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COMMENTS

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Free Association for Micronesia and the Marshall Islands: A Transitional Political Status Model

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I. INTRODUCTION

From 1986 to 2003, the United States was party to a treaty of international political association with two Pacific island micro-states that had been under U.S. administration from 1947 to 1986, pursuant to the trusteeship provisions of the United Nations Charter. The economic and defense provisions—both central elements of the association—were set to expire in 2003. These provisions were, however, renewed by international agreements that will extend the life of the association based on an amended treaty.

The terms of the renewal agreements reflect the history of the islands as strategically vital to the United States, as well as the dependence of the island people on U.S. economic assistance. Even more so than the original 1986 treaty of association, the terms of the amended treaty reveal that the parties have agreed to gradually reverse and ultimately end certain significant features of political integration between the islands and the United States. Thus, free association serves as a transitional political status that enables a former territory to achieve separate sovereignty, nationality and citizenship on the international plane outside the U.S. constitutional system. Under the free association model, the island governments and people first determine for themselves that they prefer sovereignty rather than integration with the United States. Then, the treaty of association becomes the instrument that terminates policies and programs implemented during the territorial period. This Article recounts the evolution of the American model of free association as a transition to international status. Importantly, it distinguishes free association from domestic territorial status.

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II. PERIODIC RENEWAL AND TERMINABILITY OF COMPACT OF FREE ASSOCIATION

In 1984, President Reagan proposed to the U.S. Congress that the political status of two emerging nations in the U.S.-administered Trust Territory of the Pacific Islands (TTPI) be resolved by adopting a proposed Compact of Free Association (CFA).[1] These emerging nations were the Federated States of Micronesia (FSM) and the Republic of the Marshall Islands (RMI). In his message to Congress recommending ratification of the CFA, President Reagan emphasized that the CFA included defense provisions "of great importance to our strategic position in the Pacific,"[2] and that ending U.S. administration of the island territories under the United Nations trusteeship system would "fulfill our commitment . . . to bring about self-government."[3]

Over two years later, after more than twenty Congressional hearings before two U.S. Senate committees and five U.S. House of Representatives committees, the CFA for the FSM and the RMI was approved by Congress and signed into law by President Reagan.[4] Without ignoring the disposition of U.S. interests in the Panama Canal Zone by treaty, this was the first successful completion of a political status resolution process for any area administered under the U.S. territorial model since Alaska and Hawai'i were admitted to the union in 1959. The United States continues to administer five inhabited territories that have local governments organized under federal statutory law, but which have not achieved full self-government or a constitutionally defined permanent political status.[5]

The political, legal and administrative framework for free association under the CFA continues until one or both of the parties terminates it.[6] General provisions of the CFA are a hollow shell without the economic assistance and defense provisions that define the mutual national interests at the core of the association. These provisions are set to expire periodically and may only continue if the parties so agree.[7] Under the original 1986 CFA, these provisions

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[1] *See* Howard L. Hills, *Compact of Free Association for Micronesia: Constitutional and International Law Issues*, 18 INT'L LAW. 583 (1984) [hereinafter Hills, *Compact*].

[2] President's Message to Congress Transmitting Proposed Legislation to Approve the Compact of Free Ass'n Between the United States and the Trust Territory of the Pacific Islands, PUB. PAPERS (Mar. 30, 1984).

[3] *Id.*

[4] Compact of Free Association Act of 1985, Pub. L. No. 99-239, 99 Stat. 1770 (1986).

[5] These inhabited territories are American Samoa, Guam, Puerto Rico, Northern Mariana Islands and U.S. Virgin Islands.

[6] § 201, 99 Stat. at 1801 (Title One, Government Relations); *see also id.* at 1827 (Title Four, General Provisions, Article IV).

[7] *See id.* at 1813 (Title Two, Economic Relations); *see also id.* at 1822 (Title Three, Security and Defense Relations).

were scheduled to expire in 2001, unless extended by mutual agreement through a structured consultation and negotiation process.[8]

Congress had anticipated the expiration of economic assistance and defense provisions, as well as the prospect of a mutual proposal to renew those CFA provisions in some form. It requested that the Government Accounting Office (GAO) evaluate implementation of the CFA from 1986 to 2000, as well as the overall efficacy of the free association model under the treaty. The GAO report concluded that the CFA had succeeded in establishing self-government and protecting U.S. national and international security interests, but it had failed to realize certain economic development goals.[9]

Meanwhile, late in the Clinton Administration, the U.S. Department of State and the associated state governments began to negotiate renewal of the expiring defense and economic assistance provisions of the CFA. Failure to resolve differences over critical issues delayed the negotiations into the Bush Administration, triggering a two-year extension of the negotiating period, during which time the economic assistance and defense provisions of the CFA continued as well.[10] The issues complicating CFA renewal negotiations included the level of payments to landowners for military base rights for the Ronald Reagan Missile Testing Range at Kwajalein Atoll in the Marshall Islands,[11] levels of U.S. economic assistance, claims arising from nuclear testing in the Marshall Islands in the 1950s,[12] and restriction of associated state citizen travel and residency privileges in the United States.[13] These difficult issues were brought to resolution due to the approaching expiration of economic assistance and defense provisions. The amended treaties with the FSM and RMI were signed on May 14, and April 30, 2003, respectively. Thereafter, proposed legislation to approve agreements to extend free association and renew the CFA was transmitted to Congress by the U.S. Department of State.[14] Approved by Congress on November 20, 2003, and signed into law by President Bush on December 17, 2003, the "Compact of Free Association Amendments Act of 2003" not only ratified the amended and renewed CFA,

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[8] *See id.* § 231, at 1818.

[9] United States General Accounting Office, GAO/NSIAD-00-216, *Foreign Assistance: U.S. Funds to Two Micronesian Nations Had Little Impact on Economic Development* (Report to Congressional Requesters Sept. 2000), *available at* http://www.gao.gov/new.items/ns00216.pdf.

[10] § 231, 99 Stat. at 1818.

[11] *See id.* § 321, at 1824.

[12] *See id.* § 177, at 1812.

[13] *See id.* § 141, at 1804.

[14] Joint letter from Richard L. Armitage, Deputy Secretary of State, and Gale A. Norton, Secretary of Interior (June 20, 2003) (on file with the University of Hawai'i Law Review).

but also provided for funding and legal authority to implement its newly amended terms.[15]

In light of these recent historic events, this report updates U.S. law and practice with respect to free association as a treaty-based political status model for former U.S.-administered territories. The terms of the renewed CFA clearly demonstrate that under U.S. policy, law and practice, free association is a transitional status model for a U.S.-administered territory that will not be integrated into the U.S. federal political union. Under the amended CFA, the relationship between the United States and both the FSM and RMI will transition from the domestic territorial status model implemented during the trusteeship to sovereign status. During the transition period, the amended and renewed CFA will provide economic support to reverse the process of integration that occurred during the trust territory period. The end result will be the establishment of a bilateral relationship between the United States and each island nation outside the U.S. domestic system of constitutional federalism.

III. FOUNDATIONS OF THE FREE ASSOCIATION MODEL

The United Nations (U.N.) General Assembly has adopted resolutions recognizing free association as a political status option for post-colonial, non-self-governing territories that are not yet prepared for either integration with a sovereign nation or independence.[16] The United Nations has adopted principles for decolonization based on free association. Most importantly, the people of the non-self-governing territory should create free association through a free and informed act of self-determination; they must consent to clearly stated legal terms establishing free association. Next, the former territory should have substantial powers of internal self-government, free from undue interference from the metropolitan power that is party to the association. Also, to ensure that the association is consistent with the right to independence, there must be access to a procedure to terminate the association in favor of separate sovereign and independent nationhood.[17] These international principles must be respected in order to establish an associated state status that is truly non-colonial and non-territorial. In each free association relationship, of course, the specific terms of association are determined and

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[15] Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, 117 Stat. 2720 (2003).

[16] G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, U.N. Doc. A/4684 (1960); G.A Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4684 (1960); G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, at 121, U.N. Doc A/5217 (1970).

[17] JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 376 (Clarendon Press 1979).

implemented by the national law of the sovereign nations concerned rather than U.N. resolutions.[18]

Through the international decolonization process in the twentieth century, including under the U.N. Charter over the last five decades, eleven former trust territories and many other former colonies achieved sovereignty through integration or separate nationhood.[19] Only five small island micro-states and their former administering powers have found the free association model to be a mutually beneficial framework for managing the transition to non-colonial status. The first case study in free association was the Cook Islands, which has a political relationship with New Zealand that has been recognized as a form of free association.[20] In that case the metropolitan power, New Zealand, has no written national constitution. The status of the associated state is therefore not constitutionally defined. Rather, the association is loosely defined by statute and diplomatic notes as a "voluntary partnership" in accordance with New Zealand law.[21] The New Zealand association with the Cook Islands is based on the British commonwealth model, Her Majesty the Queen is the Head of State and the Cook Islands are within the Realm of New Zealand, with common citizenship and autonomy for indigenous peoples of the Cook Islands.[22]

The international model of free association has also been adapted to the constitutional system of the United States for the three island nations to emerge from the Trust Territory of the Pacific Islands—the FSM, RMI, and Palau.[23] Unlike the New Zealand model, the U.S. domestic law does not

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[18] Hills, *Compact*, *supra* note 1, at 607.

[19] In a November 6, 2003 address to the National Endowment for Democracy, President Bush pointed out that from 1970 to 2000, the number of countries classified by the United States and U.N. as democracies went from approximately 40 to 120, including many former colonies that achieved a recognized form of full self-government without going through the U.N. trusteeship system. President George W. Bush, Remarks at the 20th Anniversary of the National Endowment for Democracy United States Chamber of Commerce (Nov. 6, 2003), *available at* http://www.whitehouse.gov/news/releases/2003/11/20031106-2.html (last visited Mar. 13, 2003).

[20] G.A. Res. 2064, U.N. GAOR, 20th Sess., Supp. No. 14, at 56-57, U.N. Doc. A/6014 (1965).

[21] COOK ISLAND CONST. (Constitution Act, 1964) (Kirk/Henry Exchange of Letters, 1973), *available at* http://mfat.govt.nz/foreign/regions/pacific/cookislandsdeclaration/cooksindependence.

[22] New Zealand also has a free association relationship with Niue. *See* NIUE CONST. (Constitution Act, 1974).

[23] Compact of Free Association with Palau, Pub. L. No. 99-658, 100 Stat. 3672 (1986) [hereinafter *Palau Compact*]. Palau is a third associated state under a subsequently approved Compact.

provide the legal framework for establishment of free association.[24] Indeed, the CFA does not enter into force by operation of U.S. law alone, but must also be approved in accordance with the constitutional process of the associated states in the exercise of their national sovereignty. For example, in 1986, the RMI National Parliament ratified the CFA under the terms of Nitijela Resolution No. 62 (N.D. 2).

In the U.S. constitutional context, sovereign free association is defined and sustained not by the territorial clause powers of Congress,[25] but through the treaty-making and foreign policy powers of the federal government based on separate sovereignty, nationality, and citizenship for the United States and the associated state.[26] There is no other constitutional foundation for free association to exist within the federal system or under the U.S. Constitution.[27] This conclusion is consistent not only with the terms of the CFA itself but also with the U.S. political system.[28] The U.S. federal courts also recognize that the CFA and status of free association evolved out of the Trusteeship Agreement between the United States and U.N. as an international arrangement for administration of the islands,[29] rather than domestic territorial status under U.S. national sovereignty.[30]

The legal history of the CFA demonstrates how the international theory of free association works in the U.S. legal context. Specifically, all three branches of the U.S. federal government have recognized that the political status of the FSM and the RMI under U.S. administration pursuant to the U.N. trusteeship system was not a domestic constitutional relationship under the

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[24] Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 471, 99 Stat. 1770, 1834 (1986); Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, § 471, 117 Stat. 2720, 2794 (2003) (with FSM); *see id.* § 471 at 2834 (with RMI).

[25] U.S. CONST. art. IV, §3, cl. 2.

[26] Hills, *Compact*, *supra* note 1, at 587-88.

[27] *Id.* at 607; *see generally* John Armstrong & Howard Hills, *The Negotiations for the Future Political Status of Micronesia*, 78 AM. J. INT'L L. 484 (1984) (discussing the culmination of negotiations for Micronesian political status).

[28] Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, § 201, 117 Stat. 2770, 2758 (2003).

[29] Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301, T.I.A.S. No. 1665, 8 U.N.T.S. 189.

[30] Juda v. United States, 6 Cl. Ct. 441, 456 (1984).

> After 1947, United States authority in the Trust territory implements a Trusteeship Agreement with the United Nations, and the United States administration of the Trust Territory is based upon the President's treaty power conferred in Article II, section 2, clause 2 of the Constitution. The United States has not administered the Trust territory under the authority conferred in Article IV, section 3, concerning regulation by Congress of territories or other property belonging to the United States.

Id.

Territorial Clause, Article IV, Section 3, Clause 2 of the U.S. Constitution.[31] Consistent with the non-applicability of the Territorial Clause to the former trust territory islands, negotiation of the CFA was not a federal-territorial matter in the domestic legal or constitutional context. Rather, the CFA was negotiated by the United States, the FSM, the RMI, and Palau within the framework of the Hilo Principles.[32] Section 3 of the Hilo Principles was ambiguous about the "constitutional arrangements" for implementing free association because the international principles of that status had never been adapted to the U.S. constitutional system. That ambiguity ended when seven committees in the U.S. Congress held more than twenty hearings on the proposed CFA. Those committees approved it as an international agreement under the foreign relations authority of the President and the international affairs jurisdiction of Congress, rather than under the Territorial Clause.[33] The result is that in U.S. constitutional and international practice, free association is separate nationhood and an international association between sovereigns. This is clearly stated in the CFA Preamble. It provides that the constitutions of the nations that are party to the association remain the supreme law for each nation, and that the CFA is a treaty which is subordinate in each nation's legal system of their respective national constitutions.[34] Consequently, sovereign free association as adopted by the United States and its associated states is not a form of domestic political union under the U.S. Constitution. Rather, it is an international association that is classified as a foreign affairs matter assigned to the U.S. Department of State for all government-to-government political status matters.[35]

The U.S. model of free association is governed by international agreements where each party to the association retains fully the right to independence without association at any time. For example, Section 442 of the recently amended CFA for the FSM and RMI states the following:

> [T]his Compact, as amended, may be terminated by the Government of the United States in accordance with its constitutional processes. Such termination shall be effective on the date specified in the notice of termination by the

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[31] *Id.*; *see* Hills, *Compact*, *supra* note 1, at 590-91; *see also Hearing on Puerto Rico Status, U.S. House of Representatives, Comm. on Resources*, Serial No. 105-16, 113 (1997) (statement of Fred M. Zeder II).

[32] Agreed Principles of Free Association, Apr. 9, 1978, U.S.-Micr.-Marsh. Is.-Palau, *reprinted in* 72 AM. J. INT'L L. 879, 882-83 (1978).

[33] Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 221, 99 Stat. 1770, 1773 (1986).

[34] *See* Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, 117 Stat. 2720, 2758 (2003); *see also id.* § 443 at 2788; *see also id.* § 471 at 2794.

[35] *See id.* § 105(b), at 2744-47. Only the federal programs being phased out from the trust territory period are coordinated by the Department of Interior. *See id.*

> Government of the United States but not earlier than six months following delivery of such notice.[36]

Like the original termination provision in Section 443 of the CFA approved by U.S. Public Law 99-239 in 1986, under Section 442 and Section 452 of the CFA as amended by U.S. Public Law 108-188, some elements of economic assistance and U.S. defense rights can continue after termination under terms of separate agreements. However, the free association relationship itself ends if either government exercises its unilateral right of termination.

Because the U.S. model of free association fully and faithfully implements the principle that each party must be able to terminate the association consistent with the right of independence, the FSM, the RMI and Palau have all been admitted as full member states in the U.N. Under Chapter I, Article 2(1) of the U.N. Charter, a political status consistent with independence is a criterion for membership. Thus, with the admission of the U.S.-associated states to the United Nations in 1990, the U.N. recognized that the American model of free association is actually based on an underlying status of independence, which is consistent with Chapter III, Article 4(1) of the U.N. Charter.

IV. Free Association Under American Law

While the 1986 original CFA for the FSM and the RMI was a multilateral agreement between the United States and those two nations, it actually defined two bilateral associations. Accordingly, the amended and renewed CFA approved by Congress under Public Number 108-188 in 2003, terminates the original CFA as a multilateral compact and creates two bilateral compacts.[37] As noted above, the United States also has a renewable CFA with Palau under U.S. Public Law 99-658,[38] taking effect in 1994 and continuing in force, as may be further agreed, until 2009.[39] The bifurcation of the CFA for the FSM and the RMI puts those two associated states on a bilateral footing fundamentally the same as Palau. This allows the United States and each of

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[36] *See id.* § 442, at 2788.

[37] *See id.* § 201(a), at 2757.

[38] *See* Compact of Free Association with Palau, Pub. L. No. 99-658, 100 Stat. 3672 (1986).

[39] Citations in this article to the CFA, as amended by P.L. 108-188 in 2003, may be to either the FSM or RMI version of the renewed Compact. Most cited sections are identical or similar. Similarly, many cited sections of the 1986 original CFA remain the same or nearly so in the renewed CFA of 2003, and citations may be made to the 1986 CFA for purposes of explaining the original purpose or the evolving form of the provision. This reflects the fact that the CFA is (1) not a treaty of indefinite duration, but of a temporary nature, (2) a close political relationship terminable at the pleasure of any party, and (3) a trilateral status model implemented through three bilateral agreements.

the three associated micro-states to continue or terminate their relationship on a purely bilateral basis—without the vestiges of multilateralism left over from the time when the United States governed the FSM, the RMI and Palau in a manner similar to the U.S. domestic insular territories allowed under the U.N. trusteeship system.[40]

The original CFA of 1986, and the amended and renewed CFA of 2003, were both ratified by Congress as a Joint Resolution rather than a simple treaty. This is because the CFA also enacts the domestic federal law necessary to define and implement U.S. rights and responsibilities under the amended CFA.[41] The original CFA in fact included many domestic U.S. federal programs and services first extended to the FSM and RMI when they were administered like other U.S. territories under the U.N. trusteeship.[42] Nevertheless, both the 1986 CFA and the 2003 amended and renewed CFA are international agreements and treaties. Negotiation and implementation of both are thus the responsibility of the U.S. State Department as the foreign policy and international organ of the U.S. federal government.[43]

In addition to the lead role of the U.S. State Department in managing the free association relationship, other departments and agencies that normally operate only in the United States also operate in the FSM, the RMI and Palau. Accordingly, Congressional committees with jurisdiction over domestic programs also oversee CFA affairs. For example, subject to annual appropriation by the U.S. Congress, the U.S. Postal Service, the U.S. Weather Service, the Federal Communications Commission, the Department of Transportation (FAA), and other federal services still operate in the associated republics.[44] However, domestic federal programs and services under the original CFA are being phased out under the 2003 amended and renewed

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[40] Trusteeship Agreement for the Former Japanese Mandated Islands, July 18, 1947, 61 Stat. 3301, art. 3, T.I.A.S. No. 1665, 8 U.N.T.S. 189 (providing "the administering authority shall have full powers of administration, legislation, and jurisdiction over the territory . . . and may apply to the trust territory, subject to any modification the administering authority may consider desirable, such of the laws of the United States as it may deem appropriate"); *see also id.* at Article 9 (providing "the administering authority shall be entitled to constitute the trust territory into . . . administrative union . . . with other territories under U.S. jurisdiction").

[41] Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 221, 99 Stat. 1770, 1816 (1986); *see also* Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, § 221, 117 Stat. 2720, 2776-77 (2003).

[42] *Federal Programs and Services Agreement Concluded Pursuant to Sections 221, 224, 225, and 232 of the Compact of Free Association: reprinted in* 181 *et seq., Hearing on S. 98-1067 Before the Senate Comm. on Energy and Natural Resources*, 98th Cong. (1984), *microformed on* CIS No. 97-5331-44 (Cong. Info. Serv.).

[43] Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181 (1945); § 105(b)(6), 117 Stat. at 2745.

[44] *See id.* § 221, at 2776-77.

CFA, along with direct financial grant assistance that will end when the twenty-year extension expires.[45]

Clearly for the FSM, the RMI, and Palau, the free association model serves as a "soft landing" from dependency as the domestic features of the CFA are allowed to lapse. Those domestic elements of the 1986 CFA are viewed by Congress as vestiges of the territorial model for administration left over after the end of the U.N. trusteeship. Free association is not a constitutionally permanent status. It is based on separate sovereignty, nationality, and citizenship. Therefore, the free association model as practiced by the United States must be seen and understood as a transitional arrangement put into place when the peoples concerned voted against further integration with the United States.[46] While the terms and conditions may vary, in the United States, free association has proven a political "half-way house" to full independence without association. It is a mechanism to reverse the integration that occurred during the trust territory period, so that true separate nationhood can be achieved in accordance with indigenous political, social, and economic capacities.[47] The legal framework of free association under the CFA can continue indefinitely or be terminated at will by either party at any time.[48] Thus, Congress retains full national powers to determine at regular intervals if the free association formula continues to serve the U.S. national interest, and to modify or even terminate it as deemed necessary.

Even though the United States has a good record of meeting its obligations and keeping its promises under the CFA, it is significant that during the first seventeen years, all federal programs and services were subject to the annual appropriations process in Congress.[49] The renewal process gave Congress the opportunity to realign the association to meet current U.S. priorities and eventually end annual appropriations that sustained the associated states as they emerged from the territorial trusteeship period.[50] In addition, the "full faith and credit" pledge, which supported U.S. assistance grants under the original CFA,[51] has been converted into a generic pledge to seek annual funding of the CFA by Congress.[52] In short, free association represents a statutory and treaty-based policy to conduct foreign relations with

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[45] *See id.* § 221(a), at 2771-72; *see id.* § 215(a), at 2776-77; *see Federal Programs and Services Agreement* art. XIII § 2 concluded under § 231, 117 Stat. at 2778.

[46] Preamble, 117 Stat. at 2758.

[47] *See id.* at 2757-58.

[48] *See id.* §§ 441-43, at 2788-89.

[49] *Federal Programs and Services Agreement*, *supra* note 42, art. II, §1; *see* Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 462(e), 99 Stat. 1170, 1833 (1986).

[50] §§ 215(a), 216, 117 Stat. at 2774-75.

[51] § 236, 99 Stat. at 1819.

[52] § 233, 117 Stat. at 2778.

a separate nation under international agreements, subject to termination, or renewal, on such terms as may be agreed by Congress.[53]

The lesson of the CFA for the FSM, the RMI, and Palau is that free association must be adapted from abstract international theory to the federal political system, especially if the metropolitan power is the United States. That is precisely what the State Department did in negotiating the original CFA for the FSM and the RMI.[54] The free association model was moved even further in the international realm and away from the domestic territorial model by the 2003 amended and renewed CFA. To illustrate the true face of free association under U.S. law and practice, what follows is an inventory of features of the sovereign free association model approved by Congress under the renewed CFA as amended and renewed by U.S. Public Law 108-188.[55]

V. ECONOMIC ASSISTANCE AND U.S. MILITARY RIGHTS

The features of the 2003 amended and renewed CFA reflect the link between economic assistance and defense relations. The mutual agreement embodied in the CFA is predicated on the reciprocal interests of the parties in the association. For the United States, the logic underlying the association is simple. The cost of preserving a special relationship with a former territorial dependency through economic assistance is justified by the strategic value of the islands and their territorial waters, as well as the specific basing rights acquired under the CFA. The features of the CFA that redeem these mutual interests are as follows:

- As noted above, U.S. obligations to provide government-to-government financial grant assistance continue for an additional twenty-year period. However, grants end altogether in 2024. During the final twenty-year period, each annual economic assistance grant will decrease until being zeroed out in 2024. At the same time, the United States will make annual contributions to a trust fund to provide budgetary resources to sustain the final transition to the period after U.S. grants end.[56]
- Over the twenty-year period of the renewed CFA, the total economic assistance to the FSM will be $2.3 billion. The total for the RMI will be $1.2 billion. On a per capita basis, this is about one-half the level of

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[53] *See id.* §§ 211(a), 215(a) & 231, 117 Stat. at 2771, 2774 & 2777-78; *see also Federal Programs and Services Agreement, supra* note 42, art. XIII, §3.

[54] S. REP. NO. 98-1067, at 32-119 (1984) (Statement of the President's Personal Representative for Micronesian Status); *see Zeder Statement at Hearing Rec., U.S. House of Representatives, Comm. on Resources*, Serial No. 105-16, 113 (Mar. 19, 1997).

[55] 117 Stat. 2720.

[56] *See id.* § 211, 117 Stat. at 2771; *see id.* § 215, at 2774.

annual assistance provided under the original CFA during the first fifteen years of free association.[57]

- The original CFA of 1986, and the 2003 amended CFA (renewed for 20 years), both reflect a gradual reduction of per capita levels of assistance. Specifically, according to GAO testimony in Congress on the CFA renewal legislation, the annual U.S. economic assistance to the FSM under the original CFA dropped from approximately $1,600 per person in 1986 to $850 per person in 2003. In the RMI, the annual per capita value of U.S. assistance dropped from approximately $1,200 to $650, during the same period. This downward trend continues under the 2003 amended and renewed CFA. Specifically, the real per capita funding for the FSM drops from $687 in 2004 to $476 in 2023. In the RMI, the annual per capita value of U.S. assistance drops from $627 in 2004 to $303 by 2023.[58]
- During the twenty-year period of the renewed CFA, the United States will continue to exercise plenary authority in all defense matters in the FSM and RMI.[59] This includes the authority to deny third-country access[60] and the ability to conduct necessary military operations within the lands, waters, and airspace of the associated states.[61] In accordance with these provisions, the current base rights agreement for use of Kwajalein Missile Range until the year 2016 has been extended by fifty years to 2066, with a U.S. option to extend it another twenty years to 2086.[62] The total funding authorized to pay for those base rights over the next eight decades is $3.1 billion. Since the RMI does not have the unencumbered constitutional power to take lands for base rights under eminent domain, the funding for Kwajalein goes to pay lease costs to the landowners where the base is located. Until landowners accept the terms of the new base rights agreement, the additional funding available now will be placed in an escrow account.[63]
- Federal Emergency Management Agency (FEMA) disaster relief programs will continue for only five more years, to be replaced by disaster relief programs based on an international rather than domestic

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[57] COMPACT OF FREE ASSOCIATION: AN ASSESSMENT OF THE AMENDED COMPACTS AND RELATED AGREEMENTS, GAO-03-988T (July 10, 2003), *at* http://www.gao.gov/new.items/d03988t.pdf.

[58] *Id.*

[59] § 311, 117 Stat. at 2781.

[60] *See id.* § 311(a)(2).

[61] *See id.* § 312; *see id.* § 323, at 2823.

[62] *See id.* § 211(b), at 2773; *see id.* § 321, at 2783; *see also id.* § 323; *see also id.* § 462(b)(6), at 2833.

[63] *See id.* § 103(1)(3), at 2736.

model as may be mutually agreed. If no agreement is reached, then the FSM and RMI will be eligible for disaster relief from the Agency of International Development (AID), which provides humanitarian relief to foreign nations.[64]

- Federal education programs will also be converted from the domestic model established during the territorial period to a more international arrangement. Thus, subject to annual appropriation by Congress, the Individuals with Disabilities Act educational grant programs,[65] as well as some but not all "Pell Grants" under the Higher Education Act of 1965,[66] will remain available from 2004 to 2023. All other federal educational programs will be terminated and replaced by annual cash grants of $12 million for the FSM and $6 million for the RMI for the twenty-year period before federal economic assistance under the CFA ends in 2023.[67]
- The limited fiscal autonomy allowed under the 1986 original CFA is further restricted by the 2003 amended and renewed CFA, through measures that include oversight of associated state government expenditures of U.S. grant assistance by a Joint Economic Management Committee. That oversight committee will include three U.S. members, including the committee chair, and two associated states members.[68] In addition, the local governments of the associated states will be subject to audit by the GAO and Comptroller General of the United States.[69]

VI. IMMIGRATION PROVISIONS

During the negotiations to renew the CFA in 2003, the United States refused to discuss RMI claims for personal injury and land damages arising from U.S. nuclear testing at Bikini and Enewetak during the early years of the U.N. trusteeship. The United States based its refusal on the grounds that the nuclear claims are already governed by a CFA provision which was not expiring.[70] At the same time the United States demanded that the associated states accept new travel and residency restrictions under amendments to provisions of the original CFA that also were not expiring.[71] While the inconsistency of the U.S. position on the negotiability of these issues produced

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[64] *See id.* § 105(f)(1)(A), at 2748-49.

[65] 20 U.S.C.A. § 1400 (1997).

[66] *See id.* § 1070a (1998).

[67] § 105(f)(1)(B), 117 Stat. at 2749-50.

[68] *See id.* § 213, at 2774.

[69] *See id.* § 232, at 2778.

[70] Compact of Free Association Act of 1985, Pub. L. No. 99-239, § 177, 99 Stat. 1770, 1812 (1986).

[71] *See id.* § 141, at 1804.

considerable frustration for both FSM and RMI negotiators, the U.S. economic assistance set to expire represented somewhere close to three-fourths of associated state per capita Gross National Product (GNP). This restricted the negotiating leverage of the two island governments. Ultimately the United States threatened not to submit any proposal to Congress for renewal of the CFA unless the FSM and RMI agreed to the following terms, which are now the law under the CFA:

- Citizens of the associated states are aliens under U.S. immigration and naturalization law, and are to be treated like other aliens, except for certain special travel privileges, including entry without a visa if in compliance with all other immigration laws.[72]
- Citizens of the associated state may not enter and be employed in the United States without a passport issued by the government of the associated state.[73]
- The United States will deny entry to any person bearing a passport of the associated state if the United States determines that the passport was issued as part of an investment incentive program for citizens from third countries, or otherwise issued for improper purposes not within the legitimate naturalization process of the associated states.[74]
- A person naturalized under the laws of the associated state cannot enter the United States under the CFA unless that person was an actual resident of the associated state for five years before the CFA entered into force. Actual residence is determined by the U.S. government, based on a requirement of physical presence in the associated state for no less than 85% of the five year period.[75]
- A person who brings an infant to the United States from the associated state, as well as the infant, will be denied entry if the U.S. immigration inspectors believe the child is being brought to the United States for adoption under U.S. law.[76]
- The CFA confers permission on citizens of the associated states to be employed in the United States upon admission as a CFA migrant, but the requirement for possession of an unexpired passport issued by the associated state government is mandatory to establish "identity and employment authorization" under U.S. immigration laws.[77]

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[72] *See* Compact of Free Association Amendments Act of 2003, Pub. L. No. 108-188, § 141(e)(4), 117 Stat. 2720, 2762 (2003); *see also id.* § 141(a), at 2760.

[73] *See id.* § 141(d), at 2762.

[74] *See id.* § 141(c), at 2761-62.

[75] *See id.* § 141(a)(4), at 2761.

[76] *See id.* § 141(b).

[77] *See id.* § 141(d), at 2762.

- The U.S. Immigration and Nationality Act applies fully to associated state citizens, including all grounds for exclusion and deportation based on conviction of a serious crime, in the interest of public health, or inability to show "sufficient means of support in the United States."[78]
- The limited privilege to travel to the United States from the associated state without a visa may be further regulated as deemed necessary by the Attorney General of the United States.[79]
- Birth in the formerly U.S.-administrated territory does not create eligibility for naturalization in the United States. Further, residence in the United States under the CFA does not count as residence for purposes of naturalization as a U.S. citizen.[80]
- Citizens of the associated states residing in the United States under the CFA for more than one year are subject to conscription for involuntary military service in the U.S. armed forces.[81]
- U.S. citizens have the right to reside in the associated states and lawfully engage in occupations without discrimination or treatment less favorable than associated state citizens receive in the United States.[82]

VII. CONCLUSION

The terms for continuation of free association under the CFA as amended and renewed in 2003, have clear and undeniable implications for the freely associated states. Foremost is the practical reality that free association has been defined by the United States as a transitional status, the features of which change in accordance with policy priorities of the metropolitan power. This is reflected in the provisions that will end United States direct financial assistance in 2023, and includes the more restricted immigration privileges. These changes, combined with the U.S. decision to support the associated states' application for U.N. membership, clearly establish that under U.S. law and practice, free association is a treaty-based status that is neither constitutionally defined nor permanent (as in the case of admission to the union as a state). Nor is it a status defined by and subject to the supremacy of federal law (as in the case of U.S. territories under Article IV, Section 3, Clause 2 of the U.S. Constitution). This status formula, defined by international agreement, is consistent with and preserves the right of independence not only for the associated states, but also for the United States as the metropolitan power. This formula is no accident, but results from the require-

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[78] *See id.* § 141(f)(1).
[79] *See id.* § 141(f)(5), at 2763.
[80] *See id.* § 141(h).
[81] *See id.* § 341, at 2784.
[82] *See id.* § 142, at 2763-64.

ment that free association must be an international relationship rather than a domestic political union. The people of the associated state govern themselves as a sovereign nation, not as a territory under the jurisdiction of the U.S. Congress. That is why, from a constitutional perspective, the United States must have the same ability as the associated states to forfeit its rights and choose independence without association at any time. Indeed, as implemented by Congress under the U.S. Constitution, to be non-colonial and non-territorial, free association must preserve each party's ability to terminate it in favor of independence for both parties at any time. In the case of FSM and RMI, the free association model has been a successful transitional association that has sustained the right of succession to sovereign nationhood and eventual independence.

