Partner, Ashford & Wriston (Nov. 19, 2002); *see also* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 233 (1984).

[167] Landowners strongly resisted selling leased lands, pointing to the significant federal tax liabilities they would incur. Landowners explained that they chose to lease, rather than sell their lands, in order to avoid the paying extreme tax amounts. Landowners argue that, in condemning the land in question, the Hawai'i legislature made land sales involuntary so that federal tax consequences would be less severe to landowner when transferring lands in fee simple. *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 233 (1984).

[168] HAW. REV. STAT. § 516-22 (1993); *Midkiff*, 467 U.S. 229 at 233.

[169] *Conversion Passes*, *supra* note 110.

[170] Richardson v. City & County of Honolulu, 124 F.3d 1150, 1158 (1997); *Midkiff*, 467 U.S. at 241.

[171] *Richardson II*, 124 F.3d at 1158.

[172] *See supra* Section IV.A.

in *Richardson II*, the state, county, and judiciary should not unfairly force these small condominium landowners to bear public burdens.

V. THE PUBLIC USE DOCTRINE

A. Findings of Public Purpose

The United States and Hawai'i Constitutions allow state governments to exercise their powers of eminent domain and take private property for public use, with just compensation.[173] However, the transfer fails constitutional muster on public purpose grounds when it is made for a "strictly private use or purpose."[174] To satisfy the public use requirement, however, a taking need only be "rationally related to a conceivable public purpose."[175]

Courts give broad deference to the legislature in its determination of public use.[176] Thus, the role of the judiciary in examining a legislature's finding of public use is "'an extremely narrow' one."[177] Although courts generally will not question a legislature's discretion for use of eminent domain power, the government "does not have unlimited power to redefine property rights."[178]

Traditionally, public purposes that withstand judicial scrutiny are found where the public itself makes use of the property.[179] Nevertheless, a transfer of land to a private individual does not automatically violate the Public Use Clause. As the *Midkiff* Court stated, "it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause."[180] Recently, however, courts have struggled with situations where the public power is invoked for a purely or primarily private use, and where states have used their eminent domain powers for the benefit of private parties when a

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[173] U.S. CONST. amend. V, HAW. CONST. art. I, § 20.

[174] Haw. Hous. Auth. v. Lyman, 68 Haw. 55, 67, 704 P.2d 888, 895 (1985).

[175] *Midkiff*, 467 U.S. at 241.

[176] *Id.* at 240, 241; Klein, *supra* note 6, at 33.

[177] *Midkiff*, 467 U.S. at 240. Conversely, the United States Supreme Court in an earlier decision declared that when a legislative determination is at issue, the question of "what is a public use" belongs to the judiciary. City of Cincinatti v. Vester, 281 U.S. 439, 446 (1930).

[178] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 439 (1982).

[179] Derek Werner, Note, *The Public Use Clause, Common Sense and Takings*, 10 B.U. PUB. INT. L. J. 335, 343 (2001). The Ninth Circuit in *Midkiff v. Tom* identified such uses as those where: "(A) The taking will result in condemnation of property for an historically accepted public use; (B) The taking will result in a change in the use of the land; (C) The taking will result in a change in possession of the land; (D) The taking will result in a transfer of ownership from a private party to a governmental entity." Midkiff v. Tom, 702 F.2d 788, 793 (9th Cir. 1983). The Ninth Circuit accordingly found that leasehold conversion as mandated by HLRA failed to satisfy the aforementioned generally recognized criteria. *Id.* at 794.

[180] *Midkiff*, 467 U.S. at 244.

greater public purpose will be served.[181] One heavily litigated area concerns Hawai'i's mandatory leasehold conversion laws and whether they serve a valid public purpose.[182]

B. Hawai'i and Other Jurisdictions

1. Standard of Scrutiny

Hawai'i employs the rational basis test,[183] the lowest standard of review in public use determinations.[184] Under this test, the legislative determination of a public use carries a heavy presumption of constitutionality unless it is "palpably without reasonable foundation."[185] In determining whether the Public Use Clause is satisfied, the legislature must contemplate whether it can "reasonably consider the use public, and whether it rationally could have believed that the application of the sovereign's condemnation powers would accomplish the public use goal."[186] The legislature's choice need not be wise, merely rational.[187] Numerous scholars contend that the exceptionally deferential stance applied in *Midkiff* has "nearly eliminated judicial review of compensated takings," and making any compensated exercise of eminent domain practically impossible to overturn.[188]

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

[182] *See supra* note 11 and accompanying text.

[183] Under the rational basis test, "a legislative classification must be sustained, if the classification itself is rationally related to a legitimate governmental interest." U. S. Dept. of Agric. v. Moreno, 413 U.S. 528, 533 (1973).

[184] Haw. Hous. Auth. v. Lyman, 68 Haw. 55, 69, 704 P.2d 888, 897 (1985). Hawai'i formally adopted the "minimum rationality" or "rational basis" standard in 1985. *Id.*

[185] *Id.* at 68, 704 P.2d at 896; *see also* Ry. Express Agency v. State of New York, 336 U.S. 106, 109 (1949) (setting forth the proposition that courts should respect any measure bearing relation to the purpose for which it is made, unless shown to be "palpably false."). This presumption is exceptionally difficult to overturn. *See* Merrill, *supra* note 78 (providing statistics indicating the probability of success on a public use challenge).

[186] *Lyman*, 68 Haw. at 69, 704 P.2d at 897 (citing *Midkiff* at 242).

[187] Small Landowners of Oahu v. City & County of Honolulu, 832 F. Supp. 1404, 1410 (D. Haw. 1993). Hawai'i requires only that the city council have "*some* evidence that could convince a rational legislator of the truth of the findings." *Id.* (emphasis added).

[188] *Ninth Circuit Rejects Public Use Clause Challenge to Honolulu's Lease to Fee Ordinance—Richardson v. City & County of Honolulu*, Recent Case, 111 HARV. L. REV. 1614, 1614 (1998). *See* Klein, *supra* note 6, at 34-36 ("[t]oday, legal challenges to public-private takings are handicapped by decades old case law . . . [which] leaves policy makers' decisions largely unchecked"); *see also* Merrill, *supra* note 79 and accompanying text.

In contrast to Hawai'i, Michigan adheres to a heightened scrutiny test when a condemnation action benefits specific and identifiable private interests.[189] The Michigan Supreme Court established this "primary benefit" test in *Poletown Neighborhood Council v. City of Detroit*.[190] Under this standard, the court employs a balancing test to weigh the public and private interests, and examines whether the primary benefit is conferred upon the general public or a private party.[191] If the court finds that a private entity receives the primary benefit, rather than the public, the condemnation action will not pass judicial scrutiny.[192]

A California district court, in *Cottonwood Christian Center v. Cypress Redevelopment Agency*,[193] advanced another "heightened scrutiny" approach.[194] *Cottonwood* involved a city's condemnation against a church.[195] The California court, applying a strict scrutiny analysis, balanced the parties' hardships.[196] It concluded that condemnation and transfer to a private retailer would cause the plaintiff-church to suffer immense hardship.[197] The court found that the public interest and balance of hardships weighed overwhelmingly in favor of the church, and thus granted an injunction against the city.[198] The *Cottonwood* court further pointed out the public's interest in "moving very cautiously in condemning private property for uses that are only questionably public."[199] Exercising such sensitivity in condemnation actions provides greater assurances that the condemnation is indeed valid.

Likewise, in Illinois, it is a longstanding rule that "to constitute a public use, something more than a mere benefit to the public must flow from the

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[189] Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 459-60 (Mich. 1981).

[190] *Id.* at 459-60; Callies, *supra* note 4 at 11 (explaining that *Poletown*'s heightened standard is also known as the "primary benefit" test).

[191] *Poletown*, 304 N.W.2d at 458. This benefit must be "clear and significant" rather than "speculative or marginal." *Id.* at 459-60.

[192] *See id.* at 459.

[193] 218 F. Supp. 2d 1203 (C.D. Cal. 2002).

[194] *See id.* at 1230-31.

[195] *Id.* at 1209.

[196] *See id.* at 1230-31. The court applied strict scrutiny analysis as mandated under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). *Id.* RLUIPA prohibits the government from imposing "a substantial burden on the religious exercise of a person . . . religious assembly or institution." *Id.* at 1220. This is only permissible where it withstands a strict scrutiny analysis, meaning the government action is "in furtherance of a compelling governmental interest and . . . is the least restrictive means of furthering that interest." *Id.* Note that strict scrutiny does not apply absent a RLUIPA or comparable entitlement. 42 U.S.C. §2000cc-2; *see Cottonwood*, 218 F. Supp. 2d at 1221.

[197] *Cottonwood*, 218 F. Supp. 2d at 1231-32.

[198] *Id.* at 1231-32.

[199] *Id.* at 1231.

contemplated improvement . . . [;] [t]he public must be to some extent entitled to use or enjoy the property . . . by right."[200] Similarly, the Michigan Supreme Court found "the right of the public to *receive* and *enjoy* the benefit of the use" determinative of "whether the use is public or private."[201] These prerequisites help safeguard against misuse of the Public Use Clause.

Jurisdictions that employ a stricter standard of review than the rational basis test are able to balance parties' hardships when making public use determinations. They are thus better equipped to fairly weigh the interests of parties in eminent domain evaluations. This provides security that the condemnation will indeed benefit the public.

2. *Specific Public Use Findings*

In addition to applying differing tests, states have found various uses to constitute public purposes, aside from those which are inherently public in nature. The state of Washington's *Manufactured Housing Communities of Washington v. State of Washington*[202] involved a state statute that granted mobile home park tenants a right of first refusal to purchase land within the park in which they resided.[203] The statute was supported by the legislative purpose of encouraging mobile home ownership to park residents.[204] The Washington Supreme Court, *en banc*, struck down the statute, deeming it a taking for purely private use.[205] In so doing, the court noted that because no member of the public could use the park, the statute merely provided a "public benefit," not a public use.[206] Therefore, it unconstitutionally violated the state constitution's eminent domain provision.[207]

Similarly, in *Southwestern Illinois Development Authority v. National City Environmental*,[208] the City of Chicago condemned land for transfer to a racetrack company to use as a parking facility.[209] Although economic development was recognized as a valid public purpose, the Illinois Supreme Court noted the city's failure to conduct any study of the economic benefit of a parking facility.[210] The court concluded that the city's true intentions were

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[200] Gaylord v. Sanitary Dist. of Chi., 68 N.E. 522, 524 (Ill. 1903).

[201] Hays v. City of Kalamazoo, 25 N.W.2d 787, 791 (Mich. 1947).

[202] 13 P.3d 183 (Wash. 2000).

[203] *Id.* at 185.

[204] *Id.* at 196.

[205] *Id.* at 195.

[206] *Id.* at 196.

[207] *Id.* The Washington Constitution requires that "private property shall not be taken for private use." WASH. CONST. art I, § 16.

[208] 768 N.E.2d 1 (Ill. 2002).

[209] *Id.* at 3.

[210] *Id.* at 9.

to act as a "default broker" for the racetrack company, who chose condemnation as an easier and less expensive alternative to purchasing the property.[211] The court accordingly characterized the condemnation as a "misuse of the power entrusted by the public," when striking down the city's actions.[212]

In *Gaylord v. Sanitary District of Chicago*,[213] an Illinois statute allowed for the condemnation of private property for public mills or machinery.[214] The Illinois Supreme Court found that the statute's lack of specificity did not ensure that petitioner's mill would reap *actual* public use and benefit.[215] As Hawai'i condominium lessors argue, the court found that one should not be deprived of his land to enrich another.[216]

Unlike other jurisdictions, Hawai'i cases decided on the issue of public use or purpose generally reflect a common, simple theme: an identifiable public use or benefit.[217] By contrast, the public use in a mandatory leasehold condominium conversion is considerably more difficult to ascertain.

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[211] *Id.* at 10.

[212] *Id.* at 11.

[213] 68 N.E. 522 (Ill. 1903).

[214] *Id.* at 522-23.

[215] *Id.* at 525. The court added that, even had it been more specific, "it would be essential that the statute should require the use to be public in fact . . . that it should contain provisions entitling the public to accommodations." *Id.*

[216] *Id.* at 526.

[217] For instance, the condemnation of private lands for construction of a parking facility to reduce congestion in a downtown area was confirmed as a valid public purpose. Schnack v. City & County of Honolulu, 41 Haw. 219 (1955). Not surprisingly, condemnation for a public park and beach was held to satisfy a valid public purpose as the public enjoyed a direct benefit. City & County of Honolulu v. Bishop Trust Co., 49 Haw. 494, 421 P.2d 300 (1966). The Hawai'i Supreme Court also found that providing for additional land to expand the Honolulu Civic Center, now the site of Hawai'i's State Capitol, was valid as a public purpose even though specific uses for the land had not yet been identified. Kashiwa v. Chang, 46 Haw. 279, 378 P.2d 882 (1963). Condemnation for the purpose of a city-run sanitary landfill was affirmed by the Hawai'i Supreme Court as fulfilling a valid public purpose. City & County of Honolulu v. Trotter, 70 Haw. 18, 757 P.2d 647 (1988). Further, a statute granting a housing authority and government agency condemnation powers for "slum clearance and construction of safe and sanitary low income housing accommodations" was found to satisfy a public use and purpose. Haw. Hous. Auth. v. Ajimine, 39 Haw. 543 (1952). Even a condemnation of land for use as a rehabilitation site for blind and physically handicapped persons near an existing private hospital and rehabilitation center was held to satisfy a public use. Therefore, it passed constitutional muster. Territory by Atty. Gen. v. Aona, 43 Haw. 253 (1959).

C. Possible Remedies

1. Public Purpose is not satisfied

Given the current circumstances surrounding condominium fee simple ownership in Hawai'i, there appears to be no appreciable public benefit that would support a judicial or legislative finding of a "public purpose" or "public use" to justify lease-to-fee conversions of condominium properties. The Hawai'i Supreme Court stated, "[i]mplicit in the constitutional and statutory provision that private property may be taken for public use is the requirement that the taking shall be *necessary* for such use."[218] In light of the statistics reflecting an abundance of current fee simple condominium ownership opportunities, the public purpose of increasing fee simple ownership opportunities, which might have existed in 1991, no longer exists.[219]

Due to the absence of a clear definition or criteria for a finding of "public purpose" with respect to use of eminent domain, "[a]n attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts."[220] The facts here are clear: the Hawai'i condominium market is not dominated by an "oligopoly," nor is there an unavailability of fee simple condominium units.[221] The lofty purposes of the HLRA have since gone unfulfilled, as have those adopted in Chapter 38.[222] Thus, Hawai'i must find a means of correcting the harms caused by leasehold conversion and prevent against future injustice. The following subsection contains proposals for potential remedies to Hawai'i's existing leasehold conversion dispute.

2. Proposals for Alternatives and Remedies

Any specific remedies would be beneficial in resolving Hawai'i's condominium leasehold conversion debate. However, application of a heightened standard of judicial scrutiny would likely best ensure the protection of private property rights. Therefore, the following explains the most viable and effective solutions to Hawai'i's condominium leasehold debate.

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[218] *Aona*, 43 Haw. at 258 (emphasis added).

[219] *See supra* notes 107-08 and accompanying text; *The Living Nation: Bill 53*, *supra* note 47.

[220] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 239 (1984).

[221] *See supra* Section IV.A.

[222] DEPARTMENT OF BUSINESS, ECONOMIC DEVELOPMENT & TOURISM, *STATE OF HAWAII DATA BOOK: A STATISTICAL ABSTRACT* tbl.6.07 (2001). Over thirty years after its enactment, the HLRA has failed to achieve its goal of dissolving a land oligopoly in Hawai'i. *See id.* As of 2001, Kamehameha Schools Bishop Estate remained the largest private landowner of fee simple lands across the state, owning 366,458 acres. *Id.*; *see also supra* note 31 (stating that in 1965, Kamechameha Schools Bishop Estate owned a total of 369,700 acres in Hawai'i).

Many courts recognize that *Berman* and *Midkiff* established the rational basis standard as the appropriate test to apply in determining public use in eminent domain lawsuits.[223] However, the standard *Midkiff* set was merely a floor, not a ceiling.[224] State courts are not bound to adopt the rational basis standard. Once states recognize the potential abuses of eminent domain power as a mask for noticeably private purposes, they may elect to prevent such abuse by tightening the standard by which public purpose determinations are made.[225]

There are many avenues the judiciary may explore to better ensure the proper use of eminent domain. Nonetheless, mandatory leasehold conversion decisions' close adherence to the minimal-scrutiny rational basis test suggests the adoption of conservative measures, if any.[226]

The augmented rational basis "with a bite" examination, applied in *City of Cleburne v. Cleburne Living Center*,[227] preserves the significant latitude and flexibility normally conferred upon a legislative body in eminent domain determinations.[228] In addition, this standard offers a slightly more rigorous review than the traditional rational basis test. Application of this standard prohibits the state from "rely[ing] on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."[229] As a result, application of this standard in Hawai'i would allow landowners enhanced protection of their private property rights without significantly burdening or compromising the legislature's eminent domain powers.

In contrast, the *Poletown* balancing test functions to identify and separate private from public property interests.[230] Under the *Poletown* test, condemnation actions may fail judicial scrutiny if a "primarily private" rather than "primarily public" interest is advanced.[231] Application of this standard in

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[223] *See supra* Section IV.B.1.

[224] Interview with David L. Callies, Professor of Law, William S. Richardson School of Law, in Honolulu, Haw. (Oct. 23, 2002); *see also* Berman v. Parker, 348 U.S. 26, 35-36 (1954); *Midkiff*, 467 U.S. at 240-41.

[225] *See supra* note 6 and accompanying text. According to Councilman DeSoto, many council decisions have come as a result of "political pressures." Telephone Interview with John DeSoto, Honolulu City Council Member (Oct. 17, 2002); *see also The Living Nation: Bill 53*, *supra* note 47.

[226] *See, e.g.*, Haw. Hous. Auth. v. Lyman, 68 Haw. 55, 704 P.2d 888 (1985); *Midkiff*, 467 U.S. 229 (1984); Hous. Fin. & Dev. Corp. v. Castle, 79 Hawai'i 64, 898 P.2d 576 (1995).

[227] 473 U.S. 432 (1985).

[228] *Id.* at 446.

[229] *Id.*

[230] 304 N.W.2d 455 (Mich. 1972).

[231] *Poletown*, 304 N.W.2d at 459-60. "The power of eminent domain is restricted to furthering public uses and purposes and is not to be exercised without substantial proof the public is primarily to be benefited." *Id.* at 459.

leasehold conversion cases would likely better ensure that the public benefit is, in fact, the "predominant interest being advanced."[232]

A different method of ensuring proper use of eminent domain in leasehold conversions, advanced in *Cottonwood*, involves balancing the hardships caused by the condemnation at issue.[233] This "substantial burden" approach weighs the adverse impact suffered by both parties.[234] An analogous test would assess the degree of public good each party could advance. Thus, if a greater public benefit is derived absent the condemnation, the proposed condemnation fails constitutional muster. Both tests are valuable in enabling state governments to assess both financial and social impact to the public, as well as to charitable trusts and small landowners. In commenting on the effect the passage of Bill 53 would have on the Queen Lili'uokalani Trust, former Lieutenant Governor Mazie Hirono, once an advocate for leasehold conversion, recognized the "severe" and "dire" impact condominium leasehold would have upon such charitable organizations and advised the Honolulu City Council to:

> figure out a way to either exempt or do some kind of burden-shifting so that the [Queen Lili'uokalani Trust] must come forward to show that it is serving a public service in its program . . . . Therefore, if the county wants to proceed, it must show a *compelling state interest* to override the public purpose that is being served by the trust.[235]

Thus, application of this test to condominium leasehold conversions in Hawai'i would help to ascertain whether a charitable entity or private lessee's use of the property would confer a greater benefit upon the public at large.[236]

Charitable and nonprofit groups exist solely to advance the public good. Therefore, a Chapter 38 amendment creating a legislative exemption for charitable and non-profit entities could be appropriate and ultimately beneficial to Hawai'i's people.

Proponents of condominium leasehold reform agree that voluntary conversion is preferable to mandatory conversion.[237] Thus, a comparable

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[232] *Id.* at 460. This standard requires a "clear and significant" public benefit to pass constitutional scrutiny. *Id.*

[233] Cottonwood Christian Ctr. v. Cypress Redevelopment Agency, 218 F. Supp. 2d 1203, 1231 (C.D. Cal. 2002).

[234] *Id.*

[235] Pat Omandam, *Hirono Urges Lease-to-Fee Exception*, HONOLULU STAR-BULL., Oct. 8, 2002, *available at* http://starbulletin.com/2002/ 10/08/news/story10.html (last visited Jan. 5, 2003) (emphasis added).

[236] *See supra* note 93 (for information regarding QLT's charitable functions); *supra* note 97 (for a brief description of Kamehameha Schools Bishop Estate and First United Methodist Church's charitable operations).

[237] *Difficult but Necessary*, *supra* note 140.

alternative could be awarding a tax credit to those lessors who agree to sell fee interests to interested lessees. Such a tax credit would likely enable home ownership for lessees without forcing reluctant lessor-landowners to sell their land.

Alternatively, an equally effective option could be awarding lessors a tax credit for allowing lessees to extend lease periods. This would conceivably allay lessees' concerns of possible homelessness while allowing them to keep the improvements made to their property.

Yet another option could be the application of a general "heightened scrutiny" standard for all public use determinations. As set forth by *Berman*[238] and *Midkiff*,[239] great deference should be accorded to the decisions of legislative bodies, allowing the judiciary to play but an extremely narrow role.[240] However, it is the judiciary's responsibility to ensure that the power of eminent domain is used in "a manner contemplated by the framers of the constitutions and by the legislature that granted the specific power in question."[241]

Landowners in Hawai'i have already petitioned the Ninth Circuit Court to implement a heightened scrutiny standard in judicial public use determinations.[242] The court dismissed this petition on the premise that public burdens should not be placed on individuals, but borne by the public as a whole.[243] Paradoxically, application of this very reasoning supports a heightened scrutiny standard in public use determinations. Small landowners should not be forced to bear public burdens without careful scrutiny by the judicial branch.

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[238] Berman v. Parker, 348 U.S. 26, 32 (1954) (setting forth the broad principle that "when the legislature has spoken, the public interest has been declared well-nigh conclusive . . . [i]n such cases the legislature, not he judiciary, is the main guardian of public needs to be served by social legislation").

[239] Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 240 (adopting the pronouncement that a court's role in any legislative determination is an "extremely narrow" one and that courts must defer to the legislature's public use determination "until it is shown to be an impossibility").

[240] *See* Merrill, *supra* note 79 and accompanying text; *see also supra* note 185 and accompanying text.

[241] Southwestern Ill. Dev. Auth. v. Nat'l City Envtl., 768 N.E.2d 1, 8 (Ill. 2002). It is likely that the framers of the Constitution did not contemplate this type of "public use." The Latin maxim "*expressio unius est exclusio alterius*," is instructive, meaning, the inclusion of one thing is the exclusion of another. BLACK'S LAW DICTIONARY 602 (7th ed. 1999). It follows that the fact the Constitution specifies that a taking should be for public use implies that the framers deemed a taking for private use constitutionally impermissible. *See generally* U.S. CONST. amend. V.

[242] Richardson v. City & County of Honolulu, 124 F.3d 1150, 1157-58 (9th Cir. 1997).

[243] *Id.* at 1158.

VI. CONCLUSION

Since the United States Supreme Court's *Berman* and *Midkiff* decisions, an unparalleled boldness has swept courts in their interpretations and validations of legislative determinations under the Public Use Clause.[244] The current debate over whether condominium lease to fee conversions satisfy a requisite public purpose underlines the breadth of this problem. Accordingly, the broad, unstable, and seemingly arbitrary nature of the public use doctrine necessitates a more clear and stringent standard. Hawai'i should take heed of heightened standards utilized in other jurisdictions, which better ensure proper use of the public's eminent domain power. The rational basis standard set forth in *Midkiff* and used by courts in Hawai'i has been consistently referred to as "ineffectual" and "so deferential as to be meaningless."[245] Regardless of the method, Hawai'i's legislature and judiciary should take prompt, affirmative steps to protect private property rights and reserve public functions for truly public purposes. If legislative abuses and misinterpretations continue, the sticks in the "bundle of rights"[246] we presently know as private property may soon cease to exist.

Jennifer M. Young[247]

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[244] *See supra* note 6; *see also supra* note 79 and accompanying text.

[245] David M. Burke, The "Presumption of Constitutionality" Doctrine and the Rehnquist Court: A Lethal Combination for Individual Liberty, 18 HARV. J.L. & PUB. POL'Y, 73, 172 (1994); Richard E. Levy, Escaping Lochner's Shadow: Toward a Coherent Jurisprudence of Economic Rights, 73 N.C. L. REV. 329, 426; *see* Interview with John Van Dyke, Professor of Law, William S. Richardson School of Law, in Honolulu, Haw. (Oct. 10, 2002); *see also supra* note 185 and accompanying text.

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

[247] Class of 2004, University of Hawai'i, William S. Richardson School of Law. Thanks to Erin Lum, Malia Lee, Alison Kunishige, and the entire staff of the 2002-2003 University of Hawai'i Law Review for their invaluable editorial assistance and support. Thank you to Benjamin A. Kudo, David L. Callies, James Mee, and former Councilman John DeSoto for their helpful insights. Special thanks to Stanton K. Oishi, whose scholarship I shall always aspire to, and whose guidance I am truly grateful for.

Erisa and Federal Preemption Following *Rush Prudential HMO, Inc. v. Moran*: Preemptive Effects Felt in Hawai'i

I. INTRODUCTION

ERISA's preemptive force continues to create uncertainty in the balance between the federal interest in regulating employer-sponsored pension plans and the state interest in regulating health care.

Debra Moran, an Illinois resident, had medical insurance sponsored by her husband's employer.[1] When she experienced pain, numbness, loss of function, and decreased mobility in her right shoulder, she sought treatment.[2] After being treated with standard procedures by her primary care physician, a Health Maintenance Organization ("HMO") affiliated physician, her symptoms were not relieved.[3] She then sought treatment from an out-of-network surgeon who specialized in micro-reconstructive surgery.[4] The out-of-network surgeon recommended that Debra undergo specialized and more complicated microneurolysis surgery.[5] Debra's primary care physician agreed with the specialist and recommended that the HMO approve specialized surgery (to be done by the out-of-network specialist).[6] The HMO denied the request on grounds that it was not "medically necessary," and instead approved a network surgeon to do standard surgery.[7] Debra appealed the HMO's decision.[8] After Debra's internal appeals failed, she demanded a review by an independent physician, as guaranteed by section 4-10 of the Illinois HMO Act.[9] Section 4-10 states that "[i]n the event that the reviewing physician determines the covered service to be medically necessary, the [HMO] shall provide the covered service."[10] The independent reviewer concluded that the treatment was medically necessary.[11] Despite the reviewer's finding, the HMO again

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[1] Moran v. Rush Prudential HMO, Inc., 230 F.3d 959, 962 (7th Cir. 2000), *aff'd*, 536 U.S. 355, 122 S. Ct. 2151 (2002); Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, ___, 122 S. Ct. 2151, 2156 (2002).

[2] *Moran*, 230 F.3d at 963; *Rush*, 536 U.S. at ___, 122 S. Ct. at 2156.

[3] *Moran*, 230 F.3d at 963; *Rush*, 536 U.S. at ___, 122 S. Ct. at 2156.

[4] *Moran*, 230 F.3d at 963; *Rush*, 536 U.S. at ___, 122 S. Ct. at 2156.

[5] *Moran*, 230 F.3d at 963.

[6] *Moran*, 230 F.3d at 963; *Rush*, 536 U.S. at ___, 122 S. Ct. at 2156.

[7] *Moran*, 230 F.3d at 963; *Rush*, 536 U.S. at ___, 122 S. Ct. at 2156.

[8] *Moran*, 230 F.3d at 964; *Rush*, 536 U.S. at ___, 122 S. Ct. at 2156.

[9] *Moran*, 230 F.3d at 964; *Rush*, 536 U.S. at ___, 122 S. Ct. at 2156.

[10] 215 ILL. COMP. STAT. 125/4-10 (2000).

[11] *Moran*, 230 F.3d at 965; *Rush*, 536 U.S. at ___, 122 S. Ct. at 2157.

denied Debra's benefits claim.[12] Debra subsequently filed suit against the HMO to compel compliance with state law.[13] The Seventh Circuit and the United States Supreme Court upheld Illinois's independent review law that required the HMO to pay for treatments deemed medically necessary by an independent reviewer.[14]

Fortunately, Debra's claim was subject to the independent review law of Illinois. If this situation occurred in Hawai'i, Debra could not have prevailed because the burdensome language in Hawai'i's external review law renders any claim for a review invalid. This note argues that, under the United States Supreme Court's analysis in *Rush Prudential HMO, Inc. v. Moran*, Hawai'i's external review law is preempted by the Employee Retirement Income Security Act[15] ("ERISA"). Preemption of Hawai'i's law under *Rush* leaves claimants, like Debra, with no rights to an external review of benefit denials.

This article addresses Hawai'i's external review law, Hawai'i Revised Statute ("HRS") section 432E-6,[16] as it applies to Managed Care Organizations[17] ("MCO") that contract to provide medical services for employee welfare benefit plans covered by ERISA. Part II discusses the purpose and guidelines of ERISA, Illinois's independent review law, and Hawai'i's external review law. Part III discusses the *Rush* case and United States Supreme Court's analysis as applied to Illinois's independent review law. Part IV discusses the *Rush* tests as applied to Hawai'i's external review law. Part V concludes that HRS section 432E-6 fails to satisfy the *Rush* tests and is therefore preempted by ERISA.

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[12] *Moran*, 230 F.3d at 965; *Rush*, 536 U.S. at ___, 122 S. Ct. at 2157.

[13] *Moran*, 230 F.3d at 965; *Rush*, 536 U.S. at ___, 122 S. Ct. at 2157.

[14] *Moran*, 230 F.3d at 972-74; *Rush*, 536 U.S. at ___, 122 S. Ct. at 2158.

[15] 29 U.S.C.A. §§ 1001-1461 (West, WESTLAW through 1999 Pub. L. 107-239).

[16] The same issues arise under HRS section 432E-6.5, expedited appeal, therefore the results would be the same.

[17] HRS section 432E-1 defines managed care plans as:

> any plan, regardless of form, offered or administered by any person or entity, including but limited to an insurer governed by chapter 431, a mutual benefit society governed by chapter 432, a health maintenance organization . . . a point of service organization, a health insurance issuer, a fiscal intermediary, a payor, a prepaid health care plan, and any other mixed model, that provides for the financing or delivery of health care services or benefits to enrollees . . . .

HAW. REV. STAT. § 432E-1 (2001).

II. BACKGROUND

A. ERISA

In 1974, Congress enacted ERISA[18] to protect the rights of employees from unfair benefit plan practices, to establish minimum standards,[19] and to provide uniformity.[20] In recent years, employee benefit plans have grown in "size, scope and numbers."[21] President Jimmy Carter wrote to Congress stating that "ERISA was an essential step in the protection of worker pension rights."[22] It would eliminate the "bureaucratic confusion" and "overlapping jurisdictional authority" of these plans.[23] Congress designed ERISA to regulate employer-sponsored pension or benefit[24] plans.[25] ERISA "establishe[d] a national standard for MCOs administrating group health plans and provides remedies for plan participants who bring claims for benefits against their plans."[26] The four main clauses used to determine whether a law is preempted are sections 1144(a), the "relate to" provision, 1144(b)(2)(A), the "saving clause," 1144(b)(2)(B), the "deemer clause," and 1132, the civil enforcement provision.

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[18] 29 U.S.C.A. §§ 1001-1461 (West, WESTLAW through 1999 Pub. L. 107-239).

[19] 29 U.S.C.A. section 1001(a) states that "the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial . . . [and] minimum standards [need to] be provided [to] assur[e] the equitable character of such plans and their financial soundness." 29 U.S.C.A. § 1001(a) (West, WESTLAW through 1999 Pub. L. 107-239).

[20] Exec. Order No. 12,262, 46 Fed. Reg. 2313 (Jan. 7, 1981), *reprinted in* 29 U.S.C.A. § 1001 (West, WESTLAW through 1999 Pub. L. 107-239). Jimmy Carter stated that "[t]he new plan will eliminate overlap and duplication in the administration of ERISA and help us achieve our goal of well regulated private pension plans." *Id.*

[21] 29 U.S.C.A. § 1001(a) (West, WESTLAW through 1999 Pub. L. 107-239).

[22] Exec. Order No. 12,262, 46 Fed. Reg. 2313 (Jan. 7, 1981), *reprinted in* 29 U.S.C.A. § 1001 (West WESTLAW through 1999 Pub. L. 107-239).

[23] *Id.*

[24] Employee benefit plans are defined as "any plan, fund, or program . . . established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits." 29 U.S.C.A. § 1002 (West, WESTLAW through 1999 Pub. L. 107-239).

[25] *See id.* § 1003.

[26] David Schultz & Tracey Galinson, *Suits Against Managed Care Providers May Elude ERISA with Increasing Success, Malpractice and Quality-of-Care Claims Against HMOs are Circumventing ERISA's Broad Pre-emption*, NAT'L L. J., July 6, 1998, at B9.

1. Section 1144(a) "relate to" preemption provision

Congress included an express preemption clause, section 1144(a), that preempts all state laws that "relate to"[27] an employee benefits plan because it was Congress's intention "to occupy the field of regulation of employee benefits plans, to the exclusion of even consistent state regulation."[28] ERISA's preemption clause states that "the provisions of this . . . [chapter] shall supersede any and all State laws insofar as they . . . *relate to* any employee benefit plan."[29]

The United States Supreme Court has provided guidance as to when state laws are preempted by ERISA.[30] First, where Congress intends "to occupy a specific field, all state laws within the scope of the field are preempted."[31] Second, "[w]hen Congress fails to completely replace state law in a field, state laws are preempted if they in fact conflict with federal law."[32] Third, "if it is impossible to comply with both state and federal [laws]," then state law is preempted.[33] Finally, state laws will also be preempted if they impair the goals of Congress.[34]

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[27] A law "relates to" an ERISA plan if it "has a connection with or reference to" the plan. Shaw v. Delta Air Lines, 463 U.S. 85, 96-97 (1983) (citing Black's Law Dictionary 1158 (5th ed. 1979)).

[28] ROBERT H. JERRY II, UNDERSTANDING INSURANCE LAW 98 (LexisNexis 2002) (citing Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 741, 739 (1985)). This is a classic example of federal supremacy and the tension between federal and state law. "Erie" problems arise when a federal court is faced with a conflict between a state and federal law. Darrell N. Braman, Jr. & Mark D. Neumann, *The Still Unrepressed Myth of Erie*, 18 U. BALT. L. REV. 403 (1989).

[29] 29 U.S.C.A. § 1144(a) (West, WESTLAW through 1999 Pub. L. 107-272).

[30] L. Darnell Weeden, *HMOs, ERISA's "Relate To" Preemption and a Patient's Right to an External Review of Medical Necessity Decisions and the Implications of Field and Conflict Preemption*, 5 DEPAUL J. HEALTH CARE L. 207 (2002) (written prior to the U.S. Supreme Court's decision in *Rush*, Weeden discusses two federal appeals courts' decisions regarding ERISA's preemptive reach to state laws providing for an inspection of an HMO's denial of medical treatment).

[31] *Id.* at 224 (citing Pac. Gas & Elec. Co. v. State Emergency Res. Conservation & Dev. Comm'n, 461 U.S. 190 (1983)); *see also Pacific Gas*, 461 U.S. at 204 (state law not invalid because it did not create a barrier to the fulfillment of the federal goal).

[32] Weeden, *supra* note 30, at 224 (citing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963)); *see also Paul*, 373 U.S. at 142 (where it was not impossible for dual compliance of both federal and state regulation, state law was not preempted).

[33] Weeden, *supra* note 30, at 224 (citing *Paul*, 373 U.S. at 142-43); *see also Paul*, 373 U.S. at 142-43.

[34] Weeden, *supra* note 30, at 224 (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)); *see also Hines*, 312 U.S. at 67 (federal legislation for the registration of aliens, enacted after the enactment of a state law requiring alien registration, preempted the state law because it stood as an obstacle to Congress's objectives).

Preemption of state law, in the context of ERISA, means that any state tort law, including medical malpractice, that "relates to" an ERISA plan may be preempted.[35] In *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*,[36] a New York law required hospitals to collect surcharges from HMOs based upon the number of Medicaid recipients enrolled with them.[37] The Court was asked to decide whether ERISA preempted state law for surcharges on bills of patients who were covered by an employee health plan.[38] It held that mandated surcharges did not "relate to" an ERISA employee benefit plan.[39] The Court stated that surcharges "do not bear the requisite 'connection with' ERISA plans to trigger preemption."[40] Justice Souter reasoned that the purpose of ERISA was to eliminate conflicting and inconsistent state regulation, not to create uniform prices.[41] The "indirect economic influence" of the surcharge did not "bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself."[42] The indirect influence of the surcharge did not prevent uniform administrative practice or a uniform benefit package.[43] Surcharges did not "relate to" an ERISA plan, and were therefore not preempted.

When a cause of action relates "to the essence of the pension plan itself" it is preempted.[44] In *Ingersoll-Rand Co. v. McClendon*,[45] an employee sued his former employer in a wrongful discharge action.[46] The employee alleged that he was fired because his employer did not want to add to the employee's pension fund.[47] The Court held that ERISA preempted the employee's wrongful termination suit under state law.[48] The Court reasoned that the "cause of action relate[d] not merely to pension benefits, but to the essence of

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[35] Thomas R. McLean, M.D. & Edward P. Richards, *Managed Care Liability for Breach of Fiduciary Duty After Pegram v. Herdrich: The End of ERISA Preemption for State Law Liability for Medical Care Decision Making*, 53 FLA. L. REV. 1, 8 (2001) (citing Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134 (1985)); Shaw v. Delta Airlines, Inc., 463 U.S. 85, 96-97 (1983) (state law preempted with respect to employee benefit plans because it prohibited lawful federal practices).

[36] 514 U.S. 645 (1995).

[37] *Id.*

[38] *Id.* at 649.

[39] *Id.*

[40] *Id.* at 662.

[41] *Id.*

[42] *Id.* at 659.

[43] *Id.*

[44] Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990).

[45] *Id.*

[46] *Id.* at 140.

[47] *Id.*

[48] *Id.*

the pension plan itself."[49] The state claim made specific reference to, and was premised on, the existence of a pension plan.[50] Thus, because the causes of action were "related to" an ERISA plan, they were preempted.

On the other hand, a cause of action is not preempted when it does not conflict with ERISA's objectives.[51] For example, in *California Division of Labor Standards Enforcement v. Dillingham Construction, N.A., Inc.*,[52] a California law obligated employers with employees on public works projects to pay them prevailing local wages.[53] But a public works employer did not need to pay prevailing local wages to those participating in an authorized apprenticeship program.[54] The Court held that the prevailing local wage law did not "relate to" an employee benefit plan and was not preempted by ERISA.[55]

"A 'law relates to' a covered employee benefit plan for purposes of section [1144(a)] 'if it (1) has a connection with or (2) reference to such a plan.'"[56] The *Dillingham* Court stated that ERISA preempted state laws that have "imposed requirements by reference to ERISA covered programs"[57] and "a common law cause of action premised on the existence of an ERISA plan."[58] The Court stated that a law without any reference to an ERISA plan is preempted if it has a "connection with ERISA plans."[59] It looked to both the objectives of ERISA and the effect the state law had on ERISA plans to determine whether a state law has a connection with ERISA plans.[60] Thus, the Court reasoned that this case was similar to the surcharge requirement in *Travelers* because "the apprenticeship portion of the prevailing wage statute does not bind ERISA plans to anything."[61]

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[49] *Id.* (emphasis omitted).

[50] *Id.*

[51] 519 U.S. 316 (1997).

[52] *Id.*

[53] *Id.* at 325.

[54] *Id.* at 320.

[55] *Id.* at 334.

[56] *Id.* at 324 (citing District of Columbia v. Greater Wash. Bd. of Trade, 506 U.S. 125, 129 (1992)) (ERISA section 514(a) is codified in 29 U.S.C.A. § 1144(a)).

[57] *Id.* (citing *Greater Wash. Bd. of Trade*, 506 U.S. at 130-31); *see also Greater Wash. Bd. of Trade*, 506 U.S. at 130-31 (ERISA preempted District of Columbia's law that required employers who provide insurance for their employees to provide insurance for their injured employees who were eligible for workers' compensation).

[58] *Dillingham*, 519 U.S. at 324 (citing Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 140 (1990)); *see also Ingersoll-Rand*, 498 U.S. at 140.

[59] *Dillingham*, 519 U.S. at 325.

[60] *Id.* (citations omitted).

[61] *Id.* at 332.

2. Section 1144(b)(2)(A)—"saving clause"—state regulation of insurance

However, even if a state law "relates to" an employee benefit plan, it will be saved from preemption if it is deemed to "regulate insurance."[62] ERISA's "saving clause,"[63] section 1144(b)(2)(A), was designed to preserve Congress's reservation of insurance regulation to the states under the McCarran-Ferguson Act.[64] Thus, state laws that survive preemption are not subject to the control of ERISA. The "saving clause" provides that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities."[65] In the following cases the United States Supreme Court explained when a state law is "saved" from preemption.

In *Metropolitan Life Insurance Co. v. Massachusetts*,[66] the Court set forth a two-part test to determine whether a state law "regulates insurance" and is saved from preemption.[67] In the first part of the test, the common sense inquiry, the Court looked to the "common-sense view of the matter."[68] In the second part, the Court determined whether the state law governed the "business of insurance," as defined by the McCarran-Ferguson Act.[69]

In *Pilot Life Insurance Co. v. Dedeaux*,[70] the Court, utilizing the two-part test from *Metropolitan Life*, decided whether ERISA preempts state tort and contract actions under an employee pension plan.[71] The Court stated that the

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[62] *See* 29 U.S.C.A. § 1144(b)(2)(A) (West, WESTLAW through 1999 Pub. L. 107-272).