Arrow of Time: Vested Rights, Zoning Estoppel, and Development Agreements in Hawai'i

Kenneth R. Kupchak,* Gregory W. Kugle,** Robert H. Thomas***

I. INTRODUCTION

The modern land regulation and development process—particularly in Hawai'i where both the state and the local government may be involved in excruciating detail—is a complex, lengthy, expensive, and very often uncertain undertaking[1] for any property owner desiring to exercise the fundamental right to make reasonable use of its property.[2] The uncertainty is compounded by the ability of the government to change the regulations applicable to property after the owner has begun planning or building but has not completed construction. Operating within a system that is rightly or wrongly perceived as arbitrary or subject to change at whim or for political reasons only magnifies owner uncertainty and regulatory risk.[3] On the other hand, the

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[1] The Hawai'i Legislature recognizes the complexities of the land use regulation and development process:

> The legislature finds that with land use laws taking on refinements *that make the development of land complex, time consuming, and requiring advance financial commitments, the development approval process involves the expenditure of considerable sums of money.* Generally speaking, the larger the project contemplated, the greater the expenses and the more time involved in complying with the conditions precedent to filing for a building permit.
>
> The *lack of certainty in the development approval process* can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and commitment to comprehensive planning.

HAW. REV. STAT. § 46-121 (2003) (emphases added).

[2] The right to make reasonable use of property is a fundamental right. *See* Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972) ("[T]he dichotomy between personal liberties and property rights is a false one."). The right to develop land is inherent in ownership. Richard B. Cunningham & David H. Kremer, *Vested Rights, Estoppel, and the Land Development Process*, 29 HASTINGS L.J. 625, 633 (1978).

[3] The "arrow of time" in this Article's title refers to reconciliation of the theory in quantum mechanics about time having no direction—and thus no meaning—with the human perception that the arrow of time moves forward. *See* ILYA PRIGOGINE, THE END OF CERTAINTY: TIME,

government understandably seeks to retain maximum flexibility in the application of its police power and have the ability to respond to changing situations by amending land use regulations.

Attempting to balance these competing interests, the courts have responded by creating the doctrines of vested rights and zoning estoppel. These closely-related principles permit the government to retain flexibility in land use planning only if a property owner has not proceeded sufficiently along the development path that it would be unconstitutional or unfair to prevent it from completion. These often judicially overlapped doctrines have roots in constitutional law,[4] the law of variances and non-conforming uses, and equitable principles of detrimental reliance.

Once an owner's rights have "vested," the owner possesses development rights,[5] and these development rights are property rights that "cannot be taken away by government regulation."[6] If the government is estopped, it is prevented from applying any future incompatible, albeit legal, regulations to the property. Vested rights and zoning estoppel thus counterbalance the government's unfettered ability to use its police power to regulate land uses, providing some insulation of the land development process from shifting political winds.[7]

Vested rights and zoning estoppel arise in several situations, the most common being when the government issues a permit, but later takes some action to affirmatively revoke, rescind, or invalidate it.[8] Or when the

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CHAOS, AND THE NEW LAWS OF NATURE (1997). A physicist of the Brussels School probably would not care for the vested rights and zoning estoppel doctrines as they are but one of the law's attempts to wrest order from chaos and insure a level of certainty in future events. We suppose predictability and repose only have meaning if the future and past exist but that weighty question is well beyond the scope of this Article.

[4] The Due Process, Takings, and Ex Post Facto Clauses, for example, which prohibit arbitrary, standardless, uncompensated, and retroactive laws, respectively.

[5] "Use of the term 'vested right' refers, of course, to a *right* to develop land; the characterization of a right as *vested* usually means that it is secure, recognized, or presently existing." Cunningham & Kremer, *supra* note 2, at 629.

[6] David Heeter, *Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes*, 1971 URB. L. ANN. 63, 64-5.

[7] *See* Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1569-70 (2003) (Constitutional limitations on the ability to impact property "anticipates the danger that a local majority might co-opt the legislature and persuade it to seize the property of a minority without paying compensation."); *see, e.g.*, Allen v. City & County of Honolulu, 58 Haw. 432, 434 n.1, 571 P.2d 328, 329 n.1 (1977) (ordinance to change zoning was "in response to political pressure." (quoting Trial Court's Finding of Fact No. 8)).

[8] *See, e.g.*, Alderman v. Stevens, 189 So. 2d 168 (Fla. Dist. Ct. App. 1966) (attempt to "cancel" permit). In that case, the property owner wanted to build a garage and playhouse and telephoned the city building inspector who approved with no setback. *Id.* at 169. After the owner began working, the building inspector apparently had a change of heart and informed him

government, instead of revoking approvals, creates new regulations or amends existing regulations rendering the prior approvals ineffective,[9] or some combination of the above.[10] And while development agreements are available to some degree to anticipate and prevent vested rights and zoning estoppel litigation in those Hawai'i counties that have enacted development agreement ordinances, an understanding of these doctrines is necessary in order to understand development agreements and their limitations, and for the property owner and government in the City and County of Honolulu to determine when development approvals become immune from revocation or alteration.[11] The development agreement statute also incorporates by reference the rules of vested rights, so an understanding of the doctrines is necessary to understanding the proper scope of development agreements.[12]

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that a 15 foot setback was required. *Id.* When the owner appealed to the board of adjustment, the city claimed a 25 foot setback was mandated by law. *Id.* Ultimately, after an appeal, the board of adjustment informed the property owner that if he could get a permit with a 15 foot setback, the board would take no action (meaning the board would recognize an exemption). *Id.* at 170. The owner obtained such a permit. But one month later the board cancelled the permit, presumably because of insufficient setback. *Id.* at 169. However, the building inspector admitted that he had permitted at least four other owners to proceed with setbacks similar to Mr. Stevens, who believed the board when it told him it would take no action if he obtained a 15 foot setback building permit. *Id.* at 170. The court held that the building permit could not be revoked since it was validly issued, and the owner had every reason to believe it was valid. *Id.* *See also* O'Laughlin v. City of Chicago, 357 N.E.2d 472, 473 (Ill. 1976) (city revoked building permits for cause after mistakenly issuing them); Crow v. Bd. of Adjustment of Iowa City, 288 N.W. 145 (Iowa 1939) (city's attempt to "cancel" and "revoke" building permit rejected).

[9] *See, e.g.*, Denning v. County of Maui, 52 Haw. 653, 485 P.2d 1048 (1971) (after preliminary approval but before construction, government lowered height limit). For a more recent example, *see Maunalua Associates v. City & County of Honolulu*, No. 89-3539-11SSM (Haw. Cir. Ct. filed Nov. 14, 1989), in which the Honolulu City Council issued a Special Management Area Permit (SMP) to the developer for property zoned "Residential," giving its final permission to build a residential housing project, but after public pressure, downzoned the property to "Preservation." *Id.* Honolulu did not have a process for revoking SMP's, so the Council amended the underlying zoning in an attempt to render the SMP valueless. *Id.*

[10] *See, e.g.*, Transland Props., Inc. v. Bd. of Adjustment, 198 S.E.2d 1 (N.C. Ct. App. 1973) (after owner had started actual construction of a condominium, the government changed the regulations to prohibit condominiums, and revoked previously issued building permits).

[11] Of Hawai'i's four counties, only three—Maui, Kauai, and Hawai'i—have enacted development agreement ordinances pursuant to the enabling legislation, Hawai'i Revised Statutes section 46-123. The City and County of Honolulu, however, has not done so and development agreements are not an available tool to the government or developers on Oahu.

[12] The statute provides that entering into a valid development agreement will give rise to "vested property rights," but does not define those rights:

> Development agreements will *encourage the vesting of property rights* by protecting such rights from the effect of subsequently enacted county legislation which may conflict with any term or provision of the development agreement or in any way hinder, restrict, or prevent the development of the project. Development agreements are intended to provide

This Article explains the doctrinal differences between vested rights and zoning estoppel in Part II. Part III discusses the application of the doctrines in other jurisdictions and the potential choices the Hawai'i Supreme Court had before it when it first formulated its own rules, while Part IV details the development of the doctrines by the Hawai'i courts. Part V discusses the application of vested rights and zoning estoppel in Hawai'i land use litigation. Part VI discusses remedies, and Part VII analyzes alternatives to vested rights and zoning estoppel litigation such as development agreements, land swaps, and transferred development rights.

II. THE DISTINCTION BETWEEN VESTED RIGHTS AND ZONING ESTOPPEL

Although usually treated by courts and many commentators as interchangeable,[13] the theories of vested rights and zoning estoppel are doctrinally distinct.

A. Common Theoretical Underpinnings

As a general rule, the government is free to enact prospective regulations—including those that impact property uses—and change the rules regulating uses of those interests, but no law may have retrospective operation unless expressly stated or obviously intended.[14] This proscription, however, begs the questions: can the government simply declare a regulation prohibits or modifies that which had previously been permissible? May the government revoke a granted permit, or change its interpretation or application of the law

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> a reasonable certainty as to the lawful requirements that must be met in protecting *vested property rights*, while maintaining the authority and duty of government to enact and enforce laws which promote the public safety, health, and general welfare of the citizens of our State.

HAW. REV. STAT. § 46-121 (2003) (emphases added). The Hawai'i Supreme Court in *County of Kauai v. Pacific Standard Life Insurance Co.* (hereinafter *Nukolii*, named for the location of the land at issue), noted that the Kauai County Charter also used the term "vested rights," but did not define it; the court defined the term under the common law principles of "zoning estoppel," 65 Haw. 318, 325-26, 653 P.2d 766, 773 (1982).

[13] *See* Shea Homes Ltd. P'ship v. County of Alameda, 2 Cal. Rptr. 3d 739, 758 (Cal. Ct. App. 2003) ("Estoppel and vested rights claims are essentially synonymous in land use issues. . . ."). *See also* Robert M. Rhodes & Cathy M. Sellers, *Vested Rights: Establishing Predictability in a Changing Regulatory System*, 20 STETSON L. REV. 475, 476 (1991) ("Although the doctrines of equitable estoppel and vested rights arise from distinct theoretical bases, Florida courts have employed these concepts interchangeably."); Cunningham & Kremer, *supra* note 2, at 648 ("A majority of courts presume that the rationale underlying the vested rights doctrine is found in the concept of equitable estoppel.").

[14] HAW. REV. STAT. § 1-3 (2003) ("No law has any retrospective operation, unless otherwise expressed or obviously intended.").

and apply that interpretation to disapprove that which it previously approved? With respect to land use, hornbook law allowed the government to change its mind without consequence unless the development had been completed: "[P]ermits for buildings and businesses are not per se protected against revocation in effect by subsequent enactment or amendment of zoning laws prohibiting the building, business or use for which they have been issued."[15] The government could simply legislate permitted uses out of existence. Under this rule the property owner would absorb all of the regulatory risk: development would always be subject to the possibility of intervening incompatible regulation or revocation of government approvals, until the last nail was driven.

Because it would be both unfair and unconstitutional to allow the government to simply decree rights out of existence, particularly when dealing with real property, the power was limited when applied to preexisting uses or structures. Thus, most zoning codes contain provisions mandating the continuation of non-conforming or preexisting structures or uses, also known as "grandfathering."[16] By the same token, broad-based zoning code amendments often expressly disclaim any retroactive effect so as not to impact projects or buildings that are under construction but not complete at the time of enactment.[17] In sum, all works well when the government can be trusted to rein in the reach of its regulations and actions.

When it cannot, the Constitution and equity limit the power of government to change the ground rules without due process and without compensation, or when to do so would be fundamentally unfair to the property owner. For example, what if the owner has not yet completed construction, and what about those unfortunate property owners who have been intentionally and actively targeted—by either the government or the public (which are frequently one-in-the-same)—through an effort to prevent a planned project that was completely legal at the outset and may have even received necessary government approvals? In those circumstances, the courts have recognized two related doctrines—vested rights and zoning estoppel—to protect the rights of the minority from the excesses of the majority.[18]

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[15] *Nukolii*, 65 Haw. at 326-27, 653 P.2d at 773 (quoting 8 EUGENE MCQUILLIAN, THE LAW OF MUNICIPAL CORPORATIONS § 25.156, at 459 (3d ed. 1976)).

[16] *See* Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. of Appeals, 86 Hawai'i 343, 354, 949 P.2d 183, 194 (Haw. Ct. App. 1997) (grandfather provisions in zoning act and land use ordinance prohibit new ordinances from interfering with owner's lawful uses).

[17] *See, e.g.*, Protect Ala Wai Skyline v. Land Use & Controls Comm., 6 Haw. App. 540, 548-49, 735 P.2d 950, 955-56 (1987) (the General Plan is prospective in nature and only applies to changes in use or zoning proposed after its adoption), *overruled in part on other grounds by* GATRI v. Blane, 88 Hawai'i 108, 962 P.2d 367 (1998).

[18] *See, e.g.*, Denning v. County of Maui, 52 Haw. 653, 656-57, 485 P.2d 1048, 1050 (1971) (ordinance enacted without grandfather provision); Ralph D. Rinaldi, Comment, *Virginia's Vested Property Rights Rule: Legal and Economic Considerations*, 2 GEO. MASON L. REV. 77,

B. Vested Rights—Constitutional Property Rights

Vested rights analysis focuses on whether an owner has made irrevocable commitments which create a property right deserving constitutional protection.[19] In other words, whether the owner possesses constitutional "property rights which cannot be taken away by government regulation."[20] The vested rights analysis turns on whether the property owner has gone so far down the development path that the government cannot change the law or its interpretation or application of the law.[21] The key question as posed by the United States Supreme Court regarding the due process context in *Board of Regents v. Roth*,[22] is whether the owner has "a legitimate claim of entitlement"[23] to the right to continue. As *Roth* also held, this question is a matter for the states to decide.[24]

Property rights are not created by the state, and the reasonable use of property is a fundamental human right, one of the trinity of rights acknowledged in both the Fifth and Fourteenth Amendments, on par with life and liberty.[25] Consequently, the states do not have a completely free hand in regulating and defining property rights, as their own constitutions and the United States Constitution place limits on their ability to simply wipe out settled and long-standing expectations without due process and by taking and paying for them.[26] This is the wellspring of the vested rights doctrine, and a

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78 (1994) (vested rights issues arise when government does not put a "grandfather" provision in new regulations to protect completed or ongoing developments).

[19] *Nukolii*, 65 Haw. at 336-39, 653 P.2d at 779-81.

[20] *Id.* at 325, 653 P.2d at 772 (quoting Allen v. City & County of Honolulu, 58 Haw. 432, 435, 571 P.2d 328, 329 (1977)); *see also* Kasparek v. Johnson County Bd. of Health, 288 N.W.2d 511, 518 (Iowa 1980) (vested rights are "property right[s] which cannot be arbitrarily interfered with or taken away without compensation").

[21] *Nukolii*, 65 Haw. at 338, 653 P.2d at 780.

[22] 408 U.S. 564 (1972).

[23] *Id.* at 577.

[24] *Id.* "Property interests, of course, 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—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.*

[25] U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1. The constitutional acknowledgment and protection of property stems from the natural rights philosophy of John Locke, which asserts that property rights predate government and thus cannot be subject to absolute state control. *See* James S. Burling, *Private Property Rights and the Environment after* Palazzolo, 30 B.C. ENVTL. AFF. L. REV. 1, 2-5 (2002) (the Supreme Court firmly embraced the Lockean view of property in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001)).

[26] *See* Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 164 (1980) (the state may not, "by *ipse dixit* . . . transform private property into public property without compensation"); Hughes v. Washington, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring) (the government cannot defeat property rights and permit a taking simply by declaring that the

majority of jurisdictions, Hawai'i included, hold that vested rights are property rights for purposes of the federal and state constitutions.[27] The owner of the right has a right to procedural due process,[28] substantive due process,[29] and is protected from a taking without just compensation.[30] These property rights are not limited to real property, and include development and permit rights, so just compensation in this context must include fair market value of the property in its fully entitled state.[31]

C. Estoppel—Equity and Reliance

Equitable estoppel in the land use context is known as "zoning estoppel," and shifts the focus from the owner's irrevocable commitments to the government's process and whether it would be unfair to permit the government to

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property never existed at all); *Palazzolo*, 533 U.S. at 627 (2001) (the state cannot simply wipe out property rights by prospective legislation); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029-30 (1992) (regulation destroying all value of property is a taking unless it codifies common law nuisance).

[27] *See* John J. Delaney & Emily J. Vaias, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims*, 49 WASH. U. J. URBAN & CONTEMP. L. 27 (1996) (listing decisions treating vested rights as constitutionally-protected property rights).

[28] Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. of Appeals, 86 Hawai'i 343, 353-54, 949 P.2d 183, 193-94 (Haw. Ct. App. 1997) ("[D]ue process principles protect a property owner from having his or her vested property rights interfered with . . . and preexisting lawful uses of property are generally considered to be vested rights that zoning ordinances may not abrogate.") (citations omitted); *see also* Brown v. Thompson, 91 Hawai'i 1, 11, 979 P.2d 586, 596 (1999) (boat mooring and live-aboard permits are property and may not be revoked without due process).

[29] Town of Orangetown v. Magee, 665 N.E.2d 1061, 1065 (N.Y. 1996) (downzoning in violation of vested rights was also arbitrary and capricious and violated substantive due process).

[30] Kaiser Aetna v. United States, 444 U.S. 164, 179 (1979) ("While the consent of individual officials representing the United States cannot 'estop' the United States, it can lead to the fruition of a number of expectancies embodied in the concept of 'property'—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property.") (citations omitted); *see also* Trans-Oceanic Oil Corp. v. City of Santa Barbara, 194 P.2d 148, 152 (Cal. Dist. Ct. App. 1948) (once a property right is vested, the "permit cannot be revoked"). *See generally* Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 URB. LAW. 215, 237-38 (1995) ("A landowner's expectations are investment-backed and reasonable when he substantially proceeds in good faith after government approval of his development.").

[31] *See Kaiser Aetna*, 444 U.S. at 178 ("economic advantage" that has "the law back of it" cannot be interfered with without exercising eminent domain); Order Granting Summary Judgment, Maunalua Assocs. v. City & County of Honolulu, No. 89-3539-119SSM (Haw. Cir. Ct. filed Nov. 14, 1989) (noting that just compensation and damages owed for taking land and permit) (copy on file with authors).

exercise its regulatory power to change regulation after its act or omission has induced a property owner to alter its position in reliance.[32] In *Life of the Land, Inc. v. City Council of the City and County of Honolulu*,[33] the Hawai'i Supreme Court described the general rule of zoning estoppel, focusing on expenditures made in reliance on "*official assurance*" that a proposed use can proceed.[34] The court adopted the most common formulation of zoning estoppel:

> A local government exercising its zoning powers will be estopped when a property owner, (1) relying in good faith (2) upon some act or omission of the government (3) had made such a substantial change in position or incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the rights which he ostensibly has acquired.[35]

As the court explained in *Nukolii*, the initial zoning estoppel inquiry is whether the government has given official assurance to the developer that the proposed project may proceed, and whether the owner relied on the official assurance to its detriment.[36] Thus, the policy underlying zoning estoppel is two-fold: hold the government to its commitments, and treat property owners who rely fairly.

Although the vested rights and zoning estoppel doctrines are different and have significantly different theoretical underpinnings—the Constitution and common law on one hand, and equity on the other—many courts, including the Hawai'i Supreme Court, have collapsed the two approaches into one, rationalizing that the two analyses rarely produce a different result.[37] This gross oversimplification can be traced originally to a journal article which explained:

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[32] County of Kauai v. Pac. Standard Life Ins. Co., 65 Haw. 318, 325, 653 P.2d 766, 772 (1982) [hereinafter *Nukolii*]. For a recent formulation of the zoning estoppel doctrine, *see Shea Homes, Ltd. P'ship v. County of Alameda*, 2 Cal. Rptr. 3d 739, 758 (Cal. Ct. App. 2003):

> In the context of land use, the principle of estoppel prohibits a governmental entity from exercising its regulatory power to prohibit a proposed land use when a developer has incurred substantial expense in reasonable and good faith reliance on some governmental act or omission so that it would be highly inequitable to deprive him of the right to complete the development as proposed.

Id. (citing Toigo v. Town of Ross, 82 Cal. Rptr. 2d 649, 656 (Cal. Ct. App. 1998)).

[33] 61 Haw. 390, 606 P.2d 866 (1980).

[34] *Id.* at 453, 606 P.2d at 902 (emphasis added).

[35] Heeter, *supra* note 6, at 66. *See generally* David Callies, *Land Use: Herein of Vested Rights, Plans, and the Relationship of Planning and Controls*, 2 U. HAW. L. REV. 167, 174 (1979).

[36] *Nukolii*, 65 Haw. at 327-28, 653 P.2d at 774-75.

[37] Allen v. City & County of Honolulu, 58 Haw. 432, 435, 571 P.2d 328, 329 (1977) ("Though theoretically distinct, courts across the country seem to reach the same results when applying these defenses to identical factual situations.").

> The defense of estoppel is derived from equity, but the defense of vested rights reflects principles of common and constitutional law. Similarly their elements are different. Estoppel focuses on whether it would be inequitable to allow the government to repudiate its prior conduct; vested rights upon whether the owner acquired real property rights which cannot be taken away by governmental regulation. Nevertheless, the courts seem to reach the same results when applying these defenses to identical factual situations.[38]

Even though the judicial analyses to determine whether an owner has a "legitimate claim of entitlement" for vesting purposes, and whether the government has given "official assurance" for zoning estoppel are often the same, the doctrines should be kept separate. In a vested rights determination the focus is on the property owner's expectations and fundamental rights, while in analyzing zoning estoppel the focus is on the government's process and whether it induced the owner's reliance.

III. OTHER JURISDICTIONS' APPROACH TO THE TRIGGER TO VESTED RIGHTS AND ZONING ESTOPPEL

Because state law defines property rights, each jurisdiction to consider vested rights and equitable estoppel has been free to develop its own rules, either by statute or decisional law, and the courts have approached the doctrines in a variety of ways.[39]

While the results differ under the various approaches, the key elements remain roughly similar: rights will vest and the government will be estopped when a property owner substantially changes position in reliance on some government act or omission. The key difference is in timing—what government action in the development approval process gives a property owner the green light.

A. The Building Permit Rule

A number of jurisdictions determine that property rights vest very late in the development process. This rule, epitomized by the California case *Avco Community Developers, Inc. v. South Coastal Regional Commission*,[40] finds vesting when the government issues a building permit and the developer

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[38] *Id.* (quoting Heeter, *supra* note 6, at 64-65).

[39] *See generally* Lynn Ackerman, Comment, *Searching for a Standard for Regulatory Takings Based on Investment-Backed Expectations*, 36 EMORY L. J. 1219, 1235-73 (1987) (surveying different jurisdictions' approaches to vested rights and zoning estoppel).

[40] 553 P.2d 546 (Cal. 1976).

begins "substantial work."[41] The developer remains at risk until construction is well under way. Despite the obvious unfairness to property owners, *Avco* created a very bright line rule and reasoned that to allow vesting prior to building permit issuance and substantial work would unreasonably tie the hands of government regulators and would permit property owners to lock in regulations and not be in any hurry to complete development resulting in vested property lying undeveloped and subject to outdated regulations.[42]

While it does provide for certainty, the building permit rule has been widely criticized, even by courts that apply it, because it provides for certainty too late in the process, does not forestall litigation, and maximizes the owner's exposure to regulatory risk.[43]

B. The Early Vesting Rules

Other states are not as limited as building permit jurisdictions and follow the modern trend of providing for vested rights at earlier stages in the development process. For example, Virginia's rule triggers vested rights early in the development process after the owner relies on any governmental site-specific approval, such as a preliminary plan or subdivision approval.[44] The

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[41] *Id.* at 550. New York and Maryland follow the building permit rule. Thirty other states have also adopted the rule without substantial modification. *See, e.g.*, Prince George's County v. Sunrise Dev. Ltd. P'ship, 623 A.2d 1296 (Md. 1993).

[42] Avco spent at least $2 million dollars but had not obtained its building permit or begun substantial construction, so its rights to develop did not vest. *Avco*, 553 P.2d at 549.

[43] *See, e.g.*, Leroy Land Dev. Corp. v. Tahoe Reg'l Planning Agency, 543 F. Supp. 277, 281 (D. Nev. 1982):

> The Court had some difficulty ascribing much significant or magical to the ministerial act of issuing a building permit mandated by prior discretionary approval of governmental agencies. Nevertheless, even though the final discretionary approval test might provide a fairer and more logical basis to determine vested rights, it is not the law. This Court is not free to choose what it might believe to be the better test.

Id. at 282. The Hawai'i Supreme Court rejected *Avco* as "harsh." County of Kauai v. Pac. Standard Life Ins. Co., 65 Haw. 318, 338, 653 P.2d 766, 780 (1982) [hereinafter *Nukolii*]. For a summary of judicial and scholarly criticisms to all of the various vesting rules, *see* Karen L. Crocker, *Vested Rights and Zoning: Avoiding All-or-Nothing Results*, 43 B.C. L. REV. 935, 954-58 (2002); *see also* Cunningham & Kremer, *supra* note 2, at 626-27 (building permit rule does not recognize modern practice since it developed in an era of "small-scale land development projects which take only a few months to construct and are proposed by individual entrepreneurs"); *and* John J. Delaney & William Kominers, *He Who Rests Less, Vests Best: Acquisition of Vested Rights in Land Development*, 23 ST. LOUIS U. L.J. 219, 241-48 (1979) (building permit rule is harsh).

[44] *See generally* Bd. of Supervisors of Fairfax County v. Med. Structures, Inc., 192 S.E.2d 799 (Va. 1972) (a special use permit triggers vested rights); Bd. of Supervisors of Fairfax County v. Cities Serv. Oil Co., 193 S.E.2d 1 (Va. 1972) (a special use permit triggers vested rights). Virginia subsequently clarified the rule and held that a vested right arises upon issuance

Virginia rule also requires good faith reliance and a substantial change in position by the property owner.[45] Other jurisdictions hold that property rights vest even earlier on the filing of a subdivision application.[46] These early vesting rules are more sound than the building permit rule, and are more consistent with modern, large-scale and long term development projects. The rise of development agreement and vesting statutes are legislative recognition that the late vesting rules have not lived up to their billing of providing certainty.[47]

IV. DEVELOPMENT OF THE DOCTRINES IN HAWAI'I

Instead of choosing one of these vested rights and zoning estoppel models, Hawai'i courts charted their own path, selecting the trigger to vesting as official assurances of some form based upon the land use regulation scheme applicable to the land at issue.[48] The Hawai'i Supreme Court characterized its rule as "the midpoint in a wide spectrum of possibilities represented by the decisions of other jurisdictions."[49] While it may not be squarely center, the court's rule does take into account the special nature of development in Hawai'i, where, depending on the location of the property, differing regula-

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of any government permit, or approval of a site plan. *See* Town of Stephens City v. Russell, 399 S.E.2d 814 (Va. 1991) (the owner did not have a vested right because it had not obtained any site-specific permit or approval). Prior to these cases, Virginia had followed the late vesting "building permit" rule of *Avco*.

[45] Rinaldi, *supra* note 18, at 82. This is an odd result given that Virginia explicitly rejects zoning estoppel, reasoning that the government is not subject to estoppel when discharging its governmental functions. *See* Notestein v. Bd. of Supervisors of Appomattox County, 393 S.E.2d 205, 208 (Va. 1990). Property rights should not be dependent on quasi-estoppel elements such as "reliance" and especially "good faith," since constitutional rights do not derive from equity. Some commentators have suggested that good faith inquiries have no place in vested rights analysis which is founded in common and constitutional law of property. *See* DAVID L. CALLIES, DANIEL J. CURTIN & JULIE A. TAPPENDORF, BARGAINING FOR DEVELOPMENT: A HANDBOOK ON DEVELOPMENT AGREEMENTS, ANNEXATION AGREEMENTS, LAND DEVELOPMENT CONDITIONS, VESTED RIGHTS, AND THE PROVISION OF PUBLIC FACILITIES 129-130 & n.756 (2003) (citing Morgan R. Bentley, *Effects of Equitable Estoppel and Substantial Deviations to Vested Rights in DRI Projects: A New Approach*, 43 FLA. L. REV. 767, 774 (1991) (analyzing the differences between vested rights and estoppel and arguing that equity principles are not applicable to vesting questions)).

[46] *See, e.g.*, Smith v. Winhall Planning Comm'n, 436 A.2d 760 (Vt. 1981).

[47] California has effectively supplanted *Avco*'s "building permit rule" for vesting by permitting development agreements pursuant to statute. *See* CAL. GOV'T CODE § 65865.2 (West 2003) (providing for development agreements); *see id.* § 66498.1-3 (providing for "vesting tentative maps"). In the absence of a development agreement, however, the building permit rule still applies. *See, e.g.*, Toigo v. Town of Ross, 82 Cal. Rptr. 2d 649 (Cal. Ct. App. 1998).

[48] *See Nukolii*, 65 Haw. at 329-32, 653 P.2d at 775-76.

[49] *Id.* at 329 n.8, 653 P.2d at 774 n.8.

tory schemes may be applicable, each with unique requirements.[50] Thus, the determination of vested rights or zoning estoppel is dependent on the specific set of regulations applicable to a particular piece of property, and one rule is not applicable to every conceivable situation, or every parcel developed. The *Nukolii* case is the most well-known and the latest Hawai'i appellate decision dealing with vested rights and zoning estoppel, but it was not the first, nor is it the only precedent to examine when undertaking an analysis.[51] To understand vested rights and zoning estoppel rules it is necessary to examine cases beyond *Nukolii* which remain essential elements in the Hawai'i vested rights and zoning estoppel canon.

A. Denning—*"Assurances of Some Form" as the Zoning Estoppel Trigger*

The Hawai'i Supreme Court's first pass at zoning estoppel came in *Denning v. County of Maui*.[52] Denning purchased a parcel zoned "Hotel," a classification which permitted construction of a twelve story structure. He submitted plans for an eight story building to the planning director and received preliminary approval.[53] However, before construction commenced, the zoning was changed to allow only six-stories; Denning submitted revised plans for a six-story structure and again received preliminary approval.[54] However, the County again downzoned the parcel, this time limiting height to only two stories.[55] The planning director informed Denning that the new ordinance would be applied to the project and no building permit would be issued for any structure exceeding this new, lower height limit, but by that time Denning had spent $38,000 for architectural, advertising and legal fees on the project.[56]

Denning sought a determination by the Maui Board of Adjustment and Appeals (BAA) that the new ordinance did not apply to the property and

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[50] But "official assurance" may not be the "midpoint." By choosing to base vested rights and zoning estoppel on "official assurances," the Hawai'i Supreme Court was choosing a point fairly early in the development process, more towards the early vested rights jurisdictions, and nowhere near the extremes of the building permit jurisdictions, which it criticized as "harsh." *Id.* at 338, 653 P.2d at 780.

[51] Lyle S. Hosoda, Comment, *Development Agreement Legislation in Hawaii: An Answer to the Vested Rights Uncertainty*, 7 U. HAW. L. REV. 173, 174 n.3 (1985) ("The *Nukolii* decision was not the Hawaii Supreme Court's first attempt to resolve the issue of vested rights. Rather, *Nukolii* was the impetus which carried the development community over the boiling point in terms of waiting for the courts to resolve the problem.").

[52] 52 Haw. 653, 485 P.2d 1048 (1971).

[53] *Id.* at 655, 485 P.2d at 1049.

[54] *Id.* at 656, 485 P.2d at 1050.

[55] *Id.* at 656-57, 485 P.2d at 1050.

[56] *Id.* at 657, 485 P.2d at 1050.

Denning could proceed with his six-story project.[57] The BAA refused to act, asserting it had no power to permit Denning to continue as it was obligated to apply the current zoning.[58] The trial court issued a writ of mandamus directing the BAA to hear Denning's case.[59]

On appeal, the Hawai'i Supreme Court concluded that the BAA lacked jurisdiction over the controversy, because it was bound to apply the existing law.[60] However, the court remanded the case to the trial court for a further determination, setting forth the test for zoning estoppel:

> [W]e are of the opinion that for Denning to be allowed the right to proceed in constructing the planned structure the facts must show that Denning had been given *assurances of some form* by [the County] that Denning's proposed construction met zoning requirements. And that Denning had a right to rely on such assurances thereby equitably estopping [the County] from enforcing the terms of [the new zoning ordinance].[61]

The court observed the "[m]ere good faith expectancy that a permit will issue does not create in a property owner a right to continue proposed construction" but that the property owner needed "assurances of some form."[62] The court remanded the case to the trial court to determine whether Denning had been given assurances and whether he had a right to rely.[63] The court left unanswered the question of when a property owner "had a right to rely."[64]

B. Waianae Model—*Government Good Faith Begets Justifiable Reliance*

Two years later, the court decided *Waianae Model Neighborhood Area Ass'n v. City and County of Honolulu*,[65] answering the question left open in *Denning*. In that case, the City and County of Honolulu enacted the Comprehensive Zoning Code (CZC), which would have prevented the owner's proposed apartment/hotel development in rural Oahu.[66] The CZC contained a grandfather provision for building permit applications submitted prior to its effective date.[67] A planning department official charged with reviewing the

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[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.* at 657-58, 485 P.2d at 1050-51.
[61] *Id.* at 658-59, 485 P.2d at 1051 (emphasis added).
[62] *Id.*
[63] *Id.*
[64] *Id.* at 659, 485 P.2d at 1051.
[65] 55 Haw. 40, 514 P.2d 861 (1973).
[66] *Id.* at 40, 514 P.2d at 862.
[67] *Id.* at 42, 514 P.2d at 862.

proposed plans granted the developer's request for an extension of time not explicitly permitted by the CZC to submit revisions to his application.[68]

The developer complied, and was issued a building permit.[69] Neighbors filed suit against the City seeking to invalidate the permit since the application revisions were untimely filed, claiming the planning department official had no authority to extend the application deadline.[70]

The Hawai'i Supreme Court held that the authority of the planning official granting the extension was "at least debatable," and although the CZC did not explicitly allow for extensions of time, neither did it specifically prohibit it.[71] The actual good faith of the official was not disputed, nor did the court examine whether the planning department official was correct when he allowed the extension.[72] The court held:

> [A]n act of an administrative official which is without any semblance of compliance with or authorization in an ordinance, is beyond his competence and is utterly void; but if an act of such official, done in good faith and *within the ambit of his duty, upon an erroneous and debatable interpretation of an ordinance*, is no more than an irregularity, and the validity of such act may not be questioned after expenditures have been made and contractual obligations have been incurred in reliance thereon in good faith.[73]

In other words, government good faith action leads to justifiable reliance by the property owner. Because the extension of time was within the official's ambit of authority, the property owner was entitled to rely on the official's action, even if wrong.