[63] *Id.*

[64] Metropolitan Life Ins. v. Massachusetts, 471 U.S. 724, 744 n. 21 (1985). Section 2(a) of the McCarran-Ferguson Act states that "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several states which relate to the regulation or taxation of such business." 15 U.S.C.A. § 1012 (West, WESTLAW through 1997 Pub. L. 107-209). Section 2(b) states that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance." *Id.*

[65] 29 U.S.C.A. § 1144(b)(2)(A) (West, WESTLAW through 1999 Pub. L. 107-272).

[66] 471 U.S. 724 (1985).

[67] *Id.* at 740-43.

[68] *Id.* at 740.

[69] *Id.* at 743. The McCarran-Ferguson Act has been identified with three criteria: "[(1)] whether the practice has the effect of transferring or spreading a policyholder's risk; [(2)] whether the practice is an integral part of the policy relationship between the insurer and the insured; and [(3)] whether the practice is limited to entities within the insurance industry." *Id.* (citing Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982)); *see also Pireno*, 458 U.S. at 129 (insurer's use of peer review to examine chiropractor's treatments did not constitute the "business of insurance" and was not exempt from antitrust laws by the McCarran-Ferguson Act).

[70] 481 U.S. 41 (1987).

[71] *Id.* at 43.

"common sense view of the word 'regulates' would lead to the conclusion that in order to regulate insurance, a law must not just have an impact on the insurance industry, but must be specifically directed toward that industry."[72]

The *Pilot Life* Court concluded that state law failed the common sense inquiry because, although identified with the insurance industry, it has its "roots . . . firmly planted in the general principles of . . . tort and contract law."[73] "Any breach of contract, and not merely breach of an insurance contract, may lead to liability for . . . damages under [state] law."[74] In applying the second test, the satisfaction of the McCarran-Ferguson factors, the Court determined that the state law possibly satisfied the second factor.[75] The Court concluded that the law did not affect the spreading of a policyholder's risk and only slightly concerned the policy relationship.[76] It reasoned that the state law "[did] not define the terms of the relationship between the insurer and the insured; it declare[d] only that, whatever terms have been agreed upon in the insurance contract, a breach of that contract may in certain circumstances allow the policyholder to obtain . . . damages."[77] Thus, arguably, under *Pilot Life*, ERISA preempts state common law tort and contract actions relating to ERISA plans because they do not regulate insurance.

In *UNUM Life Insurance Co. v. Ward*,[78] California's notice-prejudice law, which permits an insured to file a proof of claim beyond the policy limitation period as long as the insurer suffers no prejudice, was saved from preemption by *Metropolitan Life's* two-part test.[79] The Court stated that the law "regulated insurance" from a common sense view because it "controls the terms of the insurance relationship by 'requiring the insurer to prove prejudice before enforcing proof-of-claim requirements,' . . . [and] 'is directed specifically at the insurance industry and is applicable only to insurance contracts.'"[80] The

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[72] *Id.* at 50.

[73] *Id.*

[74] *Id.*

[75] *Id.* The second factor asks "whether the practice is an integral part of the policy relationship between the insurer and the insured." Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985) (citing Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982)); *see supra* note 69 and accompanying text (listing the three criteria identified with the McCarran-Ferguson Act).

[76] *Pilot Life*, 481 U.S. at 50-51.

[77] *Id.* at 51.

[78] 526 U.S. 358 (1999).

[79] *Id.* at 367.

[80] *Id.* at 368 (citing Cisneros v. UNUM Life Ins. Co., 134 F.3d 939, 945 (1998) (citations omitted)); *see also Cisneros*, 134 F.3d at 945 (holding that California's notice-prejudice law, requiring insurer to prove prejudice to avoid liability was not preempted by ERISA).

Court determined that the law regulated insurance as defined by the two-part test and was saved from ERISA preemption.[81]

Although states are permitted to regulate the business of insurance, they are not without limits. In *Silkwood v. Kerr-McGee Corp.*,[82] the Court, in reviewing its precedent, stated how state laws may be preempted. "If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted."[83] "If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent that it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law,"[84] "or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."[85] Thus, if a law "regulates insurance" within the meaning of the two-part test, the law may nevertheless be preempted if it conflicts with federal law or with the objectives of Congress.

3. Section 1144(b)(2)(B)—"deemer clause"

The "deemer clause,"[86] section 1144(b)(2)(B), provides that "an employee benefit plan . . . shall [neither] be deemed to be an insurance company . . . [n]or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies."[87] This prohibits

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[81] *Ward*, 526 U.S. at 368. The *Ward* Court noted that the McCarran-Ferguson factors serve only as "guideposts, not separate essential elements . . . that must each be satisfied" to save a state law from preemption. *Id.* at 374 (citing *Cisneros*, 134 F.3d at 946). The Court did not decide whether the first factor was satisfied because "the remaining . . . factors, verifying the common-sense view, [were] securely satisfied." *Id.* The second factor, whether the practice is "an integral part of the policy relationship between the insurer and the insured," was satisfied because the law "change[d] the bargain between the insurer and the insured. *Id.* (citing Metropolitan Life Ins. Co. v. Mass., 471 U.S. 724, 743 (1985)). It 'effectively create[d] a mandatory contract term' that require[d] the insurer to prove prejudice before enforcing a timeliness-of-claim provision." *Id.* (citing *Cisneros*, 134 F.3d at 946). The third factor, "whether the rule is limited to entities within the insurance industry, was met because the law "focuse[d] on the insurance industry," and "[did] not merely have an impact on the insurance industry; it [was] aimed at it." *Id.* at 375 (citing FMC Corp. v. Holliday, 498 U.S. 52, 61 (1990)); *see also FMC Corp.*, 498 U.S. at 61.

[82] 464 U.S. 238 (1984).

[83] *Id.* at 248 (citing Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 204 (1993)); *see also Pacific Gas*, 461 U.S. at 204.

[84] *Silkwood*, 464 U.S. at 248 (citing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963)); *see also Paul*, 373 U.S. at 142-43.

[85] *Silkwood*, 464 U.S. at 248 (citing Hines v. Davidowitz, 312 U.S. 52, 67 (1941)); *see also Hines*, 312 U.S. at 67.

[86] 29 U.S.C.A. § 1144(b)(2)(B) (West, WESTLAW through 1994 Pub. L. 107-272).

[87] *Id.*

states from regulating self-insured or self-funded employee benefits plans. The purpose of the "deemer clause" was to draw a line "between the business of insurance companies, which is regulated by state law notwithstanding ERISA, and the business of employee benefits plans, which is subject to exclusive federal regulation even though self-insured plans resemble traditional insurance in many respects."[88]

In *FMC Corp. v. Holliday*,[89] FMC Corporation ("FMC") operated a self-funded[90] employee welfare benefit plan for its employees and their dependents. FMC sought subrogation for amounts paid for medical expenses stemming from an automobile accident claim that was settled by the parties.[91] The Court held that ERISA preempted the state's anti-subrogation law as applied to FMC because "self-funded ERISA plans are exempt from state regulation insofar as that regulation 'relates to' the plans."[92] The Court stated that:

> State laws that directly regulate insurance are "saved" but do not reach self-funded employee benefit plans because the plans may not be deemed to be insurance companies, other insurers, or engaged in the business of insurance for purposes of such state laws. On the other hand, employee benefit plans that are insured are subject to indirect state insurance regulation.[93]

In effect, if a plan is insured, then a state may regulate it; if a plan is uninsured, the state may not regulate it.[94]

4. Section 1132—civil enforcement provision

Claims that fall within the scope of ERISA are limited to the equitable remedies allowed under ERISA's civil enforcement provision, section 1132.[95] Compensatory, punitive, consequential, or reliance damages, normally available under state tort and contract law, are not available under ERISA.[96] For example, participants who are denied benefits are limited to bringing suit

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[88] JERRY, *supra* note 28, at 99.

[89] 498 U.S. 52 (1990).

[90] FMC's plan was self funded because "it [did] not purchase an insurance policy from any insurance company in order to satisfy its obligations to its participants." *Id.* at 54.

[91] *Id.* at 55.

[92] *Id.* at 61.

[93] *Id.*

[94] *Id.* at 64.

[95] 29 U.S.C.A. § 1132(a) (West, WESTLAW through 1994 Pub. L. 107-272).

[96] Garcia v. Kaiser Found. Hosp., 90 Hawai'i 425, 436, 978 P.2d 863, 874 (1999). The Hawai'i Supreme Court held that ERISA preempted all of participant's claims except for his claim for an injunction (equitable relief). *Id.* at 433, 978 P.2d at 871.

to recover benefits due under the terms of the plan, and to obtain other equitable relief to redress such violations or enforce such terms.[97]

In *Massachusetts Mutual Life Insurance Co. v. Russell*,[98] a plan participant brought suit to recover damages for improper processing of disability claim benefits.[99] The Court stated that Congress limited the remedies available to ERISA plan beneficiaries and that there was no Congressional intent to provide extracontractual damages.[100] It noted that the "six carefully integrated civil enforcement provisions found in [section 1132(a)] . . . provide strong evidence that Congress did not intend to authorize other remedies it simply forgot to incorporate expressly."[101] The Court stated that if the plan administrator had determined that plaintiff was not entitled to disability benefits under the plan, plaintiff "could have filed an action pursuant to [section 1132(a)(1)(B)] to recover accrued benefits, to obtain a declaratory judgment that she is entitled to benefits under the provisions of the plan contract, and to enjoin the plan administrator from improperly refusing to pay benefits in the future"[102] because the only remedies available under ERISA are equitable remedies.[103]

In *Pilot Life*,[104] the Court stated that it was Congress's "intent that the civil enforcement provisions of ERISA [section 1132(a)] be the exclusive vehicle for actions by ERISA-plan participants and beneficiaries . . . and that varying state causes of action for claims within the scope of [section 1132(a)] would pose an obstacle to the purposes and objectives of Congress."[105] The Court held that the employee's state common law claims did not fall within the civil enforcement provision of ERISA, which allows a plan participant to sue to recover benefits due under the plan, or to clarify the right to receive future benefits under the plan.[106] The Court stated that Congress intended a "federal

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[97] Steven W. Kasten, *Third-Party Review of Adverse Health Benefit Determinations Under the Massachusetts Managed Care Patient Protection Act: Evaluation of Possible ERISA Preemption*, 45 BOSTON BAR J., June 2001, at 6, 20.

[98] 473 U.S. 134 (1985).

[99] *Id.*

[100] *Id.* at 148.

[101] *Id.* at 146 (emphasis omitted).

[102] *Id.* at 147.

[103] 29 U.S.C.A. § 1132 (West, WESTLAW through 1999 Pub. L. 107-272).

[104] 481 U.S. 41 (1987).

[105] *Id.* at 52.

[106] *Id.* The Court stated that:

> a plan participant or beneficiary may sue to recover benefits due under the plan, to enforce the participant's rights under the plan, or to clarify rights to future benefits. Relief may take the form of accrued benefits due, a declaratory judgment on entitlement to benefits, or an injunction against a plan administrator's improper refusal to pay benefits. A participant or beneficiary may also bring a cause of action for breach of fiduciary duty, and under this cause of action may seek removal of the fiduciary. In an

common law of rights and obligations"[107] to develop under ERISA, without enlargement by independent state remedies. "[T]he question whether a certain state action is pre-empted by federal law is one of congressional intent."[108] The Court stated that "the saving clause had to stop short of subverting congressional intent, clearly expressed 'through the structure and legislative history[,] that the federal remed[ies] displace state causes of action.'"[109] Thus, a "saved" state law is still preempted if it directly conflicts with an exclusive sphere of ERISA regulation.

In *Ingersoll-Rand Co. v. McClendon*,[110] the Texas tort of wrongful discharge duplicated the elements of a claim available under ERISA. This created a "direct conflict" between federal and state laws. As the Court stated in *Rush*, the Texas state law "converted the remedy from an equitable one under [section] 1132(a)(3) (available exclusively in federal district courts) into a legal one for money damages (available in a state tribunal)."[111] Thus, ERISA preempted the state law because it provided a form of relief that substantially differed from the remedies provided by ERISA.

ERISA governs claims made by employee pension plan participants and their beneficiaries that relate to the pension plan. If a pension plan provides health insurance, any claim "relating to" it is within the scope of ERISA. One such type of action is a claim relating to benefit denials and state laws that govern review of benefit denials, e.g. independent or external review laws.

B. Independent or External Review Laws

In spite of ERISA's preemption provisions, plan participants continue to file claims against MCOs.[112] One type of claim commonly filed is the direct claim

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action under these civil enforcement provisions, the court in its discretion may allow an award of attorney's fees to either party.

Id. at 53 (citing 29 U.S.C.A. § 1132 (West, WESTLAW through 1999 Pub. L. 107-272)) (citations omitted).

[107] *Id.* at 56.

[108] Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 208 (1985) (state tort law action against employer and insurer was preempted by federal regulation that provided a mechanism for contract grievance).

[109] Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, ___, 122 S. Ct. 2151, 2165 (2002) (citing *Pilot Life*, 481 U.S at 57); *see also Pilot Life*, 481 U.S. at 57.

[110] 498 U.S. 133 (1990).

[111] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2166. Section 1132 (a)(3) provides that:

A civil action may be brought by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of this plan.

29 U.S.C.A. § 1132(a)(3) (West, WESTLAW through 1994 Pub. L. 107-272).

[112] Schultz & Galinson, *supra* note 26, at B9.

against an MCO for failure to provide care based on benefits determinations.[113] A benefit determination may be made by deciding whether a particular treatment is medically necessary pursuant to the terms of the plan.[114]

Approximately forty states have enacted independent review laws that provide for independent or external review of an MCO's denial of a treating physician's medical necessity decision.[115] The purpose of these laws is to improve the quality of care provided by MCOs.[116] Independent review laws differ among the states, but they all require an MCO to submit to an independent reviewer to either uphold or reverse the MCO's denial of coverage.[117] States have important interests in protecting its citizens from "ill-advised decisions by [MCOs]."[118] Two of these states that have enacted such laws are Illinois and Hawai'i.

1. The Illinois independent review law

The Illinois independent review law "requires each HMO in Illinois regulated by insurance under the McCarran-Ferguson factors to give each patient the substantive right to an independent review on the issue of medical necessity when there is a dispute between the primary care physician and the patient's HMO."[119] The Illinois independent review law, entitled "Medical Necessity – Dispute Resolution – Independent Second Opinion," states that an HMO "shall provide . . . for the . . . review by a physician holding the same class of license as the primary care physician, who is unaffiliated with the [HMO], . . . in the event of a dispute between the primary care physician and the [HMO] regarding the medical necessity of a covered service."[120] "In the event that the reviewing physician determines the covered service to be *medically necessary*, the [HMO] shall provide the covered service."[121]

The Illinois law resembles a second medical opinion. When a medical decision is made, a plan beneficiary may request for a review of the decision. The independent medical physician, "holding the same class of license as the primary care physician,"[122] only needs to determine whether "a covered service

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[113] *Id.*

[114] *Id.*

[115] Brief of Amici Curiae of the States of Texas, et al. at 1-2, Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 122 S. Ct. 2151 (2002) (No. 00-1021).

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] Weeden, *supra* note 30, at 240-41.

[120] 215 ILL. COMP. STAT. 125/4-10 (2000).

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

[122] *Id.*

[is] medically necessary."[123] The physician merely comes to an independent medical decision. The Illinois law does not call for any type of structured procedure or provide any rigorous guidelines for the review. The law merely states that "[e]ach [HMO] shall provide a mechanism for the timely review by a physician."[124] If the physician finds that the procedure is "medically necessary," then the HMO "shall provide the covered service."[125] This statute is relatively simple compared to Hawai'i's external review law.

2. The Hawai'i external review law

In 1998, the Hawai'i State Legislature enacted an external review law that provided for a review of "managed care plan[s]'s final internal determinations," including denials of medical services or coverage.[126] The purpose of the law was to create a "bill of rights" and protections for patients.[127] The House and Senate Standing and Conference Committees acknowledged that managed care plans developed to reduce the costs of medical care.[128] They reasoned that this resulted in "complications or loss of quality of health care"[129] and that the external review law would provide patient protections and "help to balance the quality of health care received with the cost-reducing measures implemented by managed care plans."[130] The House Conference Committee stated that the law "is a regulation on the 'business of insurance' and is not intended to interfere with employer health plans as they operate under federal law."[131]

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[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] HAW. REV. STAT. § 432E-6 (2001).

[127] HAW. H.R. CONF. COMM. REP. NO. 35, 25th Leg., Reg. Sess. (1998) *reprinted in* 1998 HAW. HOUSE J., 960, 960; HAW. SEN. CONF. COMM. REP. NO. 35, 25th Leg., Reg. Sess. (1998), *reprinted in* 1998 HAW. SEN. J., 755, 755; HAW. SEN. STAND. COMM. REP. NO. 2718, 25th Leg., Reg. Sess. (1998) *reprinted in* 1998 HAW. SEN. J., 1098, 1098; HAW. SEN. STAN. COMM. REP. NO. 2414, 25th Leg., Reg. Sess. (1998) *reprinted in* 1998 HAW. SEN. J., 989, 990.

[128] HAW H.R. STAND. COMM. REP. NO. 1296-98, 25th Leg., Reg. Sess. (1998) *reprinted in* 1998 HAW. HOUSE J., 1582, 1582; HAW. SEN. STAND. COMM. REP. NO. 2718, 25th Leg., Reg. Sess. (1998) *reprinted in* 1998 HAW. HOUSE J., 1098, 1098; HAW. SEN. STAND. COMM. REP. NO. 2414, 25th Leg., Reg. Sess. (1998) *reprinted in* 1998 HAW. SEN. J., 989, 990.

[129] HAW. H.R. STAND. COMM. REP. NO. 1296-98, 25th Leg., Reg. Sess. (1998) *reprinted in* 1998 HAW. HOUSE J., 1582, 1582.

[130] *Id.*

[131] HAW. H.R. CONF. COMM. REP. NO. 35, 25th Leg., Reg. Sess. (1998) *reprinted in* 1998 HAW. HOUSE J., 960, 960. This was incorporated into HRS section 432E-1 which defines managed care plans as:

> any plan, regardless of form, offered or administered by any person or entity, including but not limited to an insurer governed by chapter 431, a mutual benefit society governed

At the inception of the bill, a representative voiced concerns that this law would increase the cost of delivering health care with little or no improvement in the quality of care.[132] "The proposed new process will add an additional and unnecessary layer of effort and cost."[133] Despite this concern, the legislature passed the external review law.

The Hawai'i external review procedure states that after denial of a request for benefits, a plan enrollee may request an external review by a three member panel of the MCO's internal determination.[134] The Hawai'i law provides rigorous guidelines for the formation of the review panel. The three-member review panel, appointed by the insurance commissioner, is composed of a representative from a managed care plan uninvolved in the complaint; a provider licensed to practice and who is practicing medicine in Hawai'i and who is not involved in the complaint; and finally, the insurance commissioner or the commissioner's designee.[135] The law requires the insurance commissioner to retain assistance from an independent medical expert as well as the services of an independent review organization.[136]

The Hawai'i law provides rigorous procedures for reviewing a claim. The review panel must conduct a hearing pursuant to chapter 91.[137] Chapter 91 itself contains extensive hearing procedures.[138] HRS section 432E-6 provides that if the claim is less than $500, the commissioner may conduct a review

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by chapter 432, a health maintenance organization governed by chapter 432D, a preferred provider organization, a point of service organization, a health insurance issuer . . . a prepaid health care plan, and any other mixed model, that provides for the financing or delivery of health care services or benefits to enrollees through: (a) [a]rrangements with selected providers or provider networks to furnish health care services or benefits; and (2) [f]inancial incentives for enrollees to use participating providers and procedures provided by a plan.

HAW. REV. STAT. § 432E-1 (2001).

[132] *Hearing on S.B. No. 2297*, 25th Leg., Reg. Sess. 798-99 (1998) (testimony of Dennis A. Arakaki, Chair, Health Committee).

[133] *Hearing on S.B. No. 2297*, 25th Leg., Reg. Sess. 798-99 (1998) (testimony of Dennis A. Arakaki, Chair, Health Committee). Arakaki stated that:

> The bill may end up limiting competition, may be too restrictive and may be the type of overregulation that businesses say restrict economic recover[y]. It must be remembered that managed care is a strategic opportunity to keep costs down with a minimal standard of care. However, if regulation of managed health care results in driving costs up, health care costs may again spiral upwards with no increase in quality of care."

Id.

[134] HAW. REV. STAT. § 432E-6 (2001).

[135] *Id.*

[136] HAW. REV. STAT. § 432E-6(a)(2)(A) (2001); HAW. REV. STAT. § 432E-6(a)(2)(B) (2001).

[137] HAW. REV. STAT. § 432E-6(a)(4) (2001). HRS Section 91-9 entitled "Contested cases; notice; hearing; records" provides an appeals process for any contested case.

[138] HAW. REV. STAT. Ch. 91.

hearing without appointing a review panel.[139] The law also allows the commissioner to dismiss a request for external review if it is determined that the request is frivolous or without merit.[140] In effect, a claim may be decided without it ever being reviewed by a medical doctor. The claimant must also show "good cause" to trigger a review hearing.[141]

The Hawai'i law also requires specific information to be submitted for review. Within seven days of receipt of request for external review, the managed care plan shall provide all the relevant documentation used by the doctors and managed care plan.[142] If the managed care plan fails to provide the documents within the prescribed time periods, the commissioner may issue a decision to reverse the final internal determination.[143]

The Hawai'i law does not require the panel to decide whether the procedure is medically necessary. Instead it provides for the review of whether the MCO acted *reasonably*. [144] The review panel shall consider:

> [t]he *terms of the agreement of the insurance policy*, evidence of *coverage* (or similar document); *[w]hether the medical director properly applied the medical necessity criteria* in section [432E-1.4][145] in making the final internal determination; [a]ll relevant medical records; [t]he *clinical standards of the plan*; [t]he information provided; [t]he attending physician's recommendation and; [g]enerally accepted practice guidelines.[146]

Upon a majority vote of the panel, the commissioner shall issue an order affirming, modifying, or reversing the decision.[147]

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[139] *Id.*

[140] HAW. REV. STAT. § 432E-6(6) (2001).

[141] *See id.* § 432E-6(a)(4).

[142] The managed care plan must provide:

> (a) [a]ny documents or information used in making the final internal determination including medical records; (b) [a]ny documentation or written information submitted to the managed care plan in support of the enrollee's initial complaint and; (c) [a] list of names, addresses, and telephone numbers of each licensed health care provider who cared for the enrollee and who may have medical records relevant to the external review.

See id. § 432E-6(3).

[143] *Id.*

[144] *See id.* § 432E-6(7).

[145] *See id.* Section 432E-1.4 states that:

> A health intervention is medically necessary if it is recommended by the treating physician . . . is approved by the health plan's medical director . . . and is . . . [f]or the purpose of treating a medical condition . . . [t]he most appropriate delivery or level of service, considering potential benefits and harms to the patient . . . [k]nown to be effective in improving health outcomes.

See id. § 432E-1.4.

[146] *See id.* § 432E-6(7) (emphasis added).

[147] *Id.*

The Hawai'i law further provides that no person shall serve on the review panel who, through a familial relationship, or for other reasons, has a direct and substantial professional, financial, or personal interest in the plan involved in the complaint or the treatment of the enrollee.[148] "Members of the review panel shall be granted immunity from liability and damages relating to their duties under this section."[149] An enrollee may be awarded a reasonable sum for attorney's fees and reasonable costs incurred in connection with the external review.[150]

Hawai'i's external review law establishes complex procedures and guidelines that all MCOs must submit to. The law creates a uniform method of review for all MCOs in Hawai'i and it provides for the use of the appeals procedures in HRS Chapter 91. The complexity of the Hawai'i law raises the issues, considered by the *Rush* Court, regarding its validity.

III. RUSH PRUDENTIAL HMO, INC. V. MORAN

A. Factual Background

Rush Prudential HMO, Inc. ("Rush"), an HMO, contracted with employers to provide medical services under employee welfare benefits plans covered by ERISA.[151] Debra Moran ("Moran"), a beneficiary under such an ERISA plan sponsored by her husband's employer, brought suit against Rush.[152] Rush's plan, issued to participating employees, promised that Rush will provide them with "medically necessary"[153] services.[154] "Rush contracts with physicians 'to arrange for or provide services and supplies for medical care and treatment' of covered persons."[155] Rush covered costs of each covered person under care of

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[148] *See id.* § 432E-6(7)(c).

[149] *See id.* § 432E-6(7)(d).

[150] *See id.* § 432E-6(7)(e).

[151] Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, ___, 122 S. Ct. 2151, 2156 (2002).

[152] *Id.*

[153] Rush's coverage states that:

> a service is covered as "medically necessary" if Rush finds: (a) [The service] is furnished or authorized by a Participating Doctor for the diagnosis or the treatment of a Sickness or Injury or for the maintenance of a person's good health. (b) The prevailing opinion within the appropriate specialty of the United States medical profession is that [the service] is safe and effective for its intended use, and that its omission would adversely affect the person's medical condition. (c) It is furnished by a provider with appropriate training, experience, staff and facilities to furnish that particular service or supply.

Id.

[154] *Id.*

[155] *Id.*

his or her primary care physician.[156] However, Rush only covered services by an unaffiliated physician if Rush's medical director and the patient's primary care physician authorized the service.[157]

When Moran felt pain and numbness in her right shoulder, her primary care physician "unsuccessfully administered 'conservative' treatments such as physiotherapy."[158] Moran's primary care physician recommended that Rush approve surgery by an unaffiliated specialist who had developed an unconventional treatment.[159] Rush denied the request to provide coverage of surgery by an unaffiliated specialist on the basis that the procedure was not medically necessary.[160] Rush instead approved standard surgery by a Rush affiliated surgeon.[161] Moran demanded an independent medical review of her claim, as guaranteed by section 4-10 of the Illinois HMO Act,[162] which provided that "[i]n the event that the reviewing physician determines the covered service to be medically necessary, the [HMO] shall provide the covered service."[163] After Rush refused her demand, Moran sued in state court to compel compliance.[164] Rush removed the suit to federal district court.[165] Rush argued that the cause of action was completely preempted under ERISA.[166] The federal court remanded the case back to state court because the "request for independent review under [section] 4-10 would not require interpretation of the terms of an ERISA plan."[167]

The state court ordered Rush to submit to review by an independent physician and the reviewing physician found the treatment medically necessary.[168] Rush again denied coverage.[169] Moran had the surgery while her suit was pending and amended her complaint to seek reimbursement.[170] Rush again removed the case to federal court where the court denied Moran's claim on the basis that Moran's complaint stated a claim for ERISA benefits and was

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[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *Id.*
[161] *Id.*
[162] 215 ILL. COMP. STAT. 125/4-10 (2000).
[163] *Id.*
[164] Moran v. Rush Prudential HMO, Inc., 230 F.3d 959, 964 (7th Cir. 2000); *Rush*, 536 U.S. at ___, 122 S. Ct. at 2157.
[165] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2157.
[166] *Moran*, 230 F.3d at 964; *Rush*, 536 U.S. at ___, 122 S. Ct. at 2157.
[167] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2157.
[168] *Moran*, 230 F.3d at 964-65; *Rush*, 536 U.S. at ___, 122 S. Ct. at 2157.
[169] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2157.
[170] *Id.*

completely preempted by ERISA's civil enforcement[171] provisions.[172] The district court denied the claim on the ground that ERISA preempted Illinois's independent review statute.[173] The Seventh Circuit Court of Appeals reversed.[174]

The Seventh Circuit found that "although ERISA broadly preempts any state laws that 'relate to'[175] employee benefit plans, . . . state laws that 'regulat[e] insurance'[176] are saved from preemption."[177] The court found that the Illinois HMO Act regulated insurance and that "the independent review requirement [was not that] different from a state-mandated contractual term"[178] that the Supreme Court "had held to survive ERISA preemption."[179] The court "rejected the contention that Illinois's independent review requirement constituted a forbidden 'alternative remedy.'"[180] The court further "emphasized that [section] 4-10 does not authorize any particular form of relief in state courts; rather, with respect to any ERISA health plan, the judgment of the independent reviewer is only enforceable in an action brought under ERISA's civil enforcement scheme."[181] The Seventh Circuit held that the Illinois law was not preempted because although it "relate[s] to" an employee benefit plan, it also "regulates insurance" under ERISA's saving clause.[182] Rush filed a writ of certiorari to the United States Supreme Court.

B. Majority Opinion

Justice Souter began the Court's opinion in *Rush* by first taking note of the difficulty in attempting to "extrapolate congressional intent"[183] in interpreting ERISA. The opinion stated that while "congressional language seems . . . to preempt everything and hardly anything, we 'have no choice' but to temper the assumption that the ordinary meaning . . . accurately expresses the legislative

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[171] 29 U.S.C.A. § 1132(a) (West, WESTLAW through 1999 Pub. L. 107-272).

[172] *Moran*, 230 F.3d at 965; *Rush*, 536 U.S. at ___, 122 S. Ct. at 2158.

[173] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2158.

[174] *Moran*, 230 F.3d 959; *Rush*, 536 U.S. at ___, 122 S. Ct. 2158.

[175] 29 U.S.C.A. § 1144(a) (West, WESTLAW through 1999 Pub. L. 107-272).

[176] *See id.* § 1144(b)(2)(A).

[177] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2158.

[178] *Id.*

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] Moran v. Rush Prudential HMO, Inc., 230 F.3d 959, 962 (7th Cir. 2000); *Rush*, 536 U.S. at ___, 122 S. Ct. at 2158.

[183] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2159.

purpose."[184] The Court also noted that "the history[y] [of] police powers of the States were not meant to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[185]

The Court stated that "[i]t is beyond serious dispute that under existing precedent [section] 4-10 of the Illinois HMO Act 'relates to' employee benefit plans within the meaning of [section] 1144(a)."[186] The only issue is whether the law that "relates to" ERISA plans under section 1144(a) is saved from preemption only if it also "regulates insurance" under section 1144(b)(2)(A).

The majority looked to *Metropolitan Life*,[187] where the Court stated "that in deciding whether a law 'regulates insurance' under ERISA's saving clause," the first test is a "common-sense view of the matter."[188] Relying on *Metropolitan Life*, the Court first made a common sense inquiry to determine if the "law . . . [had] an impact on the insurance industry, [and was] specifically directed toward that industry."[189] The Court then tested the results of the common-sense inquiry by employing the McCarran-Ferguson factors.[190]

The common sense inquiry test "focuses on 'primary elements of an insurance contract, which are the spreading and underwriting of a policyholder's risk.'"[191] The Illinois statute defines HMOs "by reference to the risk that it bears."[192] The Court stated that an HMO is both a health care provider and an insurer.[193] "The defining feature of an HMO is receipt of a fixed fee for each patient enrolled under the terms of a contract to provide specified health care if needed."[194] "The HMO thus assumes the financial risk

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[184] *Id.* (internal quotations omitted); *see also* Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740 (1985) (quoting Park'N Fly, Inc. v. Dollar Park and Fly, Inc., 469 U.S. 189, 194 (1985)).

[185] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2159.

[186] *Id.*

[187] 471 U.S. 724 (1985).

[188] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2159 (citing *Metropolitan Life*, 471 U.S. at 740); *see also Metropolitan Life*, 471 U.S. at 740.

[189] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2159 (citing Pilot Life v. Dedeaux, 481 U.S. 41, 50 (1987)); *see also Pilot Life*, 481 U.S. at 50.

[190] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2159 (citing 15 U.S.C. § 1011 et.seq. (2002)).

[191] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2159 (citing Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 211 (1979)); *see also Royal Drug*, 440 U.S. at 211 (agreements to fix retail prices are not the "business of insurance" and are not exempt from antitrust laws by the McCarran-Ferguson Act).

[192] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2159. Section 1-2(9) of the Illinois HMO Act states that an HMO "provide[s] or arrange[s] for . . . health care plans under a system which causes any part of the risk of health care delivery to be borne by the organization or its providers." 215 ILL. COMP. STAT. 125/1-2(9) (2000).

[193] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2160.

[194] *Id.* (quoting Pegram v. Herdrich, 530 U.S. 211, 218 (2000)); *see also Pegram*, 530 U.S. at 218 (treatment decisions made by physicians affiliated with HMO were not fiduciary acts

of providing the benefits promised: if a particular participant never gets sick, the HMO keeps the money regardless, and if a participant becomes excessively ill, the HMO is responsible for the treatment."[195]

The Court acknowledged that from its inception, the HMO Act of 1973 had been understood by Congress "to encourage the development of HMOs as a new form of health care delivery system."[196] Congress set the standard that these organizations would have to meet to gain certain federal benefits, and some included requirements of risk bearing.[197] The Senate viewed HMOs as insurers because "'the same stringent requirements do not apply to other indemnity or service benefits insurance plans.'"[198] Before Congress passed ERISA, it defined HMOs by reference to the risk that they bear, "set minimum standards for managing the risk[s], showed awareness that States regulated HMOs as insurers, and compared HMOs to 'indemnity or service benefits insurance plans.'"[199] Thus, the Court held that "the Illinois HMO Act is a law 'directed toward' the insurance industry, and an 'insurance regulation' under a 'common sense' view."[200]

The Court held that the McCarran-Ferguson factors confirm this conclusion.[201] A law that regulates insurance for McCarran-Ferguson purposes "targets practices or provisions that 'have the effect of transferring or spreading a policyholder's risk; are an integral part of the policy relationship between the insurer and the insured; and are limited to entities within the insurance industry.'"[202] Since these factors are guideposts, a state law does not have to satisfy all three McCarran-Ferguson criteria to survive preemption.[203] The Court decided to leave the question open as to whether the statute may be described as "going to a practice that 'spreads a policyholder's risk'" and instead held that the second and third factors were "clearly satisfied."[204]

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within the meaning of ERISA).

[195] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2160 (citing *Pegram*, 530 U.S. at 218-19); *see also Pegram*, 530 U.S. at 218.

[196] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2160.

[197] *Id.*

[198] *Id.* (quoting S. REP. NO. 93-129, at 3061 (1973), *reprinted in* 1973 U.S.C.C.A.N. 3033, 3060).

[199] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2161.

[200] *Id.* at ___, 122 S. Ct. at 2163. *See supra* note 14 and accompanying text.

[201] *Id.* at ___, 122 S. Ct. at 2163-64; *see supra* note 69 and accompanying text (listing the three criteria identified with the McCarran-Ferguson Act).

[202] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2163. (quoting Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982)); *see also Pireno*, 458 U.S. at 129.

[203] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2163.

[204] *Id.*

The second McCarran-Ferguson factor requires the law to be an integral part of the policy relationship between the insurer and the insured.[205] The Court stated that "[i]t is obvious enough that the independent review requirement regulates 'an integral part of the policy relationship between the insurer and the insured.'"[206] The Illinois law "adds an extra layer of review when there is internal disagreement about an HMO's denial of coverage."[207] The independent reviewer employs a medical necessity standard of care and construes policy terms.[208] The Court stated that the review affects the "policy relationship" between HMO and plan participants by interpreting the relationship into definite terms of specific obligation.[209] The Court noted its "repeated statements that the interpretation of insurance contracts is at the 'core' of the business of insurance."[210] Section 4-10 provides the insured with a legal right to obtain an authoritative determination of the HMO's medical decision that is enforceable against the HMO.[211]

The third factor requires that the law be aimed at a "practice . . . limited to entities within the insurance industry."[212] The Court held that this final factor is satisfied for many of the same reasons that the statute passed the common sense inquiry.[213] "The law regulates application of HMO contracts and provides for review of claim denials; once it is established that HMO contracts are, in fact, contracts for insurance (and not merely contracts for medical care), it is clear that [section] 4-10 does not apply to entities outside the insurance industry."[214]

The Court held that the Illinois statute regulated insurance and was thus saved from preemption.[215] In dicta, the Court went on to discuss possible methods of preempting state laws that "regulate insurance."[216] Under ERISA,

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[205] *Id.*

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] *Id.* (citing SEC v. Nat'l Sec., Inc., 393 U.S. 453, 460 (1969)); *see also SEC*, 393 U.S. at 460 (fraudulent misrepresentation suit by SEC was not barred by McCarran-Ferguson Act because Congress did not intend to supersede any state law regulating the business of insurance).

[211] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2164.

[212] *Id.* (citing Union Labor Life Ins. v. Pireno, 458 U.S. 119, 129 (1982)); *see also Pireno*, 458 U.S. at 129.

[213] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2164.

[214] *Id.*

[215] *Id.*

[216] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2165.

the Court recognized the overpowering federal policy in the civil enforcement provisions[217] that authorize civil actions for six specific types of relief.[218]

The *Rush* Court distinguished earlier precedent in determining whether Illinois's independent review law improperly conflicted with ERISA's remedial scheme. Notably, the Court distinguished *Russell*, [219] *Pilot Life*,[220] and *Ingersoll-Rand*.[221] The *Rush* Court looked to *Russell*, where the *Russell* Court held that the civil provisions of ERISA created an "interlocking, interrelated, and interdependent remedial scheme"[222] which was later described as "represent[ing] a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans."[223] The *Rush* Court found that "the civil enforcement provisions are of such extraordinarily preemptive power that they override even the 'well-pleaded complaint' rule for establishing the conditions under which a cause of action may be removed to a federal forum."[224] The *Rush* Court noted that although such a conflict between the congressional policies of exclusively federal remedies and the "'reservation of the business of insurance to the States'" had not yet been encountered, it "anticipated such a conflict, with the state insurance regulation losing out if it allows plan participants 'to obtain remedies . . . that Congress rejected in ERISA.'"[225]

The *Rush* Court noted that in *Pilot Life*, the *Pilot Life* Court held that the plan participant's claims for breach of contract, emotional distress, and punitive damages were damages unavailable under ERISA provisions.[226] "Congress intended a 'federal common law of rights and obligations' to develop under ERISA, without embellishment by independent state

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[217] 29 U.S.C.A. § 1132(a) (West, WESTLAW through 1994 Pub. L. 107-272).

[218] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2164.

[219] 473 U.S. 134 (1985).

[220] 481 U.S. 41 (1987).

[221] 498 U.S. 133 (1990).

[222] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2165 (citing *Russell*, 473 U.S. at 146); *see also Russell*, 473 U.S. at 146.

[223] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2165 (citing *Pilot Life*, 481 U.S. at 54); *see also Pilot Life*, 481 U.S. at 54.

[224] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2165 (citing Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63-64 (1987)); *see also Taylor*, 481 U.S. at 63-64 (former employee's common law claims of breach of contract, retaliatory discharge and wrongful termination of disability benefits against former employer were preempted by ERISA).

[225] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2165 (citing *Metropolitan Life*, 471 U.S. at 744 n.21 and *Pilot Life*, 481 U.S. at 54); *see also Metropolitan Life*, 471 U.S. at 744 n.21 and *Pilot Life*, 481 U.S. at 54.

[226] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2165 (citing *Pilot Life*, 481 U.S. at 50-51); *see also Pilot Life*, 481 U.S. at 50-51.

remedies."[227] The *Rush* Court stated that "the saving clause had to stop short of subverting congressional intent, clearly expressed 'through the structure and legislative history[,] that the federal remedy . . . displace state causes of action.'"[228]

Similarly, in *Ingersoll-Rand*,[229] Texas's tort of wrongful discharge duplicated the elements of a claim available under ERISA. The state law converted the equitable remedy under ERISA into a legal remedy for money damages.[230] The *Ingersoll-Rand* Court held the Texas law to be incompatible with ERISA's enforcement scheme.[231] "[T]he law provided a form of ultimate relief in a judicial forum that added to the judicial remedies provided by ERISA."[232]

The *Rush* Court distinguished *Ingersoll-Rand* from its facts by stating that "[*Rush*] addresses a state regulatory scheme that provides no new cause of action under state law and authorizes no new form of ultimate relief."[233] The Court conceded that while the independent review law "may well settle the fate of a benefit claim under a particular contract, the state statute does not enlarge the claim beyond the benefits available in any action brought under [section] 1132(a)."[234] Although the independent reviewer's determination could "replace that of the HMO as to what is 'medically necessary' under th[e] contract, the relief ultimately available would still be what ERISA authorizes in a suit for benefits under [section] 1132(a)."[235]

The Rush Court held that the Illinois law did not involve the type of additional claim or remedy exemplified in *Pilot Life*, *Russell*, and *Ingersoll-Rand*. However, the Court did not end there. It commented that:

> We do not believe that the mere fact that state independent review laws are likely to entail different procedures will impose burdens on plan administration that would threaten the object of 29 U.S.C. [section] 1132(a) . . . . *We recognize, of course, that a State might enact an independent review requirement with*

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[227] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2165 (citations omitted) (citing *Pilot Life*, 481 U.S. at 56); *see also Pilot Life*, 481 U.S. at 56.

[228] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2165 (citing *Pilot Life*, 481 U.S. at 57); *see also Pilot Life*, 481 U.S. at 57.

[229] 498 U.S. 133 (1990).

[230] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2166 (citing Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 145 (1990)); *see also Ingersoll-Rand*, 498 U.S. at 145.

[231] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2166 (citing *Ingersoll-Rand*, 498 U.S. at 145); *see also Ingersoll-Rand*, 498 U.S. at 145.

[232] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2166 (citing *Pilot Life*, 481 U.S. at 56); *see also Pilot Life*, 481 U.S. at 56.

[233] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2167.

[234] *Id.*

[235] *Id.*

procedures so elaborate, and burdens so onerous, that they might undermine section 1132(a).[236]

For example, a type of review that resembles an adjudication would fall within *Pilot Life's* categorical bar.[237] Arbitration, a form of adjudication, arises when parties in dispute choose an arbitrator to provide a final and binding decision on the merits.[238] Normally, arbitrators conduct hearings where parties submit evidence and cross examine the opposing side.[239] They are often invested with powers similar to a judge, including the power to subpoena witnesses and administer oaths.[240]

The *Rush* Court conceded that the Illinois statute does resemble an arbitration provision, but only "to the extent that the independent reviewer considers disputes about the meaning of the HMO contract and receives 'evidence' in the form of medical records, statements from physicians, and the like."[241] It held that other features of the independent review are not at odds with the policy behind section 1132(a).[242] The law "does not give the independent reviewer a free-ranging power to construe contract terms, but instead, confines review to a single term: the phrase 'medical necessity.'"[243] The term is used to define the services covered under the contract.