The developer had incurred unrecoverable expenses in reliance and the court affirmed summary judgment in favor of the City and against the third-

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[68] *Id.* at 43, 514 P.2d at 863.

[69] *Id.* at 42, 514 P.2d at 863.

[70] *Id.* Contrast this with the situation where the government issues a permit in compliance with existing policy, but then subsequently changes its policy and attempts to revoke the permit. This is not an error of law or a "mistake," but rather is a change of policy. *See, e.g.*, Aranosian Oil Co. v. City of Portsmouth, 612 A.2d 357 (N.H. 1992), where the court held that the government could not revoke a building permit claiming "mistake" in its issuance. *Id.* at 359. In that case, the property owner sought and obtained a building permit to convert his gas station service bay into a convenience store. *Id.* at 357. After the owner completed the work, the city shut him down claiming that the permit had been issued in error because the government had not realized the service bays would be abandoned in favor of retail sales. *Id.* at 358. The court rejected the city's attempt to revoke because the property owner's permit application did not hide his plans, and the permit itself properly described the elimination of the service bays. *Id.* at 358-59.

[71] *Waianae Model*, 55 Haw. at 45, 514 P.2d at 864.

[72] *Id.* at 45, 514 P.2d at 865.

[73] *Id.* at 44, 514 P.2d at 864 (emphasis added) (citing Schultze v. Wilson, 148 A.2d 852 (N.J. Super. Ct. App. Div. 1959)).

party objectors.[74] *Waianae Model* is in accord with cases from other jurisdictions that hold that reliance on an erroneously issued permit is reasonable if the property owner had no reason to know that the permit was erroneously issued or reliance was induced by the conduct of the government officer.[75]

C. Allen *and* First English*—Builder's and Compensation Remedies*

Four years later, the Hawai'i Supreme Court decided *Allen v. City and County of Honolulu*.[76] In *Allen*, the landowner purchased an oceanfront parcel zoned "Apartment," which permitted up to a 350-foot tall building. The landowner submitted a building permit application for an eleven story structure in conformity with the zoning, and several City departments preliminarily approved the plans.[77] The property owner spent over $77,000 in non-recoverable expenses.[78] Before issuance of the building permit, however, and in response to pressure by neighborhood residents, the City downzoned the property from "Apartment" to "Residential," a classification that did not allow the proposed structure.[79] Upon enactment of the downzoning ordinance, the property owner withdrew its building permit application and plans and sued the City for damages to recover the money spent.[80] The trial court held that the property owner incurred expenses in reliance on the Apartment zoning on the reasonable probability that a building permit would be issued, and because the owner had a right to rely on the zoning requirements, the City was liable to pay damages.[81]

The Hawai'i Supreme Court first noted the claim for damages was based on both a vested rights and a zoning estoppel theory, but immediately discarded

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[74] Note in this case the government sided with the developer and defended its actions against a third-party attack.

[75] *See* Waste Recovery Enter., LLC v. Town of Unadilla, 294 A.D.2d 766 (N.Y. App. Div. 2002); Town of Orangetown v. Magee, 665 N.E.2d 1061 (N.Y. 1996); Roseberry Life Ins. Co. v. Zoning Hearing Bd. of the City of McKeesport, 664 A.2d 688 (Pa. Commw. Ct. 1995). However, if the permit applicant in fact knows the permit was wrongfully issued because she misled the government, she has no right to rely on a wrongfully issued permit. *See, e.g.*, O'Laughlin v. City of Chicago, 357 N.E.2d 472, 473 (Ill. 1976) (permit applicant induced city to issue building permit in error by manipulating his permit application to make it appear they conformed to the regulation, and should have known that the application did not comply with the law). *Cf.* Cities Services Oil Co. v. City of Des Plaines, 171 N.E.2d 605, 607-08 (Ill. 1961) (city gave owner a copy of an outdated ordinance which was no longer effective; when owner relied on that ordinance, city estopped from claiming a violation of the new ordinance).

[76] 58 Haw. 432, 571 P.2d 328 (1977).

[77] *Id.*

[78] *Id.* at 434, 571 P.2d at 329.

[79] *Id.* at 434, 571 P.2d at 329 n.1.

[80] *Id.* at 434, 571 P.2d at 329.

[81] *Id.* at 434-35, 571 P.2d at 329.

any distinction between them.[82] The court reaffirmed *Denning*'s two-part zoning estoppel test of "assurances of some form" that the proposed development met zoning requirements, coupled with reliance by the owner.[83] However, the court stopped short of determining whether Allen had vested rights or the City was estopped, focusing instead on the remedy available to the property owner if it prevailed.[84] The court recognized only a "builder's remedy"—invalidation of the ordinance and permitting the development to proceed.[85] Presumably the remedy was limited even if the regulation had totally wiped out all of the property's value for the period the invalid regulation was in effect.

Subsequently, the United States Supreme Court in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[86] recognized that a just compensation remedy is constitutionally required for a temporary deprivation of value, even if the government rescinds the illegal regulation or the courts invalidate it, so the remedy holding of *Allen* is no longer viable, and an owner asserting vested rights has a claim for damages or inverse condemnation for the time the government interfered with its rights, as well as the builder's remedy.

Allen is also remembered for another still valid proposition—a vested right is a property right, and if the government still desires to prevent development, it must exercise eminent domain and pay just compensation:

> Once the City is estopped from enforcing the new zoning, if it still feels the development must be halted, it must look to its powers of eminent domain. In order for the City to operate with any sense of financial responsibility the choice

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[82] *Id.* at 435, 571 P.2d at 329.

[83] *Id.* at 437, 571 P.2d at 330.

[84] *Id.*

[85] *Id.* at 438-39, 571 P.2d at 331. Allen sought only damages, and did not seek to complete construction. *Id.* at 434, 571 P.2d at 329. The Hawai'i Supreme Court rejected as a matter of law the claim for damages. *Id.* at 438, 571 P.2d at 331. In other words, when faced with a judgment holding a regulation unconstitutional, all the government need do was "merely amend the regulation and start over again." San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 655 n.22 (1981) (quotations omitted).

[86] 482 U.S. 304 (1987). In *Allen*, the Hawai'i Supreme Court adopted California's then-valid doctrine that the only remedy available to the property owner when a regulation resulted in a taking was judicial invalidation of the regulation, and did not include just compensation for the time in which the regulation was in effect and placed a cloud on the property. *Allen*, 58 Haw. at 436-39, 571 P.2d at 330-31. California's limitation of the remedy—along with *Allen*'s—was rejected by *First English*. Some courts hold that *First English* requires a state to provide a compensation remedy, even if it has not explicitly done so. *See, e.g.*, Carson Harbor Village, Ltd. v. City of Carson, 353 F.3d 824, 829-30 (9th Cir. 2004) (a regulatory takings claim was not ripe since property owner had not sought compensation via state procedures and had not shown that such procedures were unavailable).

> between continued construction and paying to have it stopped by condemnation, if possible, must rest with the City not property owners.[87]

Thus, *Allen* stands for the proposition that after establishing vested rights or zoning estoppel, the government is obligated to either let the development progress, or it must exercise eminent domain and pay the fair market value of the property as entitled. It is barred from using regulation to prevent development.

D. Life of the Land—*Post-Assurance Expenditures and Soft Cost Reliance*

After *Allen* came two opinions in a lawsuit seeking to stop a large apartment project in central Honolulu.[88] In that case, existing zoning permitted the proposed 350-foot high building.[89] However, the City enacted a moratorium on the acceptance of any building permits for apartment projects while it was considering enactment of special historic district provisions for the area.[90] The moratorium did not affect the zoning and provided for variances giving the City discretion to exempt applicants from the building permit moratorium.[91]

After taking into account opponents' objections, the City granted a variance and permitted the developer to construct its apartment project in compliance with the zoning.[92] The City also imposed conditions on the variance to mitigate the project's impact, such as reducing the height and density of the planned building.[93] After the owner's plans were completed, it submitted a building permit application to the City as allowed by the variance, but the third-party objectors filed suit against the City, which consequently withheld final action on the application.[94]

After the trial court ruled in favor of the City, the City Council determined that all of the conditions imposed in the variance had been met. This freed the building department to issue the building permit, which it did.[95]

In the first opinion, *Life of the Land I*, the Hawai'i Supreme Court denied the third-party objectors' motion for temporary injunction pending appeal,

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[87] *Allen*, 58 Haw. at 439, 571 P.2d at 331.

[88] Life of the Land, Inc. v. City Council of Honolulu, 60 Haw. 446, 592 P.2d 26 (1979) [hereinafter *Life of the Land I*] (denial of temporary injunction pending appeal), *on appeal after remand*, 61 Haw. 390, 606 P.2d 866 (1980) [hereinafter *Life of the Land II*] (affirming summary judgment).

[89] *Life of the Land II*, 61 Haw. at 394, 606 P.2d at 871.

[90] *Id.* at 394-95, 606 P.2d at 872.

[91] *Id.* at 395, 606 P.2d at 872.

[92] *Life of the Land I*, 60 Haw. at 448, 592 P.2d at 27-28.

[93] *Id.* at 449, 592 P.2d at 28.

[94] *Id.*

[95] *Id.* at 449, 592 P.2d at 28.

noting that the City was likely to prevail on the merits of a zoning estoppel claim.[96] The court held that the amounts incurred by the developers for planning and design were substantial, implicitly rejecting the *Avco* building permit rule, and choosing a point for "official assurances" somewhere before the issuance of a building permit.[97]

> The expenditures for planning and design were incurred by reason of, and in compliance with, council action on their application, and in reliance upon the *implicit assurance* that if the special construction conditions imposed by the council were met, a building permit would issue.[98]

In *Life of the Land II*, the court expanded on this opinion in a massive, wandering decision on the merits, affirming the "official assurance" touchstone from *Denning* and *Allen*, and further clarifying the standards for zoning estoppel:

> The doctrine of equitable estoppel is based on a change of position on the part of a land developer by substantial expenditure of money in connection with his project in reliance, not solely on existing zoning laws or on good faith expectancy that his development will be permitted, but on official assurance on which he has a right to rely that his project has met zoning requirements, that necessary approvals will be forthcoming in due course, and he may safely proceed with the project.[99]

Applying this rule, the court noted that the first official assurance on which the developer could rely was the Council's conditional approval of the variance.[100] The second official assurance was the Council's amendment to the prior approval, reducing further the height and density of the project.[101] The court concluded that the post-variance expenditures brought the developer within the zoning estoppel rule—in other words they were substantial as a matter of law.[102] By the same token, the pre-variance expenditures before official assurance was obtained (primarily site acquisition and preliminary planning and design fees), did not count for purposes of the rule.[103]

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[96] *Id.* at 451, 592 P.2d at 29.

[97] *Id.* at 450-51, 592 P.2d at 29.

[98] *Id.* (emphasis added). One major lesson to be learned from *Life of the Land I* is that absent the issuance of a temporary restraining order pending appeal, construction may continue despite objections.

[99] Life of the Land, Inc. v. City Council of Honolulu, 61 Haw. 390, 453, 606 P.2d 866, 902 (1980) [hereinafter *Life of the Land II*].

[100] *Id.*

[101] *Id.*

[102] *Id.* at 454, 606 P.2d at 903.

[103] Not surprisingly, the court rejected the objectors' contention that these sums were expended in "bad faith" simply because they preceded official assurance. *Id.* at 455, 606 P.2d at 903. Anyone familiar with the land development process knows that neither land, nor

Moreover, the court observed that it was immaterial whether the developer had applied for or obtained a building permit for the project. The issuance of a building permit is purely ministerial and the building department must issue it when the application complies with the applicable statutes, ordinances, rules, regulations and conditions previously imposed.[104] The court implicitly rejected California's strict "building permit rule"[105] holding that in Hawai'i, zoning estoppel occurs at a point in the development process prior to the building permit stage.[106]

E. Nukolii, *the Last Discretionary Action, and Industry Standards*

The "official assurance" standard and the *Denning*, *Waianae Model*, *Allen*, and *Life of the Land* opinions did not provide sufficient guidance to land owners and local governments who needed to put this standard into action,[107] and the core question remained unanswered: given Hawai'i's complex and multi-jurisdictional land development process, is there a general rule of when a developer can proceed? Thus, the stage was set for the touchstone *Nukolii* opinion.

That case involved the oceanfront Nukolii parcel on Kauai, which was zoned for open space and agriculture at the time it was purchased.[108] After the County designated the parcel "Resort" on the County General Plan, the landowners sought a rezoning to permit construction of three hotels.[109] The County Council approved the resort and condominium use, but scaled back the

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planners and designers, are free. This simply confirms that, as long as the government has not provided official assurance of some form, the developer bears a degree of risk. *See infra* Part V.A.2.

The court also clarified that the owner's state of mind is not relevant in the zoning estoppel inquiry, and noted that despite expending funds and making development efforts before the variance, the developers "acted in good faith throughout the controversy." *Life of the Land II*, 61 Haw. at 455, 606 P.2d at 903. This holding is critical when facing a claim that a developer engaged in a "race of diligence" to vest its rights. *Life of the Land II* informs that this inquiry is not relevant to "good faith," as there is nothing wrong with vigorously pursuing property rights.

[104] *Id.* at 454, 606 P.2d at 903.

[105] Some states hold that vesting occurs either upon the submission of an application for a building permit or upon issuance of the building permit, and not before. *See supra* Part II.

[106] *Life of the Land II*, 61 Haw. at 454, 606 P.2d at 903.

[107] *See* Hosoda, *supra* note 51, at 174 n.3 (The cases preceding *Nukolii* "failed to provide developers with any standards or guidelines for how to proceed with developments, and did not delineate a point in the development process the developer had to reach before the government was precluded from making subsequent zone changes.").

[108] County of Kauai v. Pac. Standard Life Ins. Co., 65 Haw. 318, 320-21, 653 P.2d 766, 770 (1982) [hereinafter *Nukolii*].

[109] *Id.* at 321, 653 P.2d at 770.

proposed project and exacted an "in-lieu" fee from the developer.[110] At that time, a referendum petition pursuant to the County Charter was circulated to repeal the resort zoning and return the parcel to agriculture and open space zoning.[111] At the same time the landowner applied to the County Planning Commission for a Special Management Area permit.[112] Before the Special Management Area permit was issued, however, enough signatures had been obtained on the petition and the referendum was certified by the County and placed on the ballot for the next election.[113]

The Planning Commission issued the Special Management Area permit, and the landowner applied for and received a building permit for 150 condominium units (at that point, the circuit court denied an injunction against the construction).[114] On the day before the referendum election, the landowner obtained a building permit for a 350 unit hotel.[115] The next day, the voters passed the referendum and repealed the resort zoning ordinance by a two-to-one margin.[116] The County sought a declaratory judgment in the trial court, which held that the owner's rights had vested and the County was equitably estopped from prohibiting completion of the project.[117]

The Hawai'i Supreme Court addressed zoning estoppel and vested rights separately, first addressing the equity claim:

> Put another way, "[t]he critical questions become: (1) What reliance is 'good faith'; (2) what sums are 'substantial'; (3) what constitutes 'assurance' by officials; and (4) when does a developer have a right to rely on such assurances?" Because the logical analytical progression begins with the last two questions, we shall consider these together first.[118]

From there, the court examined *Life of the Land II*, noting the variance in that case was a non-legislative implementation of an existing ordinance in which the City Council imposed conditions precedent to the issuance of a building permit.[119] Consequently, the variance was a "discretionary" action, and the court concluded it would define the "final discretionary action" as the "official assurance" for the *Nukolii* development.[120] The court reasoned:

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[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.* at 322, 653 P.2d at 771.
[115] *Id.*
[116] *Id.*
[117] *Id.* at 322-23, 653 P.2d at 771.
[118] *Id.* at 327, 653 P.2d at 774 (citing Callies, *supra* note 35, at 174).
[119] *Id.* at 327-28, 653 P.2d at 773-74 (discussing Life of the Land, Inc. v. City Council of Honolulu, 61 Haw. 390, 606 P.2d 866 (1980) [hereinafter *Life of the Land II*]).
[120] *Id.* at 328, 653 P.2d at 774.

> This rule acknowledges the incremental nature of the modern development process and strikes the appropriate balance between competing private and public interests. It preserves government control over development until the government's own process for making land use decisions leaves nothing to discretion. A proper understanding of the last discretionary action in a governmental process will lead to predictable results consistent with the important public policy considerations that underlie Hawaii's estoppel rule.
>
> *In each case, then, the central focus must be on the existing legal process.* Identification of the operative mechanisms also will determine whether analogous governmental actions give rise to a similar right to rely.[121]

The court searched the existing legal process for the Nukolii parcels for approvals analogous to the *Life of the Land II* variance and held that under the existing process, a shoreline permit normally would be the final discretionary action for the project.[122] The court did not stop there, however, since the Kauai Charter permitted referenda, and one was certified prior to the County Planning Commission issuing the shoreline permit.[123] The referendum election, therefore, was part of the parcel's "existing legal process" and the vote was the last discretionary action.[124] The court supported its choice by reference to the standards of the development industry: In considering whether a developer's expenditures were made in good faith, we employ an objective standard that reflects "reasonableness according to the practices of the development industry."[125] Once the referendum was certified the owner should have known that the voters were going to have the last say on the project, not the County Planning Commission.[126]

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[121] *Id.* at 328-29, 653 P.2d at 774-75 (emphasis added).

[122] *Id.* at 330, 653 P.2d at 775.

[123] *Id.* at 329-30, 653 P.2d at 775-76. Referenda, as a standardless yes-no vote by the electorate in which citizens' passions, prejudices and biases are insulated from inquiry epitomize discretionary action. *See generally* Kaiser Hawaii Kai Dev. Co. v. City & County of Honolulu, 70 Haw. 480, 777 P.2d 244 (1989) (initiative is not a proper means of enacting land use ordinances in Hawai'i).

[124] *See Nukolii*, 65 Haw. at 329-31, 653 P.2d at 774-76.

[125] *Id.* at 332, 653 P.2d at 777 (quoting Cunningham & Kremer, *supra* note 2, at 720). The Hawai'i Real Estate Commission warned potential purchasers of the condominium about the upcoming vote, and the developer's bank reserved its right to terminate financing if the referendum was approved. *Id.* at 334, 653 P.2d at 777-78.

[126] The process in *Nukolii* was unusual since the existence of the referendum process meant that there was a discretionary hurdle to cross even after the last ministerial permit (the building permit) had been issued. Generally speaking, ministerial action follows discretionary, not the other way around. The developers could hardly be blamed for believing their rights were vested since "[v]irtually all authorities agree that the granting of a building permit vests the land development rights of a landowner." CALLIES, CURTIN & TAPPENDORF, *supra* note 45, at 135.

This is not to say that the standards of the development industry determine what is "official assurance," or what is the last discretionary action in the legal process applicable to the land at issue. The law is the law, of course, and the standards of the development industry cannot change that. What the court was getting at was that the industry standards confirmed the court's choice of the last discretionary action as the green light to rely in that situation.[127] Thus, the court held that any expenditures made or obligations incurred by the owner in reliance on the shoreline permit were subject to the known risk that the voters might approve the referendum and withhold their discretionary approval for the project. The court observed that the landowner's expenditures which predated the outcome of the referendum election did not count for estoppel purposes because the landowner had not obtained the final official assurance, which was the vote itself.[128]

The court then undertook a vested rights analysis to determine whether there were any constitutional prohibitions:

> When a property owner has actually proceeded toward development pursuant to then existing zoning, the initial inquiry is whether a developer's actions constituting irrevocable commitments were reasonably made or were speculative business risks not rising to the level of a vested property right. Thus, the Developers may not establish "a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development." The particular circumstances of each case will determine whether "the regulation has interfered with distinct investment-backed expectations" sufficient to require compensation therefor.[129]

Applying this rule, the court referred to its prior zoning estoppel analysis, noting that the landowner's reasonable belief a resort could be built became speculative once the referendum petition was certified. Thus, it held the expenditures and site preparation work were business risks rather than a basis for a constitutional claim:

> Because the referendum was certified before any post-zoning approvals were obtained, preliminary or otherwise, enforcement of the 1980 referendum, which returned the permitted land use for the Nukolii site to the prepurchase zoning, does not offend principles of equity or constitutional guarantees. Since they acquired no irrevocable rights to construct the resort complex by virtue of the

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[127] *Nukolii* did not address vested rights on parcels where no discretionary approvals are necessary because that was not the case before it. *See infra* Part V.A.3.

[128] *Nukolii*, 65 Haw. at 338, 653 P.2d 780.

[129] *Id.* (citations omitted). The court equated establishing a vested right with establishing a regulatory taking. *Id.*

intervening events, the Developers have no constitutional claim that a taking has occurred.[130]

Nukolii was subject to criticism since it did not choose an absolute bright-line rule but relied on a flexible case-by-case standard.[131] Say what you will about *Avco*'s harsh building permit rule or early vesting rules—the lines they draw are very bright, and property owners in those jurisdictions know before the process starts when their rights will vest. Any criticism of *Nukolii*, however, should be tempered because a careful examination of the opinion and the zoning estoppel cases that preceded it reveal objective standards that may be applied to similar controversies. No application of judicial decisions is ironclad of course. However, the court has enunciated concrete rules which, when read in light of the permit register statute can lead to predictable results.

V. SUMMARY JUDGMENT IN VESTED RIGHTS AND ZONING ESTOPPEL LITIGATION

As the Hawai'i cases demonstrate, the key questions are ones of law. What actions constitute "official assurances?" Are there discretionary acts in the regulatory scheme applicable to a parcel, and if so, what is the "last discretionary act?" What is "good faith" reliance, and what is "substantial?" As issues of law, the answers to these questions should be bright line rules for the lower courts to apply.[132] Consequently, vested rights and zoning estoppel claims should be subject to resolution by summary judgment, and a trial should not be necessary on the questions of official assurances, good faith or substantial expenditures. The overarching goals of vested rights and zoning estoppel analysis are to provide property owners certainty about what their rights are, what uses the government may or may not permit, and to allow for predictable results in the land development process.[133] These purposes would obviously be frustrated if uncertainty during the permitting stages were removed by the vested rights and zoning estoppel doctrines, only to be reim-

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[130] *Id.* at 339, 653 P.2d at 781.

[131] Hosoda, *supra* note 51, at 174 n.3 (*Nukolii* opinion did not provide certainty and spurred the development community to seek a legislative solution).

[132] Rinaldi, *supra* note 18, at 100 n.107 (citing 1983 ZONING & PLANNING LAW HANDBOOK § 5.04[3] (Fredric Strom, ed. 1983) (vested rights determinations are "pervasive legal questions")). *See also* West Main Assoc. v. City of Bellevue, 720 P.2d 782, 785 (Wash. 1986) (purpose of the vested rights doctrine is to set rules that permit owners to understand them and plan accordingly).

[133] *See, e.g., Nukolii*, 65 Haw. at 332, 653 P.2d at 777; (standards of development industry are guidelines to objective reliance); Delaney & Kominers, *supra* note 43, at 220. The legislature agrees. *See* HAW. REV. STAT. § 46-121 (2003) ("Predictability would encourage maximum efficient utilization of resources at the least economic cost to the public.").

posed during litigation, or by the lower court's misreading a case-by-case balancing test into the legal analysis.[134] If late-coming opponents to a development (whether private or governmental) were able to oppose a claim of vested rights for years by initiating lawsuits and avoiding summary adjudication by demanding a trial, the policies of certainty and predictability would be meaningless. State and county regulatory agencies and trial courts should understand that the Hawai'i Supreme Court's opinions confirm the issues are readily amenable to summary adjudication.[135]

A. Official Assurances and the "Last Discretionary Action"

1. The central coordinating agency and the county permit register

The first step in determining whether a use is vested or the government is estopped is to understand the existing regulatory process applicable to the property and the development project and determine what "assurances of some form" need to be made. This determination should not be difficult and the owner can consult the applicable "permit register," a repository of every federal, state and local land use regulation and restriction that Hawai'i law requires every county compile and maintain. The counties are required to be able to instruct an owner of all regulations applicable to her property. Section 46-18(a) of the Hawai'i Revised Statutes ("H.R.S.") requires:

> Each county shall, by ordinance, designate an existing agency within each county which shall be designated as the central coordinating agency and in addition to its existing functions shall:
>
> (1) Maintain and continuously update a repository of all laws, rules and regulations, procedures, permit requirements and review criteria of all federal, state and county agencies having any control or regulatory powers over land development projects within such county and shall make said repository and knowledgeable personnel available to inform any person

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[134] *See* Rinaldi, *supra* note 18, at 85 ("[A] particular vested rights rule is better than a balancing test in that it fosters certainty in the law."). *See also id.* at 100 (citing Nott v. Wolff, 163 N.E.2d 809 (Ill. 1960) (court balances public and private benefits and held the owner's rights vested)); Ackerman, *supra* note 39, at 1269 (an owner can never be completely sure that it has vested rights under case specific determinations).

[135] *See, e.g.*, Life of the Land, Inc. v. City & County of Honolulu, 61 Haw. 390, 461-63, 606 P.2d 806, 907 (affirming summary judgment in favor of landowner) [hereinafter *Life of the Land II*]; *Nukolii*, 65 Haw. at 339, 653 P.2d at 781 (reversing summary judgment for landowner and entering summary judgment for project opponents). *See also* Maunalua Assocs. v. City & County of Honolulu, No. 89-3539-119SSM (Haw. Cir. Ct. filed Nov. 14, 1989) (entering summary judgment on liability for a taking of land and vested permit).

> requesting information as to the applicability of the same to a particular proposed project within the county.[136]

A property owner should be able to rely absolutely on the permit register and official statement of applicability as official assurances of what regulations are applicable to the property. *Waianae Model* instructs that when "knowledgeable personnel" from the central coordinating agency "inform any person" about the regulatory scheme applicable to a proposed project, the official is acting within the ambit of his authority and the developer is entitled to rely on that information, even if incorrect.[137] This statute brings *Waianae Model* into context since the government is obviously in a better position than citizens to determine what the government's own regulations require. Government is the best source of its own restrictions and requirements.[138] It is incumbent on the government to provide this information, and not leave the public guessing as to what the government's position may be.[139] The constitutional protections of private property rights may even require a statute like section 46-18. The alternative is that citizens could never trust or rely upon what the planning department tells them.

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[136] HAW. REV. STAT. § 46-18(a) (2003). State law also requires the state department of business, economic development, and tourism to "[m]aintain and update a repository of the laws, rules, procedures, permit requirements, and criteria of federal, state, and county agencies having control or regulatory power over land and water use for development or the control or regulatory power over natural, cultural, or environmental resources." *See id.* § 201-63(2) (2003). The state maintains a "permits guide" on the web. *See* State of Hawai'i Dep't of Business, Econ. Dev. & Tourism, Permits Guide at http://www.hawaii.gov/dbedt/ert/permits.html (last visited Oct. 30, 2004).

[137] Waianae Model Neighborhood Area Ass'n v. City & County of Honolulu, 55 Haw. 40, 44, 514 P.2d 861, 864 (1973) (owner is entitled to rely on official acting under color of office who provides a "debatable" interpretation of the law).

[138] Aranosian Oil Co. v. City of Portsmouth, 612 A.2d 357, 359 (N.H. 1992) (The government "knew the details of the proposed project and must be presumed to know its own zoning requirements.").

[139] *See* Texas Co. v. Town of Miami Springs, 44 So. 2d 808 (Fla. 1950). In that case, the court held that when government officials affirmed that a property owner could make particular use of his property, the property owner had a right to rely on those assurances:

> The appellant took the precaution before it purchased the property involved of going to the only place it could get authoritative information to determine whether the land could be used for the purpose intended. There it was advised that there was no inhibition against the construction of the filling stations and was granted formal permission to proceed. The authority was repeated and emphasized when the permits were renewed. Relying upon the information and the authorization from an official source, the appellant bought the land, and bought it for one purpose only.

Id. at 809.

2. Distinguishing discretionary from ministerial action

The next step is to identify what government action in this process is the "official assurance" on which the owner is entitled to rely, and whether any discretionary approvals are necessary. *Nukolii* should not be misread as requiring a search for a "last discretionary action" in every case. Rather, *Nukolii* holds that *if* there is discretion in the process, the "last discretionary act" is "official assurance."[140] The *Nukolii* analysis is not applicable where there are no discretionary approvals in the process.[141] In those circumstances, the property owner need only obtain "assurances of some form" from the government as the green light to reliance.[142]

Discretionary action is "non-legislative action *imposing new conditions* on the development which expressly made compliance therewith precedent to issuance of the building permit."[143] The ability to impose conditions on approval is the hallmark of "discretionary" action.[144] Approvals of coastal zone permits,[145] preliminary subdivision plats, and special use permits[146] are common examples of discretionary government actions. The supposed antithesis of a discretionary action is a ministerial action. A "ministerial" act is one performed under a given set of facts and in a prescribed manner without exercise of judgment.[147] As the court held in *Life of the Land II*, a ministerial action by an official is "to process the application for compliance with all applicable statutes, ordinances, rules and regulations, and the conditions

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[140] *Nukolii*, 65 Haw. at 329-30, 653 P.2d at 775.

[141] *Id.*

[142] Denning v. County of Maui, 52 Haw. 653, 658-59, 485 P.2d 1048, 1051 (1971) ("assurances of some form . . . that [the] proposed construction met zoning requirements").

[143] *Nukolii*, 65 Haw. at 330, 653 P.2d at 775 (emphasis added).

[144] *See, e.g.*, Friends of Westwood v. City of Los Angeles, 191 Cal. App. 3d 259, 273 (1987) (the question in determining whether a statute authorizes discretionary power is "whether the [government] had the power to deny or condition." If not, it would be ministerial power.).

[145] *Nukolii*, 65 Haw. at 330, 653 P.2d at 775.

[146] CALLIES, CURTIN & TAPPENDORF, *supra* note 45, at 142-43. *See, e.g.*, Richlands Medical Ass'n v. Commonwealth *ex rel.* State Health Comm'r, 337 S.E.2d 737 (Va. 1985) (commissioner who was exercising a quasi-judicial duty, weighed conflicting evidence, interpreted law, and applied law to facts was acting in a discretionary manner).

[147] Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group, 219 F. Supp. 2d 20, 42 (D.D.C. 2002) (quoting Wilbur v. United States, 281 U.S. 206, 218-19 (1930)). A "ministerial duty" must be:

> so plainly prescribed as to be free from doubt and equivalent to a positive command . . . . Where the duty is not thus plainly prescribed, but depends on a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus.

Id.

attached to the approvals, and to issue the requested building permit after such processing."[148] In other words, a ministerial approval is one which the government has no ability to deny if the applicant has conformed to the law. Approvals of building permits,[149] final subdivision plats,[150] site plans,[151] and in some jurisdictions grading permits[152] are common examples of ministerial actions.

Under Hawai'i's complex mix of land use regulations where every parcel it often seems has unique regulatory criteria, conclusory statements and lists of examples such as these are not very useful in determining whether a regulatory scheme contains discretionary acts or not.[153] The following Part details the identifying marks of discretionary and ministerial actions and proposes a template to evaluate land use regulations to determine whether a court should focus on the *Denning* "official assurance" standard, or on the "last discretionary act" standard of *Nukolii*.

The temptation is to view most regulatory language as discretionary, for what exercise of authority does not rely to some degree on the judgment of the person administering it? However, great care should be exercised in the determination of whether discretionary approvals exist in the process, since delegations of discretion without any meaningful standards are unconstitutionally vague, and a property owner should not be left guessing.[154]

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[148] Life of the Land, Inc. v. City & County of Honolulu, 61 Haw. 390, 545, 606 P.2d 866, 903 (1980) [hereinafter *Life of the Land II*].

[149] *Id.*; Waterfront Estates Dev., Inc. v. City of Palos Hills, 597 N.E.2d 641 (Ill. App. Ct. 1992).

[150] CALLIES, CURTIN & TAPPENDORF, *supra* note 45, at 140.

[151] *See, e.g.*, Bd. of County Supervisors of Prince William County v. Hylton Enter., Inc., 221 S.E.2d 534 (Va. 1976).

[152] *See, e.g.*, Juanita Bay Valley Cmty Ass'n v. City of Kirkland, 510 P.2d 1140 (Wash. Ct. App. 1973) (no functional difference between a grading permit and a building permit).

[153] For example, the legislature defines "discretionary consent" in the context of environmental impact statements as an action "for which judgment and free will may be exercised by the issuing agency, as distinguished from a ministerial consent." HAW. REV. STAT. § 343-2 (2003). This definition is somewhat circular and is not applicable to the non-statutory vested rights and zoning estoppel doctrines.