The Rush Court noted that in *Pegram*,[244] the *Pegram* Court explained that "when an HMO guarantees medically necessary care, determinations of coverage 'cannot be untangled from physicians' judgments about reasonable medical treatment."[245] The *Rush* Court stated that the Illinois law operates in

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[236] *Id.* at ___, 122 S. Ct. at 2168 n.11 (emphasis added) (citations omitted). The note also stated that:

> it is the HMO contracting with a plan, and not the plan itself, that will be subject to these regulations, and every HMO will have to establish procedures for conforming with the local laws, regardless of what this Court may think ERISA forbids. This means that there will be no special burden of compliance upon an ERISA plan beyond what the HMO has already provided for. And although the added compliance cost to the HMO may ultimately be passed on to the ERISA plan, we have said that such 'indirect economic effect[s],' are not enough to preempt state regulation even outside of the insurance context.

Id. (citations omitted).

[237] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2168.

[238] *Id.* (citing I. MacNeil, R. Speidel, & T. Stipanowich, FEDERAL ARBITRATION LAW § 2.1.1 (1995)).

[239] *Id.* (citing Uniform Arbitration Act § 5 (1997)).

[240] *Id.* (citations omitted).

[241] *Id.*

[242] *Id.*

[243] *Id.*

[244] 530 U.S. 211 (2000).

[245] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2168 (citing Pegram v. Herdrich, 530 U.S. 211, 229 (2000)); *see also Pegram*, 530 U.S. at 229.

the same way.[246] The Court held that the practice of obtaining a second opinion is far from any resemblance of an enforcement scheme.[247]

The *Rush* Court concluded that section 4-10 imposed no new obligation or remedy like the causes of action considered in *Pilot Life*, *Russell*, and *Ingersoll-Rand*.[248] Instead, the Illinois statute merely resembled a second medical opinion rather than an unacceptable arbitration scheme.[249] Thus, the law survived ERISA preemption and the Court affirmed the judgment of the Seventh Circuit.

C. Dissenting Opinion

The dissent, authored by Justice Thomas, began by noting that the Court has "repeatedly recognized that ERISA's civil enforcement provision provides the exclusive vehicle for actions asserting a claim for benefits under health plans governed by ERISA, and . . . that state laws that create additional remedies are preempted."[250] "[E]ven a state law that 'regulates insurance' may be preempted if it supplements the remedies provided by ERISA, despite ERISA's saving clause."[251]

The dissent stated that the Court allowed Moran to "short circuit ERISA's remedial scheme by allowing her claim for benefits to be determined in the first instance though an arbitral-like procedure provided under Illinois law, and by a decisionmaker other than a court."[252] The dissent called for a reversal of the court of appeals' judgment and a remand for a determination of whether Moran was entitled to reimbursement absent the independent review.[253]

A state law regulating insurance will be preempted if it provides separate means to assert a claim for benefits outside of, or in addition to, ERISA's

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[246] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2168. The Court commented that:

> [T]he reviewer in this case did not hold the kind of conventional evidentiary hearing common in arbitration, but simply received medical records submitted by the parties, and ultimately came to a professional judgment of his own. Once this process is set in motion, it does not resemble either contract interpretation or evidentiary litigation before a neutral arbiter, as much as it looks like a practice (having nothing to do with arbitration) of obtaining another medical opinion. The reference to an independent reviewer is similar to the submission to a second physician, which many health insurers are required by law to provide before denying coverage.

Id. at ___, 122 S. Ct. at 2168-69 (citations omitted).

[247] *Id.* at ___, 122 S. Ct. at 2169.

[248] *Id.* at ___, 122 S. Ct. at 2170.

[249] *Id.*

[250] *Id.* at ___, 122 S. Ct. at 2171. (Thomas, J., dissenting).

[251] *Id.*

[252] *Id.* at ___, 122 S. Ct. at 2172.

[253] *Id.*

remedial scheme.[254] The dissent argued that ERISA provided Moran with the "most obvious remedy: a civil suit to recover benefits due under the terms of the plan."[255] However, Moran did not bring such a suit, instead she sought to have her right to benefits determined outside of ERISA's remedial scheme through the arbitral-like mechanism available under the Illinois statute.[256]

The dissent's main argument focused on the premise that the Illinois statute "cannot be characterized as anything other than an alternative state-law remedy or vehicle for seeking benefits."[257] The Illinois law "is in fact a binding determination of whether benefits are due: 'In the event that the reviewing physician determines the covered service to be medically necessary, the [HMO] shall provide the covered service.'"[258] "Section 4-10 is thus most precisely characterized as an arbitration-like mechanism to settle benefits disputes."[259]

Noting that the Court had previously held that *arbitration* constituted an alternative state law remedy to litigation,[260] the dissent maintained that section 4-10 is like arbitration where plan members may seek to conclusively resolve their dispute.[261] The dissent stated that "[s]tates may not circumvent ERISA pre-emption by mandating an alternative arbitral-like remedy as a plan term enforceable through an ERISA action."[262] The dissent contended that section 4-10 a binding decision on the merits and therefore resembles arbitration more than anything else.[263] The dissent noted that the decision of the independent reviewer is ultimately enforceable through a benefits suit under ERISA.[264] To the dissenters, this further supported the proposition that the Illinois statute is an arbitral remedy because it is enforceable through a subsequent action.[265]

In closing, the dissent concluded that by "[a]llowing disparate state laws that provide inconsistent external review requirements to govern a participant's or beneficiary's claim to benefits under an employee benefit plan is wholly destructive of Congress' expressly stated goal of uniformity in this area."[266]

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[254] *Id.* at ___, 122 S. Ct. at 2174.

[255] *Id.* at ___, 122 S. Ct. at 2175.

[256] *Id.*

[257] *Id.*

[258] *Id.* (citing 215 ILL. COMP. STAT. 125/4-10 (2000)) (emphasis omitted).

[259] *Id.*

[260] *See* Air Line Pilots v. Miller, 523 U.S. 866, 876 (1998); DelCostello v. Int'l Bd. Of Teamsters, 462 U.S. 151, 163 (1983); Great American Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 377-78 (1979).

[261] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2178 (Thomas, J., dissenting).

[262] *Id.* at ___, 122 S. Ct. at 2175.

[263] *Id.*

[264] *Id.*

[265] *Id.*

[266] *Id.* at ___, 122 S. Ct. at 2178.

IV. ANALYSIS

The *Rush* Court's definitive ruling on validating second opinion independent review laws has been called "'a major victory for America's patients and their physicians'" by the American Medical Association.[267] However, that victory may be limited to those state laws that mimic Illinois's independent review law. The *Rush* Court has set limits on what features of an independent review law save it from preemption. A state law may not be saved from preemption if it reaches beyond the allowable limits, and the following analysis reveals that Hawai'i's external review law is such a law. The following sections will analyze whether Hawai'i's statute "relates to" insurance, whether it "regulates insurance," and whether it conflicts with ERISA's civil enforcement by providing an alternative enforcement mechanism, resembling arbitration, or resembling contract interpretation.

A. Whether HRS Section 432E-6 "Relates To" Insurance

ERISA contains an express preemption provision that states, ERISA "shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan."[268] Like the Illinois independent review law, the Hawai'i external review law is also a law that "relates to" an employee welfare benefits plan. HRS section 432E-6 provides for a distinct enforcement mechanism and applies only to insured benefit plans by allowing an enrollee of a provider to request for an external review of the MCO's final internal determination.[269] To the extent that HRS section 432E regulates the terms and conditions of MCOs, it regulates the design and structure of ERISA-regulated employee benefit plans. Since HRS section 432E-6 dictates that an MCO provide an external review, it has a "connection with" and "reference to" an ERISA plan and thus, "relates to" an ERISA plan.[270]

B. Whether HRS Section 432E-6 "Regulates Insurance"

Although a state law "relates to" an employee welfare benefit plan, it may be saved from preemption if it also "regulates insurance."[271] Hawai'i's

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[267] Jo-el J. Meyer & Peyton M. Sturges, *Divided U.S. Supreme Court Finds Independent Review Law Not Preempted*, 26-11, BNA HEALTH L. REP. 933 (2002).

[268] 29 U.S.C.A. § 1144(a) (West, WESTLAW through 1999 Pub. L. 107-272) (emphasis added).

[269] HAW. REV. STAT. § 432E-6 (2001).

[270] *See* discussion *supra* Part II.A.1.

[271] 29 U.S.C.A. § 1144(b)(2)(A) (West, WESTLAW through 1999 Pub. L. 107-272).

external review law is directed towards the insurance industry and is an insurance regulation under a common sense view. It is listed under Title 24, the Insurance title, of the HRS.[272] The Hawai'i external review law is subject to compliance by MCOs and is thus directed toward the insurance industry.[273] The legislative history also confirms that HRS section 432E-6 is a law directed toward the insurance industry and is an insurance regulation.[274] Because Hawai'i's law is directed towards the insurance industry, it also regulates insurance under the common sense inquiry.

For the same reasons used by the *Rush* Court, the Hawai'i external review law regulates an integral part of the policy relationship between the insurer and the insured, and thus satisfies the second McCarran-Ferguson factor.[275] HRS section 432E-6 may affect the determination of coverage when it is denied internally. The statute also provides a standard of medical care and construes policy terms regarding whether the MCO acted reasonably.[276] The Hawai'i external review procedure also satisfies the third factor because it provides for review of claim denials and applies only to the insurance industry.[277] Therefore, HRS section 432E-6 regulates insurance from a common sense view and satisfies the McCarran Ferguson test.

C. Whether HRS Section 432E-6 Conflicts With ERISA's Civil Enforcement

State laws that regulate insurance will not be saved from preemption if they conflict with ERISA's enforcement scheme.[278] The *Rush* Court provided three ways that a state law may conflict with ERISA's civil enforcement provision. A law conflicts with ERISA by (1) providing for an alternative enforcement mechanism, such as a remedy available only in state court, (2) by resembling arbitration, or (3) by resembling a form of contract interpretation.[279]

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[272] HAW. REV. STAT. Title 24 (2002).

[273] *See supra* note 193 and accompanying text (explaining that an HMO is both a health care provider and an insurer).

[274] HAW. H.R. CONF. COMM. REP. NO. 35, 25th Leg., Reg. Sess. (1998) *reprinted in* 1998 HAW. HOUSE J., 960, 960 (stating that "this law is a regulation on the 'business of insurance' and is not intended to interfere with employer health plans as they operate under federal law").

[275] *See supra* note 69 and accompanying text (listing the three criteria identified with the McCarran-Ferguson Act).

[276] HAW. REV. STAT. § 432E-6 (2001).

[277] *See id.* § 432E.

[278] Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 57 (1987) (holding that the language, structure, and legislative history of ERISA required the conclusion that its civil enforcement provisions were meant to establish an exclusive remedy for violations related to employee benefit plans).

[279] *See generally* Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 122 S. Ct. 2151 (2002).

1. Whether HRS section 432E-6 provides for an alternative enforcement mechanism

"[A]ny state law providing an alternative mechanism for the enforcement of benefit obligations under an ERISA plan is pre-empted even where directed solely at the insurance industry, and even if it is consistent with and merely supplements the ERISA enforcement scheme."[280] The *Rush* Court noted that it anticipates a conflict, where "the state insurance regulation los[es] out if it allows plan participants 'to obtain remedies that Congress rejected in ERISA.'"[281] In the choice between the congressional policies of exclusively federal remedies and the reservation of regulating insurance to the states, the states would lose.[282]

ERISA allows only equitable claims to be brought under the provisions of [section] 1132 in federal court.[283] As the *Rush* Court noted in *Moran*, the Seventh Circuit "emphasized that [section] 4-10 does not authorize any particular form of relief in state courts; rather, with respect to any ERISA health plan, the judgment of the independent reviewer is only enforceable in an action brought under ERISA's civil enforcement scheme."[284] HRS section 432E-6, however, provides an additional remedy by offering a form of relief in state court. HRS section 432E-6(a)(4) states that the commissioner "shall conduct a review hearing pursuant to chapter 91 [Hawai'i Administrative Procedure Act ("HAPA")]."[285] HAPA provides additional procedures such as the requirement of formal written findings and conclusions,[286] and the right of judicial review[287] in state court. Because judicial review under HRS section 91-14 is an appeal, not an original proceeding, in state court, it cannot be deemed a suit for benefits under section 1132(a) of ERISA.[288] A prevailing

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[280] Kasten, *supra* note 97, at 20.

[281] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2165 (citing *Pilot Life v. Dedeaux*, 481 U.S. 41, 54 (1987)).

[282] *See id.*

[283] *See* 29 U.S.C.A. § 1132 (West, WESTLAW through 1994 Pub. L. 107-272).

[284] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2158.

[285] HAW. REV. STAT. § 432E-6(a)(4) (2001).

[286] HRS section 91-12 states that "[e]very decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law." *See id.* § 91-12 (2001).

[287] HRS section 91-14 states that "[a]ny person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral or review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review." *See id.* § 91-14 (2001).

[288] *See id.*

claimant would still need to bring a section 1132(a) action in federal court after the entire review process, including any appeal, has run its course in state court.[289] This would likely raise res judicata and collateral estoppel issues.[290] Thus, unlike the situation in *Rush*, where the Court noted that the reviewer's judgment "could carry great weight in a subsequent suit for benefits under 1132(a),"[291] and that the court in a 1132(a) action would not have any "role beyond ordering compliance with the reviewer's determination,"[292] the judgment in an external review in Hawai'i could very well be deemed preclusive, thereby completely supplanting the ERISA remedy. Thus, HRS section 432E-6 conflicts with ERISA by providing an additional remedy in state court.

2. Whether HRS section 432E-6 conflicts with ERISA by resembling arbitration or a form of adjudication

Arbitration constitutes an alternative state law remedy to litigation and thus conflicts with ERISA's civil enforcement provision.[293] In *Alexander v. Gardner-Denver Co.*,[294] the Court upheld an employee's invocation of two alternative remedies for allegations of employment discrimination: arbitration under a collective-bargaining agreement and litigation under Title VII.[295] The Court recognized that because arbitration can be utilized in place of filing suit, it is another remedy to dispute resolution.[296]

The *Rush* Court stated a law is incompatible with ERISA's enforcement scheme if it provides "a form of ultimate relief in a judicial forum," thus

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[289] *Rush*, 536 U.S. at ___, 122 S. Ct. 2151, 2167 n.10.

[290] Black's Law Dictionary defines res judicata as:

> An affirmative defense barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been – but was not – raised in the first suit. The three essential elements are (1) an earlier decision on the issue, (2) a final judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties.

BLACK'S LAW DICTIONARY 1312 (7th ed. 1999).

Collateral estoppel is defined as "[a]n affirmative defense barring a party from relitigating an issue determined against that party in an earlier action, even if the second action differs significantly from the first one." BLACK'S LAW DICTIONARY 256 (7th ed. 1999).

[291] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2169 n.7.

[292] *See Rush*, 536 U.S. at ___, 122 S. Ct. at 2167 n.10.

[293] *See* Air Line Pilots Ass'n v. Miller, 523 U.S. 866, 876 (1998); DelCostello v. Int'l Bd. of Teamsters, 462 U.S. 151, 163 (1983); Great American Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 377-78 (1979).

[294] 415 U.S. 36 (1974).

[295] *Id.* at 59.

[296] *Id.*

adding "to the judicial remedies provided by ERISA."[297] The Hawai'i external review statute resembles an evidentiary proceeding before a neutral arbiter. The Hawai'i statute provides that a three-member panel appointed by the insurance commissioner shall consider "[a]ny documents or information used in making the . . . determination including the enrollee's medical records."[298] The panel shall receive "[a]ny documentation or written information submitted to the managed care plan in support of the enrollee's initial complaint"[299] and "[a] list of names, addresses, and telephone numbers of each licensed health care provider who cared for the enrollee and who may have medical records relevant to the external review."[300] The Hawai'i law differs from the Illinois law in that the review is not conducted by a single physician, but rather by a three-member panel, only one of whom need be a physician. The panel may consider more evidence than medical records.[301] The panel, under the Hawai'i law, does not simply render a professional medical judgment as required by the Illinois statute. The ultimate conclusion reached by the panel is not like a second medical opinion, but rather an adjudication.

HRS section 432E-6(a)(4) provides that the commissioner "shall conduct a review hearing pursuant to chapter 91 [(HAPA)]."[302] Contested case hearings under HAPA are full evidentiary hearings that are essentially identical to the example of arbitration raised by the *Rush* Court. As in arbitration, litigants in a contested case hearing have the right to "submit evidence and conduct cross-examinations."[303] This is similar to the Hawai'i Uniform Arbitration Act that defines the arbitration process and confers upon the arbiter the ability to "determine the admissibility, relevance, materiality, and weight of any evidence."[304] "[A] party to the arbitration proceeding has a right . . . to present evidence . . . and to cross-examine witnesses appearing at the hearing."[305]

The Hawai'i law provides that "[i]f the amount in controversy is less than $500, the commissioner may conduct a review hearing without appointing a review panel."[306] This is not like a second medical opinion because the commissioner, likely not a physician with the same qualifications as the treating physician, cannot give a medical opinion. The law also allows the commissioner to dismiss the complaint if it is determined that the request is

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[297] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2166.
[298] HAW. REV. STAT. § 432E-6(a)(3)(A) (2001).
[299] *See id.* § 432E-6(a)(3)(B).
[300] *See id.* § 432E-6(a)(3)(C).
[301] *See id.* § 432E-6(a)(3).
[302] *See id.* § 432E-6(4).
[303] *Rush*, 536 U.S. at ___, 122 S. Ct. at 2168.
[304] HAW. REV. STAT. § 658A-15(a) (2001).
[305] *See id.* § 658A-15(d).
[306] *See id.* § 432E-6(a)(4).

frivolous, without merit, [307] or without good cause.[308] This resembles adjudication before a judge who renders summary judgment for failure to state a claim.

Members of the review panel shall be granted immunity from liability and damages relating to their duties as panel members.[309] This is practically identical to a provision in Hawai'i's adopted version of the Uniform Arbitration Act,[310] which states, "[a]n arbitrator . . . acting in that capacity is immune from civil liability to the same extent as a judge of a court."[311]

Thus, the Hawai'i statute does not merely provide a doctor's "second opinion," but more closely resembles a form of arbitration. HRS section 432E-6 imposes an entire alternative procedure for adjudication, complete with rights to an evidentiary hearing and appeal.[312]

3. Whether HRS section 432E-6 conflicts with ERISA by resembling contract interpretation

ERISA preempts state laws that "require some substantial analysis or interpretation of plan contract terms."[313] In *Kanne v. Connecticut General Life Insurance Co.*,[314] an insured brought suit against his group health insurer for breach of contract. The Ninth Circuit Court of Appeals held that where a claim is premised on the interpretation of an insurance contract it is preempted by ERISA.[315] The court reasoned that the "common law of contract

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[307] *See id.* § 432E-6(a)(6).

[308] *See id.* § 432E-6(a)(4).

[309] *See id.* § 432E-6(7)(d).

[310] *See id.* Ch. 658A (2002).

[311] *See id.* § 658A-14(a).

[312] *See id.* Section 432E-6(7) states that:

> The review panel shall review every final internal determination to determine whether the managed care plan involved acted reasonably. The review panel and the commissioner or the commissioner's designee shall consider . . . [t]he terms of the agreement of the enrollee's insurance policy, evidence of coverage, or similar document . . . [w]hether the medical director properly applied the medical necessity criteria in section 432E-[1.4] in making the final internal determination . . . [a]ll relevant medical records . . . [t]he clinical standards of the plan . . . [t]he information provided . . . [t]he attending physician's recommendations; and . . . [g]enerally accepted practice guidelines. The commissioner, upon a majority vote of the panel, shall issue an order affirming, modifying, or reversing the decision within thirty days of the hearing.

Id.

[313] Donald T. Bogan, *ERISA: The Saving Clause, § 502 Implied Preemption, Complete Preemption, and State Law Remedies*, 42 SANTA CLARA L. REV. 105, 175 (2001); *see also* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985).

[314] 867 F.2d 489 (9th Cir. 1988).

[315] *Id.* at 494.

interpretation is not 'specifically directed toward the insurance industry.'"[316] A state's "common law of contract interpretation is not a law that 'regulates insurance,' and therefore is not saved from preemption."[317] In *Rice v. Panchal*,[318] the Seventh Circuit Court of Appeals stated that "complete preemption is required where a state law claim cannot be resolved without an interpretation of the contract governed by federal law."[319]

The Hawai'i law resembles a scheme of contract interpretation by authorizing an open-ended review by the panel of the MCO's decision. The Hawai'i panel "shall consider" numerous factors beyond mere "medical necessity."[320] "The review panel shall review every . . . internal determination to determine whether the managed care plan . . . acted reasonably."[321] The panel considers: "[t]he terms of the agreement of the enrollee's insurance policy; evidence of coverage";[322] "[w]hether the medical director properly applied the medical necessity criteria . . . in making the . . . determination";[323] "[a]ll relevant medical records";[324] "[t]he clinical standards of the plan; the information provided";[325] "[t]he attending physician's recommendations";[326] and "[g]enerally accepted practice guidelines."[327]

The panel's determination resembles a scheme of contract interpretation more than a physician's second opinion. It decides the terms of the policy, evidence of coverage, and whether the medical director properly applied the medical necessity criteria.[328] Thus, the law extends far beyond the issue of "medical necessity" and creates an alternative scheme of contract interpretation for ERISA plans that is contrary to ERISA procedures.