[154] *See, e.g.*, Stringer v. Realty Unlimited, Inc., 97 S.W.3d 446, 447-48 (Ky. 2002) ("[A]n ordinance which lays down no requirements to be followed and no general and uniform rule is invalid because it leaves the granting of such a thing as a building permit to the sometimes arbitrary discretion of municipal authorities." (quoting Colyer v. City of Somerset, 208 S.W.2d 976, 977 (Ky. 1947)) (quotations omitted) (alterations in original)). In *Stringer*, the county zoning commission disapproved a landowner's subdivision map. *Id.* at 447. The language in the ordinance contained the word "may" (specifically "may not") as well as mandatory language. *Id.* at 448. The court held that interpreting the word "may" to connote discretionary authority would render the ordinance unconstitutional because it set forth no standards to be followed. *Id.*

If the property owner has been informed by the "knowledgeable personnel" what the regulations require, an actual analysis of the regulations may not be necessary, because in *Waianae Model* the court held that the relevant inquiry is what the planning official conveyed to the owner about the law, not what the law is. Recall that in that case, a planning department official informed an applicant that he could have more time to submit his application even though the ordinance was silent regarding extensions. The court did not inquire whether the official was right or not. It held that as long as the authority of the planning official was "at least debatable,"[155] the applicant was entitled to rely on the official and "the validity of such act may not be questioned after expenditures have been made and contractual obligations have been incurred in reliance thereon in good faith."[156] The court held that even an "erroneous and debatable interpretation" would suffice to trigger reliance when a government official acts in "good faith and within the ambit of his duty."[157] Indeed, the court never even analyzed whether the planning department official in that case correctly interpreted and applied the ordinance in question; the court simply noted that the question was "debatable" and affirmed summary judgment for the applicant.[158] Thus, the only relevant inquiry under *Waianae Model* is what the planning department officials told the property owner and whether the officials were within their official capacity and acting under color of office. Illustrative of the "ambit of authority" principle is *City of Peru v. Querciagrossa*,[159] in which the court held:

> Persons dealing with the zoning inspector would expect an official in that position to have knowledge of the zoning ordinance and to advise building permit applicants correctly. We think defendants were justified in relying upon the express instructions he gave them concerning setback lines and upon the building permit he issued. Clearly, it was this conduct of the zoning inspector which induced defendants to proceed with their building plans and to make substantial expenditures. The only conclusion that can be drawn from these facts is that the city is estopped to revoke the permit and to enjoin construction.[160]

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[155] Waianae Model Neighborhood Area Ass'n, Inc. v. City & County of Honolulu, 55 Haw. 40, 45, 514 P.2d 861, 864 (1973).

[156] *Id.* at 44, 514 P.2d at 864.

[157] *Id.*

[158] *Id.* at 45-46, 514 P.2d at 864-65. *See also* Cities Serv. Oil Co. v. City of Des Plaines, 171 N.E.2d 605, 608 (Ill. 1961) (city allegedly gave owner a copy of an outdated ordinance which was no longer effective and issued owner's predecessor in interest a building permit; when owner in good faith relied on that ordinance permit, city was estopped from claiming a violation of the new, correct, ordinance).

[159] 392 N.E.2d 778 (Ill. App. Ct. 1979).

[160] *Id.* at 780.

Similarly, in *Texas Co. v. Town of Miami Springs*,[161] the Florida Supreme Court held that when government officials granted permits allowing a property owner to make particular use of his property, the property owner had a right to rely on those assurances:

> The appellant took the precaution before it purchased the property involved of going to the only place it could get authoritative information to determine whether the land could be used for the purpose intended. There it was advised that there was no inhibition against the construction of the filling stations and was granted formal permission to proceed. The authority was repeated and emphasized when the permits were renewed. Relying upon the information and the authorization from an official source, the appellant bought the land, and bought it for one purpose only.[162]

If there have been no clear expressions by the government officials, even though H.R.S. section 46-18 would seem to require them, the starting point is the language of the regulation. The terms "shall" or "may" are strong indicators of ministerial or discretionary authority. The word "shall" generally signals ministerial action, while "may" signals ministerial.[163] This analysis is not necessarily conclusive, however, since courts have held that "may" and "shall" are not absolutely determinative and that legislative intent may be examined.[164]

Many land use regulations require the government to make factual determinations prior to granting approvals,[165] but that ability by itself is not a

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[161] 44 So. 2d 808 (Fla. 1950).

[162] *Id.* at 809.

[163] *See In re* Fasi, 63 Haw. 624, 626, 634 P.2d 98, 101 (1981). *See also* Judicial Watch, Inc. v. Nat'l Energy Policy Dev. Group, 219 F. Supp. 2d 20, 43 (D.D.C. 2002); BLACK'S LAW DICTIONARY 1375 (6th ed. 1990) ("As used in statutes, contracts, or the like, this word is generally imperative or mandatory . . . . The word in ordinary usage means 'must' and is inconsistent with a concept of discretion."); MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1075-76 (10th ed. 1993) ("used in laws, regulations, or directives to express what is mandatory"); Abreu v. United States, 796 F. Supp. 50, 53 (D.R.I. 1992) ("Mandatory language indicates a [legislative] limitation on agency discretion.").

[164] Courts have sometimes used the words "may" and "shall" interchangeably. *Compare* Bd. of Comm'rs of Vigo County v. Davis, 36 N.E. 141, 142 (Ind. 1894) ("The word *may* has in some instances, been construed as the equivalent of the word *shall* . . . ." (emphases added) (internal quotations omitted)) *with* People *ex rel.* Oak Supply & Furniture Co. v. Dep't of Revenue, 320 N.E.2d 236, 239 (Ill. Ct. App. 1974) ("shall" may be read as "may" if the legislative intent indicates). *See also* Seiden v. United States, 537 F.2d 867, 869 (6th Cir. 1976) ("use of the mandatory 'shall defend' . . . does not *require* the conclusion that the [administrator's action] is ministerial rather than discretionary") (emphasis added).

[165] *See, e.g.*, HAW. REV. STAT. § 205A-22 (Supp. 2003), in which the Legislature delegated authority to the counties to determine whether a proposed action within the shoreline special management area is a "development" requiring a permit. This statute sets forth factual criteria that the county authorities must adhere to when evaluating whether a proposed action is a "development." *Id.*

delegation of discretionary authority.[166] A requirement of fact-finding does not necessarily confer discretion, and may signal ministerial action based on a set of predicate facts.[167] If the predicate facts are determined to exist, a duty outlined in the regulation that must be performed is ministerial.[168]

The most important indicator to determine whether a particular approval is discretionary or ministerial is language conferring the ability to impose conditions. The Hawai'i Supreme Court defines discretionary action as "non-legislative action imposing new conditions on the development which expressly made compliance therewith precedent to issuance of the building permit."[169]

Absence of conditional language indicates ministerial authority. Thus, if the regulations do not authorize the permitting authority to impose conditions, then the power granted is ministerial and the answer to what assurance are official lies elsewhere.[170]

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[166] *See, e.g.*, Life of the Land, Inc. v. City & County of Honolulu, 61 Haw. 390, 454, 606 P.2d 866, 903 (1980) [hereinafter *Life of the Land II*] (a ministerial act is one performed under a given set of facts and in a prescribed manner without exercise of judgment).

[167] *See, e.g.*, *Davis*, 36 N.E. at 141 ("An act is none the less ministerial because the person performing it may have to satisfy himself that the state of facts exists under which it is his right and duty to perform the act."); Hilt Truck Line, Inc., v. Peterson, 337 N.W.2d 133, 136 (Neb. 1983) (citing Little v. Bd. of County Comm'r of Cherry County, 140 N.W.2d 1, 3-4 (Neb. 1966)) ("[A]n act may be held to be ministerial even though the person performing it may have to satisfy himself that a certain state of facts exist under which it is his duty to perform the act."); 2 AM. JUR. 2D *Administrative Law* § 60 (2004) (Any discretion upon the municipal officer may be discretion in ascertaining the facts in which are necessary in administering the statute. "The fact that a necessity may exist for the ascertainment of the facts or conditions, upon the existence of which the performance of an act becomes a clear and specific duty, does not convert a ministerial act into a discretionary one.").

[168] *See also* Sioux Valley Empire Elec. Ass'n v. Butz, 367 F. Supp. 686, 695 (D.S.D. 1973) (even though statute "was couched in permissive terms . . . the Administrator's discretion extended only to a determination as to whether a particular area met the criteria as an emergency loan area. The permissive language did not confer absolute discretion on the Secretary . . . ."); Taylor County Farm Bureau v. Bd. of Supervisors, 252 N.W. 498, 500 (Iowa 1934) (duty is ministerial when it is to be performed upon a certain state of facts, even though the officer or body must judge according to their best discretion whether the facts exist, and whether they should perform the act); State v. Union Tank Car Co., 439 So. 2d 377, 380 (La. 1983) ("[A]lthough the legislature may not delegate the legislative power to determine what the law shall be, it may delegate to administrative boards and agencies of the state the power to ascertain and determine the facts upon which the laws are to be applied and enforced.") (citations omitted).

[169] County of Kauai v. Pac. Standard Life Ins. Co., 65 Haw. 318, 330, 653 P.2d 766, 775 (1982) [hereinafter *Nukolii*].

[170] For an example of conditional language typical of a grant of discretionary authority, *see* the Hawai'i Coastal Zone Management Act's provisions authorizing the counties to grant special management area use permits "[a]ll developments in the special management area shall be *subject to reasonable terms and conditions set by the authority*." HAW. REV. STAT. § 205A-26(1) (Supp. 2003) (emphasis added).

3. Triggering vested rights and zoning estoppel on parcels with no discretionary approvals remaining

What if there is no discretionary action beyond existing zoning applicable to the property at issue? For example, an owner has a parcel on which no conditional use permits, site plan approvals, development plan, subdivision, or other special approvals are necessary, and only a ministerial building permit is needed—what then? In an "everything in its place" Euclidean scheme, zoning alone may give rise to a right to develop.[171] Can the owner rely before obtaining the building permit and will obligations incurred "count" towards vested rights or estoppel? The Hawai'i Supreme Court has disclaimed the building permit rule as too "harsh,"[172] so it would be ironic if the owner of a parcel on which there are no discretionary approvals necessary were to vest later in the process than an owner who needed the last discretionary act.

As a general rule, a property owner is not entitled to rely and its rights are not vested on zoning alone.[173] However, the Hawai'i Supreme Court's formulation of the "assurances of some form" standard in *Denning*[174] and *Nukolii*'s "last discretionary action" trigger,[175] represents a significant departure from

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[171] Vill. of Euclid v. Ambler Realty Co., 272 U.S. 265 (1926) (U.S. Supreme Court upheld the state's authority to zone against a due process challenge). The Hawai'i Supreme Court adopted the traditional Euclidean model and held that a building permit is ministerial, not discretionary, so if a property has proper zoning the owner can generally build any of-right use. *Life of the Land II*, 61 Haw. at 453-54, 606 P.2d at 902-03. It was in *Nukolii*, however, that the court for the first time explicitly endorsed the Euclidean standard. *Nukolii*, 65 Haw. at 336-37, 653 P.2d at 779 (citing *Euclid*, 272 U.S. 265).

[172] *Nukolii*, 65 Haw. at 338, 653 P.2d at 780 (rejecting the *Avco* rule as too "harsh").

[173] *See id.* at 327, 653 P.2d at 774 (zoning estoppel is based on change in position in reliance "not solely on existing zoning law or on good faith expectancy that his development will be permitted"); CALLIES, CURTIN & TAPPENDORF, *supra* note 45, at 130-31 (traditionally an owner could not base vested rights or zoning estoppel on zoning unless it was recent or accomplished at the owner's behest). *See, e.g.*, Golden Gate Corp. v. Town of Narragansett, 359 A.2d 321, 328 (R.I. 1976) (existing classification "in and of itself confers no vested right"). However, the property owner's lack of vested right does not give the government carte blanche to impact the land, since ownership of the land itself gives rise to due process protections. *See, e.g.*, DeBlasio v. Zoning Bd. of Adjustment for Township of West Amwell, 53 F.3d 592, 601 (3d Cir. 1995).

[174] Denning v. County of Maui, 52 Haw. 653, 658-59, 485 P.2d 1048, 1051 (1971) ("[T]o be allowed the right to proceed in constructing . . . the facts must show . . . assurances of some form . . . that [the] proposed construction met zoning requirements.").

[175] "When a property owner has actually proceeded toward development pursuant to then existing zoning, the initial inquiry is whether a developer's actions constituting irrevocable commitments were reasonably made or were speculative business risks not rising to the level of a vested property right." *Nukolii*, 65 Haw. at 338, 653 P.2d at 780.

the general rule of no vesting from zoning alone.[176] In *Denning*, after zoning there were no further discretionary approvals in the process. Presumably, since *Denning* was decided before enactment of the permit register requirement, today an absence in the permit register of further discretionary approvals or assurances by the County's "knowledgeable personnel . . . as to the applicability of the same to a particular proposed project,"[177] would be "assurances of some form" triggering a right to rely. The standards of the development industry are relevant to determine whether an owner has an objectively reasonable right to rely on the permit register, the "knowledgeable personnel," or some other form of government assurance. Provided the government has no discretion remaining in the regulatory scheme applicable to a parcel—in other words, all that remains are ministerial approvals which the government cannot deny if the applicant has complied with the standards—the owner of such property is entitled as a matter of law to incur costs and obligations in reliance on zoning provided they are towards some concrete development goal. It would make little sense to delay vesting until the application for or issuance of a building permit, as this would acknowledge vested rights later in the development process on less-regulated parcels than on those subject to more complex land use controls.[178] Such a rule would also violate the Hawai'i Supreme Court's consistent policy of soft cost expenditures counting towards vested rights and zoning estoppel, as analyzed in Part V.C.1.

B. The Landowner's Right to Rely—"Good Faith" as a Matter of Law

The most important lessons of *Life of the Land II* and *Nukolii* are that once the government provides official assurances—whatever those may be under the circumstances—the property owner is entitled as a matter of law to rely on that approval in making expenditures. Once that approval is in hand, the landowner may proceed without fear that the rug can be pulled out from under him.

In *Life of the Land II*, the citizens' group attempted to argue that the developer proceeded in bad faith because it incurred obligations before the government had given official assurances. The court rejected the argument,

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[176] Even the general rule was subject to myriad exceptions. Some courts do not follow this rule and hold that zoning alone may trigger vested rights. *See, e.g.*, Texas Co. v. Town of Miami Springs, 44 So. 2d 808, 809 (Fla. 1950).

[177] HAW. REV. STAT. § 46-18(a) (2003).

[178] The Hawai'i Supreme Court expressly rejected California's common law "building permit" rule, and by focusing on when in the process the government has no more discretion to deny development, held that vesting in Hawai'i occurs sometime earlier than issuance of a ministerial building permit. *Nukolii*, 65 Haw. at 338-39, 653 P.2d at 780.

however, holding that the developers acted in good faith throughout the case.[179] *Nukolii* clarified, holding that once official assurance is obtained in the form of the last discretionary action, subjective good faith and bad faith are no longer relevant, particularly in a constitutional vested rights claim where state of mind should not matter.[180] The court instructed that it would employ an objective standard guided by the practice of the development industry.[181] The court determined that a reasonable developer would not have relied upon the shoreline permit, but would have waited for the referendum results. In other words, once official assurances have been given, subsequent expenditures by the owner are considered reasonable, regardless of the owner's actual state of mind. Under *Nukolii*'s rationale, obligations incurred before the official assurance (the referendum) should be disregarded as speculative, and conversely, those incurred after the final discretionary action must be considered objectively reasonable and made in good faith because the official green light may be relied upon as a matter of law.[182]

What if the government is mistaken, however? Provided the government was acting in good faith, defined by *Waianae Model* as "within the ambit of his duty, upon an erroneous and debatable interpretation of an ordinance,"[183] then the innocent owner is entitled to rely on such government action.

A rule requiring judicial inquiry into an owner's post-assurance subjective belief is unfair and unworkable. The government—or even a development's opponents—could always defeat vested rights and zoning estoppel simply by

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[179] *Life of the Land, Inc. v. City & County of Honolulu*, 61 Haw. 390, 455, 606 P.2d 866, 903 (1980) [hereinafter *Life of the Land II*].

[180] "In considering whether a developer's expenditures were made in good faith, we employ an objective standard that reflects 'reasonableness according to the practices of the development industry.'" *Nukolii*, 65 Haw. at 332, 653 P.2d at 777 (quoting Cunningham & Kremer, *supra* note 2, at 720). The court held that state of mind and subjective good faith are not relevant concerns in a vested rights or zoning estoppel analysis: "[c]onsideration of a developer's race to complete a project before adoption of anticipated restrictive legislation usually reflects a subjective test of good faith, complicated by the uncertainty inherent in the normal legislative process." *Id.* at 335 n.18, 653 P.2d at 777 n.18.

[181] The court noted that the undisputed evidence before it was that the development industry considered the owner's expenditures speculative business risks because they were made before the last discretionary act. Therefore, its rights did not vest. *Id.* at 334-35, 653 P.2d at 777-78. The documents for the owner's financing of its project contained language in which the lender warned it that its expenditures were speculative since the last discretionary action had not taken place. *Id.* Further, the Hawai'i Real Estate Commission warned in a report on the project that the last discretionary action had not taken place, and thus the owner's rights were speculative. *Id.*

[182] *Id.* at 332, 653 P.2d at 777.

[183] Waianae Model Neighborhood Ass'n v. City & County of Honolulu, 55 Haw. 40, 44, 514 P.2d 861, 864 (1973) (citing Schultze v. Wilson, 148 A.2d 852 (N.J. Super. Ct. App. Div. 1959)).

instructing property owners, rightly or wrongly, not rely on any of its permits, and a trial could be required in every case to inquire into what the developer knew and when he knew it.[184] So much for summary judgment and so much for certainty. By rejecting the subjective good faith rule, *Nukolii* avoids the expensive and inherently unreliable nature of an inquiry into an owner's state of mind, which invariably leads to unjust and questionable results.[185] A clear example of good faith comes in *Sakolsky v. City of Coral Gables*.[186] In that case, the property owner visited the mayor of the city to "discuss with him the best location for [a 12-story building]."[187] The mayor suggested a suitable place. Based on these actions, the owner entered into options to purchase the land the mayor suggested. The mayor also suggested that the owner prepare plans, which he did and which were submitted to the city's planning department for approval, which tentatively was granted.[188] After the public was notified of the project, one hundred objectors showed up at the hearing.[189] The city commission nevertheless granted permission to build over one "no" vote, and issued a permit.[190] All looked well for Mr. Sakolsky and he began planning his building. But then the commissioners sat for election, and the composition of the commission changed. The dissenting member of the

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[184] One federal court questioned the U.S. Army Corps of Engineers' attempt to issue a "provisional" permit that cautioned "NOT VALID . . . DO NOT BEGIN WORK." *See* Cooley v. United States, 324 F.3d 1297, 1301 (Fed. Cir. 2003).

[185] *See* Cunningham & Kremer, *supra* note 2 at 719-20 ("Insofar as the good faith element of the vested rights doctrine implies clean hands or moral cupidity, it thus usually operates to penalize the developer who is astute or sophisticated enough to recognize the threat of proposed legislation, while rewarding the developer naive or duplicitous enough to ignore the potentialities of the legislative proposals."). The authors explain further:

> Rather than making the moral judgment implicit in application of the rule of good faith, a more realistic guide would involve a determination of whether a developer's irrevocable commitment was "reasonable" according to the practices of the development industry . . . . "Reasonableness" should be defined to incorporate many of the elements discussed in good faith cases, but the definition would recognize the political and financial aspects of straightforward risk-taking for what they are, business decisions based on an informed appraisal of the situation.
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> . . . If a project proponent could demonstrate that a permit process was designed such that the effective approval had been achieved at some finite stage short of the ultimate permit, that proof would substantiate the reasonableness of a decision to commit resources irrevocably.

Id. at 720.

[186] 151 So. 2d 433 (Fla. 1963).

[187] *Id.* at 434.

[188] *Id.*

[189] *Id.*

[190] *Id.* at 435.

commission, whose "no" vote had been overridden, mustered enough support on the newly-elected commission to "rescind" the permit.[191]

Within the span of nineteen days, Mr. Sakolsky saw his permit granted, an election shift commission membership, and his permit "rescinded." The city shut him down and he sought relief in the courts. The city took the position that the owner had no business believing the city's original assurances or acting on the permit because, "at the time [he] obtained his permit and thereafter he 'had good reason to believe' the official mind might change because 'strenuous objection was present and made known, suit was threatened and the political issue made apparent.'"[192] The public knew that an election was impending and that the commission composition was subject to change.[193] The court rejected the argument: "The basic concepts of equitable estoppel, held by the prior cited case to be applicable to municipalities as to individuals, preclude the notion of such instability in municipal action merely because its business is conducted through a body whose membership is subject to change."[194] The court also explicitly rejected the rule that "an impending change of municipal officers can prevent reliance on an act of the current governing body, is in error and inconsistent with precedent condemning arbitrary action by these public bodies."[195] The court concluded:

> Such a permit as that here involved, intentionally and lawfully issued by the proper municipal officers, can have no other purpose than to authorize action by the permittee in reliance on its terms. Notice or knowledge of mere equivocation independent of actual infirmities or pending official action, cannot in this situation operate to negative or prevent reliance on the official act.[196]

"We conclude consequently," the court held, "that [Mr. Sakolsky] acted in good faith."[197] This rationale is consistent with *Waianae Model* analysis where an owner is entitled to rely on an official acting within the ambit of authority.

C. What are "Expenditures" and "Commitments," and How Much is "Substantial?"

Under the vested rights and zoning estoppel rules, it is not enough that the government has provided official assurances—there must be "substantial

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[191] *Id.*
[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] *Id.* at 435-36.
[197] *Id.* at 436.

expenditures" made in reliance. The maxim "equity aids the vigilant, not those who sleep on their rights"[198] is likely the source of this requirement, and is the key to understanding this element of vested rights and zoning estoppel.[199] The expenditure element presents two issues: what types of expenditures count, and what are "substantial" expenditures?

1. "Soft" vs. "hard" construction costs

Because Hawai'i has rejected the building permit rule in favor of an earlier date for vesting, unlike other jurisdictions which require substantial actual construction or "hard" construction costs before rights can vest, Hawai'i requires neither.[200] It follows from the fixing of "official assurances" as the green light that hard costs (which are generally incurred later in the process) are not necessary. The type of obligations incurred following such approvals are soft costs and obligations such as architect's fees, financing points,[201] legal fees,[202] advertising fees,[203] fees for engineering work,[204] costs for "design and

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[198] *See, e.g.*, Kenosha County v. Town of Paris, 434 N.W.2d 801, 807 (Wis. Ct. App. 1988).

[199] The Pennsylvania Supreme Court held that a landowner need spend nothing to obtain vested rights in permits to build townhouses which were issued prior to any contemplated zoning change (the property was downzoned to prohibit townhouses after the permits were issued). Gallagher v. Building Inspector, City of Erie, 247 A.2d 572 (Pa. 1968) (affirming summary judgment in mandamus action ordering issuance of improperly revoked permits). In fact, the Pennsylvania Supreme Court specifically assumed for the sake of argument that no expenditures had been made, and noted that the issue of expenditures arises only when the permit is obtained at the time of a pending zoning change. *Id.* at 573. This is consistent with the constitutional analysis of vested rights, in which an owner obtains a property right that cannot be taken away after the government has given its irrevocable permission to go forward. It is also consistent with state and federal constitutional protection of property (a legitimate claim of entitlement), which does not turn upon a showing that the citizen exercised extraordinary reliance to establish the existence of the right. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254 (1970) (public assistance payments are property which cannot be taken away without due process); Brown v. Thompson, 91 Hawai'i 1, 979 P.2d 586 (1999) (state-issued mooring and live-aboard permits are "property" within the meaning of the United States and Hawai'i Constitutions).

[200] For an example of "hard" construction costs, *see* Clackamas County v. Holmes, 508 P.2d 190, 199 (Or. 1973) (the acts of the owner should rise above preparatory work "such as the leveling of land, boring of test holes, or preliminary negotiations with contractors or architects").

[201] *See* Waianae Model Neighborhood Area Ass'n v. City & County of Honolulu, 55 Haw. 40, 46, 514 P.2d 861, 865 (1973) (including architect's fees and financing points as costs incurred); Denning v. County of Maui, 52 Haw. 653, 657, 485 P.2d 1048, 1050 (1971) (architects fees incurred); Bd. of Supervisors of Fairfax County v. Med. Structures, Inc., 192 S.E.2d 799, 801 (1972) (architecture plans).

[202] *See Denning*, 52 Haw. at 657, 485 P.2d at 1050 (legal fees).

[203] *Id.* (advertising fees).

[204] Allen v. City Council of Honolulu, 58 Haw. 432, 433, 571 P.2d 328, 328 (1977) (the developer incurred costs for "architectural, engineering and other work necessary to obtain a building permit"); *Med. Structures*, 192 S.E.2d at 801 (engineering plans).

planning,"[205] costs of archeological research,[206] planning and development consultant fees,[207] and appraisal fees.[208] These examples, of course, are not exclusive, and it is clear that a wide range of project-specific costs count.[209]

The Hawai'i Supreme Court's focus on preliminary planning and non-construction costs recognizes the realities of the development process because one or more other actions will generally be required following official assurances before actual site work can commence. It therefore would not make sense to attempt to analyze these later obligations to measure whether a property owner earlier relied.

2. Strict quantum analysis

Equally important is how to determine when these expenditures and commitments are "substantial." Hawai'i courts undertake a strict quantum analysis to determine substantiality.[210] In other words, the actual money spent and obligations incurred are tallied as raw figures, not as a proportion of anticipated or actual project costs. The Hawai'i Supreme Court has never held that a landowner's expenditures (either proven or alleged) were insubstantial,[211]

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[205] Life of the Land, Inc. v. City & County of Honolulu, 61 Haw. 390, 454, 606 P.2d 866, 903 (1980) [hereinafter *Life of the Land II*] (developer spent approximately $360,000 for design and planning); County of Kauai v. Pac. Standard Life Ins. Co., 65 Haw. 318, 332, 653 P.2d 766, 777 (1982) [hereinafter *Nukolii*] (developer spent $158,797.64 for design and planning); Town of Longboat Key v. Mezrah, 467 So. 2d 488, 491 (Fla. Dist. Ct. App. 1985) (engineering specifications).

[206] *Nukolii*, 65 Haw. at 333, 653 P.2d at 775.

[207] *Id.*

[208] *Id.*

[209] There are other costs and obligations which support vested rights and zoning estoppel. *See, e.g.*, City of Gainesville v. Bishop, 174 So. 2d 100 (Fla. Dist. Ct. App. 1965) (commitments to purchase, sale negotiations, financing agreements); City of Lauderdale Lakes v. Corn, 427 So. 2d 239 (Fla. Dist. Ct. App. 1983) (request for annexation, changes to topography); *Mezrah*, 467 So.2d at 491 (Fla. Dist. Ct. App. 1985) (environmental and beach control plans, plans for sewage and water supply); Texas Co. v. Town of Miami Springs, 44 So. 2d 808 (Fla. 1950) (land purchase).

[210] Hawai'i courts have implicitly rejected the approach utilized in a minority of jurisdictions that substantiality is measured as a proportion of total project costs. *See, e.g.*, Reichenbach v. Windward at Southampton, 364 N.Y.S.2d 283 (N.Y. Sup. Ct. 1975); Clackamas County v. Holmes, 508 P.2d 190 (Or. 1973). *But see* Miller v. Dassler, 155 N.Y.S.2d 975, 977-78 (N.Y. Sup. Ct. 1956) (landowner's expenditure of $4,029.69 was "substantial" for purposes of vested rights, "[e]ven in and of itself, without reference to total contemplated cost"). Besides having equal protection problems, total project cost is not applicable to analysis of Hawai'i vested rights questions since the jurisdictions that adopt it generally determine vesting much later in the development process when total costs are more certain.

[211] For instance, in Denning v. County of Maui, 52 Haw. 653, 657-58, 485 P.2d 1048, 1050-51 (1971), the court suggested that the developer's expenditure of approximately $38,047.34 in soft costs would trigger zoning estoppel. In *Waianae Model*, the government was estopped

and has never suggested that actual expenditures or obligations are to be compared to future or anticipated project costs. In both *Life of the Land* opinions—decisions in which the court determined that the government was equitably estopped—neither the supreme court nor the trial court even calculated the total projected project cost despite ample opportunities during the course of two appeals and a remand; apparently, it was not relevant to the analysis.[212] Rather, each court accepted that the amount incurred by the owner was satisfactory in and of itself and not in relation to any other amount.[213]

Given the Hawai'i Supreme Court's choice of the vesting and estoppel trigger as a self-described "midpoint" in the spectrum of possible rules to adopt,[214] the strict quantum rule reflects a healthy dose of judicial pragmatism and the court's recognition of the realities of the development industry. At the early stages of a project, the total anticipated project costs are often unknown, and it would not have made sense in *Nukolii* to require an examination of total project costs since those costs were not capable of accurate determination at or just after the usual discretionary approval stage. Further, the purpose of vested rights and zoning estoppel—certainty—would be entirely undermined if courts were required to balance costs on a case-by-case basis.

Ultimately, the expenditure requirement should exist only as objective extrinsic evidence that a landowner has been vigilant and has not slept on its rights, but has actually and affirmatively relied on the government's assurances.[215] "Substantiality" is required not to protect those who spend more (rewarding those who plan larger development), but to allow early and definitive resolution of vested rights and zoning estoppel cases. These doctrines turn on timing, and the significant date is when official assurances are given

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because the developer spent $7,440 for architect's fees (and an additional $151,560 incurred but not paid); $7,255 for construction; and $78,281.25 paid for financing points (and an additional $297,468.75 by promissory note). Waianae Model Neighborhood Area Ass'n v. City & County of Honolulu, 55 Haw. 40, 45-46, 514 P.2d 861, 865 (1973). In *Allen*, per case, $77,017.26 was incurred for "architectural, engineering and other work necessary to obtain a building permit." Allen v. City & County of Honolulu, 58 Haw. 432, 433-34, 571 P.2d 328, 328-29 (1977). In *Life of the Land*, the developer spent per case, $360,629.12 for design and planning. Life of the Land, Inc. v. City & County of Honolulu, 61 Haw. 390, 454, 606 P.2d 866, 903 (1980) [hereinafter *Life of the Land II*]. In *Nukolii*, the developer spent $158,797.64 for design and planning, including $31,352.96 in architectural fees, $1,000 for archeological research, $125,456.68 in planning and development consultant fees, and $1,000 in appraisal fees. *Nukolii*, 65 Haw. at 332-33, 653 P.2d at 777.

[212] *See* Life of the Land, Inc. v. City Council of Honolulu, 60 Haw. 446, 450, 592 P.2d 26, 29 (1979) [hereinafter *Life of the Land I*] ("The record is not clear exactly how much was spent by the developers in preparation of plans and designs in support of their applications . . . .").

[213] *Id.*

[214] *Nukolii*, 65 Haw. at 329 n.8, 653 P.2d at 774 n.8.

[215] *See* Ackerman, *supra* note 39, at 1270 (substantial reliance requirement is to give owner notice that he must make "some diligent pursuit of the permitted use").

and the owner acts on those assurances, not some indeterminate date weeks or months later, when the owner spends that final penny which pushes its expenditures from the "insubstantial" into the "substantial."

VI. REMEDIES IN VESTED RIGHTS AND ZONING ESTOPPEL LITIGATION: A SWORD AND A SHIELD

Although sometimes referred to as "defenses,"[216] vesting and estoppel are, in practice, used both as a shield and as a sword. "Defensive" application can be seen in *Life of the Land* and *Waianae Model*, in which the doctrines were invoked by the government and the intervening landowners as defenses to third party suits to enjoin construction or invalidate permits.[217] Another version of the defensive use arises where the government seeks to enforce a new property regulation and the landowner invokes the doctrines as a defense to fines or tear-down orders for completed development, or to prevent application of the new regulation to halt ongoing development.[218] Vested rights and zoning estoppel may also be asserted as a defense when the government attempts to revoke previously-granted permits or permissions after an official change of heart.[219] The doctrines can also, however, be asserted affirmatively as positive claims against the government. For example, in *Denning*, when the county refused to issue a building permit, the property owner asserted that its rights had vested, and posed an affirmative claim to compel issuance.[220] Vested rights may also be asserted positively as an element of a due process or regulatory taking claim, to establish that the owner possesses "property" that was taken without just compensation or by a government action that does not substantially advance a legitimate state interest.[221]

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[216] *See, e.g.*, Heeter, *supra* note 6, at 64-65 (labeling both vested rights and zoning estoppel "defenses").

[217] *See, e.g.*, *Life of the Land I*, 60 Haw. 446, 592 P.2d 26.

[218] *See, e.g.*, Waikiki Marketplace Inv. Co. v. Chair of Zoning Bd. of Appeals of Honolulu, 86 Hawai'i 343, 354, 949 P.2d 183, 194 (1997) (grandfather and non-conforming use provisions used a defense to tear-down order).

[219] *See, e.g.*, Sakolsky v. City of Coral Gables, 151 So. 2d 433, 435 (Fla. 1963) (new city administration attempted to revoke permit issued by prior administration, claiming mistake).

[220] Denning v. County of Maui, 52 Haw. 653, 657, 485 P.2d 1048, 1050 (1970). *See also County of Kauai v. Pac. Life Ins. Co.*, 65 Haw. 318, 329-30, 653 P.2d 766, 775-76 (1982) [hereinafter *Nukolii*] (the landowner can bring an action to mandate issuance of ministerial permits).

[221] *See, e.g.*, Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (setting forth the disjunctive regulatory takings test: a regulation takes property when it deprives an owner of use or fails to substantially advance a legitimate state interest); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834-35 (1987) (detailing the takings standard for substantially advancing legitimate state interests); Chevron U.S.A., Inc. v. Bronster, 363 F.3d 846 (9th Cir. 2004), *cert. granted sub nom.* Lingle v. Chevron U.S.A., Inc., __ U.S. __, 125 S. Ct. 314 (2004).

Because of the conflation of the doctrines, successfully establishing either vested rights or zoning estoppel will result in a "builders' remedy"—the right to complete the development in accordance with the earlier regulations. Furthermore, a finding of zoning estoppel will prevent the government from applying the newly-enacted regulation to the property owner.[222] *Allen* held that if the government determines that it is in the public interest to prevent a project that has already been approved, it must invoke its power of eminent domain and condemn the property at its entitled value.[223] Additionally, any period during which this right to complete the development was clouded by delay may also subject the government to liability for a temporary regulatory taking.[224]

Since vested rights are grounded in the Constitution, governmental interference with those rights also provides the property owner with potent tools and a wider range of possible remedies than under zoning estoppel. For example, zoning estoppel may only impact a government agency and other government agencies in privity,[225] but once property rights have vested, the owner is on more solid footing, since they are rights that cannot be taken away by regulation, and may be good against the world, not just the particular government entity that is estopped. This is extremely critical in Hawai'i which has both state and local zoning and planning and multiple layers of regulations by different governments and agencies. Also, success in a zoning estoppel claim will not necessarily result in a protected property right that must be condemned in order to be prevented—what the developer gets is a right to finish.[226] Also, establishing a vested property right gives rise to

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[222] *See, e.g.*, Allen v. City & County of Honolulu, 58 Haw. 438-39, 437, 571 P.2d 328, 330 (1977) (remedies are invalidation of ordinance or the right to complete; no "no damages" holding of *Allen* has been implicitly overruled by *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987)); *Denning*, 52 Haw. at 658, 485 P.2d at 1051 ("constructing the planned structure"); Leroy Land Dev. Corp. v. Tahoe Reg'l Planning Agency, 543 F. Supp. 277, 279 (D. Nev. 1982) (the owner contended that it had a vested right to complete construction of planned condominium project); Town of Longboat Key v. Mezrah, 467 So. 2d 488, 489 (Fla. Dist. Ct. App. 1985) (the government must permit owner use of the property for zoning in place when approved, not later-enacted zoning). Of course, in a building permit jurisdiction, the vested right, if established, is easy to define by the terms of the building permit itself. *See* Avco Cmty. Developers v. S. Coast Reg'l Comm'n, 553 P.2d 546, 550 (Cal. 1976) (once vested, an owner "acquires a vested right to complete construction in accordance with the terms of the permit").

[223] *Allen*, 58 Haw. at 439, 571 P.2d at 331.

[224] *See* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 304-05 (1987).

[225] *See* Lerner v. Los Angeles City Bd. of Educ., 380 P.2d 97, 105 (Cal. 1963) (the estoppel binds not only the state board, but also those in privity with it such as the city board).

[226] The government should not assume that in the absence of a vested property right, the owner of a parcel of land has no other property rights that can be interfered with without due

federal remedies. For example, governmental interference with vested rights in response to public opposition to a project is a violation of substantive due process. In *Town of Orangetown v. Magee*,[227] the New York Court of Appeals affirmed an award of $5,137,126 for violation of substantive due process rights where a municipality interfered with an owner's property rights simply to appease public opposition to an already-approved project.[228] In addition, the permits were reinstated so construction could proceed.[229] Revocation of vested development rights can give rise to liability for violation of procedural due process as well. For instance, in *Tri County Industries, Inc. v. District of Columbia*,[230] the court reinstated the original jury verdict of $5,000,000 for the suspension of a building permit in response to public opposition, in violation of the permit holder's right to procedural due process.[231] Interference with vested rights can also result in a regulatory taking of property since vested property rights epitomize an owner's "investment-backed expectations" that must be condemned, and compensated if taken.[232] When the government reacts to public opposition to a previously-approved and vested development by rezoning the parcel to preclude the previously approved use, it is liable to pay just compensation for the diminution in value.[233] Temporary interference with a vested property right must also be compensated.[234]

In addition, because federal rights are protected from deprivation under color of state law by a federal civil rights statute,[235] a property owner has a

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process or properly exercised eminent domain authority. *See, e.g.*, DeBlasio v. Zoning Bd. of Adjustment, 53 F.3d 592, 601 (3d Cir. 1995).

[227] 665 N.E.2d 1061. Almost by definition, a successful assertion of vested rights or zoning estoppel evidence a lack of planning on the part of the government. Had it truly undertaken a comprehensive and long range planning process, it would not have found it necessary to reverse course after giving a property owner official assurances a project could proceed. The alternative—that the government simply reacts to the demands of the majority in derogation of the rights of the minority—is the epitome of arbitrariness, but it will also probably be a fact of life, notwithstanding constitutional protections.

[228] *Id.* at 1068.

[229] *Id.* at 1065.

[230] 200 F.3d 836 (D.C. Cir. 2000).

[231] *Id.*

[232] *See* Penn Central Trans. Co. v. City of New York, 438 U.S. 104, 124 (1978) (setting forth the three-part ad hoc takings test which examines, among other things, an owner's reasonable investment-backed expectations); Kasparek v. Johnson County Bd. of Health, 288 N.W.2d 511, 518 (Iowa 1980) (vested rights are investment-backed expectations).

[233] *See, e.g.*, A.A. Profiles, Inc. v. City of Ft. Lauderdale, 850 F.2d 1483, 1488 (11th Cir. 1988) (taking occurred when city rezoned property to prevent completion of an approved wood-chipping facility in response to public opposition).

[234] *See, e.g.*, Wheeler v. City of Pleasant Grove, 833 F.2d 267, 271 (11th Cir. 1987) (damages for temporary interference is the "return on the portion of fair market value that is lost").

[235] 42 U.S.C. § 1983 (2003). This statute provides a remedy when federal rights are infringed upon by persons acting under color of state law, which include local governments:

federal statutory damage claim when its vested rights are infringed.[236] A property owner prevailing on a constitutional claim may recover attorneys' and experts' fees and costs.[237]

VII. The Relationship of Vested Rights and Zoning Estoppel to Creative Land Use Planning and Dispute Resolution Tools

Establishing a vested right means that the government cannot use regulation to take away that right. As *Allen* and *First English* instruct, the government may still exercise eminent domain upon payment of just compensation at entitled value if there is a public use in stopping a project.[238] Assuming the government has determined its interests are not served by the proposed development but it cannot or will not condemn the property and pay just compensation, it must look elsewhere for a solution. But even when the government is prevented from exercising its eminent domain power, establishing a vested right to develop provides opportunities for creative settlement strategies to both the property owner and the government.

A. Avoiding Vested Rights Litigation—Development Agreements

Development agreements are "vested rights" contracts between a developer and the local government in which the government agrees to not apply future

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> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

See id. Counties are "persons" liable under § 1983, and county officials, including elected officials, may be personally liable and have no immunity if they are acting in their non-legislative, administrative, or quasi-judicial capacity, such as issuing or revoking permits.

[236] Section 1983 claims may be brought for regulatory takings, and procedural and substantive due process violations. *See id.*

[237] 42 U.S.C. § 1988(b) (2003).

[238] Note that if the government invokes eminent domain to condemn a vested right, it must first demonstrate that the condemnation is for public use. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation."); HAW. CONST. art. I, § 20 ("Private property shall not be taken or damaged for public use without just compensation."). The Hawai'i Supreme Court has noted that in takings under the Hawai'i Constitution, it may well require a higher nexus between invoked and actual public use than utilized by the U.S. Supreme Court in Fifth Amendment cases. *See* Haw. Hous. Auth. v. Lyman, 68 Haw. 55, 69, 704 P.2d 888, 896 (1985) (citations omitted) (the term "public use" in the Hawai'i Constitution is not necessarily coterminous with the U.S. Constitution's "public use").

land use regulations against the property for a period of time.[239] They are prophylactic measures designed by the legislature to prospectively avoid many of the uncertainties of establishing a vested right.[240] They are useful tools to anticipate issues, avoid a mad rush to vest,[241] and to encourage developer investment while reserving the local government's police power.[242] In Hawai'i, development agreements have two explicit purposes: to eliminate the "lack of certainty in the development approval process," and to "provide a means by which an individual may be assured at a specific point in time that having met or having agreed to meet all of the terms and conditions of the development agreement, the individual's rights to develop a property in a certain manner shall be vested."[243] Development agreements also are designed to provide government assurances to the property owner about the state of its own existing regulatory process, and to give assurances that the owner may proceed with development if it complies with that process.[244] Development agreements, however, are not proper vehicles to change the existing process, affirm industry practices which do not comply with the law, or to bind other governments.[245] Thus, development agreements are not a panacea to all the problems in the land development process, nor are they a one-size-fits-all solution. The property owner and local government considering entering into a development agreement must insure that it is an appropriate means to achieve their goals since development agreements are not legislative sanction for local governments to begin wheeling and dealing for future or anticipated land uses.[246]

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[239] Development agreements provide for a "freezing [of] the existing zoning regulations." Morgran Co. v. Orange County, 818 So. 2d 640, 643 (Fla. Dist. Ct. App. 2002) (quoting Brad K. Schwartz, *Development Agreements: Contracting for Vested Rights*, 28 B.C. ENVTL. AFF. L. REV. 719, 720 (2001)).

[240] *See* HAW. REV. STAT. § 46-121 (2003) providing in pertinent part:

> Development agreements are intended to provide a reasonable certainty as to the lawful requirements that must be met in protecting vested property rights, while maintaining the authority and duty of government to enact and enforce laws which promote the public safety, health, and general welfare of the citizens of our State.

See id.

[241] The title of a journal article on vested rights says it all: *He Who Rests Less, Vests Best. See generally* Delaney & Kominers, *supra* note 43, at 219.

[242] *See generally* CALLIES, CURTIN & TAPPENDORF, *supra* note 45, at 91.

[243] HAW. REV. STAT. § 46-121 (2003).

[244] *See id.*

[245] *See id.* For example, development agreements cannot bind another government unless it signs on. *See id.* § 46-126(d) (2003). This is particularly important to remember given Hawai'i's multi-tiered land regulation system where both state and county controls often are applicable to a single parcel.

[246] *See* Hosoda, *supra* note 51, at 190 ("The agreements must not become a vehicle for evading or subverting the currently existing planning and land use process.").

At best, development agreements "freeze" current land use regulations or practices of the governmental entity entering into the agreement, but do not permit it to enter into executory provisions for future government agreement, or to change existing zoning.[247] The property owner and the local government must carefully consider whether the scope of the agreement is within the local government's power to agree; "contract zoning" and a bargaining away of the police power are still not permitted.

The case of *Morgran Company, Inc. v. Orange County*[248] illustrates the limitations on the proper scope of development agreements. In that case, a developer sought to construct a "primarily residential, mixed-use" project on property that was zoned for agricultural uses.[249] The developer sought and obtained an amendment to the County's comprehensive plan, which was necessary to proceed with its plans. Also necessary was a rezoning of the property to "Planned Development."[250] The developer did not seek the zone change through the usual county process but rather entered into a development agreement with the County in which the County agreed to "support and expeditiously process" the rezoning request in exchange for the donation by the developer of fifty acres of its property for use as a public park once the zone change was completed.[251]

But after the County chairman—the very official who executed the development agreement—subsequently mandated a blanket rejection of all rezoning requests in areas where the school board considered the schools to be overcrowded—which apparently included the developer's property—the County failed to support and process the rezoning application as it had agreed, and instead repudiated the development agreement and actively opposed the rezoning.[252] When the developer sued the County for breach of contract and

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[247] *See* Schwartz, *supra* note 239, at 720 (defining development agreement as "a contract between [local government] and a property owner/developer, which provides the developer with vested rights by freezing the existing zoning regulations applicable to a property in exchange for public benefits"). To the extent that a development agreement locks down existing zoning for a period of time into the future, most courts find this is not a bargaining away of future police powers. *See, e.g.*, Santa Margarita Area Residents Together v. San Luis Obispo County Bd. of Supervisors, 100 Cal. Rptr. 2d 740, 748 (Cal. Ct. App. 2000) (a zoning freeze does not contract away police power). Development agreements are designed to lock in current approvals, not to agree to new ones. *See* Hosoda, *supra* note 51, at 191 ("Developers must still apply for and receive traditional approvals. However, once a developer receives such ratification and complies with the terms of the agreement the government cannot obliterate the developer's right to continue."). *See also* HAW. REV. STAT. § 46-127(b) (2003) (valid agreement insulates property from subsequent change in the law).

[248] 818 So. 2d 640 (Fla. Dist. Ct. App. 2002).

[249] *Id.* at 641.

[250] *Id.*

[251] *Id.* at 642.

[252] *Id.*

promissory estoppel, the County asserted the development agreement was void as contract zoning beyond the ability of the County to agree to.[253] Despite warning that "[t]his case may also serve as a cautionary tale for anyone who enters into a contract with Orange County,"[254] the court agreed with the County, holding the government could not contractually bind itself to support a future request for rezoning.[255] The court reasoned that future approval is discretionary legislative power which cannot be agreed to in advance and was therefore beyond the scope of permitted development agreements.[256]

Contrast *Morgran*'s development agreement with the one at issue in *Santa Margarita Area Residents Together v. San Luis Obispo County Board of Supervisors*.[257] In that case, the County and the developer entered into an agreement as part of a settlement of a lawsuit.[258] The agreement froze existing zoning, committed the developer to file future applications, and committed the County to "process, review, and approve or disapprove the specific plan."[259] It did not commit the County to favorably consider the developer's applications, or even "support" the developer as in *Morgran*.[260] The County only agreed to process the future applications in accordance with the zoning and planning in effect at the time of the execution of the agreement for five years into the future.[261] Critically, the court held "[t]he Agreement does not give [the developer] a right to construct the Project or impose upon it an obligation to do so."[262] The County retained the discretion to approve or deny the developer's future applications, and the agreement did "not permit construction until the County has approved detailed building plans."[263]

Thus as a general rule, a development agreement may only freeze existing regulation and may not grant or promise future approvals or changes. This distinction makes sense because existing zoning is presumed valid having been imposed through the comprehensive Euclidean process, while there is no such procedural assurance for executory zoning accomplished by way of a

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[253] *Id.* "Contract zoning is, in essence, an agreement by a governmental body with a private landowner to rezone property for consideration." *Id.* (citing Hartnett v. Austin, 93 So. 2d 86 (Fla. 1956); Chung v. Sarasota County, 686 So. 2d 1358 (Fla. Dist. Ct. App. 1996)). *See also* CALLIES, CURTIN & TAPPENDORF, *supra* note 45, at 92 ("government cannot bind itself to not exercise its police powers").

[254] *Morgran*, 818 So. 2d at 641.

[255] *Id.* at 643.

[256] *Id.*

[257] 100 Cal. Rptr. 2d 740 (Cal. Ct. App. 2000).

[258] *Id.* at 742-43.

[259] *Id.* at 743.

[260] *Morgran*, 818 So. 2d at 641.

[261] *Santa Margarita*, 100 Cal. Rptr. 2d at 743.

[262] *Id.*

[263] *Id.* at 748.

development agreement. Development agreements are not approved like zoning ordinances, since they are approved after a single public hearing and are administrative acts, while zoning regulations are legislative acts enacted by ordinance.[264]

B. Breaching Impasses—TDR's, Land Swaps, and Consent Decrees

When the situation presents itself and a development agreement is not available or possible, the cash-free concepts of transferred development rights, land swaps, and consent decrees can be useful to resolve difficult land use litigation. Local government coffers are not overflowing with cash but unconstitutional action may be undertaken by government officials independently or prompted by a public not aware of constitutional limitations or the consequences of failing to respect them.[265] The use of transferred development rights or land swaps may provide adequate consideration for a property owner to forego its legal claims. However, the adage "once bitten, twice shy" comes into play; where the government is attempting to prevent the completion of a project it has, by definition, already approved, there will be an understandable hesitancy on the part of a property owner to trust the government not to interfere with its new project or another property.

The consent decree provides the judicial oversight often required by the landowner to insure that its rights are not violated a second time. There is ample precedent for the use of the consent decree to resolve land use disputes.[266] These tools can be an effective means of giving all parties that

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[264] HAW. REV. STAT. § 46-131 (2003) (defining a development agreement as an "administrative act" of the county); *id.* § 46-128 (one public hearing).

[265] For stark examples, *see Kaiser Hawaii Kai Development Co. v. City & County of Honolulu*, 70 Haw. 480, 777 P.2d 244 (1989), and *Lum Yip Kee, Ltd. v. City & County of Honolulu*, 70 Haw. 179, 767 P.2d 815 (1989). In both of those cases, development was proposed consistent with zoning, but the public objected and through initiative attempted to stop the projects by changing the zoning and planning designations. The Hawai'i Supreme Court rejected zoning and planning by initiative in *Kaiser Hawaii Kai* and invalidated the initiative downzoning ordinance, holding that zoning and planning must be accomplished by the City Council under state law that trumped the City Charter's initiative provision. *Kaiser Hawaii Kai*, 70 Haw. at 489, 777 P.2d at 250. Subsequently, the City Council, sensing an inflamed electorate, passed a "confirmation" ordinance to downzone the parcels as the electorate had attempted to do by initiative. This resulted in a lawsuit for vested rights, zoning estoppel and a regulatory taking, among other claims, in which the trial court entered judgment on liability for the property owner. *See* Maunalua Assocs. v. City & County of Honolulu, No. 89-3539-119SSM (Haw. Cir. Ct. filed Nov. 14, 1989) (copy of judgment on file with the authors).

[266] Establishing a vested property right also results in the court having greater tools available for creative settlements. For example, vindicating a constitutional right permits a federal court to order a local government to undertake actions not permitted by development agreements or local ordinances. *See, e.g.*, Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 373 F. Supp.

which they desire: return on investment for the owner; cash-free solutions for the politicians; and public benefits for the taxpayers.

VIII. CONCLUSION

Under the doctrines of vested rights and zoning estoppel, the "arrow of time" moves forward. These principles shield property owners from the shifting winds of local politics and the vagaries of vindictive officials. While the counties and the state are aware that these rules protect property owners, they will often be tossed aside in the interest of political expediency, forcing the landowner to aggressively protect its rights. Vested rights and zoning estoppel inject a measure of certainty in an otherwise uncertain process and attempt to minimize the risk that the rug can be pulled out unexpectedly from a property owner after the government has given the green light to a use and the owner has started down the path in reliance.

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208 (N.D. Ill. 1974), *rev'd*, 517 F.2d 409 (7th Cir. 1975), *rev'd*, 429 U.S. 252 (1977), *on remand*, 469 F. Supp. 836 (N.D. Ill. 1979), *aff'd*, 616 F.2d 1006 (7th Cir. 1980). *See also* Mesalic v. Slayton, 689 F. Supp. 416 (D.N.J. 1988). Professor David Callies has authored a comprehensive analysis of the rationale and the process of using consent decrees to settle land use disputes. *See* David L. Callies, *The Use of Consent Decrees in Settling Land Use and Environmental Disputes*, 21 STETSON L. REV. 871 (1992). A very comprehensive settlement procedure was undertaken in *Maunalua Assocs.* See *Maunalua Assocs.*, No. 89-3539-119SSM.

Emergency Contraception in Religious Hospitals: The Struggle Between Religious Freedom and Personal Autonomy

I. INTRODUCTION

A sales representative was raped by an acquaintance in her apartment.[1] She checked into a local hospital for treatment for sexually transmitted diseases, and was not offered emergency contraception to prevent pregnancy.[2] Given her state of shock, she did not think to ask for the treatment.[3] Luckily, she did not get pregnant. As a result of her ordeal, she is among those who vigorously support state laws to require all hospitals to provide emergency contraception to rape victims if requested.[4]

Another rape victim, Susan Mosely, of Columbus, Mississippi became pregnant from an attack.[5] She opted to put the child up for adoption.[6] For Susan, emergency contraception was not an option because of her belief that it could cause an abortion.[7] Susan's view is that it is not the baby's fault and therefore the baby should not be punished via an abortion.[8]

There is currently a debate between the autonomy of rape victims and the protection of religious freedom across the country. Hawai'i is among many states that has pending legislation which would require all hospitals to provide emergency contraception to rape victims who request it, regardless of the institution's religious beliefs. Why is this such a controversial issue and where should the burden lie? This Comment addresses the issues underlying this debate. It looks at potential arguments for both the rape victim and the religious hospitals, using Hawai'i as an example.

Part II discusses the background of emergency contraception; the current treatment for rape victims in Hawai'i; the specifics of state legislation pertaining to emergency contraception; and the probable effect of the pending legislation in Hawai'i. Part III analyzes the following: (1) the right to privacy and autonomy of a rape victim; (2) proposed and enacted Conscience Clause

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[1] Joan Treadway, *Post-rape Birth Control Debated; Religious, Health-Care Concerns Weighed*, NEW ORLEANS TIMES-PICAYUNE, Mar. 9, 2003, at 1, *available at* LEXIS, News & Business, Major Newspapers.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *See id.*

legislation in the federal and state governments to protect health care providers; (3) the religion clauses of the United States and Hawai'i Constitutions; and (4) points to other policy arguments for both rape victims and religious hospitals. Part IV predicts the probable outcome that the bill will have under the Hawai'i or United States Constitutions.

II. BACKGROUND

There are various views and beliefs of when pregnancy begins and when abortion takes place. These contradicting views underlie the heated controversy regarding emergency contraception legislation. On both ends of the debate, the dispute is based on the issue of whether emergency contraception has the effect of causing an abortion.

A. Morning-After Pill

Emergency contraception, also known as the morning after pill, essentially consists of increased doses of certain oral contraceptive pills.[9] Emergency contraception can reduce the risk of pregnancy after unprotected intercourse if taken within 120 hours.[10] The treatment consists of two doses, the first to be taken within seventy-two hours after intercourse and the second dose to be taken twelve hours later.[11] The pill is most effective when taken 12-24 hours after unprotected sex. If taken within seventy-two hours, the pill is still between seventy-five and eighty-nine percent effective.[12]

There are three ways in which the morning-after pill can work. The first is that it inhibits ovulation, which means that the egg will not be released.[13] The

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[9] Planned Parenthood, *Emergency Contraception*, *at* http://www.plannedparenthood.org/ec/ (last visited Nov. 29, 2004) (referencing general information on the morning-after pill). Planned Parenthood Federation of America, Inc., is the world's largest and most trusted voluntary reproduction health care organization. *See* Planned Parenthood, *About Us*, *at* http://www.plannedparenthood.org/about/ (last visited Nov. 29, 2004). Planned Parenthood was founded as America's first birth control clinic. *Id.* Planned Parenthood believes in everyone's right to choose when or whether to have a child and that every child should be wanted and loved, and that women should be in charge of their own destinies. *Id.*

[10] Planned Parenthood, *Fact Sheet: EC Defined*, *at* http://www.plannedparenthood.org/library/facts/obstructing_032102.html [hereinafter *EC Defined*] (last visited Nov. 29, 2004).

[11] Planned Parenthood, *Emergency Contraception: How to Use ECP's*, *at* http://www.plannedparenthood.org/library/BIRTHCONTROL/EmergContra.htm (last visited Nov. 29, 2004).

[12] *Id.*

[13] Planned Parenthood, *Fact Sheet: Emergency Contraception Is Not Abortion*, *at* http://www.plannedparenthood.org/library/BIRTHCONTROL/EC.html [hereinafter *Not Abortion*] (last visited Nov. 29, 2004) (quoting the Food and Drug Administration's description of the contraceptive's effect).

second is that it inhibits fertilization by altering the tubal transport of sperm or ova.[14] Third, it may inhibit implantation by altering the endometrium,[15] making the uterus wall inhospitable to the egg.[16] According to the Food and Drug Administration ("FDA"), the morning-after pill is not effective if the woman is already pregnant.[17]

There are two specific brands of emergency contraception already approved by the Food and Drug Administration: Preven and Plan B.[18] Preven, approved by the FDA in 1998, consists of a combination of estrogen and certain progestin hormones.[19] Plan B, approved by the FDA in 1999, consists of progestin-only products and no estrogen.[20] There are currently no long-term studies on whether there could be permanent damage or risk of disease from taking the morning-after pills.[21] The FDA maintains, however, that emergency contraception is a safe and effective means of reducing unwanted pregnancy.[22]

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[14] *Id.*

[15] *Id.*

[16] Sexual Health InfoCenter, *Morning-After Pill, How Does the Morning-After Pill Work?*, *at* http://www.sexhealth.org/birthcontrol/morningafter.shtml (last visited Nov. 29, 2004). Sexual Health InfoCenter is a website that provides a wealth of information on sexual health. *See* Sexual Health InfoCenter, *About Us: General Information*, *at* http://www.sexhealth.org/aboutus/ (last visited Nov. 29, 2004). The Sexual Health InfoCenter "was created in the spirit that there should be open and honest discussion of human sexuality available. Today the InfoCenter provides information and forums for adults to discuss human sexuality and its nuances." *Id.*

[17] *Not Abortion*, *supra* note 13.

[18] *EC Defined*, *supra* note 10.

[19] *Id.* Nausea and vomiting are common side effects of taking Preven. *See* Planned Parenthood, *Fact Sheet: Progestin-Only ECPs Greatly Reduce Side Effects*, *at* http://www.plannedparenthood.org/library/BIRTHCONTROL/EC.html [hereinafter *Progestin-Only ECP's*] (citations omitted) (last visited Nov. 29, 2004). Other side effects include breast tenderness, fatigue, irregular bleeding, abdominal pain, headaches, and dizziness. *See id.*

[20] *EC Defined*, *supra* note 10. Studies show that side effects for Plan B are less prevalent than with the use of the combination emergency contraception in Preven. *Progestin-Only ECP's*, *supra* note 19.

[21] Bioethics Advisory Commission, *Emergency Contraception: The morning-after pill*, *at* http://www.morningafterpill.org/map2.htm (last visited Sept. 23, 2004) (on file with author).

[22] Press Release, American College of Obstetricians and Gynecologists, Statement of the American College of Obstetricians and Gynecologists Supporting the Availability of Over-the-Counter Emergency Contraception (Feb. 14, 2001), *available at* http://www.acog.org/from_home/publications/press_releases/nr02-14-01.cfm (endorsing the morning-after pill and also noting the FDA's support of the medication) (last visited Nov. 29, 2004).

B. Current Treatment for Sexual Assault Victims in Hawai'i

In the United States, there are approximately 300,000 women who are sexually assaulted each year.[23] It is estimated that over 32,000 of them become pregnant as a result of the sexual assault and approximately fifty percent of the pregnancies end in abortion.[24] In 2002, Hawai'i had 372 reported forcible rapes and 367 rapes in 2003.[25] It is reliably estimated that over half of all rapes go unreported.[26]

Currently, rape victims on Oahu are taken or referred directly to the sex abuse treatment center ("SATC") at Kapi'olani hospital.[27] There are three other SATCs, located on the islands of Hawai'i, Maui, and Kaua'i.[28] The SATC on Oahu is the only treatment center that provides emergency contraception on site as part of the center's rape examination.[29] The SATCs on the outer islands refer the victims to a hospital or physician for examination and treatment.[30] The examination consists of the collection of specimen as well as treatment for physical and emotional harm caused by the perpetrator.[31] Treatment is not contingent upon the victim reporting the perpetrator to authorities. In fact, the examination completed by the rape centers will be kept on file in case the victim chooses to pursue an action against the perpetrator.[32]

Victims who are picked up by an ambulance are taken directly to the SATC for treatment.[33] Victims who walk into a hospital emergency room are treated for injuries then referred to the SATC for a full forensic examination as well

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[23] H.B. 189, 2003 Leg., 22nd Sess. § 1 (Haw. 2004) (quoting statistics of rape and pregnancy in Hawai'i and the United States).

[24] *Id.*

[25] United States Department of Justice, Federal Bureau of Investigation, *Crime in the United States: 2002*; United States Department of Justice, Federal Bureau of Investigation, *Crime in the United States: 2003*, *available at* http://www.fbi.gov/ucr/ucr.htm (last visited Nov. 29, 2004) (providing crime reports and statistics in the United States as well as each state individually).

[26] *See* H.B. 189, 2003 Leg., 22nd Sess. (Haw. 2004); Interview with Adriana Ramelli, Director, The Sex Abuse Treatment Center, in Honolulu, Haw. (Feb. 18, 2004) [hereinafter Interview Ramelli].

[27] Interview Ramelli, *supra* note 26.

[28] *Id.*

[29] According to Adriana Ramelli, SATC has been providing emergency contraception to rape victims since approximately 1976. *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] Interview with Walter Yoshimitsu, Deacon, Catholic Diocese, Honolulu, Haw. (Feb. 20, 2004) [hereinafter Interview Yoshimitsu].

as for the opportunity to receive emergency contraception.[34] The hospital emergency rooms are not obligated to inform, nor provide emergency contraception to rape victims who walk in their doors.[35]

C. State Legislation Requiring Hospitals to Administer Emergency Contraception

There has been a recent push to require all hospitals to provide emergency contraception to rape victims.[36] Currently, seven states have laws to make emergency contraception more widely available by requiring hospitals to provide information and/or emergency contraception to rape victims.[37] The statutes or bills come in three variations:

> 1) laws that require hospitals to supply the victim with accurate information about emergency contraception; 2) laws that require hospitals both to give information and to refer the victim to another site to receive emergency contraception; and 3) laws requiring hospitals not only to give information, but also to administer emergency contraception on site if the victim requests it.[38]

Most of the seven states have passed legislation requiring hospitals to provide emergency contraception on site, without any religious exemption.[39] Only one state, Illinois, gives the hospital the choice of whether or not to administer the treatment, as long as information regarding all emergency contraception options is given to the victim.[40]

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[34] *Id.*

[35] *Id.*

[36] In 2003, the United States Congress reviewed a bill that would require all hospitals to administer emergency contraception to rape victims who request it. *See, e.g.*, S. Res. 1564, 108th Cong. (2003); H.R. Con. Res. 2527, 108th Cong. (2003). Many states, including Hawai'i, have had recent pending legislation to require hospitals to provide emergency contraception to rape victims. *See, e.g.*, H.B. 189, 2003 Leg., 22nd Sess. (Haw. 2004); S.F. 270, 83rd Leg., Reg. Sess. (Minn. 2003); S.B. 378, 2003 Leg., 226th Sess. (N.Y. 2003); H.J.R. 611, 2003 Leg. Sess. (Va. 2002); S.B. 544, 96th Leg., Reg. Sess. (Wis. 2003-2004).

[37] *See, e.g.*, 410 ILL. COMP. STAT. 70/2.2 (2002); S.C. CODE ANN. § 16-3-1350(B) (2002); CAL. PENAL CODE § 13823.11(e)(1) (West 2000 & Supp. 2004); WASH. REV. CODE § 70.41.350(1)(c)(2003); OHIO REV. CODE ANN. § 2907.29 (West 2003); N.M. STAT. ANN. § 24-10D-3 (Michie 2003); N.Y. PUB. HEALTH LAW § 2805-p (McKinney 2001 & Supp. 2004).

[38] Heather R. Skeeles, Note, *Patient Autonomy Versus Religious Freedom: Should State Legislatures Require Catholic Hospitals to Provide Emergency Contraception to Rape Victims?*, 60 WASH. & LEE L. REV. 1007, 1018 (2003) (citations omitted) (summarizing the three forms of emergency contraception legislation pertaining to hospital emergency rooms).

[39] *See, e.g.*, S.C. CODE ANN. § 16-3-1350(B) (2002); CAL. PENAL CODE § 13823.11(e)(1) (West 2000 & Supp. 2004); WASH. REV. CODE § 70.41.350(1)(a)(2003); N.M. STAT. ANN. § 24-10D-3 (Michie 2003); N.Y. PUB HEALTH LAW § 2805-p (McKinney 2001 & Supp. 2004).

[40] 410 ILL. COMP. STAT. 70/2.2 (2002).

Hawai'i's emergency contraception bill ("emergency contraception bill") is currently being debated in the legislature.[41] The proponents of the bill want the law to require all hospitals to dispense the morning-after pill to all victims who request it.[42] The Catholic Church and Catholic hospitals are lobbying to make sure that the bill contains a conscience clause. This clause would give them a religious exemption from having to comply with providing emergency contraception.[43] Hawai'i legislators first introduced the emergency contraception bill in 2003, known as S.B. 658.[44] S.B. 658 passed both the Senate and the House with a religious exemption.[45] This exemption, however, was not a guaranteed exemption.[46] The governor vetoed that bill on the ground that a law that "interfered with an individual's or institution's right to the free exercise of religion requires the state to show not only that the limitation in question furthers a compelling state interest, but also that the desired result is accomplished in a reasonable and least-restrictive manner."[47]

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[41] *See* H.B. 189, 2003 Leg., 22nd Sess. (Haw. 2004).

[42] Interview Ramelli, *supra* note 26; Interview with Annelle Amaral, Director, Planned Parenthood of Hawai'i, in Honolulu, Haw. (Feb. 26, 2004) [hereinafter Interview Amaral].

[43] Interview Yoshimitsu, *supra* note 33.

[44] S.B. 658, 2003 Leg., 21st Sess. (Haw. 2003).

[45] *See* Bill Summary and Status, S.B. 658, 2003 Leg., 22nd Sess. (Haw. 2003) (vetoed in 2003), *available at* http://www.capitol.hawaii.gov/session2003/status/SB658.asp (last visited Sept. 22, 2004) (providing legislative information, including the status of bills in Hawai'i).

[46] *See* Statement of Objections to S.B. 658, 2003 Leg., 22nd Sess. (June 20, 2003). Governor Lingle, in her veto statement said: "This bill would not have been objectionable if the Legislature had included an 'opt-out' provision for religious hospitals." S.B. 658 included an exception whereby a religious hospital can request to be exempt from the regulation, and the department of health *may* issue an exemption. *See* S.B. 658, 2003 Leg., 22d Sess. (Haw. 2003) (vetoed in 2003). The approval process would take approximately thirty days. *Id.* If within those thirty days a rape victim would have walked in the emergency room, the Catholic hospital would not have been able to refuse to provide emergency contraception to the patient or else strict penalties would have been imposed. *Id.*

[47] Statement of Objections, *supra* note 46. Upon issuing a veto, the governor stated:

> This bill directly interferes with the constitutional right to the free exercise of religion by requiring hospital personnel to administer emergency contraception drugs even if such an act is in contravention of religious beliefs and hospital policies which reflect those beliefs, as is the case at St. Francis. When the State interferes with an individual's or institution's right to the free exercise of religion, the State must show not only that the limitation in question furthers a compelling state interest, but also that the desired result is accomplished in a reasonable and least-restrictive manner.

Id. The standard expressed in Governor Lingle's Statement of Objections is not the established strict scrutiny standard applied in Hawai'i Free Exercise Claims. *See infra* Part III.C.1 for discussion.