In sum, HRS section 432E-6 "relates to" an employee-benefits plan. It also "regulates insurance" under the common sense view and McCarran-Ferguson factors. The law, however, is not "saved" from preemption because it conflicts with ERISA's civil enforcement provision by providing an alternative enforcement mechanism in state court, by resembling a form of arbitration, and by resembling a form of contract interpretation.

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316 *Id.* (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 51 (1987)).
317 *Kanne*, 867 F.2d at 494.
318 65 F.3d 637 (7th Cir. 1995).
319 *Id.* at 644.
320 HAW. REV. STAT. § 432E-6(7) (2001).
321 *Id.*
322 *See id.* § 432E-6(a)(7)(A).
323 *See id.* § 432E-6(a)(7)(B).
324 *See id.* § 432E-6(a)(7)(C).
325 *See id.* § 432E-6(a)(7)(D).
326 *See id.* § 432E-6(a)(7)(F).
327 *See id.* § 432E-6(a)(7)(G).
328 *Id.*

The policy of federal supremacy thwarts the efforts of Hawai'i's legislature to protect patients' rights. Numerous hours spent researching and debating the provisions of this law produced a complex and burdensome method of review. Because the purpose of HRS section 432E-6 is to protect patients' rights, the language of the statute should at least be comprehendible by the majority of plan members who would seek to utilize the law and enforce it. As it stands, the law is much too complex and burdensome. Although ERISA preempts HRS section 432E-6, it may be a blessing in disguise to compel the Hawai'i State Legislature to amend the statute to a much simpler form. HRS section 432E-6 should be amended to duplicate the simple *and valid* Illinois independent review law.

V. CONCLUSION

The United States Supreme Court in *Rush Prudential HMO, Inc. v. Moran* set guidelines to determine whether a state law is preempted by ERISA. The Court determined that a law will be preempted if it either "relates to" and employee-benefits plan or if it conflicts with the purposes of ERISA. In formulating the tests of conflict preemption, the Court held that the Illinois independent review law was not preempted because it resembled a second medical opinion and did not conflict with the purposes of ERISA.

Utilizing the tests formulated by the *Rush* Court, it is evident that the Hawai'i external review law cannot survive preemption. HRS section 432E-6 "regulates insurance" and seems to be "saved" from preemption at first glance. The law, however, provides for provisions that conflict with ERISA's civil enforcement scheme. The Hawai'i law provides for an alternative enforcement mechanism available only in state court, whereas ERISA provides for equitable remedies in federal court. The law resembles arbitration, which is an alternative state law remedy to litigation, a form of adjudication not available under ERISA. The law also requires a form of contract interpretation, a state common law claim that is not an insurance regulation.

Although the Hawai'i external review law is an admirable attempt to protect the rights of patients by providing a structured procedure to review benefit denials, it must be amended to avoid ERISA preemption so that patients like Debra Moran can have an independent review of benefit denials.

Lori K. Amano[329]

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[329] Class of 2004, The University of Hawai'i, William S. Richardson School of Law. Many thanks to Professor Hazel Beh, Joie Yuen, and the law review editors. Special thanks to my parents, Daniel and Gail Miyasato, and my husband, Joshua, for all of your support.

Headwaters, Inc. v. Talent Irrigation District: Application of Aquatic Pesticides to Irrigation Canals, a Discharge, Which Requires a Clean Water Act Permit?

I. INTRODUCTION

In *Headwaters, Inc. v. Talent Irrigation District*,[1] the Ninth Circuit Court of Appeals held that the application of an aquatic pesticide to irrigation canals did not eliminate the need for a Clean Water Act ("CWA") permit even when use of the pesticide complied with the registration and labeling requirements under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA").[2] The Ninth Circuit's decision has significant implications for the regulated community, such as pesticide users, because the application of aquatic pesticides, which already comply with FIFRA's requirements, may now also be subject to additional requirements under the CWA.

The CWA regulates the discharge of pollutants into waters of the United States from point sources through the issuance of National Pollutant Discharge Elimination System ("NPDES") permits.[3] The CWA distinguishes between individual and general NPDES permits.[4] An individual NPDES permit allows a specific discharge in a specific location, whereas a general NPDES permit allows a category of similar discharges within a geographic area.[5] Typically, unpermitted point source discharges into waters of the United States violate the CWA.[6] The CWA defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, conduit . . . from which pollutants are or may be discharged."[7] This statutory definition, however, specifically excludes "return flows from irrigated agriculture."[8]

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[1] 243 F.3d 526 (9th Cir. 2001).

[2] *Id.* at 534.

[3] *See* 33 U.S.C.A. § 1311(a) (West, WESTLAW through 2001 Pub. L. 107-203). The CWA states that "the discharge of any pollutant by any person shall be unlawful." *Id.*; *see also* 33 U.S.C.A. § 1342 (West, WESTLAW through 2001 Pub. L. 107-203). The Administrator of the CWA may issue a permit for the discharge of any pollutant. 33 U.S.C.A. § 1342.

[4] *See* Natural Res. Def. Council v. U.S. Envtl. Prot. Agency, 279 F.3d 1180, 1183 (9th Cir. 2002).

[5] *See id.*

[6] *See* 33 U.S.C.A. § 1311(a).

[7] 33 U.S.C.A. § 1362(14) (West, WESTLAW through 2001 Pub. L. 107-203).

[8] *Id.* The term "point source" does not include "agricultural stormwater discharges and return flows from irrigated agriculture." *Id.*

The CWA also distinguishes between point source and nonpoint source pollution.[9] The CWA does not define "nonpoint source" activity.[10] Nonetheless, by evaluating the CWA's "point source" definition, nonpoint sources would apparently include those pollutant conveyances that are not confined or discrete.[11] This distinction is important because unlike point source discharges, the CWA does not expressly regulate nonpoint source activity through NPDES permits.[12] Instead, the CWA encourages area-wide control measures to abate or reduce nonpoint source pollution.[13]

FIFRA, however, has established a different regulatory scheme for the registration of all pesticides[14] sold in the United States.[15] The Environmental Protection Agency ("EPA") registers a pesticide if (1) its label complies with FIFRA and (2) use of the product will not cause any unreasonable adverse effects on the environment.[16] Despite the potential for overlap between FIFRA and the CWA, the Ninth Circuit's decision in *Headwaters* acknowledged that the discharge of an aquatic pesticide, even when properly labeled and registered according to FIFRA's requirements, must still comply with the CWA's NPDES permit requirement.[17]

Nearly one year after the Ninth Circuit's decision in *Headwaters*, however, the EPA issued interpretive guidance to its regional administrators that seemingly contradicted the Ninth Circuit's holding.[18] According to the

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[9] *Compare* 33 U.S.C.A. § 1342 (West, WESTLAW through 2001 Pub. L. 107-203) (describing the NPDES permit procedure), *with* 33 U.S.C.A. § 1329 (West, WESTLAW through 2001 Pub. L. 107-203) (describing nonpoint source management programs).

[10] *See* 33 U.S.C.A. § 1362.

[11] *See id.*

[12] *See* 33 U.S.C.A. § 1251(7) (West, WESTLAW through 2001 Pub. L. 107-203).

[13] *See* 33 U.S.C.A. § 1329 (West, WESTLAW through 2001 Pub. L. 107-203). The Governor of each state must submit a report to the Administrator, either the EPA or an EPA-delegated authority, that describes the best management practices to control and reduce the "level of pollution" from each category and subcategory of nonpoint sources. *Id.*

[14] The term "pesticide," which includes herbicides, is defined as "(1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, (2) any substance or mixture of substances intended for use as a *plant regulator*." 7 U.S.C.A. § 136(u) (West, WESTLAW through 1999 Pub. L. 107-203) (emphasis added).

[15] *See* 7 U.S.C.A. § 136a(a) (West, WESTLAW through 1999 Pub. L. 107-203); *see also* JEFFREY M. GABA, ENVIRONMENTAL LAW 197 (2d ed. 2001). *But cf.* Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 530 (9th Cir. 2001) (noting that FIFRA creates a regulatory scheme for the *labeling* of pesticides that are registered with the EPA).

[16] *Headwaters*, 243 F.3d at 530.

[17] *See id.* at 532. The court stated that an EPA-approved pesticide label which fails to "specify that a permit is required does not mean that the CWA does not apply to the [pesticide] discharge." *Id.*

[18] *Compare* Press Release, EPA, Irrigated Agriculture Herbicide Uses Continue To Be Regulated Under Existing Pesticide Law (Mar. 29, 2002) (on file with author) [hereinafter Press Release, EPA] (stating that the application of an aquatic herbicide to maintain an irrigation

guidance, the EPA believes that the application of an aquatic pesticide to maintain an irrigation system, consistent with the instructions on the pesticide's EPA-approved label, qualifies as nonpoint source activity. Consequently, such an application, according to the EPA, is exempt from the NPDES permit requirement because the CWA's definition of "point source" excludes return flows from irrigated agriculture.[19] The EPA's decision thus reflects a broad interpretation of the CWA's irrigation return flow exemption.

This note argues that although the Ninth Circuit's decision in *Headwaters* is consistent with Congress's overall intent under the CWA and FIFRA, the court failed to provide a thorough NPDES violation analysis.[20] The Ninth Circuit did not directly address whether the discharge of an aquatic pesticide into irrigation canals to facilitate "return flow" is a regulated point source, or whether such an application qualifies for permit exemption as non-point source activity or as a discharge that is "composed entirely of return flows from irrigated agriculture."[21] Admittedly, the Ninth Circuit was not required to address an issue raised on appeal: whether the discharge of an aquatic

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system is exempt from the CWA's NPDES permit requirement), *with Headwaters*, 243 F.3d at 532 (concluding that the registration and labeling of a pesticide under FIFRA did not preclude the need for a CWA permit), *and* Brief of Amicus Curiae United States, *infra* note 32, at 15. The amicus brief acknowledges that a pesticide user may comply with the CWA and FIFRA by following the instructions on the pesticide label and, "where the use of the pesticide constitutes the discharge of a pollutant from a point source into navigable waters, the pesticide user *must* also obtain an NPDES permit." *Id.* (emphasis added).

[19] 33 U.S.C.A. § 1362(14) (West, WESTLAW through 2001 Pub. L. 107-203). The statute states that the term, "point source," does not include "agricultural stormwater discharges and return flows from irrigated agriculture." *Id.*; *construed in* Press Release, EPA, *supra* note 18.

[20] *See Headwaters*, 243 F.3d at 532-34.

[21] 33 U.S.C.A § 1342(l)(1), *noted in* S. REP. NO. 95-370, at 31 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4360 [hereinafter S. REP.]. The Committee on Environment and Public Works stated, "In exempting discharges composed 'entirely' of return flows from irrigated agriculture . . . the committee did not intend to differentiate among return flows based upon their content. The word 'entirely' was intended to limit the exception to only those flows which do not contain additional discharges from activities unrelated to crop production." *Id.*

To prove a violation of the CWA, "the plaintiff must show that the defendants (1) discharged (2) a pollutant (3) to navigable waters (4) from a point source." *Headwaters*, 243 F.3d at 532 (quoting Mokelumne River v. East Bay Mun Util. Dist., 13 F.3d 305, 308 (9th Cir. 1993)).

Compare Headwaters, Inc. v. Talent Irrigation Dist., No. 98-6004-AA, 1999 U.S. Dist. LEXIS 21569, at *6 (D. Or. Feb. 1, 1999), *with Headwaters*, 243 F.3d at 532. The district court stated that the parties did not dispute whether the application of the aquatic pesticide constituted a "discharge" or whether the pesticide conveyance originated from a "point source." Therefore, the district court, in its NPDES permit violation analysis, omitted the "discharge" and "point source" elements. *Headwaters*, 1999 U.S. Dist. LEXIS 21569, at *6. The Ninth Circuit, however, addressed the "discharge" element but did not address the "point source" element. *Headwaters*, 243 F.3d at 532.

pesticide to irrigation canals qualifies for the CWA's "return flow" exemption from point source regulation.[22] By addressing the issue, however, the Ninth Circuit could have provided more specific guidance to both the regulated community and to regulators, thus avoiding the ensuing confusion.[23]

Part II of this note summarizes the factual background of both the district court's and the Ninth Circuit's decisions in *Headwaters*. Part III.A analyzes whether a different court's ruling that exempts the discharge of aquatic pesticides to irrigation canals from the NPDES permit requirement would be consistent with Congress's intent under the CWA. Part III.B reviews the limits on judicial deference that might be given to the EPA's interpretation of the CWA's "irrigation return flow" exemption, issued after the *Headwaters* decision. Part III.C considers other recent court decisions that involve the application of aquatic pesticides, while Part III.D suggests a reasonable and practical approach to implementing the Ninth Circuit's decision by requiring general NPDES permits for the discharge of aquatic pesticides. Part IV concludes that although the Ninth Circuit should have directly addressed the essential "point source" element in its analysis, the court's ruling nonetheless ensures that Congress's overall objective under the CWA is realized.

II. HEADWATERS, INC. V. TALENT IRRIGATION DISTRICT

A. Factual Background and Procedural History

Talent Irrigation District ("TID") operated a system of canals in Jackson County, Oregon, to provide water to its district members.[24] The canals derived water from and redirected water to numerous lakes and creeks.[25] To control the growth of weeds, TID applied Magnacide H, an aquatic herbicide, every two weeks to its irrigation canals with a hose connected to a tank on a truck.[26] Magnacide H's active ingredient is acrolein, which is acutely toxic to fish and

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[22] Reply Brief, *infra* note 94, at 9. Headwaters stated that "TID argues, for the first time on appeal, that because the contents of the canals are comprised of agricultural return flows, the canals are exempt from the CWA's NPDES permitting requirement." *Id.* (internal quotations omitted); *see also* Brief of Amicus Curiae Oregon Water Resource Congress at 25, Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526 (9th Cir. 2001).

[23] *See* Press Release, EPA, *supra* note 18.

[24] *Headwaters*, 243 F.3d at 528; Appellant's Brief at 3, Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526 (9th Cir. 2001) (No. 00-35373). TID's canal system includes four main canals—Talent Canal, Ashland Canal, East Canal, and West Canal. *Id.*

[25] *Headwaters*, 243 F.3d at 528. The canals exchange water with Bear Creek, Emigrant Lake, Wagner Lake, Anderson Creek, Coleman Creek, Dark Hollow Creek, and Butler Creek. *Id.*

[26] *Id.*

other wildlife.[27] EPA-approved pesticide labels must warn against discharge into fish bearing waters unless the product is identified in an NPDES permit.[28] Magnacide H's label, however, did not state that an NPDES permit was required for the application of Magnacide H.[29] Although TID had applied Magnacide H to its irrigation canals on numerous occasions, TID had never sought an NPDES permit.[30]

On May 8, 1996, TID applied Magnacide H to its canals.[31] The next day, the Oregon Department of Fish and Wildlife found that over 92,000 juvenile steelhead salmon and 1,500 non-salmonids were killed downstream from a leaking waste gate in the canal.[32] Headwaters, Inc. ("Headwaters") then brought a citizen lawsuit under the CWA to prohibit TID from discharging pollutants without a permit.[33]

To establish a violation of the CWA's NPDES permit requirement, a plaintiff essentially must prove that the defendant discharged a pollutant from a point source into navigable waters of the United States.[34] The CWA defines a "point source" discharge as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, [or] conduit . . . from which pollutants are or may be discharged."[35] The district court in Headwaters noted that the parties agreed that TID's pesticide application from a hose constituted a point source discharge.[36] The court further concluded that the irrigation canals were waters of the United States,

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[27] *Id.*

[28] Headwaters, Inc. v. Talent Irrigation Dist., No. 98-6004-AA, 1999 U.S. Dist. LEXIS 21569, at *17 (D. Or. Feb. 1, 1999). The revised environmental hazard warning that must appear on all pesticide labels states, "This pesticide is toxic to fish and aquatic organisms. *Do not discharge* effluent containing this product into lakes, streams, ponds, estuaries, oceans, or public water *unless this product is specifically identified and addressed in an NPDES permit.*" *Id.* (emphasis added).

[29] *Id.*; *Headwaters*, 243 F.3d at 529.

[30] *See Headwaters*, 243 F.3d at 528. A fish kill occurred in Bear Creek following an application of Magnacide H in 1983. *Id.*

[31] *Headwaters*, 1999 U.S. Dist. LEXIS 21569 at *3; *see also Headwaters*, 243 F.3d at 528.

[32] *Headwaters*, 243 F.3d at 528; Brief of Amicus Curiae United States at 6, Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526 (9th Cir. 2001) (No. 99-35373); Appellant's Brief, *infra* note 94, at 4.

[33] *See generally Headwaters*, 1999 U.S. Dist. LEXIS 21569; *Headwaters*, 243 F.3d at 529.

[34] *Headwaters*, 243 F.3d at 532. A violation of the CWA requires "the plaintiff show that the defendants (1) discharged (2) a pollutant (3) to navigable waters (4) from a point source." *Id.* (citing Mokelumne River v. East Bay Mun. Util. Dist., 13 F.3d 305, 308 (9th Cir. 1993)).

[35] 33 U.S.C.A. § 1362(14) (West, WESTLAW through 2001 Pub. L. 107-203).

[36] *See Headwaters*, 1999 U.S. Dist. LEXIS 21569, at *6. In referring to the direct discharge to the irrigation canals from a hose, the court stated that the parties do not dispute that "TID has discharged or added [Magnacide H] from a point source." *Id.* (citations and internal quotations omitted).

and that Magnacide H, with its active ingredient acrolein, is a "pollutant."[37] The court then considered whether the discharge of Magnacide H was legally authorized under FIFRA.[38]

The EPA-approved label for Magnacide H proscribed the discharge of treated water into any fish-bearing waters until six days after the application of Magnacide H.[39] The district court considered expert testimony regarding the breakdown[40] of acrolein and concluded that the six-day ban against the discharge of water that was treated with Magnacide H into fish-bearing waters was a sufficient safeguard against harm from Magnicide H.[41] Since the label on Magnacide H did not require an NPDES permit, the district court concluded that a permit was not required.[42] Although the record did not conclusively show that TID's canals were a "closed system," without proof that acroclein leaked from the canals and without a specific NPDES requirement on Magnacide H's label, the district court granted TID's motion for summary judgment.[43] As recourse, the district court noted that other pesticide labels require NPDES permits, and therefore encouraged the plaintiffs to petition the EPA to amend Magnacide H's label to also require an NPDES permit, which

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[37] *Id.* at *16. The court stated, "The herbicide, while beneficial in killing weeds and other vegetation in the canals, is shown to be toxic to fish species and other aquatic life at the recommended application levels." *Id.*

The court recognized that the canals, as tributaries to waters of the United States, are "waters of the United States under the [CWA]." *Id.* at *10 (internal quotations omitted).

[38] *See id.* at *16.

[39] *Id.* at *18-19.

[40] *See id.* at *18. According to Plaintiffs' expert, Glenn Miller, a Professor in the Department of Environmental and Resource Sciences at the University of Nevada in Reno, acrolein's half-life when applied to irrigation canals is usually between two and two and one-half days (referring to Plaintiff's Reply, Second Declaration of Glenn Miller, p.2, P4, Ex. 1, p.2). *Id.*

[41] *Id.* at *19.

[42] *See id.* at *16. The district court reasoned that an NPDES permit was not required since acrolein is regulated and controlled by FIFRA and the EPA, making "further regulation by the [CWA] unnecessary." *Id.*; *see also* Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 529 (9th Cir. 2001).

[43] *Headwaters*, 243 F.3d at 529; *Headwaters*, 1999 U.S. Dist. LEXIS 21569, at *22-23.

would require the discharger to monitor acrolein's effects and develop safe use methods.[44] Headwaters appealed the court's decision.[45]

B. The Ninth Circuit's Opinion

The Ninth Circuit Court of Appeals reversed the district court's grant of summary judgment in favor of TID, and remanded the case for entry of partial summary judgment in favor of Headwaters.[46] The Ninth Circuit first determined that the CWA and FIFRA had complementary purposes that allowed simultaneous compliance.[47] The Ninth Circuit then compared the different objectives and requirements between FIFRA and the CWA.[48]

The Ninth Circuit acknowledged that the objective of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[49] The CWA's national goals are to provide for the protection and propagation of fish and wildlife.[50] To accomplish this objective, the CWA establishes national effluent limitations, which apply to all point source discharges.[51] Point source discharges are prohibited into navigable waters unless an NPDES permit is obtained before the discharge occurs.[52] The Ninth Circuit noted that, in addition to providing national effluent standards, the CWA's permit program, which is administered by the EPA or by EPA-approved states,[53] requires a "case-by-case" assessment of the environmental effects of individual and statewide discharges of pollutants into a particular

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[44] *Headwaters*, 1999 U.S. Dist. LEXIS 21569, at *24. The court stated, "In other instances, . . . EPA has issued labels requiring applicators of aquatic pesticides to obtain NPDES—permits." *Id.* at *16.

The EPA states that pesticide producers and *users* are not relieved from the requirements of the CWA, state, or other local requirements. *See generally* Stephen L. Johnson, *U.S. Environmental Protection Agency, Pesticides: Regulating Pesticides, Pesticide Registration (PR) Notice 95-1, available at* http://www.epa.gov/opppmsd1/PR_Notices/pr95-1.html (Sept. 1, 1995), *noted in Headwaters*, 243 F.3d at 532 [hereinafter EPA Notice].

[45] *Headwaters*, 243 F.3d at 529.

[46] *Id.* at 534.