D. Effect of the Bill

The pending legislation provides a standard of care for all hospitals that treat sexual assault victims.[48] According to the bill, the hospital would be required to:

> (1) provide each sexual assault survivor with medically and factually accurate written and oral information about emergency contraception;
> (2) orally inform each sexual assault survivor of her option to receive emergency contraception at the hospital; and
> (3) provide emergency contraception immediately at the hospital to each sexual assault survivor who requests it, unless it is medically contra-indicated, as the survivor is pregnant . . . .[49]

The cost of emergency contraception dispensed will be repaid to the hospitals by the Department of Health ("DOH").[50] The DOH is required to investigate all complaints and periodically to determine whether the hospital is

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[48] *See* H.B. 189, 2003 Leg., 22nd Sess. (Haw. 2004). The Emergency Contraception Bill states that, "the standards of emergency care, established by the American Medical Association ("AMA"), require that female victims of sexual assault be counseled about the risk of pregnancy and offered emergency contraception." *Id.* The AMA's Policy is:

> (1) that physicians and other health care professionals should be encouraged to play a more active role in providing education about emergency contraception, including access and informed consent issues, by discussing it as part of routine family planning and contraceptive counseling; (2) to *enhance efforts* to expand access to emergency contraception, including making emergency contraception pills *more readily available through hospitals, clinics, emergency rooms*, acute care centers and physicians' offices; (3) *to recognize that information about emergency contraception is part of the comprehensive information to be provided as part of the emergency treatment of sexual assault victims*; [and] (4) *to support educational programs for physicians and patients regarding treatment options for the emergency treatment of sexual assault victims, including information about emergency contraception.*

American Medical Association, *Policy Finder: H-75.985 Access to Emergency Contraception*, (emphases added) (citations omitted) *available at* http://www.ama-assn.org/ama/noindex/category/11760.html (last visited Nov. 29, 2004).

Although the AMA's policy is to enhance the access to emergency contraception in emergency rooms, the policy specifically pertaining to *sexual assault victims* is only to ensure that comprehensive information is disseminated and educational treatment programs for physicians are supported.

[49] H.B. 189, 2003 Leg., 22nd Sess. (Haw. 2004).

[50] *Id.* Each hospital will bill the State DOH for each emergency contraception pill disseminated. Emergency contraception will be provided irregardless of whether the patient has medical insurance.

in compliance.[51] If the hospital is in violation, it is required to pay a fine of up to $1,000.[52] After two violations, all state funding could be terminated.[53]

The bill will change the hospitals' current practice, which is to refer sex assault victims to the SATC, and require that the hospital not only inform the victim of the option of emergency contraception, but also to provide emergency contraception if requested. The emergency contraception bill targets two groups of rape victims. The first group includes victims who walk into a hospital's emergency room on their own.[54] The concern is that it will be too great a burden to require a victim who has already transported herself to the hospital emergency room to transport herself to the SATC thereafter.[55] Another concern arises if the victim enters the emergency room during the last hours of the pill's effectiveness.[56] If the victim were denied emergency contraception at a hospital, the pill might no longer be effective if she had to travel elsewhere to receive it.[57]

The second target group consists of those victims who are picked up by an ambulance but who do not reveal, or are not able to reveal that they have been sexually assaulted.[58] In these cases, the physician treating the victim for injuries may determine that the victim was sexually assaulted.[59] Depending on the physical state of the victim, it might not be possible to transport her to another hospital or to the SATC for emergency contraception treatment.[60]

The major concern raised against this bill is the effect it would have on religious hospitals in Hawai'i. Two Catholic hospitals in Hawai'i are vigorously fighting against it because they believe that emergency contraception may cause abortion.[61] Saint Francis Medical Center, one of the Catholic hospitals,

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[51] *Id.* A hospital found not in compliance will be provided an opportunity to correct its action. However, if the hospital determines that noncompliance is continuing, the DOH may impose penalties. *Id.*

[52] *Id.* A fine of up to $1,000 may be imposed per "sexual assault survivor who is denied medically and factually accurate information about emergency contraception or who is not offered or provided emergency contraception." *Id.*

[53] *Id.* Statistical information relating to the times and dates of the violations will be provided to the agency that determines the issuance of state funding. *Id.* That agency will terminate all state funds to that hospital. *Id.*

[54] Interview Amaral, *supra* note 42.

[55] Adriana Ramelli and Annelle Amaral reasoned that victims are in a state of trauma, and it is thought to be unfair to put more burdens on them. Interview Ramelli, *supra* note 26; Interview Amaral, *supra* note 42.

[56] Interview Ramelli, *supra* note 26; Interview Amaral, *supra* note 42.

[57] Interview Ramelli, *supra* note 26; Interview Amaral, *supra* note 42.

[58] Interview Ramelli, *supra* note 26; Interview Amaral, *supra* note 42.

[59] Interview Ramelli, *supra* note 26; Interview Amaral, *supra* note 42.

[60] Interview Ramelli, *supra* note 26; Interview Amaral, *supra* note 42.

[61] Interview Yoshimitsu, *supra* note 33. According to the Catholic Religion, abortion is not allowed, and it is believed that the effect of emergency contraception may cause abortion. *Id.*

currently does not provide contraception or any services for abortion.[62] Proponents, on the other hand, do not consider the effects of the pill to be abortificient.[63] In an attempt to compromise with the proponents of the bill, the Catholic hospitals have agreed to inform victims of emergency contraception as an option, and upon the request of the victim, the hospital will transport the victim to a facility that provides emergency contraception.[64]

1. When does human life begin?

When does human life begin? There are many views as to when life as a person begins, whether it is upon conception, quickening, viability, birth, a year after birth, or after physical maturity.[65] Many religious groups consider life to commence at conception.[66] Others believe that life begins after conception and upon implantation into the womb.[67] For purposes of emergency contraception, determining when life begins is important because it defines

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See U.S. CONFERENCE OF CATHOLIC BISHOPS, INC., *Ethical Religious Directives for Catholic Health Care Services*, at Part Four (4th ed. 2001) *available at* http://www.nccbuscc.org/bishops/directives.htm [hereinafter *Ethical Religious Directives*] (last visited Nov. 29, 2004) (defining abortion in Directive 45). Directive 45 states that:

> Abortion (that is, the directly intended termination of pregnancy before viability or the directly intended destruction of a viable fetus) is never permitted. Every procedure whose sole immediate effect is the termination of pregnancy before viability is an abortion, which, in its moral context, *includes the interval between conception and implantation of the embryo*. Catholic health care institutions are not to provide abortion services, even based upon the principle of material cooperation. In this context, Catholic health care institutions need to be concerned about the danger of scandal in any association with abortion providers.

Id. (emphasis added).

[62] Interview Yoshimitsu, *supra* note 33 (recognizing that natural family planning is taught at St. Francis Medical Center instead of providing contraception or abortion services).

[63] *See* Aileen Pincus, *FDA Panel endorses 'morning after' pill*, CNN website, posted June 29, 1996 at 12:25 a.m., *at* http://www.cnn.com/HEALTH/9606/29/nfm/contraception/index.html (quoting the FDA spokeswoman Mary Pendergast) (last visited Nov. 29, 2004).

[64] Interview Yoshimitsu, *supra* note 33.

[65] *See* BARRY R. FURROW ET AL., BIOETHICS: HEALTH CARE LAW AND ETHICS 37 (4th ed. 2001). "Quickening" occurs when "[t]he first motion [of the fetus is] felt in the womb by the mother [and] occur[s] near the middle of the pregnancy." BLACK'S LAW DICTIONARY 1009 (7th ed. 2000). "Viability" is when a fetus is capable of living outside the mother's womb. BLACK'S LAW DICTIONARY 1265 (7th ed. 2000).

[66] *See* FURROW, *supra* note 65, at 38; *Ethical Religious Directives*, *supra* note 61 (quoting Pope John Paul II, *Address of October 29, 1983, to the 35th General Assembly of the World Medical Association*, ACTA APOSTOLICAE SEDIS 76 (1984): 390) (stating that "Catholic health care ministry witnesses to the sanctity of life 'from the moment of conception until death'").

[67] *See* Pincus, *supra* note 63 (suggesting that pregnancy occurs after implantation).

when pregnancy and abortion takes place, which is the underlying issue of the current controversy.

When does pregnancy begin? The traditional understanding of pregnancy, as defined in Stedman's Medical Dictionary, is "the condition of a female after conception until the birth of the baby."[68] Conception is understood as "fertilization of the ovum by the spermatozoon."[69] Catholics believe that pregnancy commences upon conception or fertilization.[70]

When does abortion take place? Black's Law Dictionary defines abortion as an "artificially induced expulsion of an embryo or fetus."[71] Dorland's Medical Dictionary defines abortion as "the premature expulsion from the uterus of the products of conception."[72] According to FDA spokeswoman Mary Pendergast, "[t]he scientific and medical definition of abortion is after implantation."[73] In contrast, according to the Ethical and Religious Directives for Catholic Health Care Services, abortion occurs when there is a direct intention to terminate pregnancy before viability, including "the interval between conception and implantation of the embryo."[74] As shown above, there are different beliefs on when life begins as well as when abortion takes place. That is why the controversy over emergency contraception is so heated, especially as it pertains to the Catholic Church.

Proponents of the bill consider emergency contraception to be purely preventative because they view pregnancy as beginning upon implantation. The Emergency Contraception's inhibiting effect on implantation is therefore viewed as contraception rather than abortion. According to FDA spokeswoman, Mary Pendergast, "[t]hese birth control pills are used to prevent pregnancy, not to stop it. This is not abortion."[75]

Catholics tend to have a very different view. They believe that life begins at conception, which is upon fertilization.[76] The effect of the pill inhibiting

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[68] *See* Nathan Hoeldtke, M.D., *Letters to the Editor, Know the Facts About 'Morning After Pill'*, HONOLULU ADVERTISER, July 29, 2002, *available at* http://the.honoluluadvertiser.com/article/2002/Jul/29/op/op04a.html (quoting the Stedman's Medical Dictionary) (last visited Nov. 29, 2004).

[69] *Id.*

[70] *See Ethical Religious Directives supra* note 61.

[71] BLACK'S LAW DICTIONARY 4 (7th ed. 2000).

[72] *See* Hoeldtke, *supra* note 68.

[73] *See* Pincus, *supra* note 63.

[74] *See Ethical Religious Directives*, *supra* note 61 (quoting Directive 45).

[75] *See* Pincus, *supra* note 63.

[76] *See Ethical Religious Directives supra* note 61; *see also* FURROW, *supra* note 65, at 41 (stating "Nevertheless, 'fertilization' continues to be the cry of many religious bodies and indeed also of the august World Medical Association, who, in 1949, adopted the Geneva Convention Code of Medical Ethics, which contains the clause: 'I will maintain the utmost respect for human life from the time of conception'").

implantation is viewed as abortion, which goes against Catholic beliefs.[77] Thus, Catholic hospitals oppose the emergency contraception bill because the law would require the Catholic hospitals to perform abortions, which is against their religious beliefs.

2. Catholic exception for emergency contraception to rape victims

Interestingly, Catholic Hospitals make an exception for the use of emergency contraception in cases of sexual assault. According to the Ethical and Religious Directives for Catholic Health Care Services, "[s]ince the sperm in the case of rape is the result of unjust aggression, *steps may be taken to prevent conception.*"[78] However, this exception allows for the use of emergency contraception in the case of a rape only if appropriate testing has been completed to ascertain that no conception has occurred.[79] It is clearly specified that treatment that has an effect of removal, destruction, or interference with the implantation of a fertilized ovum, or abortion, is prohibited.[80]

The problem with complying with this directive and administering emergency contraception is that there is no test to determine whether a woman's egg has or has not been fertilized;[81] there is only a test to determine whether or not a woman has ovulated.[82] Therefore, in order for a Catholic hospital to be able to administer emergency contraception, a pregnancy test must first be taken, then a test to determine if the woman ovulated.[83] Only if the woman

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[77] *See Ethical Religious Directives, supra* note 61 (quoting Directive 45).

[78] *See id.* at Part Three (providing an exception for rape victims in Directive 36) (emphasis added). Directive 36 states:

> Compassionate and understanding care should be given to a person who is the victim of sexual assault. Health care providers should cooperate with law enforcement officials and offer the person psychological and spiritual support as well as accurate medical information. A female who has been raped should be able to defend herself against a potential conception from the sexual assault. *If, after appropriate testing, there is no evidence that conception has occurred already, she may be treated with medications that would prevent ovulation, sperm capacitation, or fertilization.* It is *not permissible, however, to initiate or to recommend treatments that have as their purpose or direct effect the removal, destruction, or interference with the implantation of a fertilized ovum.*

Id. (emphases added).

Furthermore, "[i]t is recommended that a sexually assaulted woman be advised of the ethical restrictions that prevent Catholic hospitals from using abortificient procedures." *Id.* at n.19 (citing Pennsylvania Catholic Conference, *Guidelines for Catholic Hospitals Treating Victims of Sexual Assault*, 22 ORIGINS 810 (1993)).

[79] *Id.*

[80] *Id.*

[81] Interview Yoshimitsu, *supra* note 33.

[82] *Id.*

[83] *Id.*

has not ovulated can the hospital administer the pill.[84] If she has ovulated, the hospital will not distribute emergency contraception on the chance that fertilization occurred.[85] At any point that there is uncertainty as to whether fertilization occurred, the Catholic philosophy is to err on the side of life.[86]

Proponents of the bill use the rape exception in the Catholic Religious Directives as a key part of their main argument to try to convince legislators that this exception allows the church to dispense emergency contraception.[87] Furthermore, proponents indicate that over two hundred Catholic Hospitals in the United States already provide emergency contraception to rape victims, despite the above religious directive.[88]

E. Other Laws Promoting the Availability and Accessibility of Emergency Contraception

There are three major ways in which states have been trying to make emergency contraception more available: (1) as discussed above, some states have legislation or are considering legislation similar to the proposed statute in

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[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*; *see also* H.B. 189, 2003 Leg., 22nd Sess. (Haw. 2004) (quoting the Catholic Directives rape exception in order to support the provision of emergency contraception in the religious hospitals).

[88] *See* CATHOLICS FOR A FREE CHOICE, SECOND CHANCE DENIED: EMERGENCY CONTRACEPTION IN CATHOLIC HOSPITAL EMERGENCY ROOMS 19 T.2 (2002), *available at* http://www.cath4choice.org/PDF/EC Study.pdf [hereinafter *Second Chance Denied*] (last visited Nov. 29, 2004). Catholics for a Free Choice ("CFFC") conducted a survey to determine the availability of emergency contraception among 597 Catholic Hospitals in the United States. *Id.* The hospitals were called and the survey results were as follows: 328 hospitals would not dispense emergency contraception under any circumstances; 67 hospitals were unsure or confused whether they provided emergency contraception; 30 hospitals would provide emergency contraception upon request; and 33 hospitals leave it to the discretion of the emergency room doctor who would treat the patient; 3 hospitals provide to patients as long as they are not pregnant; and 136 hospitals report that they dispense emergency contraception only to rape survivors (of those 16 provide only for rape; 77 provide only if the victim is not pregnant; 40 provide because they do not know about the pregnancy requirement; and 3 provide only for rape when the rape is reported to the police). *Id.* Walter Yoshimitsu questions the accuracy of the study done by CFFC, which indicated that over 200 Catholic hospitals are providing emergency contraception. His concern is that because CFFC is an organization biased toward the freedom to choose, the study may not be accurate. Interview Yoshimitsu, *supra* note 33. CFFC is an independent not-for-profit organization, engaged in research, policy analysis, education, and advocacy on issues of gender equality and reproductive health. "CFFC shapes and advances sexual and reproductive ethics that are based on justice, reflect a commitment to women's well being, and respect and affirm the moral capacity of women and men to make sound decisions about their lives." *Second Chance Denied*, *supra* (summarizing the purpose of CFFC).

Hawai'i, requiring hospitals to provide emergency contraception on site to rape victims who request it;[89] (2) some states are enacting laws that allow pharmacists to provide emergency contraception without a prescription;[90] and (3) some states are trying to pass laws that will educate the public and teenagers about emergency contraception.[91]

1. Laws allowing pharmacists to dispense emergency contraception

Over the past few years, several states have passed laws allowing pharmacists to furnish emergency contraception.[92] Many other states have pending legislation that would allow pharmacists to dispense emergency contraception.[93] These bills do not require all pharmacies to provide emergency contraception or require them to dispense it. Rather, they give the owners of the pharmacy the choice as to whether or not they want to provide it.[94]

Despite the non-mandatory provisions with emergency contraception distribution through pharmacies, some pharmacy employers who chose to supply emergency contraception have penalized their employees or individual phar-

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[89] *See, e.g.*, H.B. 189, 2003 Leg., 22nd Sess. (Haw. 2004); S.F. 270, 83rd Leg., Reg. Sess. (Minn. 2003); S.B. 378, 2003 Leg., 226th Sess. (N.Y. 2004); S.B. 544, 96th Leg., Reg. Sess. (Wis. 2003-2004).

[90] *See, e.g.*, CAL. BUS. & PROF. CODE § 4052(a)(8)(A) (West 2002); HAW. REV. STAT. ANN. § 461-1 (Michie Supp. 2003); *see also* Fred Gebhart, *Drug Topics: Emergency contraception expanding in pharmacies*, (May 19, 2003), *at* http://www.drugtopics.com/drugtopics/article/articleDetail.jsp?id=115439 (last visited Nov. 29, 2004) (stating that programs which allow pharmacists to dispense emergency contraception are also established in Alaska, New Mexico and Washington). Some states have pending bills proposing that pharmacists be allowed to dispense emergency contraception. *See, e.g.*, H.B. 6577, 93rd Gen. Assem. (Ill. 2003); S.B. 247, 418th Gen. Assem., Reg. Sess. (Md. 2004); S.B. 484, 158th Sess. of the General Court, First Year (N.H. 2003); S.B. 1339, 78th Leg. Sess. (Tex. 2003); H.B. 2782, 2001 Sess. (Va. 2000); H.B. 552, 2003-2004 Biennium, Adjourned Sess. (Vt. 2003).

[91] *See, e.g.*, H.B. 4794, 92nd Leg., 1st Reg. Sess. (Mich. 2003); H.B. 315, 46th Leg., 1st Reg. Sess. (N.M. 2003); H.B. 2908, 79th Leg. (W. Va. 2004); *see also* H.R. 1812, 108th Cong. (2003).

[92] *See, e.g.*, CAL. BUS. & PROF. CODE § 4052(a)(8)(A) (West 2002); HAW. REV. STAT. ANN. § 461-1 (Michie Supp. 2003); *see also* Gebhart, *supra* note 90.

[93] *See, e.g.*, H.B. 6577, 93rd Gen. Assem. (Ill. 2003); S.B. 247, 418th Gen. Assem., Reg. Sess. (Md. 2004); S.B. 484, 158th Sess. of the General Court, First Year (N.H. 2003); S.B. 1339, 78th Leg. Sess. (Tex. 2003); H.B. 2782, 2001 Sess. (Va. 2000); H.B. 552, 2003-2004 Biennium, Adjourned Sess. (Vt. 2003).

[94] *See, e.g.*, CAL. BUS. & PROF. CODE § 4052(a)(8)(A) (West 2002); HAW. REV. STAT. ANN. § 461-1 (Michie Supp. 2003); *see also* Gebhart, *supra* note 90. California requires that a pharmacist dispense emergency contraception only under California protocol developed by the Medical Board of California. CAL. BUS. & PROF. CODE § 4052(a)(8) (2002). A fact sheet must accompany the emergency contraception, and pharmacist must undergo training to dispense emergency contraception. *Id.*

macists for refusing to distribute the morning after pill.[95] There have been two lawsuits against employers who terminated the employment of their employees for refusing to commit to dispensing emergency contraception. In 2002, a United States district court jury in Riverside, California, found Riverside County in violation of a nurse's constitutional rights after she was terminated for refusing to sign a document requiring her to dispense medication designed to end pregnancies.[96] Another lawsuit, on its way to trial, was filed against K-Mart in Ohio, on behalf of a pharmacist who was fired for refusing to sign an agreement to dispense the morning after pill.[97]

2. Laws educating the public and teens about emergency contraception

Each year, half of all pregnancies in the United States are unintended.[98] It is estimated that fifty percent of those unintended pregnancies end in abortion.[99] According to the Alan Guttmacher Institute, approximately 51,000 abortions were prevented by the use of emergency contraception in 2000.[100] Increased use of emergency contraception accounted for up to forty-three percent of the total decline in abortion rates between 1994 and 2000.[101] Despite the decline in the number of abortions over the years, most women still do not know what emergency contraception is and are unaware of its

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[95] *See generally* Press Release, American Center for Law & Justice, ACLJ Wins Religious Discrimination Case Over "Morning-After Pill" (May 29, 2002), *available at* http://www.acljlife.org/news/abortion/020529_aclj_wins_morning_after_suit.asp [hereinafter ACLJ Wins] (last visited Nov. 29, 2004); Press Release, American Center for Law & Justice, ACLJ Gets Legal Victory as Lawsuit Against Kmart Involving Abortion Producing Drugs Moves Forward (Jan. 24, 2001), *available at* http://www.acljlife.org/news/ nr_010124babortiondrugs.asp [hereinafter ACLJ Gets Legal Victory] (last visited Nov. 29, 2004). American Center for Law & Justice ("ACLJ") is a non-profit public interest law firm dedicated to defending the religious and civil liberties of Americans. *See* American Center for Law & Justice, *ACLJ Mission*, *available at* http://www.aclj.org/about/ (last visited Nov. 29, 2004).

[96] The district court jury of Riverside California ruled that Riverside County violated a nurse's constitutional rights when it terminated her employment for refusing to distribute the morning-after pill. *See* ACLJ Wins, *supra* note 95.

[97] *See* ACLJ Gets Legal Victory, *supra* note 95; *see also* Press Release, American Center for Law & Justice, ACLJ Not Deterred by Entry of Planned Parenthood into Lawsuit Against Kmart Involving Abortion Producing Drugs (Oct. 11, 2001), *available at* http://www.acljlife.org/news/pr_011111_kmart_planned_parenthood.asp (last visited Nov. 29, 2004).

[98] *See* H.R. 1812, 108th Cong. (2003) (quoting statistics in bill); *see also* H.B. 4794, 92nd Leg., 1st Reg. Sess. (Mich. 2003); H.B. 315, 46th Leg., 1st Reg. Sess. (N.M. 2003); H.B. 2908, 79th Leg. (W. Va. 2004).

[99] *See* H.R. 1812, 108th Cong. (2003) (quoting statistics in bill); *see also* H.B. 4794, 92nd Leg., 1st Reg. Sess. (Mich. 2003); H.B. 315, 46th Leg., 1st Reg. Sess. (N.M. 2003); H.B. 2908, 79th Leg. (W. Va. 2004).

[100] *See* H.R. 1812, 108th Cong. (2003).

[101] *Id.*

effects.[102] An estimated fifty percent of unintended pregnancies could have been avoided if women were aware of emergency contraception.[103] In order to minimize the number of unwanted pregnancies and ultimately the number of abortions, state legislatures and Congress made attempts to pass legislation that would provide education to the public about emergency contraception.[104]

California is the only state that has a mandatory provision requiring educators to inform seventh graders of emergency contraception options and safety.[105] Within the past few years, however, Congress and some additional states have considered bills to promote education regarding emergency contraception.[106] Such legislation would require the public health department to develop and disseminate clear and comprehensible information on emergency contraception.[107] The various bills generally included information on: (1) the description of emergency contraception; (2) the effect of emergency contraception; (3) how emergency contraception can be obtained; and (4) whether funding for it can be obtained.[108] Most states require the information in a form for distribution,[109] and others additionally require advertisements on television and radio.[110]

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[102] *See* H.R. 1812, 108th Cong. (2003) (quoting statistics in bill); *see also* H.B. 4794, 92nd Leg., 1st Reg. Sess. (Mich. 2003); H.B. 315, 46th Leg., 1st Reg. Sess. (N.M. 2003); H.B. 2908, 79th Leg. (W. Va. 2004).

[103] H.R. 1812, 108th Cong. (2003) (quoting statistics in bill); *see also* H.B. 4794, 92nd Leg., 1st Reg. Sess. (Mich. 2003); H.B. 315, 46th Leg., 1st Reg. Sess. (N.M. 2003); H.B. 2908, 79th Leg. (W. Va. 2004).

[104] *See* H.R. 1812, 108th Cong. (2003) (quoting statistics in bill); *see also* H.B. 4794, 92nd Leg., 1st Reg. Sess. (Mich. 2003); H.B. 315, 46th Leg., 1st Reg. Sess. (N.M. 2003); H.B. 2908, 79th Leg. (W. Va. 2004).

[105] *See* CAL. EDUC. CODE § 51933(b)(10)(West 2002) (stating that "[c]ommencing in grade 7, instruction and materials shall provide information about the effectiveness and safety of all FDA-approved contraceptive methods in preventing pregnancy, including, but not limited to, emergency contraception").

[106] *See, e.g.*, H.R. 1812, 108th Cong. (2003); H.B. 4794, 92nd Leg., 1st Reg. Sess. (Mich. 2003); H.B. 315, 46th Leg., 1st Reg. Sess. (N.M. 2003); H.B. 2908, 79th Leg. (W. Va. 2004).

[107] H.R. 1812, 108th Cong. (2003); H.B. 4794, 92nd Leg., 1st Reg. Sess. (Mich. 2003); H.B. 315, 46th Leg., 1st Reg. Sess. (N.M. 2003); H.B. 2908, 79th Leg. (W. Va. 2004).

[108] *See* H.R. 1812, 108th Cong. (2003); H.B. 4794, 92nd Leg., 1st Reg. Sess. (Mich. 2003); H.B. 315, 46th Leg., 1st Reg. Sess. (N.M. 2003); H.B. 2908, 79th Leg. (W. Va. 2004).

[109] *See* H.R. 1812, 108th Cong. (2003); H.B. 4794, 92nd Leg., 1st Reg. Sess. (Mich. 2003); H.B. 315, 46th Leg., 1st Reg. Sess. (N.M. 2003); H.B. 2908, 79th Leg. (W. Va. 2004).

[110] *See, e.g.*, H.B. 315, 46th Leg., 1st Reg. Sess. (N.M. 2003); H.B. 2908, 79th Leg. (W. Va. 2004).

III. ANALYSIS

Entangled in the emergency contraception debate are legal arguments in support of and against both the religious hospitals and rape victims. A rape victim's claims may be based on the right to privacy and autonomy, and the Establishment Clause of the United States Constitution. On the other hand, a religious hospital may be protected by conscience clauses and the Free Exercise Clause of the United States Constitution. Both parties also have compelling policy arguments to support their beliefs.

A. The Right to Privacy and Autonomy

The right to privacy is an element of the "liberty" afforded by the Fourteenth Amendment of the United States Constitution.[111] The right to privacy is not explicit in the Constitution, but is found in the penumbra of the Bill of Rights that create zones of privacy.[112] When a privacy right is violated by any regulation or any state actor, the strict scrutiny standard is applied, which requires a determination of whether the regulation is justified by a compelling state interest and is administered in the least drastic alternative.[113]

What exactly does the right to privacy protect? The Supreme Court extended the right to privacy to such areas as child rearing and education;[114] procreation;[115] family relationships;[116] marriage;[117] contraception for married couples[118] and for unmarried individuals;[119] sexual relations;[120] and the right

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[111] The Fourteenth Amendment of the United States Constitution states, in relevant part: "[no state shall] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[112] Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965).

[113] *See id.* at 503-04 (quoting Skinner v. Oklahoma, 316 U.S. 535, 541 (1942)); Shelton v. Tucker, 364 U.S. 479, 488 (1960); Bates v. City of Little Rock, 361 U.S. 516, 524 (1960)).

[114] *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (holding that the legislation requiring children aged 8 to 16 years old to attend public schools, interfered with parental rights); Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that children had a right to receive teaching in languages other than their native tongue).

[115] *See, e.g.*, *Skinner*, 316 U.S. 535 (concluding that a law that mandates the sterilization of criminals violates the privacy right of procreation).

[116] *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (recognizing that there is a "private realm of family life which the state cannot enter").

[117] *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (stating that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival" in a case where a couple was indicted on charges of violating the state's ban on interracial marriages).

[118] *See, e.g.*, *Griswold*, 381 U.S. at 485 (citation omitted) (finding that a law prohibiting contraception for married couples violated the couples' privacy rights. The Court stated, "such a law cannot stand in light of the familiar principle . . . that a 'governmental purpose to control

to refuse medical treatment.[121] It also includes a woman's decision as to whether or not to terminate her pregnancy.[122] A rape victim could claim that she has a fundamentally protected right to privacy, which includes the right to receive emergency contraception. Despite a woman's right to obtain emergency contraception,[123] however, the right to privacy does not require all doctors, hospitals, and physicians to provide emergency contraception to a patient.

Hawai'i's Constitution, unlike the United States Constitution, specifically includes the right to privacy.[124] It protects the fundamental rights rooted in the traditions and collective conscience of the people and "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if sacrificed."[125] Privacy rights include the freedom of an individual to "tell the world to 'mind [its] own business[,]' . . . 'the right to be left alone,' . . . [and] the 'right to control certain highly personal and intimate affairs of his own life.'"[126] The privacy clause in Hawai'i was added mainly for two purposes: (1) to protect against "possible abuses in the use of highly personal and intimate information in the hands of government or private parties" and (2) "to

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or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'").

[119] *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (deciding that the privacy right of a non-married woman was violated by a law prohibiting contraception. The Court held that "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

[120] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 560 (2003) (holding that a state law making it a crime for two persons of the same-sex to engage in certain intimate sexual conduct "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual").

[121] *See, e.g.*, Cruzan v. Dir., Missouri Dept. of Health, 497 U.S. 261 (1990) (finding that a patient has a privacy right to terminate medical treatment).

[122] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 154 (1973) (concluding that a criminal statute prohibiting abortion except in lifesaving circumstances violated the right to privacy. The Court stated that "the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.").

[123] *See, e.g.*, *Griswold*, 381 U.S. 479; *Eisenstadt*, 405 U.S. 438.

[124] *See* HAW. CONST. art. I, § 6 (1978) (stating that "[t]he right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest").

[125] State v. Mallan, 86 Hawai'i 440, 444, 950 P.2d 178, 182 (1998) (citing Baehr v. Lewin, 74 Haw. 530, 556-57, 852 P.2d 44, 57 (1993)) (discussing the *Mueller/Baehr* approach in rejecting claims that certain acts are protected by the right to privacy).

[126] State v. Mueller, 66 Haw. 616, 624-25, 671 P.2d 1351, 1357 (1983) (internal citations omitted).

ensure freedom of choice 'in certain highly personal and intimate matters [such as those relating to birth control and abortion].'"[127]

State v. Kam[128] stated that the Hawai'i Constitution "affords much greater privacy rights" than does the United States Constitution.[129] For that reason, a rape victim in Hawai'i could argue that Hawai'i's right to privacy, protects not only her choice to receive emergency contraception, but also provides a constitutional basis for the requirement that the hospital provide the emergency contraception to her. Hawai'i's right to privacy however, has been found to be violated in only one case.[130] The extent of protection afforded by Hawai'i's privacy clause is therefore questionable. For example, other cases have held that the right to privacy does not extend to the possession of marijuana,[131] smoking marijuana in a personal automobile,[132] prostitution in a private apartment,[133] or same-sex marriages.[134]

Invoking the right to privacy against a private institution has further limitations. The private entity must be considered a state actor or quasi-public actor before an individual can claim her right to privacy against it.[135] A private hospital may be deemed a state actor if, "[the state] has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must be deemed that of the State."[136] Stated otherwise, "there

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[127] Scope of Permissible Disclosure of Executive Session Deliberations and Decision on the Appointment of the Superintendent of Education, Haw. Op. Att'y Gen. 94-01 (1994) (discussing the constitutional history of HAW. CONST. art. I, § 6) *available at* http://www.hawaii.gov/ag/opinions_formal_letters/94-1.htm (last visited Nov. 29, 2004).

[128] 69 Haw. 483, 748 P.2d 372 (1988).

[129] *Id.* at 491, 748 P.2d at 377.

[130] *See id.* at 495, 748 P.2d at 380 (holding that "unless the State can point to a compelling government interest, the right to privacy is infringed upon by the prohibition against the sale of sexually explicit adult material. Since a person has the right to view pornographic items at home, there necessarily follows a correlative right to purchase such materials for this personal use, or the underlying privacy right becomes meaningless.").

[131] *See, e.g.*, State v. Renfro, 56 Haw. 501, 542 P.2d 366 (1975).

[132] *See, e.g.*, State v. Mallan, 86 Hawai'i. 440, 950 P.2d 178 (1998).

[133] *See, e.g.*, State v. Mueller, 66 Haw. 616, 671 P.2d 1351 (1983) (holding that the Constitution does not protect a woman's right to engage in sex for money in her own home. The court focused on the act itself rather than the privacy of the home, which was focused on in *Kam*).

Contrary to *Mueller*, the court in *Kam* focused on the home and determined that the right to privacy extends to what one does in his/her home. *See Kam*, 69 Haw. at 495, 748 P.2d at 380. The court in *Mueller* focused on the act itself (prostitution), holding that prostitution is not a fundamental right protected by the right to privacy, even though the act was done in the privacy of one's home. *See Mueller*, 66 Hawai'i at 618, 671 P.2d at 1353-54.

[134] *See, e.g.*, Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993).

[135] *See* Estes v. Kapi'olani Women's and Children's Med. Ctr., 71 Haw. 190, 193, 787 P.2d 216, 219 (1990).

[136] *Id.* at 193, 787 P.2d at 219 (quoting Blum v. Yaretsky, 457 U.S. 991, 1004-05 (1982)).

must be a sufficiently close nexus between the State and the challenged action so that the action of the private entity may be fairly treated as that of the State itself."[137] In showing a significant nexus between the state and the challenged action, the court will look to the degree of direction, encouragement, and State support for the private hospital.[138] The mere fact that a private entity receives funding from the government does not mean the entity is a state actor.[139]

The courts also recognize another classification in which a hospital may fall between private and public, termed quasi-public.[140] A quasi-public hospital is found if, "what would otherwise be a truly private hospital was constructed with public funds, is presently receiving public benefits or has been sufficiently incorporated into a governmental plan for providing hospital facilities to the public."[141] In essence, "a private nonprofit hospital, which receives part of its funds from public sources and through public solicitations, which receives tax benefits because of its nonprofit and nonprivate aspects and which constitutes a virtual monopoly in the area in which it function[s]," may be deemed a quasi-public entity, subject to the right to privacy.[142]

The Catholic Hospitals in Hawai'i are private institutions. They are nonprofit and receive state and federal funding through the Medicare and Medicaid programs. This alone does not render the hospitals state actors subject to the right to privacy. There are two Catholic hospitals in Hawai'i, Saint Francis–Honolulu and Saint Francis–West, one of which may be seen as a quasi-public entity due to its remote location.[143] Saint Francis–West is approximately thirty minutes away from another hospital. Therefore, the courts could consider Saint Francis–West a quasi-public hospital, which would then implicate a victim's right to privacy.

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[137] *Id.* (citing *Blum*, 457 U.S. at 1004; Jackson v. Metro. Edison Co., 419 U.S. 345, 350-51 (1974)).

[138] *Id.*

[139] *See id.* at 194, 787 P.2d at 219 (holding that the appellants did not meet their burden in showing that the hospital was a state actor despite public funding); *see also* Rendell-Baker v. Kohn, 457 U.S. 830, 840 (1982) (school not a state actor even though it received funding from the state).

[140] *See* Silver v. Castle Mem'l Hosp., 53 Haw. 475, 481-82, 497 P.2d 564, 569-70 (1972).

[141] *Id.*

[142] *Id.* at 482, 497 P.2d at 570.

[143] Saint Francis–Honolulu does not dominate the community in which it stands. There is a hospital (Kuakini Hospital) about one mile down the road. The hospital that may be found quasi-public, is the Saint Francis–West hospital. Saint Francis–West is the only hospital in that part of the island. The nearest hospital is approximately 13 miles away and a drive of 30 minutes. It is arguable whether Saint Francis–West virtually monopolizes the area in which it functions. If so, it would be considered a quasi-public entity, subject to the right to privacy.

In Hawai'i, when there is nominal government involvement with a private institution, another test may be applied to determine state action.[144] In *Silver v. Castle Memorial Hospital*,[145] the Hawai'i Supreme Court applied a balancing test—the balancing of personal autonomy versus the state interest.[146] With regard to emergency contraception, the hospital's interest is to maintain its religious autonomy, and the public's interest is to serve rape victims with compassion and care. Under the balancing test, the standard of finding state action is more flexible. If the rape victim can show that her burden of being denied emergency contraception is much greater than the protection of religious autonomy, state action will more likely be found.

B. Conscience Clauses

Healthcare providers are protected by what are known as conscience clauses. A conscience clause allows any individual or institution to refuse to perform a particular medical service due to religious or moral beliefs.[147] Conscience clauses were created in response to a preliminary injunction issued in *Taylor v. Saint Vincent's Hospital*[148] and the legalization of abortion in *Roe v. Wade*.[149] In *Taylor*, the Ninth Circuit enjoined a Catholic hospital from refusing to allow a sterilization procedure to occur in its facility. Mrs. Taylor planned to deliver and wanted to have a sterilization procedure immediately after the delivery. Saint Vincent's Hospital refused to perform

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[144] *See Silver*, 53 Haw. at 483-84, 497 P.2d at 571-72 (applying a balancing test in favor of the doctor claiming his constitutional right of procedural due process, versus a hospitals interest in preserving its autonomy and in maintaining quality control in its medical staff).

[145] 53 Haw. 475, 497 P.2d 564.

[146] *Id.* at 484, 497 P.2d at 571.

[147] The Protection of Conscience Project, *Preserving Freedom of Choice-for Everyone*, *at* http://www.consciencelaws.org (last visited Nov. 29, 2004). The Protection of Conscience Project "is a non-denominational, non-profit initiative supported by a project team and advisory board." The Protection of Conscience Project, *Who Are We?*, *at* http://www.consciencelaws.org/Contact-Conscience-Project/Conscience-Team-Advisors-01.html (last visited Nov. 29, 2004).

> The Project operates a website in order to advocate for protection of conscience legislation; facilitate communication and co-operation among protection of conscience advocates; provide legislative draftsmen with useful information; promote clarification and understanding of the issues involved to assist in reasoned public discussion; [and] act as a clearing house for reports from people who have been discriminated against for reasons of conscience, directing them to legal assistance and other support when possible.

Id.

[148] 523 F.2d 75, 76 (9th Cir. 1975). A preliminary injunction to enjoin the private hospital to perform a sterilization procedure was issued in *Taylor* by the United States District Court for the District of Montana in 1972.

[149] 410 U.S. 113 (1973).

the sterilization procedure. The United States District Court for the District of Montana enjoined the hospital from refusing to perform the surgery despite its moral objections.[150] Congress enacted the Church Amendment, also known as a conscience clause, to protect those who received federal funds from being obliged to perform abortions or sterilization procedures in conflict with their religious or moral beliefs.[151] Many states thereafter enacted their own conscience clauses.

A few states have broad conscience clauses, which give protection to health care providers regarding all/any health care services.[152] Other states provide protection for a specified combination of services, such as abortion, sterilization, and artificial insemination.[153] An additional thirty-five states provide protection only for abortions.[154] Other states provide no protection at

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[150] *See Taylor*, 523 F.2d at 76.

[151] *See* 42 U.S.C. § 300a-7(b) (1973). In relation to *Taylor*, the Church Amendment was enacted after the preliminary injunction had been issued and before final determination of the case in *Taylor*.

[152] *See, e.g.*, 745 ILL. COMP. STAT. ANN. 70/1 – 70/14 (2002); 720 ILL. COMP. STAT. ANN. 510/13 (2002); WASH. REV. CODE §§ 9.02.150, 48.43.065 (West 2003); WASH. REV. CODE § 70.47.160 (2003).

The Illinois statute protects *individuals, health care providers, and institutions* from having to perform any health care procedure against its conscience. Washington also allows the refusal of any health care procedure, but *only for individuals and religiously affiliated institutions*.

[153] *See, e.g.*, S.D. CODIFIED LAWS § 36-11-70 (Michie 2003) (providing protection of pharmacists who conscientiously object to dispensing medication that will cause abortion, assisted suicide, or euthanasia); MD. CODE ANN., HEALTH-GEN. II § 20-214 (2003) (protecting health care providers who object to participating in abortion, sterilization, and artificial insemination); 43 PA. CONS. STAT. ANN. § 955.2 (West 2003) & 18 PA. CONS. STAT. ANN. § 3213(d) (West 2003) (providing protection for health care providers who conscientiously object to participating in abortion, dispensing abortificients, and sterilization.); CAL. PROB. CODE § 4734 (West 2002) (protecting health care providers and health care institutions that conscientiously object to complying with an individual's health care instructions made in a living will or with a health care decision made according to a durable power of attorney for health care regarding the withholding or withdrawal of life-sustaining treatment.); R.I. GEN. LAWS § 23-17-11 (2003) (protecting only individuals with regard to abortion and sterilization services).

Other states provide protection with regard to abortion and sterilization procedures. *See, e.g.*, KAN. STAT. ANN. §§ 65-443, 65-444, 65-446, 65-447 (2002); MASS. GEN. LAWS ANN. ch. 112, § 12I; ch. 272, § 21B (West 2003); N.J. STAT. ANN. §§ 2A:65A-1 - 2A65A-3 (West 2003); WIS. STAT. ANN. § 253.09 (West 2003).

[154] The majority of the states protect *all health care providers* from having to perform abortions only. *See, e.g.*, ALASKA STAT. § 18.16.010(b) (Michie 2003); ARIZ. REV. STAT. § 36-2151 (2003); ARK. CODE ANN. § 20-16-601 (Michie 2003); COLO. REV. STAT. § 18-6-104 (2003); CONN. AGENCIES REGS. § 19-13-D54(f) (2004); DEL. CODE ANN. tit. 24, § 1791 (2003); FLA. STAT. ANN. § 390.0111(8) (West 2003); GA. CODE ANN. § 16-12-142 (Harrison 2002); HAW. REV. STAT. ANN. § 453-16(d) (Michie 2003); IDAHO CODE § 18-612 (Michie 2003); KY.

all.[155] One state recently considered legislation to strengthen its conscience clause for the protection of the First Amendment rights of persons and religious organizations.[156]

With regard to emergency contraception, only Illinois hospitals enjoy protection pursuant to the state's conscience clause.[157] Other states do not consider emergency contraception equivalent to abortion and therefore the administration of emergency contraception is not explicitly protected by those states' conscience clauses. California is an example of a state that does not consider emergency contraception equivalent to abortion. In *Brownfield v. Daniel Freeman Marina Hospital*,[158] the court held that emergency contraception is not the same as abortion[159] and that a tort claim might be allowed if a rape victim were injured by being denied emergency contraception.[160] In *Brownfield*, Kathleen Brownfield, a rape victim, was denied emergency contraception.[161] She brought a claim against the Daniel Freeman

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REV. STAT. ANN. § 311.800 (Banks-Baldwin 2003); LA. REV. STAT. ANN. §§ 40:1299.31 - 1299.33 (West 2003); ME. REV. STAT. ANN. tit. 22, §§ 1591, 1592 (West 2003); MICH. COMP. LAWS. ANN. §§ 333.20181 - 333.20184 (West 2003); MINN. STAT. ANN. § 145.414 (West 2003); MO. ANN. STAT. §§ 188.105, 188.110 (West 2003); NEB. REV. STAT. §§ 28-337 - 28-341 (2003); N.M. STAT. ANN. § 30-5-2 (Michie 2003); N.C. GEN. STAT. § 14-45.1 (2003); N.D. CENT. CODE § 23-16-14 (2003); OHIO REV. CODE ANN. § 4731.91 (West 2003); OR. REV. STAT. §§ 435.475, 435.485 (2001); S.D. CODIFIED LAWS §§ 34-23A-11 - 34-23A-14 (Michie 2003); TENN. CODE ANN. §§ 39-15-204, 39-15-205 (2003); VA. CODE ANN. § 18.2-75 (Michie 2003).

Some states protect *only individuals or private institutions* from participating in abortion services. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 123420 (West 2002); IND. CODE. ANN. §§ 16-34-1-3 - 16-34-1-6 (West 1997); IOWA CODE ANN. §§ 146.1 - 146.2 (West 2003); MONT. CODE ANN. § 50-20-111 (2003); NEV. REV. STAT. 449.191 (Michie 2003); OKLA. STAT. ANN. tit. 63, § 1-741 (West 2003); S.C. CODE ANN. §§ 44-41-40, 44-41-50 (Law Co-op. 2003); TEX. OCC. CODE ANN. § 103.001 (Vernon 2004); UTAH CODE ANN. § 76-7-306 (2003); WYO. STAT. ANN. §§ 35-6-105, 35-6-106 (Michie 2003).

New York and West Virginia provide protection only for an individual health care provider for participating in abortions. *See* N.Y. CIV. RIGHTS LAW § 79-i (McKinney 2003); W. VA. CODE § 16-2F-7 (2003).

[155] Alabama, Mississippi, New Hampshire, Vermont provide no protection for the rights of conscience of health care providers.

[156] S.B. 5879, 58th Leg., Reg. Sess. (Wash. 2003) (proposing to strengthen state conscience clause). The bill was neither passed nor vetoed.

[157] *See* 745 ILL. COMP. STAT. ANN. 70/1 – 70/14 (2002); 720 ILL. COMP. STAT. ANN. 510/13 (2002) (protecting individuals, health care providers and institutions from having to perform any service against their conscience).

[158] 256 Cal. Rptr. 240 (Cal. Ct. App. 1989).

[159] *Id.* at 244-45.

[160] *Id.* at 245.

[161] *Id.* at 242.

Marina Hospital.[162] Because she did not become pregnant, however, she was not able to recover injunctive relief or damages.[163]

In Hawai'i, the conscience clause is narrow and includes only protection relating to abortion.[164] It is questionable whether or not Hawai'i's conscience clause will protect the religious hospitals from having to provide emergency contraception, based on their belief that it may cause an abortion.[165] In all likelihood, however, there will be no protection for providing emergency contraception because of the contrary belief by many that emergency contraception does not cause abortion.[166] Saint Francis Hospital and the Catholic Diocese of Hawai'i are therefore strongly advocating for a religious exemption within the emergency contraception bill itself.

C. Religion Clauses

The First Amendment of the United States Constitution enables the government to provide protection for religious individuals and institutions from government regulation. It also precludes the government from passing laws, which "aid one religion, aid all religions, or prefer one religion over another."[167] The First Amendment states, "Congress shall make no law

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[162] *Id.*

[163] *See id.*

[164] *See* HAW. REV. STAT. § 453-16(d) (2003) (stating that "[n]othing in this section shall require any hospital or any person to participate in such abortion nor shall any hospital or any person be liable for such refusal"); HAW. REV. STAT. § 453-16(b) (2003) (defining abortion as "an operation to intentionally terminate the pregnancy of a nonviable fetus. The termination of a pregnancy of a viable fetus is not included in this section.").

[165] Neither the Hawai'i legislature nor the Hawai'i courts have made a determination whether emergency contraception can have the effect of abortion for purposes of conscience law protection.

[166] *See* H.B. 189, 2003 Leg., 22nd Sess. § 2 (Haw. 2004) (defining Emergency Contraception as "any drug or device approved by the United States Food and Drug Administration that prevents pregnancy after sexual intercourse"); Pincus, *supra* note 63; *Brownfield*, 256 Cal. Rptr. at 244-45.

[167] Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 15 (1947); *see also* Lewis v. Califano, 616 F.2d 73, 81 (3d Cir. 1980) (quoting Davis v. Beason, 133 U.S. 333, 342 (1890)) (expressing the importance of accommodating individual beliefs):

> The term 'religion' has reference to one's view of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the cultus or form of worship of a particular sect, but is distinguishable from the latter. The First Amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow everyone under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper . . . .

Id.

respecting an establishment of religion, or prohibiting the free exercise thereof."[168]

To determine whether government regulation requiring hospitals to provide emergency contraception to rape victims is in violation of the First Amendment, one must first ask whether the regulation violates the Free Exercise Clause. The second question is whether the state is violating the Establishment Clause of the First Amendment if it includes a religious exemption for religious hospitals. If the state is found to be in violation of either the Free Exercise Clause or the Establishment Clause, the legislation will be considered unconstitutional.

1. Free Exercise

The Catholic hospitals can argue that their freedom to exercise their religious belief against emergency contraception is violated by a regulation that would require them to provide emergency contraception to rape victims. The state may regulate the activities and conduct of religious organizations as long as it does not infringe on the exercise of religious beliefs.[169] While the freedom to believe is absolute, the freedom to act on those beliefs is not.[170]

The Free Exercise of Religion Clause protects, "first and foremost, the right to believe and profess whatever religious doctrine one desires."[171] The Supreme Court has consistently declared that, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith or the validity of particular litigants' interpretations of those creeds."[172] Courts may make factual findings, however, as to "whether a claimant has a sincerely held religious belief that conflicts with, and thus is burdened by, the challenged law."[173] Furthermore, the practice that the petitioner is seeking to protect need not be in response to the commands of a particular religious organization.[174] The test essentially is to decide whether the beliefs professed are "sincerely held and whether they are, [in the petitioner's] own scheme of things, religious."[175] Religious beliefs that merit First Amendment protection, "need

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

[169] Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

[170] *Id.*

[171] Employment Div., Dept. of Human Res. of Oregon v. Smith, 494 U.S. 872, 877 (1990).

[172] *Id.* at 887 (quoting Hernandez v. Comm'r, 490 U.S. 680, 699 (1989)).

[173] *Id.* at 907.

[174] Frazee v. Illinois Dept. of Employment Sec., 489 U.S. 829, 834 (1989) (expressing that the court must determine whether the religious beliefs are sincerely held).

[175] United States v. Seeger, 380 U.S. 163, 185 (1965).

not be acceptable, logical, consistent, or comprehensible to others."[176] Therefore, despite the fact that others do not believe or agree with the Catholic Church's belief that emergency contraception may cause abortion, it is a valid religious belief, subject to free exercise protection.

The next question is to determine the extent of the burden on the religious conduct. Until the 1990 decision in *Employment Division, Department of Human Resources of Oregon v. Smith*,[177] governmental actions that burdened religious free exercise had to be justified by a compelling state interest and by a showing that there was no less burdensome means of achieving the purpose of the regulation.[178] In *Smith*, however, Justice Scalia's opinion for the Court invalidated the prior strict scrutiny standard and applied a rational basis standard. Justice Scalia held that, "the right to free exercise does not relieve an individual of the obligation to comply with a 'valid neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[179] In response, Congress attempted to reinstate the strict scrutiny standard by enacting the Religious Freedom Restoration Act ("RFRA").[180] The legacy of RFRA was short-lived, however. In *City of Boerne v. Flores*,[181] the Court held most of RFRA unconstitutional.[182] Yet, this did not end the application of strict scrutiny in all free exercise claims.

The Court in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*[183] clarified the use of strict scrutiny in free exercise claims. The Court held that a law that directly burdens religious practice or conduct arising from religious belief "must be justified by a compelling government interest and must be narrowly tailored to advance that interest."[184] If the law is neutral and generally applicable, "[it] need not be justified by a compelling governmental

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[176] *See* Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 714 (1981); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993) (citation omitted) (holding that animal sacrifice is an integral part of the petitioners religion and "cannot be deemed bizarre or incredible"); Welsh v. United States, 398 U.S. 333, 339-40 (1970) (holding that beliefs that are deeply and sincerely held that are purely ethical or moral in source and content but that nevertheless imposes a duty of conscience to refrain from participating in any war at any time, may also be protected).

[177] 494 U.S. 872 (1990).

[178] *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 406 (1963).

[179] *Smith*, 494 U.S. at 879.

[180] 42 U.S.C. §§ 2000bb-2000bb-4 (1994).

[181] 521 U.S. 507 (1997).

[182] *Id.* at 536 (holding unconstitutional: 42 U.S.C § 2000bb-1; 42 U.S.C § 2000bb-2; 42 U.S.C § 2000bb-3; 42 U.S.C § 2000bb-4).

[183] 508 U.S. 520 (1993).

[184] *Id.* at 531-32.

interest, even if the law has the incidental effect of burdening a particular religious practice."[185]

To determine whether a law is neutral and generally applicable, the Court in *Church of Lukumi* looked to the text of the regulation.[186] A law cannot discriminate on its face.[187] Facial discrimination occurs when the law "refers to a religious practice without a secular meaning discernable from the language or context."[188] If the law infringes upon or restricts practices because of their religious motivation, the law is not neutral.[189] Moreover, the Court noted that "facial neutrality is not determinative . . . and it extends beyond facial discrimination."[190] Although not expressed in the language of a regulation itself, a court must look to the intent and impact of the law on religious conduct. Facial discrimination can be evidenced by objective factors such as the law's legislative history and its practical effect.[191] The Free Exercise Clause forbids subtle departures from neutrality[192] and protects against governmental hostility, both masked as well as overt.[193]

A recent decision, *Locke v. Davey*,[194] limited the use of the strict scrutiny standard set forth in *Church of Lukumi*. In *Davey*, a college student was denied a Washington State Promise Scholarship because of his choice to pursue a devotional theology degree at Northwest College, a private church-affiliated institution.[195] The Washington statute expressly stated that "no aid shall be awarded to any student who is pursuing a degree in theology."[196] The majority failed to apply the strict scrutiny standard set forth in *Church of Lukumi*. Even though the law facially discriminated against religion, the Court denied the argument that the law was presumptively discriminatory and thus worthy of strict scrutiny review.[197] Instead, the Court focused on two factors the majority said justified the application of a lesser standard.[198]

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[185] *Id.* (citing Employment Div., Dept. of Human Res. of Oregon v. Smith, 494 U.S. 872, 892 (1990)).

[186] *Id.* at 533.

[187] *Id.*

[188] *Id.*

[189] *Id.*

[190] *Id.* at 534.

[191] *Id.* (analyzing the legislative history and intent of the law at issue).

[192] *Id.* (quoting Gillette v. United States, 401 U.S. 437, 452 (1971)).

[193] *Id.*

[194] 540 U.S. 712 (2004).

[195] *Id.* at 717.

[196] *Id.* at 716.

[197] *See generally id.* at 712-25.

[198] *See id.* at 720, 725.

The first was the burden on the petitioner and the second was the scholar ship program's degree of animosity toward religion.[199] The Court distinguished the burden upon the petitioners in *Church of Lukumi* as compared to *Davey* and determined that the burden upon *Davey* was of a "far milder kind."[200] The statute in *Davey* imposed neither criminal nor civil sanctions on any type of religious service or rite, and it did not require students to choose between their religious beliefs and receiving a government benefit.[201] The Program merely denied funding of a distinct category of instruction.[202]

The Court then looked to the text and legislative history to determine whether there was any animosity toward religion and found none.[203] As a result, the majority held that the denial of funding for vocational religious instruction alone is not inherently constitutionally suspect.[204] Hence there was no reason to apply the strict scrutiny standard.

The impact of *Davey* on free exercise claims is to limit the application of strict scrutiny only to those laws that have a substantial burden upon the petitioner and those in which animosity toward religion is found. Essentially, the court struck down the presumption that a law that expressly discriminates against religion automatically requires the application of the strict scrutiny standard, as set forth in *Church of Lukumi*.[205] Under *Davey*, a law that facially singles out religion must only be rationally related to a state interest and therefore may more easily be found constitutional.

The current rule for free exercise claims in the Supreme Court is that a law burdening a religious practice which is not neutral or not of general application, and that is substantially burdensome and with evidence of

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[199] *Id.*

[200] *Id.* at 720.

[201] *See id.* at 721.

[202] *Id.*

[203] *See id.* at 725.

[204] *Id.*

[205] *See id.* at 726-34 (Scalia, J., dissenting). Justice Scalia's dissent in *Davey* endorsed the "'noncontroversial principle' that 'formal neutrality' is a 'necessary condition for free-exercise constitutionality.'" *Id.* at 726 (quoting Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 563 (1993)). Justice Scalia also presented a compelling argument in which he argued that measuring the burden against the petitioner is not necessary. *Id.* at 731. He stated, "the indignity of being singled out for special burdens on the basis of one's religious calling is so profound that the concrete harm produced can never be dismissed as insubstantial. The Court has not required proof of 'substantial' concrete harm with other forms of discrimination . . . ." *Id.* Justice Scalia also argued against the majority's need to find animus toward religion. *Id.* at 732. He explained, "[i]t is sufficient that the citizen's rights have been infringed. 'It does not matter that a legislature consists entirely of the pure-hearted, if the law it enacts in fact singles out a religious practice for special burdens.'" *Id.* (citation omitted).

animosity,[206] will be subject to the most rigorous scrutiny. Strict scrutiny requires a compelling governmental interest "of the highest order,"[207] and must be narrowly tailored in pursuit of such an interest.[208] When such strict scrutiny is applied, regulations that target religious conduct will most likely be invalidated. If the lesser standard of neutrality and of generally applicable elements from *Davey* have been met,[209] however, it is a rational basis standard that applies. Under this standard, the regulation is likely to be upheld.

The Hawai'i bill and committee reports specifically refer to religious hospitals as well as to the Catholic religion.[210] This could be seen as a facial discrimination, and therefore not neutral and generally applicable under the analysis in *Church of Lukumi*. If so, a strict scrutiny standard should be applied. However, *Davey*'s analysis seemingly would disregard the fact that the law specifically refers to religion and would require a showing of a substantial burden on the religious hospital. Furthermore, the analysis in *Davey* requires a showing that the law was created with animosity. This

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[206] *See generally id.*, 540 U.S. 712 (refining the neutral and general applicable law standard from *Church of Lukumi*).

[207] *Church of Lukumi*, 508 U.S. at 546 (quoting McDaniel v. Paty, 435 U.S. 618, 628 (1978)) (quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972)).

[208] *Id.*

[209] If there is an incidental burden such as that in *Davey* along with no animosity toward religion demonstrated, rational basis is applied. *Church of Lukumi* differed because the Court determined that any facial discrimination was not neutral and generally applicable and therefore automatically required strict scrutiny.

[210] *See* H.B. 189, 2003 Leg., 22nd Sess. § 1 (Haw. 2004). In justifying why the bill should not have a religious exemption, the bill states:

> The Ethical and Religious Directives for Catholic Health Care Services make an exception for contraception for rape victims, stating that "a female who has been raped should be able to defend herself against a potential conception from the sexual assault." The exception was explained in an article in the September-October 2002 issue of *Health Progress*, the journal of the Catholic Health Association of the United States by the Association's senior director of ethics, who noted that: "Catholic teaching allows for the administration of emergency contraception which certain moral limits. Measures taken to prevent conception in such cases fall outside the general prohibition against contraception because the assailant's act is a violation of justice, and any semen within the woman's body is considered a continuation of the unjust aggression against which she may licitly defend herself."

Id.

See also SEN. STAND. COMM. REP. NO. 3273, 22nd Leg., Reg. Sess. (2004). The Senate Committee Report states:

> Your Committee also noted that in some parts of Hawai'i, such as the Leeward coast of Oahu, the only hospital available is a Catholic hospital. Thus, by permitting a religious exemption, many sex assault victims will not have readily accessible emergency contraceptives . . . . [Therefore the committee] [d]oes not provide a religious hospital exception and removes all references to religious hospitals . . . .

Id.

standard would be harder to satisfy and it is therefore more likely that a rational basis standard would apply.

There are two arguments that oppose the application of a rational basis standard. The first denies the application of the *Smith* decision when assessing regulations against "religious institutions." In *Smith*, Justice Scalia held that "the right to free exercise does not relieve an individual of the obligation to comply with a 'valid neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[211] In *Catholic Charities of Sacramento, Inc. v. Superior Court of Sacramento County*,[212] Judge Brown's dissent suggested a stricter reading of *Smith* so that the obligation to comply with a valid and neutral law of general applicability would not extend to "religious institutions," but would remain applicable to "individuals" only.[213] Judge Brown suggests that the Free Exercise Clause:

> [G]uarantees a church's freedom to decide how it will govern itself, what it will teach, and to whom it will entrust its ministerial responsibilities, it does *not* guarantee the rights of its members to practice what their church may preach if that practice is forbidden by a neutral law of general application.[214]

Justice Brennan and Justice Marshall, concurring in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v.*

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[211] Employment Div., Dept. of Human Res. of Oregon v. Smith, 494 U.S. 872, 879 (1990) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982)).

[212] 85 P.3d 67 (Cal. 2004). In *Catholic Charities*, a Catholic church-affiliated employer brought an action against the state challenging the provisions of a law that required employers who provided group health care and disability insurance prescription coverage for their employees to include coverage for prescription contraceptives. *See id.* at 74-77. The California court held that Catholic Charities was not a religious institution that should be afforded a religious exemption from complying with a law that required healthcare coverage for female contraception. *Id.* at 75.

[213] *Id.* at 99-100 (Brown, J., dissenting). Since "*Smith* focused exclusively on the individual's free exercise of religion, some courts have reasoned that religious institutions are exempted entirely from the *Smith* analysis". *Id.* at 99.

[214] *Id.* at 100 (quoting E.E.O.C. v. Catholic Univ. of America, 83 F.3d 455, 463 (D.C. Cir. 1996)). The majority in *Catholic Charities* offered two reasons for deferring to religious authorities on religious questions. *Id.* at 77 (citing Watson v. Jones, 80 U.S. 679, 732 (1871)). The first justification was that civil courts are simply "incompetent" to decide matters of faith and doctrine. *Id.* The second was that the members of a church, by joining the church, implicitly consent to the church's governance in religious matters. For civil courts to review the church's judgments would "deprive these bodies of the right of construing their own church laws." *Id.* (quoting *Watson*, 80 U.S. at 733-34). The decision expressed that "courts have no expertise in religious matters, and courts 'so unwise' as to attempt to decide them 'would only involve themselves in a sea of uncertainty and doubt . . . .'" *Id.* (quoting *Watson*, 80 U.S. at 732). The court also expressed that for civil courts to review the church's judgments would "impair the right to form voluntary religious organizations." *Id.* (citing *Watson*, 80 U.S. at 728-29).

Amos,[215] also supported guaranteed protection for religious organizations.[216] Their concurring opinion stated:

> [R]eligious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: "select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected by the [Free Exercise] [C]lause."[217]

Justice Brennan and Justice Marshall further explained that "[f]or many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals."[218] There has been consistency through various opinions that "a spirit of freedom [exists] for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[219] Therefore, the underlying issue would be to determine what is considered a "religious organization" for the purposes of protection of the Free Exercise Clause.

Catholic Charities narrowly defined a "religious employer" as an organization in which:

(A) The inculcation of religious values is the purpose of the entity.
(B) The entity primarily employs persons who share the religious tenets of the entity.
(C) The entity serves primarily persons who share the religious tenets of the entity.
(D) The entity is a nonprofit organization as described in Section 6033(a)(2)(A)(i) or (iii), of the Internal Revenue Code of 1986, as amended.[220]

Catholic Charities did not qualify as a religious employer under this definition. Judge Brown, dissenting, argued that had it not been for the legislature purposefully limiting the scope of a "religious employer," Catholic Charities

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[215] 483 U.S. 327 (1987).

[216] *See generally id.* at 327-40.

[217] *Id.* at 341 (Brennan, J.; Marshall, J., concurring) (alterations in original) (citing Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1389 (1981)).

[218] *Id.* at 342.

[219] Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116 (1952).

[220] Catholic Charities of Sacramento, Inc. v. Superior Court of Sacramento County, 85 P.3d 67, 75 (Cal. 2004).

might very well have fallen within the definition and the exception.[221] The majority, however, stated that:

> [E]very person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.[222]

In other words, some burdens upon religious entities are inevitable.

The problem with the *Catholic Charities* definition is that it has a very narrow scope. Not only will charities be excluded, but religious hospitals also are likely to be excluded. Religious hospitals do not primarily employ persons who share in the hospitals' religious beliefs, but rather employ a diverse group of persons of many religious backgrounds. Religious hospitals also serve people of all faith backgrounds, a significant majority of whom do not agree with the hospitals' religious beliefs and practices. If this definition were to extend to religious hospitals for exemption purposes, the hospitals in theory would not be able to claim a religious exemption. The hospitals then may also be required to perform other services that could clearly be against their religious beliefs—abortion or even physician-assisted suicide, for instance. Many religions reach out to the general community in a social and charitable way as part of their religious duty. Religious entities may be reluctant to form charitable organizations because of the potential ability of the government to intrude on their religious beliefs.

The second argument is also against applying the *Smith* decision with regard to a religious organization's obligation to comply with a valid neutral law of general applicability on the ground that the law proscribes conduct that his religion prescribes.[223] A law requiring a religious institution to provide emergency contraception is not a law that proscribes conduct based on religious belief; rather it requires conduct which is against religious belief. The emergency contraception bill is similar to that in *Catholic Charities*. The California legislature did not restrict Catholic Charities from conduct based on its religious belief; rather, Catholic Charities was required to provide a service to its employees which was against its religious belief. In contrast, both *Smith* and *Church of Lukumi* dealt with a regulation prohibiting a religious act of worship. Providing emergency contraception is not a prohibition, but a mandate to act affirmatively against the institution's religious

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[221] *Id.* at 101 (Brown, J., dissenting).

[222] *Id.* at 93 (quoting United States v. Lee, 455 U.S. 252, 261 (1982)).

[223] *See, e.g.*, Employment Div., Dept. of Human Res. of Oregon v. Smith, 494 U.S. 872, 879 (1990).

beliefs. The Free Exercise Clause protects religious individuals' and organizations' beliefs rather than their conduct.[224]

A religious hospital may believe that contraception and abortion are sins and that emergency contraception has the potential of causing abortion.[225] A Catholic hospital also may believe that pregnancy occurs at fertilization or conception, which leads it to its determination that emergency contraception may cause an abortion. Such deeply held beliefs are expressed in the Catholic religious directives.

The emergency contraception bill would require the hospital to provide emergency contraception, which basically intrudes on the hospital's beliefs that emergency contraception may cause abortion. As Judge Brown maintained in his dissent in *Catholic Charities*, "here we are dealing with an intentional, purposeful intrusion into a religious organization's expression of its religious tenets and sense of mission. The government is not accidentally or incidentally interfering with religious practice; it is doing so willfully by making a judgment about what is or is not religious."[226] Requiring a religious institution to act upon something that is against its beliefs goes beyond mere interference with a religious institution's ability to worship. It requires the hospital to contradict its teaching and to be hypocritical.

Hawai'i's constitutional analysis of the State Constitution's Free Exercise Clause differs from the federal analysis. The Hawai'i Supreme Court has not yet had the opportunity to apply a rational basis standard as introduced in *Smith*.[227] Instead, the Hawai'i Supreme Court applies a stricter standard to those regulations which violate the free exercise of religion.[228] Set forth in *Korean Buddhist Dae Won Sa Temple of Hawai'i v. Sullivan*,[229] the court identified two thresholds that a government regulation must overcome in order for a stricter standard to be applied.

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[224] *See* Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

[225] Interview Yoshimitsu, *supra* note 33.

[226] *Catholic Charities*, 85 P.3d at 102 (Brown, J., dissenting).

[227] *See* Korean Buddhist Dae Won Sa Temple of Hawai'i v. Sullivan, 87 Hawai'i 217, 247, 953 P.2d 1315, 1345 (1998). The court in *Korean Buddhist* did not apply *Smith* because it found a loophole in *Smith*. *See id.* at 246-47 n.31, 953 P.2d at 1344-45. *Smith* does not apply to those cases in which a mechanism for individualized exemptions was created. *See id.* (quoting *Smith*, 494 U.S. at 884 (citation omitted)). The court expressed that "[i]f a state creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent." *Id.* at 247, 953 P.2d at 1345 (quoting Thomas v. Review Board of Indiana Employment Sec. Div., 450 U.S. 707, 708 (1981) (citations omitted)). It tends "to exhibit hostility, not neutrality, towards religion." *Id.* In those cases, it "is appropriate to require the State to demonstrate a compelling reason for denying the requested exemption." *Id.*

[228] *See id.* at 246-47, 953 P.2d at 1344-45 (discussing a stricter standard in determining whether a regulation violated the free exercise of religion).