[47] *Id.* at 530-531. The court "must interpret the two statutes to give effect to each if [the court] can do so while preserving [the statutes'] sense and purpose. When two statutes are capable of co-existence, it is the duty of the courts to regard each as effective." *Id.* at 530 (internal quotations and internal alteration omitted) (quoting Resource Invs., Inc. v. U.S. Army Corp. of Eng'rs, 151 F.3d 1162, 1165 (9th Cir. 1998)).

[48] *Id.* at 531-32.

[49] 33 U.S.C.A § 1251(a)(1) (West, WESTLAW through 2001 Pub. L. 107-203), *noted in Headwaters*, 243 F.3d at 531.

[50] 33 U.S.C.A. § 1251(a)(2).

[51] 33 U.S.C.A. § 1311(e).

[52] *See generally* 33 U.S.C.A. § 1342.

[53] *See id.* § 1342(a)(1), (5).

water body.[54] Therefore, the NPDES permit program tailored national effluent limitations into a more localized point source discharge analysis, and thus provided more effective protection against water pollution concerns that are unique to a particular area.[55]

The Ninth Circuit recognized that FIFRA, on the other hand, also administered by the EPA, protects human health and the environment against harm from pesticides through a nationally uniform labeling system that requires the registration of all pesticides sold in the United States.[56] The EPA registers a pesticide after determining that the pesticide will perform its intended function without unreasonable adverse effects on the environment.[57] The Ninth Circuit acknowledged that since the label is nationally uniform, FIFRA's labeling requirements do not consider the possible unique effects of pesticide application to a particular area.[58] Furthermore, FIFRA's labeling process does not authorize the EPA to make "blanket determinations" regarding the safety of pesticide discharges into a particular water body.[59] Therefore, the Ninth Circuit and the EPA recognized that FIFRA's national permitting scheme does not consider the application of pesticides under local conditions, and thus may not adequately protect against possible health and environmental hazards caused by the localized application of pesticides.[60] As such, the Ninth Circuit found that the CWA takes into account that which FIFRA's labeling and registering requirements do not, and concluded that the two statutes could operate simultaneously without compromising the objectives of either.[61]

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[54] Brief of Amicus Curiae United States, *supra* note 32, at 8.

[55] *See id.* at 11.

[56] *See* 7 U.S.C.A. § 136a (West, WESTLAW through 1999 Pub. L. 107-203); *Headwaters*, 243 F.3d at 531; *see also* GABA, *supra* note 15, at 197. The EPA not only registers the pesticides, but may also impose conditions on, cancel, or suspend the use of pesticides and may cancel or suspend the use of a pesticide. *Id.*

[57] *Headwaters*, 243 F.3d at 530.

[58] *Id.* at 531.

[59] Brief of Amicus Curiae United States, *supra* note 32, at 2. The amicus brief states that the "EPA did not analyze, was not required to analyze, and could not feasibly have analyzed, whether, or under what conditions, the product could be discharged from a point source into particular public water bodies in compliance with the CWA." *Id.* at 12.

[60] *Headwaters*, 243 F.3d at 531; *see* Headwaters, Inc. v. Talent Irrigation Dist., No. 98-6004-AA, 1999 U.S. Dist. LEXIS 21569, at *17 (D. Or. Feb. 1, 1999). The revised environmental hazard warning that must appear on all pesticide labels states, "This pesticide is toxic to fish and aquatic organisms. *Do not discharge* effluent containing this product into lakes, streams, ponds, estuaries, oceans, or public water *unless this product is specifically identified and addressed in an NPDES permit.*" *Headwaters*, 1999 U.S. Dist. LEXIS 21569, at *17 (emphasis added); *see also* Johnson, *supra* note 44 (noting that pesticide users are not relieved from the requirements under the CWA or state or other local requirements).

[61] *See Headwaters*, 243 F.3d at 531.

In its opinion, however, the Ninth Circuit only considered three of the four elements necessary to find a violation of the CWA's NPDES permit requirement.[62] Although the Ninth Circuit determined that TID had discharged Magnacide H, a pollutant, into navigable waters, the court's analysis did not include a central element—whether the pollutant conveyance originated from a point source. More specifically, the court did not consider whether the discharge of Magnacide H from a hose into the irrigation canals was a point source subject to an NPDES permit requirement or a non-point source under the "return flow" exemption.[63] Nonetheless, the Ninth Circuit concluded that the EPA-approved label on Magnacide H did not obviate the need to obtain a CWA permit.[64] As a result, the court's decision, including its silence on the point source issue, has created a "degree of confusion."[65]

III. ANALYSIS

By concluding that pesticide labeling and registration under FIFRA does not preclude the need for an NPDES permit, the Ninth Circuit in *Headwaters* recognized that the discharge of aquatic pesticides may require an NPDES permit regardless of whether an EPA-approved pesticide label specifically requires a permit.[66] The Supreme Court has also recognized that although FIFRA and the CWA allow simultaneous compliance, the two statutes operate independently.[67] After the Ninth Circuit's ruling in *Headwaters*,[68] however,

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[62] *See id.* at 532. The court considered whether TID (1) discharged (2) a pollutant (3) into navigable waters, but did not discuss whether the discharge was (4) "from a point source." *Id.*

[63] *See generally id. But cf. Headwaters*, 1999 U.S. Dist. LEXIS 21569, at *7. The district court did not address whether TID's application of Magnacide H constituted a "discharge" from a "point source." The Ninth Circuit, however, did address the "discharge" element of an NPDES permit violation. *Id.*

[64] *Headwaters*, 243 F.3d at 532.

[65] Press Release, EPA, *supra* note 18.

[66] *See Headwaters*, 243 F.3d at 532; *see also* Brief of Amicus Curiae United States, *supra* note 32, at 15. The United States Department of Justice, in an amicus brief to the Ninth Circuit in *Headwaters*, stated that "[a] pesticide user may comply with both statutes by following the instructions on the pesticide label and, where the use of the pesticide constitutes the discharge of a pollutant from a point source into navigable waters, the pesticide user *must* also obtain an NPDES permit." Brief of Amicus Curiae United States, *supra* note 32, at 15 (emphasis added).

[67] *See* Wis. Pub. Intervenor v. Mortier, 501 U.S. 597 (1991) (noting that FIFRA compliance does not translate into a general approval to apply pesticides without considering regional and local factors like climate, population, geography, and water supply, as local permitting does). *Id.* at 613-14.

[68] *Compare Headwaters*, 243 F.3d at 526 (argued and submitted on Aug. 8, 2000 and filed on March 12, 2001), *with* Memorandum from EPA, to the EPA Regional Administrators of Regions 1-10, Interpretive Statement and Regional Guidance on the Clean Water Act's exemption for Return Flows from Irrigated Agriculture (Mar. 29, 2002) (on file with author)

the EPA issued interpretive guidance to its regional administrators to clarify the Ninth Circuit's holding in *Headwaters*.[69] The EPA's guidance expresses the agency's belief that the application of an aquatic herbicide, when used according to the instructions that appear on the herbicide's EPA-approved label for the purpose of facilitating return flow from irrigated agriculture, is nonpoint source activity and is thereby exempt from any permit requirement.[70]

A key element in deciding whether an NPDES permit violation has occurred is the "point source" determination. As EPA's interpretive guidance illustrates, Congress established certain exemptions for point source discharges. A particular pollutant conveyance that lacks an NPDES permit may not always violate the CWA if that "discharge" falls into an exempt category.[71] Also, under the CWA, a pollutant conveyance from nonpoint sources may be subject to significantly different control measures than point source discharges.[72] Thus, the EPA's interpretive guidance, as well as the CWA's provisions, necessitate a careful analysis of whether a particular pollutant conveyance is from a point source or a nonpoint source.

To determine whether an NPDES permit violation occurred, a court must analyze whether a particular pollutant conveyance into the waters of the United States qualifies as nonpoint source activity or as a statutorily exempt point source discharge. The Ninth Circuit simply did not discuss this issue.[73] The next court that must decide whether a point source discharge of an aquatic pesticide that facilitates "return flow," as alleged by TID in *Headwaters*, qualifies for an NPDES permit exemption should consider Congress's intent in establishing the CWA's "return flow" exemption.

[hereinafter EPA Memorandum].

[69] *See* Press Release, EPA, *supra* note 18.

[70] *Cf.* Brief of Amicus Curiae United States, *supra* note 32, at 12. The Department of Justice stated, "EPA approves pesticides under FIFRA with the knowledge that pesticides containing pollutants may be discharged from point sources into the navigable waters *only* pursuant to a properly issued CWA permit." *Id.* (emphasis added).

[71] *See* 33 U.S.C.A. § 1362 (14) (West, WESTLAW through 2001 Pub. L. 107-203) (noting that agricultural stormwater discharges and return flows from irrigated agriculture are exempt from point source regulation).

[72] *Compare* 33 U.S.C.A. § 1342 (West, WESTLAW through 2001 Pub. L. 107-203) (describing the NPDES permit procedure), *with* 33 U.S.C.A. § 1329 (describing nonpoint source management programs).

[73] *See generally Headwaters*, 243 F.3d 526. The Ninth Circuit did not address the return flow exemption. *See* EPA Memorandum, *supra* note 68, at 1; *see also* Brief of Amicus Curiae Oregon Water Resources Congress, *supra* note 22, at 25. Although Oregon Water Resources Congress argued that the acrolein discharge was exempt under the irrigation return flow exemption, the EPA and the Ninth Circuit did not address the exemption. Brief of Amicus Curiae Oregon Water Resources Congress, *supra* note 22, at 25 (citing 33 U.S.C. § 1342(l)(1)) (stating that the Administrator of the CWA shall not require a permit for return flows from irrigated agriculture). *But see generally* Brief of Amicus Curiae United States, *supra* note 32.

A. Runoff and the Irrigation Return Flow Exemption

Nonpoint source activity is not specifically defined in or regulated by the CWA.[74] According to the CWA's definition of "point source," all pollutant conveyances that are not "discernible, confined and discrete" would be considered "non-point sources."[75] The term "non-point source" is generally used to describe runoff, including runoff from irrigated agriculture.[76] In its 1977 Senate Report, the Committee on Environment and Public Works commented that agriculture was "demonstrated to be a major source of pollution" that impairs water quality. The Committee specifically noted that the CWA's "point source" strategy is "ineffective with regard to irrigation return flows."[77] The Committee decided that such flows would be more effectively handled under area-wide treatment plans regardless of the manner in which these flows were applied to lands.[78] The irrigation return flow exemption is based on the Committee's comment that acknowledges the difficulty in identifying and regulating these non-discrete flows because the conveyance is often diffuse and dependent on various factors.[79] Therefore, Congress implied that irrigation return flow is more appropriately considered a non-point source.[80]

In 1973, the EPA defined irrigation return flow as "conveyances carrying surface irrigation return as a result of the controlled application of water . . . to land used primarily for crops."[81] As such, the EPA excluded most

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[74] *See generally* 33 U.S.C.A. § 1329.

[75] *See* 33 U.S.C.A. § 1362 (14).

[76] Drew Caputo, *A Job Half Finished: The Clean Water Act After 25 Years*, 27 ENVTL. L. REP. 10574, 10575 (1997). Non-point source pollution is more "descriptively" referred to as polluted runoff. *Id.* "Sources of polluted runoff include agricultural fields, urban pavement, and suburban lawns—any surface from which rainwater or snowmelt can carry disturbed soil or other pollutants that collect on a surface (such as pesticides, excess applications of fertilizer, or oil that has dripped onto pavement) into water bodies." *Id.*

[77] *See* S. REP., *supra* note 21, at 4335.

[78] *Id.* at 4360. The Committee stated that irrigation return flows, "regardless of the manner in which the flow was applied to agricultural *lands* . . . are more appropriately treated under [area-wide treatment plans]." *Id.* (emphasis added).

[79] *E.g.*, Sierra Club v. Meiburg, 296 F.3d 1021, 1025 (11th Cir. 2002). In *Meiburg*, the court recognized that nonpoint sources "cannot be regulated by permits because there is no way to trace the pollution to a particular point, measure it, and then set an acceptable level for that point." *Id.*; Caputo, *supra* note 76, at 10582. Practical problems of regulating polluted runoff are identifying the specific cause and remedying the pollution-causing activities. Caputo, *supra* note 76, at 10582. Polluted runoff may vary with the season and weather. *Id.*

[80] *See* S. REP., *supra* note 21, at 4360.

[81] *Id.*; OLIVER, A. HOUCK, THE CLEAN WATER TMDL PROGRAM: LAW, POLICY, AND IMPLEMENTATION 87-88 (Envtl. L. Inst. 2d ed. 2002).

agricultural operations from the permit requirement.[82] The EPA's agricultural exclusions, however, were challenged and rejected in *Natural Resources Defense Council v. Train* as contradictory to the CWA's purpose.[83] According to the district court in *Headwaters*, the EPA had the authority to grant or deny a permit, but not to make categorical exclusions.[84] Congress responded to *Train* by excluding agricultural storm water discharges and irrigation "return flows" from the CWA's "point source" definition[85] and permit requirement.[86]

By excluding only "agricultural stormwater discharges" and "return flows from irrigated agriculture" from the CWA's point source definition, Congress most likely did not intend to create limitless exemptions which would alter the overall goals of the statute.[87] For instance, the "agricultural storm water discharge" exemption has reasonable limits. Consider a farmer who owns two adjacent field lots. One lot is used for agriculture and the other remains undeveloped. Storm water runoff from pesticide application on the agricultural field would reasonably qualify for the agricultural storm water exemption. However, if the pesticide application inadvertently extended to the other lot, the storm water runoff from the non-agriculture lot would create a CWA violation unless the farmer had obtained an NPDES permit.[88] In this scenario,

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[82] HOUCK, *supra* note 81, at 88 (citing 40 C.F.R. § 125.4(j) (1975)). The EPA's list of exemptions included runoff from orchards, cultivated crops, and pastures. United States v. Frezzo Bros., Inc., 546 F. Supp. 713, 717 (E.D. Pa. 1982) (referring to the former 40 C.F.R. 125.4(i), which did not provide an exemption to agricultural point sources).

[83] Natural Res. Def. Council v. Train, 396 F. Supp. 1393, 1402 (D.D.C. 1975), *aff'd sub nom.* Natural Res. Def. Council v. Costle, 568 F.2d 1369, 1377 (D.C. Cir. 1977).

[84] *See Train*, 396 F. Supp. at 1400. The court stated that the agency's exemptions from the permit requirement, "in light of the purpose and design of the Act, thwart its enforcement mechanisms and are contrary to the intent of Congress." *Id.*; *see also Costle*, 568 F.2d at 1377 (noting the EPA "does not have authority to exempt categories of point sources from the permit requirements of [the CWA]").

[85] HOUCK, *supra* note 81, at 88. Congress amended the CWA in 1977 and 1987 to exclude from the NPDES permit requirement irrigated agriculture and agricultural storm water discharges respectively. *Id.*

[86] 33 U.S.C.A. § 1342(l)(1) (West, WESTLAW through 2001 Pub. L. 107-203). "The Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit." *Id.*

[87] *See* EPA Memorandum, *supra* note 68. The EPA states, "While EPA believes that Congress intended the exemption to be broad enough to ensure the full functioning of irrigation return flow systems, the exemption is not unbounded." *Id.* at 5.

[88] *See* Fishermen Against the Destruction of the Env't., Inc. v. Closter Farms, Inc., No. 01-11932, 2002 WL 1804952, at *2 (11th Cir. Aug. 7, 2002) (recognizing that pollutants that originate on non-agricultural property do not fall within the agricultural exemption).

the farmer's use of the land, to which pesticides had been applied, would either create a violation of, or fall within an exception to, the NPDES requirement.[89]

Similarly, reasonable limits placed upon the irrigation "return flow" exemption would be based primarily on the discrete or identifiable characteristic of the discharge and the nature of the application. By recognizing the extent of pollution from agriculture, Congress could not have intended to categorically exempt a pollutant conveyance merely because the direct point source discharge to waters of the United States has an indirect or remote connection to irrigated agriculture.[90] Congress's CWA exemptions address the "ineffectiveness" of regulating pollutant conveyances that are not discernable, confined and discrete, regardless of the manner in which those flows are applied to *land*.[91] A pesticide that is applied to land may eventually enter a water body as runoff, and therefore the pollutant's path of entry to a water body may not always be identifiable and discrete. Tracing the pollutant's path into a water body from a direct application to that water body, however, is not a difficult task.

Nevertheless, the EPA's broad definition of "return flow" includes water that may or may not eventually be used for irrigation.[92] The water in TID's irrigation canals is used for irrigating crops and is not likely to result in "return flow" to the canals.[93] Also, Magnacide H was not applied to land, but was directly injected from a hose into irrigation canals that contain "waters of the United States." [94] Exemption of a pollutant discharge, which can be easily

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[89] *See* Concerned Area Residents for the Env't. v. Southview Farm, 34 F.3d 114, 117-18 (2d Cir. 1994) (holding that the growth of crops on fields that are adjacent to feed lots that contained more than 700 cattle, defined as a "concentrated animal feed lot operation (CAFO)" under the CWA and subject to an NPDES permit, did not exempt the CAFO as an agricultural non-point source).

[90] *See* S. REP., *supra* note 21, at 4335. Agriculture was noted as a "major source of pollution." *Id.*; *see also* 33 U.S.C.A. § 1342. The CWA regulates point source discharges through NPDES permits. 33 U.S.C.A. § 1342.

[91] *See* S. REP., *supra* note 21, at 4360.

[92] *See* Reply Brief, *infra* note 94, at 10-11 (stating that the NPDES permit exemption for irrigation return flows that are applied to *land* does not apply to "water appropriated for irrigation use but not yet so utilitzed, nor does it contemplate the direct addition of pollutants to surface *waters*." (emphasis in original)).

[93] Memorandum from the California State Water Resources Control Board, to SWRCB Members 3 (Apr. 8, 2002) (on file with author) [hereinafter SWRCB Memorandum].

[94] Appellant's Reply Brief at 3, Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526 (9th Cir. 2001) (noting that the application of acrolein is "entirely unrelated to runoff from farmland which is the subject of the [irrigation return flow] exemption") [hereinafter Reply Brief]; *see* Memorandum from the State of Oregon Department of Environmental Quality, to the Water Quality Division Administrator 6 (Mar. 22, 2002) (revised May 13, 2002) (on file with author) [hereinafter Revised ODEQ Memorandum]. Acrolein is applied below the water surface of an open canal. Revised ODEQ Memorandum, *supra*, at 6.

identified and regulated, such as that from a hose, is inconsistent with Congress's overall intent in establishing the "return flow" exemption.[95] Rather, the belief that Congress intended to exempt discrete pollutant conveyances into waters of the United States to facilitate irrigation would ignore the overall regulatory framework of the CWA and the potential for detrimental effects on the environment, particularly wildlife, as demonstrated by *Headwaters*.[96] The exemption of point source discharges that are easily identified and regulated erodes the CWA's fundamental requirement that identifiable and discrete point source discharges be regulated through NPDES permits.[97]

B. Limits on Deference given to EPA's Statutory Interpretation

Congress has given the EPA authority to administer the CWA and courts usually defer to the agency's interpretation of the statute.[98] The EPA's interpretive statement on the CWA's exemption for "return flow" from irrigated agriculture, issued to regional administrators, states that the "application of an aquatic herbicide consistent with the FIFRA label to ensure the passage of irrigation return flow falls within the [NPDES permit] exemption and is nonpoint *source* activity, consistent with Congressional intent."[99] The EPA is expected to provide guidance on how to comply with the CWA and FIFRA requirements for direct pesticide applications to waters of the United States. Such guidance, however, currently maintains a low priority.[100] The EPA's interpretive guidance is "questionable in its legal

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[95] Reply Brief, *supra* note 94, at 11. Headwaters argued that "[t]he direct addition of pollutants to *waters* cannot constitute agricultural runoff." *Id.* (emphasis added).

[96] *See* Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 528 (9th Cir. 2001) (noting that over 92,000 juvenile steelhead salmon were killed downstream from TID's irrigation canal following a unregulated discharge of Magnacide H).

[97] *See* 33 U.S.C.A § 1311 (West, WESTLAW through 2001 Pub. L. 107-203) (noting the illegality of pollutant discharges); *see also* 33 U.S.C.A. § 1342 (describing the permit procedure for the discharge of any pollutant).

[98] *Headwaters*, 243 F.3d at 531. The agency's interpretation is entitled to deference if it is reasonable and not in conflict with Congressional intent. *Id.* (citing Res. Invs., Inc. v. U.S. Army Corps of Eng'rs., 151 F.3d 1165 (9th Cir. 1998)); *see* 33 U.S.C.A § 1311. This section of the CWA prohibits the discharge of pollutants from point sources. 33 U.S.C.A § 1311.

[99] EPA Memorandum, *supra* note 68 (emphasis in original).

[100] Memorandum from Sylvia K. Lowrance, Acting Assistant Administrator, EPA, to the EPA Regional Administrators, Regions I—X 2 (Mar. 29, 2002) (on file with author). The EPA states that the "low enforcement priority will remain in effect until March 31, 2003. At that time, [the EPA] will again review EPA's efforts to address direct pesticide application to waters of the United States and determine whether to continue this priority." *Id.*

effect" since it does not have the force of law.[101] Furthermore, administrative rules that treat a point source discharge of aquatic pesticides to maintain irrigation systems as a non-point source are likely to eventually be challenged and undergo judicial scrutiny.[102]

Although the EPA has discretion in interpreting and applying federal environmental laws, the level of deference lessens when the EPA's interpretation is a narrow "dissection" of the statute.[103] Courts have held that, when interpreting a statute, the statute's text is the starting point for determining whether an agency's conclusions are warranted.[104] "If the intent of Congress is clear, that is the end of the matter."[105] Since the CWA does not define "non-point source" or irrigation "return flow," courts must consider the ordinary usage of these terms along with the context of the statute's provision and the statute's broader purpose.[106]

Nonpoint sources have become synonymous with polluted runoff.[107] Although the CWA's legislative history does not resolve whether a direct discharge into surface waters to facilitate irrigation return flow was intended to fall under the CWA's "irrigation return flow" exemption, Congress's decision to exclude irrigation return flow was based on the "ineffectiveness" of point source regulation.[108] Exempting a point source discharge from the

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[101] California State Water Resources Control Board Memorandum, *supra* note 93, at 2; *see* Appellants' Response to Brief of Amicus Curiae United States at 3, Altman v. Town of Amherst, New York, 190 F. Supp.2d 467 (2d Cir. 2002) (No. 01-7468) [hereinafter Appellants' Response]. *Chevron* deference requires that the agency's interpretation be promulgated in the "exercise of congressionally-delegated authority to make *rules* carrying the force of law." Appellants' Response, *supra*, at 3 (emphasis added).

[102] *See generally* Chevron v. Natural Res. Def. Council, 467 U.S. 837 (1984) (reviewing the EPA's "construction" of a statute to determine whether it was permissible).

[103] *See* Nat'l. Wildlife Fed'n. v. Gorsuch, 693 F.2d 156, 169 (D.C. Cir. 1982). The Court of Appeals noted that the district court had perceived that the "EPA was relying in its interpretation of [the CWA] not on policy considerations but on [a] narrow dissection of the language of [the CWA], a task at which courts are equally skilled." *Id.*

[104] Natural Res. Def. Council v. U.S. Envtl. Prot. Agency, 725 F.2d 761, 768 (D.C. Cir. 1984). The court stated, "We must begin, as always, with the language of the statute." *Id.*

[105] *Chevron*, 467 U.S. at 842.

[106] *Natural Res. Def. Council*, 725 F.2d at 768. The court stated that legislation, "when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him." *Id.* (quoting Addison v. Holly Hill Co., 322 U.S. 607, 618). The court also stated, "Only after examination of the context in which statutory words are set—the statute's purpose, structure, and history—is it possible to determine reliably whether Congress used a word as a technical term of art or instead intended that word to bear merely its plain meaning." *Id.* (internal quotations and citations omitted).

[107] *See* Caputo, *supra* note 76 and accompanying text.

[108] *Natural Res. Def. Council*, 725 F.2d at 770. The court acknowledged that Congress's inability to foresee future problems under a statutory scheme requires that legislation be drafted

permit requirement when that point source discharge facilitates "return flow" is inconsistent with the CWA's basic goal of eliminating pollutant conveyances from discernable, confined, and discrete sources.[109]

Although the NPDES permit program Administrator, either the EPA or an EPA-approved state, cannot require NPDES permits for statutorily exempt categories, the Administrator has a non-discretionary duty to require permits for discharges that fall outside those exceptions.[110] The failure to require an NPDES permit, due to an incorrect assumption that a regulated activity is exempt, exposes the EPA, and EPA-approved states, to citizen suits brought under a CWA violation.[111] Currently, the amount of deference that a court will afford EPA regulations that are promulgated according to EPA's recently-issued interpretive guidance is uncertain. Until such deference becomes clear, however, citizen suits will likely be brought under the CWA for an aquatic pesticide applicator's failure to obtain an NPDES permit.

C. Other Recent Court Decisions On Aquatic Pesticide Use

In *Headwaters*, TID's direct discharge of Magnacide H from a hose into waters of the United States was irrefutable. However, *Headwaters* does not address whether an indirect point source discharge of a pesticide into waters of the United States would be subject to NPDES permits.[112] The court in *No Spray Coalition, Inc. v. New York*[113] discussed the application of pesticides into waters of the United States by an indirect point source. There, the district court held that aerial pesticide application that may result in an "unintended drift" over navigable waters did not constitute a violation of the CWA.[114] Although the district court denied a preliminary injunction for aerial spraying

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with general categories rather than specific classes of activities within those categories. *Id.* The court further noted, "That requirement, in turn, demands that courts seek out the broader purposes—the overriding statutory goals—constitutive of the general categorical term in which Congress has embodied its will." *Id.*

[109] 33 U.S.C.A § 1362 (14) (West, WESTLAW through 2001 Pub. L. 107-203).

[110] *See* Envtl. Def. Fund v. Tidwell, 837 F. Supp. 1344, 1354-57 (E.D.N.C. 1992) (denying the defendants' motion to dismiss and allowing a citizen suit to proceed, since the EPA's refusal to require timber company to obtain a permit for silvicultural activities is a non-discretionary act) (citing 33 U.S.C. § 1365(a)(2); Nat'l. Wildlife Fed'n. v. Hanson, 859 F.2d 313 (4th Cir. 1988)).

[111] *Id.*

[112] *See* Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526 (9th Cir. 2001).

[113] No. 00 CIV. 5395(JSM), 2000 WL 1401458, (S.D.N.Y. Sept. 25, 2000), *aff'd*, 252 F.3d 148 (2d Cir. 2001).

[114] *No Spray Coalition, Inc.*, 2000 WL 1401458, at *2. The court stated, "The fact that a pollutant might ultimately end up in navigable waters as it courses through the environment does not make its use a violation of the [CWA]." *Id.* at *3.

of pesticides over New York City to protect against the West Nile Virus,[115] which was affirmed by the Second Circuit Court of Appeals, the district court declined to determine whether spraying pesticides directly over the waters of New York would violate the CWA.[116] Nonetheless, the Ninth Circuit recently held, in *League of Wilderness Defenders v. Forsgren*,[117] that aerial spraying of pesticides, which was conducted by the Forest Service, was a point source that required an NPDES permit.[118]

Another important consideration in determining an NPDES violation is whether a pesticide is a pollutant.[119] In defining "pollutant," the CWA lists "chemical wastes."[120] The district court in *Headwaters* found that Magnacide H, although beneficial in killing weeds, is "toxic to fish and other aquatic life at the recommended application levels."[121] However, in *Altman v. Town of Amherst*,[122] the court concluded that a pesticide does not qualify as a pollutant under the CWA's description of "pollutant" as a "chemical waste," and that pesticide application is "more appropriately regulated under FIFRA."[123] The *Altman* court's narrow interpretation of "pollutant" is inconsistent with both the district court's and Ninth Circuit's analysis in *Headwaters*, as well as the EPA's logic. This is because FIFRA's labeling requirement for certain pesticides includes a warning to pesticide users against the discharge of treated water into fish-bearing waters unless the discharge complies with the terms of an NPDES permit.[124] The *Altman* court should have also considered that the effects of pesticide application are not limited to the target organism, but residual pesticides can cause negative impacts on municipal water supplies, recreational uses, and other aquatic organisms.[125] The court of appeals vacated

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[115] *Id.* at *5.

[116] *No Spray Coalition, Inc.*, 2000 WL 1401458, at *4. "The Court will leave for another day the question of whether the spraying of insecticides directly over the rivers, bays, sound, and ocean surrounding New York City as part of a prevention program would violate the [CWA]." *Id.*; *see No Spray Coalition, Inc.*, 252 F.3d at 150.

[117] 309 F.3d 1181 (9th Cir. 2002).

[118] *Id.* at 1192-93.

[119] *See* 33 U.S.C.A. § 1311(a) (West, WESTLAW through 2001 Pub. L. 107-203) (citing 33 U.S.C.A. § 1342). Pollutant discharges are illegal except in compliance with the other sections of the CWA. *Id.*; *see also* 33 U.S.C.A. § 1342 (West, WESTLAW through 2001 Pub. L. 107-203) (describing the procedure for the issuance of NPDES permits).

[120] 33 U.S.C.A. § 1362(6) (West, WESTLAW through 2001 Pub. L. 107-203).

[121] Headwaters, Inc. v. Talent Irrigation Dist., No. 98-6004-AA, 1999 U.S. Dist. LEXIS 21569, at *16 (D. Or. Feb. 1, 1999).

[122] 190 F. Supp. 2d 467 (W.D.N.Y. 2001) (involving the pesticide application for mosquito control in, on, or over federally regulated wetland areas).

[123] *Id.* at 471.

[124] *See Headwaters*, No. 98-6004-AA, 1999 U.S. Dist. LEXIS 21569, at *16; *see also* EPA Notice, *supra* note 44.

[125] SWRCB Order, *infra* note 143, at 2.

the district court's decision in *Altman* and remanded the case to further determine whether pesticides applied to wetlands are a pollutant subject to federal permit requirements.[126]

Currently, the EPA, similar to its position on aquatic pesticide application to irrigations canals, does not have a "specific policy under the NPDES program for the spraying of aquatic pesticides into waters of the United States to control mosquitos."[127] The EPA Region 2 "has not issued NPDES permits in the past," but has deferred to the states that, with EPA's approval, administer an NPDES permit program to determine if a permit should be required.[128]

D. Implementing the Ninth Circuit's Headwaters *Decision*

The Ninth Circuit in *Headwaters* acknowledged the different but complementary aims of FIFRA and the CWA.[129] While both statutes establish national standards, the CWA provides for statewide or local regulatory control through NPDES permits.[130] These permits are classified as either individual or general.[131] An individual permit allows a specific entity to discharge a pollutant in a specific location and is issued through an informal agency process.[132] The potential workload increase that results from processing individual NPDES permits for the application of aquatic pesticides can easily overburden the EPA.

General permits, however, categorize pollutant sources and allow the discharge of an identified pollutant by a class or group of dischargers in a particular geographic region.[133] After a general permit is issued, compliance requires that the discharger covered under the permit submit a "notice of intent" ("NOI") to the Administrator for approval.[134] The discharge is allowed upon receipt of the NOI, after a waiting period, or after the permit issuer confirms that the discharge is covered by the permit.[135] The EPA's system of

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[126] Altman v. Town of Amherst, No. 01-7468, slip op. at *4 (2d Cir. Sept. 26, 2002).

[127] Altman v. Town of Amherst, 190 F. Supp.2d 467, 468 (W.D.N.Y. 2001).

[128] *Id.*

[129] Headwaters, Inc., v. Talent Irrigation Dist., 243 F.3d 526, 531 (9th Cir. 2001).

[130] *Id.*

[131] Natural Res. Def. Council v. U.S. Envtl. Prot. Agency, 279 F.3d 1180, 1183 (9th Cir. 2002).

[132] *Id.*

[133] 40 C.F.R. § 122.28(a)(1) (West, WESTLAW through 2002 67 FR 51033); *see also Natural Res. Def. Council*, 279 F.3d at 1183. General permits may be issued when "the dischargers in a geographical area to be covered by the permit are relatively homogenous." *Natural Res. Def. Council*, 279 F.3d at 1183.

[134] 40 C.F.R. § 122.28(b)(2)(i); *see also Natural Res. Def. Council*, 279 F.3d at 1183.

[135] 40 C.F.R. § 122.28(b)(2)(iv); *see also Natural Res. Def. Council*, 279 F.3d at 1183.

requiring either individual or general permits is an administrative device that allows the EPA to administer the NPDES program in a flexible and practical manner.[136] For example, since groups of dischargers are covered by general permits, the permit process is streamlined, thereby reducing the EPA's or the approved state's workload in issuing NPDES permits. The approval process is primarily based on the review of the NOI submitted by the discharger, which makes the issuance of permits for pesticide application more feasible.[137]

In response to the Ninth Circuit's decision in *Headwaters*, states have adjusted their procedural oversight of aquatic pesticide application. Oregon began investigating the feasibility of non-herbicide methods of weed extraction to remove weeds from irrigation canals and thereby avoid pesticide application to irrigation canals.[138] Oregon's Department of Environmental Quality ("DEQ"), unable to issue NPDES permits in time for the 2002 irrigation season, has issued Mutual Agreement and Order ("MAO") permits in the interim of DEQ's general NPDES permit development.[139] Although the MAO is not an NPDES permit, the monitoring and reporting requirements under the MAO are similar to those required by a NPDES permit.[140] Nonetheless, parties that receive an MAO may experience a false sense of security. DEQ notes the uncertainty in "the degree of insulation" to liability that the MAO provides.[141] DEQ recognizes that NPDES permits will likely be required for the application of herbicides to irrigation ditches.[142]

The California State Water Resources Control Board ("SWRCB") has responded to the Ninth Circuit's decision differently and has issued general

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[136] Natural Res. Def. Council v. Costle, 568 F.2d 1369, 1371 (D.C. Cir. 1977).

[137] Appellant's Brief at 30, Altman v. Town of Amherst, 190 F. Supp.2d 467 (W.D.N.Y. 2001) (No. 01-7468) [hereinafter Appellant's Brief]. The EPA has the "authority to promulgate general permits, which reduce administrative burdens and expense, and simplify and expedite the ability of persons to come into compliance." (internal quotations omitted) (citing 33 U.S.C. § 1344(e)); *see also* 33 U.S.C.A. § 1344(e)(2) (West, WESTLAW through 2001 Pub. L. 107-240) (noting that general permits may be revoked or modified if the "activities authorized by such general permits have an adverse impact on the environment or such activities are more appropriately authorized by individual permits").

[138] *E.g.*, Washington State Department of Ecology [hereinafter WSDE], Fact Sheet for Aquatic Weed Control in Irrigation Systems: General NPDES Permit (Apr. 17, 2002) (on file with author). Non-herbicidal methods include hand pulling, mechanical harvesting, canal lining, canal shading, and herbivorous fish. *Id.* at 6.

[139] Revised ODEQ Memorandum, *supra* note 94, at 2; *see also* Memorandum from the State of Oregon Department of Environmental Quality, to the Water Quality Division Administrator 2 (May 13, 2002) (on file with author) [hereinafter May 13 ODEQ Memorandum].

[140] Revised ODEQ Memorandum, *supra* note 94, at 9.

[141] May 13 ODEQ Memorandum, *supra* note 139. The MAO is not an NPDES permit and "DEQ will not speculate on the degree of insulation that the MAO may or may not provide parties entering into the MAO." *Id.*

[142] ODEQ Memorandum, *supra* note 94, at 3.

permits for aquatic pesticides and mosquito abatement on an emergency basis.[143] Permits issued during the limited term will expire on January 31, 2004.[144] SWRCB has determined that if "dischargers are prevented from applying pesticides immediately," a public health emergency is a likely result.[145] SWRCB warns that dischargers who rely on *Headwaters* to avoid coverage under a general permit may face the risk of liability.[146]

Despite the time constraints in responding to the Ninth Circuit's decision in *Headwaters*, Washington State began regularly issuing general permits for aquatic pesticide application.[147] Now, herbicide application to surface waters in Washington State without either a general or an individual NPDES permit is subject to enforcement action.[148] The conditions of the general permit are consistent with the CWA's goals. Temporary "short term" water quality modification, which may result from aquatic pesticide application, is allowed throughout the permit term and would be in effect for all surface waters within the state.[149] Washington State also requires general permit coverage for mosquito control activities that discharge pesticides directly into surface waters.[150] Furthermore, Washington State's general NPDES permits provide safeguards that FIFRA compliance alone does not. Washington State's permits require that the impact from aquatic pesticide application allow for the

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[143] California State Water Resources Control Board, Water Quality Order No. 2001-12-WQ, Statewide General National Pollutant Discharge Elimination System (NPDES) Permit For Discharges Of Aquatic Pesticides To Surface Waters Of The United States (General Permit), General Permit No. AG990003, Waste Discharge Requirements 1, *available at* http://www.swrcb.ca.gov/resdec/wqorders/2001/wqo/wqo2001-12.doc (last visited Nov. 17, 2002) [hereinafter SWRCB Order].

[144] *Id.* at 5.

[145] *Id.* at 6.

[146] SWRCB Memorandum, *supra* note 93, at 2.

[147] WSDE, Aquatic Pesticide Permits, *available at* http://www.ecy.wa.gov/programs/wq/pesticides/npdes_develp.html (last visited Sept. 6, 2002) [hereinafter WSDE Permit]. The Washington State Department of Ecology stated, "Now, due to the Ninth Circuit Court decision, applications of pesticides will have to be regulated under a federal Clean Water Act permit as well as FIFRA." *Id.*

[148] WSDE, Fact Sheet for Aquatic Weed Control in Irrigation Systems General NPDES Permit (Apr. 17, 2002) (on file with author). The general permit covers discharges into state waters including irrigation systems at the point of discharge back to natural waters of the state. *Id.*

[149] WSDE, Irrigation System Aquatic Weed Control National Pollutant Discharge Elimination System waste Discharge General Permit, *available at* http://www.ecy.wa.gov/programs/wq/pesticides/final_pesticide_permits/irrigation/irrigation_permit_april10.pdf (last visited Sept. 6, 2002).

[150] WSDE, Aquatic Mosquito Control National Pollutant Discharge Elimination System Waste Discharge General Permit 5, *available at* http://www.ecy.wa.gov/programs/wq/pesticides/final_pesticide_permits/mosquito/mosquito_permit_april10.pdf (last visited Nov. 17, 2002).

"full restoration" of water quality and protect beneficial uses upon project completion.[151] In addition, NPDES permits, unlike FIFRA, require post-monitoring to determine pesticide persistence.[152]

Washington State's general permit requirement for the discharge of aquatic pesticides is thus consistent with the Ninth Circuit's decision, which recognized that the discharge of aquatic pesticides requires dual compliance with the CWA and FIFRA. Washington State's general permit requirement also protects human health and the environment through mandatory safeguards such as monitoring pesticide persistence in water bodies and requiring the restoration of water quality.[153] Also, a general permit requirement insulates the discharger against liability from possible CWA violations. Washington State's approach is consistent with Congress's intent under the CWA to regulate the discharge of pollutants from point sources through NPDES permits. As a state that administers the NPDES permit program, Washington has avoided the overburden of issuing individual permits for the discharge of aquatic pesticides and the potential liability from CWA violations by taking advantage of the reasonable, and flexible, permitting framework that Congress established under the CWA.

In addition to making the permitting process more efficient and manageable, general permits offer health and environmental advantages. Emergency action to protect human health and the environment may warrant a temporary exemption from compliance with the NPDES requirement.[154] The CWA does not have an emergency provision, but a "carefully crafted general permit program could allow for municipalities to resort to [pesticide] spraying on a limited basis in the waters of the United States when . . . imminent public health emergencies warrant."[155] These factors allow the EPA and EPA-approved states to administer the NPDES program in a practical manner, and thereby provide more protection for human health and the environment, as well as more protection from liability for pesticide users.

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[151] WSDE Permit, *supra* note 147, at 15.

[152] *See* Appellant's Brief, *supra* note 24, at 9.

[153] WSDE, *supra* note 147, at 15.

[154] No Spray Coalition v. New York, No. 00 CIV. 5395(JSM), 2000 WL 1401458, at *5, (S.D.N.Y. Sept. 25, 2000), *aff'd*, 252 F.3d 148 (2d Cir. 2001). The court stated, "Common sense dictates that the emergence of a mosquito-borne infectious disease . . . . unknown in the New York City area and resulting in several deaths, constitutes an emergency warranting temporary exemption from compliance." *Id.* (commenting on the emergency exception that relieves a party from preparing an environmental impact statement required by the State Environmental Quality Review before engaging in an activity that may have a significant effect on the environment).

[155] Appellant's Brief, *supra* note 137, at 30. In *Altman*, suit was filed one year prior to the emergence of the West Nile Virus in the United States and the town had more than three years to obtain an NPDES permit while the case was pending. *Id.* at 28-29.

IV. CONCLUSION

The Ninth Circuit's ruling in *Headwaters*, that the application of a properly labeled aquatic pesticide to irrigation canals does not preclude the need for an NPDES permit, is consistent with Congress's intent to restore and maintain the Nation's waters by direct regulation of "point source" pollutant discharges. The Ninth Circuit, however, did not provide the thorough NPDES permit requirement analysis necessary to avoid the confusion that both the regulated community and regulators are currently dealing with. Exempting a point source discharge of an aquatic pesticide into irrigation canals to facilitate irrigation return flow is inconsistent with Congress's overall intent, under the CWA, when the discharge has only a tenuous connection to irrigation return flow, is applied directly to water, and can be easily identified and regulated.[156]

Since aquatic pesticide application must comply with FIFRA and the CWA, general permit requirements are a practical approach to regulating the application of aquatic pesticides to navigable waters. Emergencies that require direct application of pesticides into navigable waters to protect against a substantial danger to human health and the environment, however, could constitute a justifiable exception to the NPDES requirement. With foresight, such emergency circumstances could also be addressed through general permit issuance. Therefore, subjecting aquatic pesticide application to the CWA requirements is not impractical.[157] Rather, general permit requirements for aquatic pesticide application to irrigation canals is a practical approach that would more appropriately ensure that concerns over human health and the environment are adequately addressed and the overall objectives of the CWA are significantly realized.

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[156] *See supra* notes 78-79 and accompanying text.

[157] *Cf. supra* note 79 and accompanying text.

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