[229] 87 Hawai'i 217, 953 P.2d 1315.

> The first test distinguishes government regulation of religious beliefs and opinions from restrictions affecting religious conduct. The government may never regulate religious beliefs; but, the Constitution does not prohibit absolutely government regulation of religious conduct.... The second threshold principle requires that a law have both a secular purpose and a secular effect to pass constitutional muster.[230]

If the government fails to overcome either threshold, the regulation would automatically be found in violation of religious free exercise and is thus unconstitutional.[231] Upon overcoming both thresholds, the final step is to apply the strict scrutiny standard, which requires "balancing the burden to the [religious entity's] free exercise of religion against the government's interest in [the regulation]."[232] The factors the court will balance are: (1) "whether or not the activity interfered with by the state was motivated by and rooted in a legitimate and sincerely held religious belief";[233] (2) "whether or not the parties' free exercise of religion had been burdened by the regulation";[234] and (3) "the extent or impact of the regulation on the parties' religious practices"; and (4) "whether or not the state had a compelling interest in the regulation which justified such a burden."[235] *Korean Buddhist* notes that "it is necessary in a free exercise case for one to show the coercive effect of the [law] as it operates against him in the practice of his religion,"[236] and to show a "substantial burden" on religious interests.[237] Because the Hawai'i Supreme Court has held that every enactment of the legislature is presumptively constitutional, the religious institution "has the burden of showing unconstitutionality beyond a reasonable doubt"[238] that there is a substantial burden on their free exercise of religion.[239] The burden would then shift to the government to show that the law is justified by a compelling government interest.

Hawai'i's free exercise analysis essentially provides more protection to religious parties than does the federal analysis. Hawai'i does not apply the

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[230] *Id.* at 246, 953 P.2d at 1344 (quoting Grosz v. City of Miami Beach, 721 F.2d 729, 733 (11th Cir.), *cert. denied*, 469 U.S. 827 (1983)).

[231] *See id.*

[232] *Id.*

[233] *Id.* at 247, 953 P.2d at 1345 (quoting State ex. rel. Minami v. Andrews, 65 Haw. 289, 291, 651 P.2d 473, 474 (1982) *accord* Wisconsin v. Yoder, 406 U.S. 205 (1972)).

[234] *Id.*

[235] *Id.*

[236] *Id.* (citing Sch. Dist. of Abington Township v. Schempp, 374 U.S. 203, 223 (1963)).

[237] *Id.* (citing Koolau Baptist Church v. Dep't of Labor, 68 Haw. 410, 418, 718 P.2d 267, 272 (1986); Wisconsin v. Yoder, 406 U.S. 205, 218 (1972)).

[238] *Id.* at 248, 953 P.2d at 1346 (quoting Housing Fin. and Dev. Corp. v. Castle, 79 Hawai'i 64, 75, 898 P.2d 576, 587 (1995)) (internal citations omitted).

[239] *Id.*

easier rational basis standard, but instead applies a stricter standard which provides a religious party with the opportunity to argue a law unconstitutional on two different levels: the threshold principle level and the balancing factor level.[240]

In Hawai'i, a law requiring religious hospitals to provide emergency contraception to rape victims may automatically be found unconstitutional if the Catholic hospitals show that this law regulates their beliefs against abortion rather than conduct. As noted above, this may be a compelling argument for them. If it is determined that the law regulates conduct rather than beliefs, however, the Catholic hospitals then have another opportunity to prove the law unconstitutional by showing the burden and impact of the regulation. Requiring a Catholic hospital to provide emergency contraception imposes a substantial burden because it goes against one of the hospital's core beliefs against abortion.[241] Thus, this burden would probably be a significant factor when balancing the interests set forth in *Korean Buddhist*. The legislature would then have to justify the regulation with a compelling government interest. The legislative history of the bill in its current form considers the protection of a rape victim as a compelling government interest.[242] Yet, protecting the free exercise of religion may also be a compelling government interest. Moreover, the compelling governmental interest of the state should be balanced and weighed by the "size and severity of the problem the state is attempting to solve."[243] There are no statistics in Hawai'i to show how many rape victims became pregnant from rape.[244] There were approximately four rape victims that went to the Saint Francis hospitals in 2003.[245] Because of the limited number of rape victims that Saint Francis serves, and with no statistics

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[240] Even though the Hawai'i Supreme Court has yet to apply the lesser standard as applied in *Smith*, *Korean Buddhist* suggests that the court might be inclined to adopt *Smith*. The Hawai'i Supreme Court explained in *Korean Buddhist* that it did not have to determine whether *Smith* would fall under the Hawai'i Constitution because the facts in *Korean Buddhist* did not allow that analysis. *Korean Buddhist* dealt with the City's variance law which created "a system of individualized exceptions" from the general zoning law. It was not a law generally applicable to the public as in *Smith*. *See id.* at 247 n.31, 953 P.2d at 1345 n.31.

[241] This would be considered a substantial burden unlike that in *Korean Buddhist* where the court held that burdens of expense and inconvenience are insufficient to constitute a substantial burden on the free exercise of religion. *See id.* at 248, 953 P.2d at 1346 (citations omitted).

[242] *See* SEN. STAND. COMM. REP. NO. 3273, 22nd Leg., Reg. Sess. (2004) (stating that "[y]our Committee finds that there is a compelling state interest to protect these women in such a difficult time").

[243] Catholic Charities of Sacramento, Inc. v. The Superior Court of Sacramento County, 85 P.3d 67, 108 (Cal. 2004) (Brown, J., dissenting) (stating that when determining a compelling governmental interest, "[a]t the very least, the constitutional weight of the state's interest must be affected by the size and severity of the problem the state is attempting to solve").

[244] Interview Ramelli, *supra* note 26.

[245] Interview Yoshimitsu, *supra* note 33.

as to the amount of women who are injured by the lack of access to emergency contraception, the size and severity of the problem may be insufficient to balance the factors in the government's favor.

2. *Establishment Clause*

If a religious exemption is included in the emergency contraception bill, it must pass scrutiny under the Establishment Clause. The Establishment Clause stipulates that "[n]either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another."[246] Essentially, the fundamental principle underlying the Establishment Clause is "governmental neutrality in matters of religion."[247] There is ample room under the Establishment Clause for "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[248]

The U.S. Supreme Court established three tests to determine whether a violation of the Establishment Clause exists. The first is the "Lemon test" from *Lemon v. Kurtzman*.[249] The *Lemon* test consists of three prongs: (1) a law must have a "secular legislative purpose";[250] (2) "its principal or primary effect must be one that neither advances nor inhibits religion";[251] and (3) it must not foster "an excessive government entanglement with religion."[252] The Court, in *Agostini v. Felton*,[253] refined the *Lemon* test, essentially folding the entanglement inquiry into the effect inquiry,[254] as "both inquiries rely on the same evidence and the degree of entanglement has implications for whether a statute advances or inhibits religion."[255] The Supreme Court has criticized the *Lemon* test, and there is a question as to its continued viability.[256]

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[246] County of Allegheny v. ACLU, 492 U.S. 573, 591 (1989) (citing Everson v. Bd. of Educ. of Ewing, 330 U.S. 1, 15-16 (1947)).

[247] Gillette v. United States, 401 U.S. 437, 449 (1971) (citing Epperson v. Arkansas, 393 U.S. 97, 103-04 (1968); *Everson*, 330 U.S. at 15-16).

[248] Walz v. Tax Comm'n of New York, 397 U.S. 664, 669 (1970).

[249] 403 U.S. 602 (1971).

[250] *Id.* at 612.

[251] *Id.* (citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)).

[252] *Id.* (quoting *Walz*, 397 U.S. at 674).

[253] 521 U.S. 203 (1997).

[254] *Id.* at 232-33.

[255] Zelman v. Simmons-Harris, 536 U.S. 639, 668-69 (2002) (O'Conner, J., concurring) (citations omitted) (reiterating the folding of the second and third prongs of the *Lemon* test).

[256] For criticism of the *Lemon* test, *see, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 399 (1993) (Scalia. J., concurring) (citation omitted); County of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring).

The second test is the "endorsement test," introduced in Justice O'Connor's concurrence in *Lynch v. Donnelly*.[257] The endorsement test asks "whether, irrespective of [the] government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval"[258] of religion.[259] Other words often used to determine government "endorsement" include, "preference," "promotion," and "favoritism."[260] The principle remains the same, however—that the Establishment Clause "prohibits government from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.'"[261]

The third test is the "coercion test" applied in *Lee v. Weisman*.[262] The coercion test guarantees that the "government may not coerce anyone to support or participate in religion or its exercise," and the government, "may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'"[263] In *Weisman*, principals of the public school system were allowed to invite members of the clergy to offer invocation and benediction prayers as part of the formal graduation ceremonies for middle and high schools.[264] Acting on behalf of himself and his daughter, a student at a public middle school, Weisman objected to any prayers at his daughter's graduation ceremony.[265] The Court held that inviting clergy members to offer the invocation at public school graduation ceremonies was inconsistent with the Establishment Clause of the First Amendment.[266] The Court found that the prayer exercises were improper because "the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid."[267]

Another test is suggested in *Zelman v. Simmons-Harris*.[268] The Court in *Zelman* essentially consolidated all three tests.[269] The Court reiterated the first

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[257] 465 U.S. 668 (1984).

[258] *Id.* at 690 (O'Conner, J., concurring).

[259] *Id.*

[260] *County of Allegheny*, 492 U.S. at 593.

[261] *Id.* at 594 (quoting *Lynch*, 465 U.S. at 687 (O'Conner, J., concurring)).

[262] 505 U.S. 577 (1992).

[263] *County of Allegheny*, 492 U.S. at 659 (quoting *Lynch*, 465 U.S. at 678).

[264] *Weisman*, 505 U.S. at 581.

[265] *Id.*

[266] *Id.* at 599.

[267] *Id.* at 598.

[268] 536 U.S. 639 (2002).

[269] *See* Stephen M. Feldman, *Religious Minorities and the First Amendment: The History, The Doctrine, and the Future*, 6 U. PA. J. CONST. L. 222, 263 (2003) (discussing the holding in *Zelman*).

two prongs of the *Lemon* test (the purpose and effects prongs) and "briefly mentioned endorsement and coercion as if they were mere considerations under the effects prong."[270] Furthermore, the Court focused on "neutrality and the principle of private choice, not on the number of program beneficiaries."[271] Therefore, because the effects prong was merged into the purpose prong, a law that neutrally provides a benefit to a wide spectrum of individuals may be upheld regardless of the disparate impact it has on one religion, all religions, or non-religion.

Including a religious exemption for religious hospitals can be seen as an acceptable accommodation of religion. The accommodation doctrine "refers to government laws or policies that have the purpose and effect of removing a burden on, or facilitating the exercise of, a person's or an institution's religion."[272] The Supreme Court "has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause."[273] It is important to note, however, that religious exemptions are not required, nor are they forbidden.[274]

There are two lines of accommodation cases. One relieves a burden upon religious exercise. The other confers a benefit upon religion. The former is illustrated in *Amos*. The *Amos* Court applied the accommodation doctrine in upholding an exemption to Title VII of the Civil Rights Act of 1964 that allows religious employers to discriminate according to religion in hiring decisions related to positions in non-religious, non-profit entities.[275] Applying the *Lemon* test, the Court held that: (1) under the purpose prong, "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions";[276] (2) under the effects prong, the Court ruled that "a law is not unconstitutional simply because it allows churches to advance religion,

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[270] *Id.*

[271] *Zelman*, 536 U.S. at 652; *see also* Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 8 (1993) (stating that, "government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge").

[272] Michael W. McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685, 686 (1992).

[273] Hobbie v. Unemployment Appeals Comm'n of Florida, 480 U.S. 136, 144-45 (1987).

[274] *See* Employment Div., Dep't. of Human Res. of Oregon v. Smith, 494 U.S. 872, 890 (1990); *see also* Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 303 (1985) (stating that "[i]t is virtually self-evident that the Free Exercise Clause does not require an exemption from a governmental program unless, at a minimum, inclusion in the program actually burdens the claimant's freedom to exercise religious rights").

[275] *See* Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 330-41 (1987).

[276] *Id.* at 335.

which is their very purpose";[277] and (3) under the excessive entanglement prong, the Court ruled that the accommodation at issue, "easily passe[d] muster" because limiting state interference in hiring decisions of religious institutions "effectuate[d] a more complete separation of [church and state]."[278]

Texas Monthly, Inc. v. Bullock[279] illustrates the second line of accommodation cases in which a regulation confers a benefit on religion.[280] In *Texas Monthly*, Justice Brennan's majority opinion established a narrow reading of the accommodation doctrine, creating a three-step framework to analyze exemptions involving benefits to religion. Justice Brennan stated three questions:

> 1) Are the benefits provided to a broad array of recipients, secular as well as religious?; 2) Do the benefits alleviate an obstacle to the exercise of an independent religious choice (or, conversely, do they create an incentive or inducement for making that choice)?; and 3) Is there an undue burden on nonbeneficiaries?[281]

The Court in *Texas Monthly* struck down a law exempting only religious publications from taxation because the benefit was not afforded to a sufficiently broad group of beneficiaries.[282]

Under the analysis in *Amos*, a religious exemption relieving the hospital from a burden upon its free exercise of religion will most likely be upheld. It is a valid secular purpose for the legislature to include a religious exemption for the religious hospitals to alleviate government interference so that the hospitals can carry out their religious beliefs against abortion. An exemption in this case does not have a primary effect of advancing religion. It simply allows the religious hospitals to advance their religion, which is a major purpose of any religious institution.[283] Under *Lemon*, "[f]or a law to have for-

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[277] *Id.* at 337.

[278] *Id.* at 339.

[279] 489 U.S. 1 (1989).

[280] *See id.* (challenging a sales tax exemption for religious periodicals).

[281] *See* McConnell, *supra* note 272, at 698 (discussing in detail each question from *Texas Monthly*).

[282] *Texas Monthly*, 489 U.S. at 15-17. Courts have upheld exemptions in some cases when the exemptions provided a benefit to a broad spectrum of groups. In those cases, the exemption did not single out a benefit for religious groups but provided a benefit to both the religious and non-religious. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 274 (1981); Walz v. Tax Comm'n of New York, 397 U.S. 664, 673 (1970).

[283] *Amos* is illustrative. In *Amos*, the petitioner was employed at a nonprofit gymnasium, run by the church, which was open to the public. *Amos*, 483 U.S. at 330. It is clear that a church's purpose is to advance its religion. However, the *Amos* court extended protection to non-profit facilities open to the public that is run by the church. Similarly, in our situation, the Catholic church's purpose is to advance its religion, so may its hospitals have that very purpose even though they are nonprofit and open to the public.

bidden 'effects' . . . it must be fair to say that the government itself has advanced religion through its own activities and influence."[284] Allowing an exemption also effectuates a more complete separation of the church and state. Denying the exemption would cause more entanglement because the government would be required to give direct funding to the hospitals for each emergency contraception provision,[285] as well as to require the government to enforce and oversee the hospital's compliance with the law.[286] It also avoids intrusive inquiry into the hospital's religious belief that emergency contraception may cause abortion.[287]

The standard in *Texas Monthly* will likely not apply to a religious exemption for religious hospitals. The exemption in *Texas Monthly* was not viewed as an exemption from a free exercise burden, but instead appeared to be a subsidy that only benefited religion. As explained in *Texas Monthly*:

> [W]hen government directs a subsidy exclusively to religious organizations that is not required by the Free Exercise Clause and that either burdens nonbeneficiaries markedly or cannot reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion, as Texas has done, it "provide[s] unjustifiable awards of assistance to religious organizations" and cannot but "conve[y] a message of endorsement" to slighted members of the community.[288]

For purposes of emergency contraception, including an exemption for religious hospitals would be to serve the purpose of relieving a burden imposed upon their free exercise of religion, rather than to confer a benefit or subsidize a religious organization. Thus, the permissive *Amos* line of accommodation cases will apply instead of the stricter reading in *Texas Monthly*.

D. Other Policy Considerations

There are many factors that ought to be taken into consideration in determining whether the state should regulate the freedom of religion or limit the right to privacy of an individual. The pending bill in Hawai'i underscores two very sensitive issues, one involves religion and the other involves one of the

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[284] *Id.*

[285] *See, e.g., Walz*, 397 U.S. at 674 (indicating that a factor in determining excessive entanglement is the fiscal relationship between the state and the religious entity).

[286] *See id.* at 675 (specifying that another factor to determine excessive entanglement, is whether there will be a need for surveillance or monitoring by the state over the religious institution).

[287] *See Amos*, 483 U.S. at 339 (stating that the statute at issue "effectuates a more complete separation of the [church and state] and avoids the kind of intrusive inquiry into religious belief that the District Court engaged in this case").

[288] Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 15 (1989) (quoting *Amos*, 483 U.S. at 348) (alterations in original) (internal citations omitted).

most heinous crimes, rape. The following discussion highlights policy factors that should apply to determine whether the state has a justifiable compelling interest in regulating the free exercise of religion.

1. Policy arguments in favor of rape victims

A survey taken by the Healthy Mothers, Healthy Babies Coalition of Hawai'i found that ninety percent of the emergency rooms in Hawai'i do not provide emergency contraception to a rape victim within seventy-two hours.[289] Another study shows that seventy-eight percent of Catholics believe that the church should allow a rape victim to decide on her own whether she would want emergency contraception.[290] Other studies show that ninety-six percent of all Catholic women who have ever had sex have used modern contraceptive methods at some point in their lives and seventy-five percent of Catholic women of childbearing age who are currently sexually active use a contraceptive method forbidden by the church.[291] Another survey completed by Catholics for a Free Choice found that approximately two hundred Catholic hospitals nationwide are already administering emergency contraception to rape victims, claiming that they are in accordance with the Catholic religious

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[289] *See* Kari Wheeling, *Hawai'i Emergency Contraception Access Survey*, Healthy Mothers Healthy Babies Coalition of Hawai'i, Vol. 1, No. 1, Spring 2002, at 1, 3, *available at* http://www.hmhb-hawaii.org/news_letters.htm (last visited Nov. 29, 2004). Healthy Mothers Healthy Babies Coalition of Hawai'i is a Hawai'i nonprofit agency and "is part of a national network of organizations and individuals committed to improving Hawai'i's maternal, child and family health through collaborative efforts in public education, advocacy, and collaboration." *Who We Are*, Healthy Mothers Healthy Babies Coalition of Hawai'i, *available at* http://www.hmhb-hawaii.org/who_we_are.htm (last visited Nov. 29, 2004).

Healthy Mothers Healthy Babies study results were as follows: 20 out of 45 (44%) of the family planning providers indicated that emergency contraception could be made accessible to the caller within 72 hours; 25 out of 45 (56%) of the clinic appeared to be unable to provide emergency access to the caller within 72 hours; 2 out of 20 (10%) of the emergency rooms could provide emergency contraception access to the caller within 72 hours; 18 out of 20 (90%) emergency rooms were unwilling or unable to provide emergency access; 0 out of 14 private pregnancy/counseling centers were willing or able to provide emergency contraception within 72 hours. Wheeling, *supra*.

[290] *See* Catholics for a Free Choice, *Catholic Health Care: Public Opinion on Religion and Health Care*, *available at* http://www.cath4choice.org/lowbandwidth/indexhealth.htm (last visited Nov. 29, 2004).

[291] *See* Catholics for a Free Choice, *The Facts Tell the Story: Catholics and Contraception*, *available at* http://www.cath4choice.org/lowbandwidth/indexhealth.htm (providing articles and publications with results) (last visited Nov. 26, 2004).

directives.[292] The above statistics strongly support the view that the autonomy of an individual should outweigh the burden on religious hospitals.

The effect of the morning after pill is also a policy consideration. First, emergency contraception is said to be safe and effective.[293] Second, the pill is time sensitive.[294] If, for some reason, the rape victim gets to the hospital around seventy-two hours following intercourse and is then denied access to emergency contraception, the pill may be ineffective and pregnancy may result.[295] In addition to a rape victim having a potential burden of an unwanted rape-resulting pregnancy, requiring her to transport herself to another hospital may add extra stress and anxiety to an already traumatic event.[296] It would be unfair to the rape victim to add that extra burden upon her, when the rape was not her fault.[297]

2. Policy arguments in favor of the religious hospitals

There are several policy considerations in favor of a religious exemption. The Catholic Church is the largest single church body in the state of Hawai'i.[298] Hawai'i has sixty-seven Catholic churches.[299] There are approximately two hundred thousand registered Catholics in Hawai'i.[300] Although many individual Catholics favor emergency contraception, it would be hard for a Catholic institution to condone such a practice, which it opposes and teaches against.

Another consideration is the slippery slope argument. If a regulation requires an institution to perform a service that conflicts with its religious principles, other regulations may also be mandated in the future. Overall, the intrusion upon the religious hospital needs to be carefully assessed because it

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[292] *See Second Chance Denied*, *supra* note 88 (quoting statistics from CFFC study). Walter Yoshimitsu questions the accuracy of the study done by CFFC, which indicated that over 200 Catholic hospitals are providing emergency contraception. Interview Yoshimitsu, *supra* note 33.

[293] *See* Center for Policy Alternatives, *Emergency Contraception for Sexual Assault Victims*, *available at* http://www.stateaction.org/issues/issue.cfm?issue=EC-SexualAssault.xml (last visited Nov. 29, 2004).

[294] Interview Ramelli, *supra* note 26; Interview Amaral, *supra* note 42.

[295] Interview Ramelli, *supra* note 26; Interview Amaral, *supra* note 42.

[296] Interview Ramelli, *supra* note 26; Interview Amaral, *supra* note 42.

[297] Interview Ramelli, *supra* note 26; Interview Amaral, *supra* note 42.

[298] The Catholic Church is one church body. There are more members in the Catholic church body than there is in any other church body in the state of Hawai'i. Interview Yoshimitsu, *supra* note 33.

[299] *Id.*

[300] *Id.*

may open doors for more regulation against religious beliefs involving not only Catholics, but other religions as well.

The effect of enforcement upon the community if the hospital is in violation also should be taken into consideration. As the Hawai'i bill mentions, if a hospital is found to be in violation, the first two violations require a fine of $1,000 each, and any further violation could result in the removal of state funding.[301] The Catholic hospitals in Hawai'i claim that only four rape victims walked into all their emergency rooms in 2003.[302] If they are in violation, the hospitals argue that the removal of funding would deny medical services to many more than four individuals. This may be a bigger burden upon the state, and thus it may conflict with the public health, safety, and welfare of the community.

IV. HAWAI'I'S EMERGENCY CONTRACEPTION BILL

The status of the emergency contraception bill in Hawai'i is still being debated among the advocates for religious hospitals and rape victims. The issue of whether a religious exemption should be included in the emergency contraception bill is so controversial that the bill has yet to be passed into law. In 2003, Hawai'i governor, Linda Lingle, vetoed the bill because it did not adequately provide a religious exemption for religious hospitals.[303] In doing so, the governor suggested that had the bill included an exemption for the religious hospitals, she would have passed it into law.[304] The advocates for rape victims refuse to accept Governor Lingle's suggestion. In 2004, the advocates again lobbied Hawai'i lawmakers to pass the emergency contraception bill without the religious exemption.[305] After many committee hearings and a few amendments, the advocates for rape victims succeeded in convincing most legislators to remove any religious exemption.[306] Unfortunately, the bill did not complete the full approval process and failed to reach Governor Lingle for her decision to either pass or veto.[307] Thus, the outcome of this highly controversial issue is still uncertain and unanswered.

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[301] *See, e.g.*, H.B. 189, 2003 Leg., 22nd Sess. (Haw. 2004).

[302] Interview Yoshimitsu, *supra* note 33.

[303] *See supra* note 47.

[304] *See supra* note 47.

[305] *See, e.g.*, H.B. 189, 2003 Leg., 22nd Sess. (Haw. 2004).

[306] *See id.* (including no religious exemption despite the committee hearings and bill amendments).

[307] *See* Bill Summary and Status, H.B. 189, 2003 Leg., 22nd Sess. (Haw. 2004), *available at* http://www.capitol.hawaii.gov/session2004/status/HB189.asp (last visited Sept. 22, 2004) (providing legislative information, including the status of bills in Hawai'i).

Under the law and current circumstances in Hawai'i, this Comment concludes that the emergency contraception bill in Hawai'i will require a religious exemption. Notwithstanding the various arguments presented in this Comment, this conclusion would turn on the issue of whether requiring religious hospitals to provide emergency contraception to rape victims, against their religious beliefs, is in violation of the Free Exercise clause of the United States and Hawai'i Constitutions.[308] As discussed in Part III.C.1, the federal free exercise analysis differs from Hawai'i's current free exercise analysis. Under Hawai'i's analysis, it is more likely that a favorable outcome will result for the religious hospitals.

Hawai'i's free exercise analysis employs a stricter standard of review than the federal analysis. The emergency contraception bill, on more than one level in the analysis, can be found unconstitutional. Under the first level, the government must overcome two thresholds. First, the government may never regulate religious beliefs, as opposed to conduct, and the law must have both a secular purpose and effect.[309] The second level allows for a balancing of factors, which includes "balancing the burden to the [religious entity's] free exercise of religion against the government's interest in [the regulation]."[310]

Under the first level of analysis, it is arguable whether the emergency contraception bill purports to regulate religious belief rather than conduct. The Catholic hospitals are against abortion, and under the Catholic Church's definition, the effect of emergency contraception may cause abortion. The emergency contraception law will require the hospitals to directly compromise one of its core religious beliefs against abortion. The bill will not prohibit conduct based on religious beliefs, but impose conduct which is directly against a religious hospital's religious beliefs. It is not clear whether this is a regulation of belief rather than conduct, but in the religious hospitals' view, the result of having to perform abortions clearly against their beliefs, may be found to regulate religious belief rather than conduct. Under the first threshold in the Hawai'i free exercise analysis, the emergency contraception bill may be found unconstitutional.

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[308] As noted in Part III, the other issues discussed in this comment, are not likely to be a determining issue in the emergency contraception bill. First, even though a rape victim has a right to privacy argument in taking emergency contraception, the right to privacy does not require any institution to administer contraception. Second, religious hospitals in Hawai'i are also not protected by the state conscience clause. The Hawai'i conscience clause only protects institutions from having to perform abortions and the effect of emergency contraception, is not agreed by all to cause abortions. Lastly, including a religious exemption in the emergency contraception bill will not be an establishment of religion in violation of the establishment clause. *See supra* Parts III.A-B, C.2.

[309] Korean Buddhist Dae Won Sa Temple of Hawai'i v. Sullivan, 87 Hawai'i 217, 246, 953 P.2d 1315, 1344 (1998).

[310] *Id. See also supra* Part III.C.1 (discussing the balancing factors in detail).

In balancing the factors, or applying the strict scrutiny standard currently in Hawai'i, the burden to the religious hospitals will probably outweigh the government's interest of requiring religious hospitals to provide emergency contraception to rape victims. Without disregard to the interests of rape victims, the following factors support this determination. First, not only have the Catholic hospitals in Hawai'i agreed to inform rape victims of the option of emergency contraception, they have also agreed to transport a rape victim to a facility that provides emergency contraception.[311] Being that the ultimate interest is to protect rape victims from unwanted rape-resulting pregnancies,[312] the Catholic hospitals' compromise to transport rape victims to another facility will accomplish this interest. Second, there are no statistics provided that indicate a current problem in Hawai'i. In determining the weight of the government interest, the "size and severity of the problem the state is attempting to solve"[313] should be balanced.[314] Among the rape victims in Hawai'i, only four victims entered the Catholic hospitals for treatment in 2003.[315] No information is available to indicate whether the hospital's lack of providing emergency contraception is a problem. Last, emergency contraception is becoming more accessible in Hawai'i. In 2003, the Hawai'i legislature passed a bill that would allow pharmacists to dispense emergency contraception without a prescription.[316]

Based on the foregoing factors, the government's interest in requiring a religious hospital to provide emergency contraception to protect rape victims from rape-resulting pregnancies is not compelling enough to burden a religious hospital to go against one of its deeply held religious beliefs. The compromise between the religious hospitals and the advocates for rape victims achieves the government's interest in protecting rape victims from unwanted rape-resulting pregnancy.

This determination, however, is not absolute. The balancing of factors may change depending on the change in circumstances in Hawai'i. One example would be if there is information that evidences a problem of unwanted rape-resulting pregnancies in Hawai'i due to the limited access of emergency contraception in hospital emergency rooms. This evidence may easily tip the scale in the government's favor. Moreover, if this issue were to ever reach the courts of Hawai'i, the Hawai'i courts may adopt the federal free exercise

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[311] Interview Yoshimitsu, *supra* note 33.

[312] *See* H.B. 189, 2003 Leg., 22nd Sess. (Haw. 2004).

[313] Catholic Charities of Sacramento, Inc. v. The Superior Court of Sacramento County, 85 P.3d 67, 108 (Cal. 2004) (Brown, J., dissenting).

[314] *See supra* note 243.

[315] Interview Yoshimitsu, *supra* note 33.

[316] *See supra* Part I.E.1 (discussing laws allowing pharmacist to dispense emergency contraception).

analysis.[317] If so, the federal analysis will almost certainly apply a rational basis scrutiny and allow an emergency contraception bill without a religious exemption.

V. CONCLUSION

There are undoubtedly many conflicting arguments pertaining to the emergency contraception bill. The viewpoints of both the rape victims and religious hospitals are justifiable and sincere. Unfortunately, no matter the outcome of the emergency contraception bill, one party will bear the burden. In Hawai'i, the emergency contraception bill should include a religious exception in order to be constitutional under Hawai'i's analysis for religious protection. Even if a religious exception is not included in the emergency contraception bill, however, the most important party, the rape victims, will be protected.

Tricia K. Fujikawa Lee[318]

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[317] *See* Korean Buddhist Dae Won Sa Temple v. Sullivan, 87 Hawai'i 271, 247 n.31, 953 P.2d 1315, 1345 n.31 (1998). The court in *Korean Buddhist* did not determine whether the *Smith* decision applies to the Hawai'i State Constitution because the court held that the issue in *Korean Buddhist* fell through a loophole that was left in *Smith*. *Id.* If this issue were to reach the courts, the court will then have the opportunity to adopt *Smith* or the federal rationale.

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America's Two Days of Infamy: The Immediate and Lasting Effects of Pearl Harbor and September 11th on the Ever-evolving Insurance Industry

I. INTRODUCTION

Shortly before 8:00 a.m. on December 7, 1941, a wave of 181 planes from the Empire of Japan descended upon Honolulu, Hawai'i and began a brutal surprise attack on Pearl Harbor.[1] Naval "air bases at Ford Island and Kaneohe Bay, the Marine airfield at Ewa, and the Army Air Corps fields at Bellows, Wheeler and Hickam" were assaulted simultaneously in order to prevent American planes from intercepting the Japanese forces.[2] Within minutes, battleships sank, and many sailors died.[3] The greatest loss of life came aboard the U.S.S. *Arizona*, which the Japanese destroyed with an armor piercing bomb.[4] After a short lull, a second wave of bombers continued to pummel United States battleships.[5] When the smoke finally lifted, 2,403 Americans lost their lives,[6] 21 U.S. Pacific Fleet ships were severely damaged or sunk,[7] 188 aircraft were destroyed and 159 damaged, and 1,178 military and civilians were wounded.[8]

In response, President Franklin D. Roosevelt delivered what is arguably his most memorable speech:

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[1] Department of the Navy—Naval Historical Center, Frequently Asked Questions About the Pearl Harbor Attack, 7 December 1941, http://www.history.navy.mil/faqs/faq66-1.htm (last visited Oct. 13, 2004) [hereinafter Naval Historical Center]. At the time, more than 90 ships were at anchor in Pearl Harbor, including eight battleships. *Id.*

[2] *Id.*; *see also* Arizona Memorial Museum Association, http://www.arizonamemorial.org/pearlharbor.htm (last visited Oct. 13, 2004) [hereinafter Arizona Memorial].

[3] Naval Historical Center, *supra* note 1.

[4] *Id.* The explosion and fire following the hit on the *Arizona* killed 1,177 crewmen, almost half the total number of Americans killed. *Id.*; *see also* Arizona Memorial, *supra* note 2.

[5] Japan Attacks Pearl Harbor: December 7, 1941, http://campus.northpark.edu/history/WebChron/World/PearlHarbor. Html (last visited Oct. 13, 2004) [hereinafter Japan Attacks].

[6] *Id.* Sixty-eight of the 2,403 killed were civilians. Most died from improperly fused shells fired by American aircraft that fell in Honolulu. *Id.*; *see also* Arizona Memorial, *supra* note 2.

[7] This fleet included the following battleships: USS *Arizona*, USS *California*, USS *Maryland*, USS *Nevada*, USS *Oklahoma*, USS *Pennsylvania*, USS *Tennessee*, and the USS *West Virginia*; the following cruisers: USS *Helena*, USS *Honolulu*, and USS *Raleigh*; the following destroyers: USS *Cassin*, USS *Downes*, USS *Helm*, and USS *Shaw*; seaplane tender USS *Curtiss*; target ship USS *Utah*; repair ship USS *Vestal*; minelayer USS *Oglala*; tug USS *Sotoyomo*; and *Floating Drydock Number 2*. Naval Historical Center, *supra* note 1.

[8] *Id.* In comparison, the Japanese only lost 29 planes. *Id.*

> Yesterday, December 7, 1941—a date which will live in infamy—the United States of America was suddenly and deliberately attacked by naval and air forces of the Empire of Japan . . . . I ask that the Congress declare that since the unprovoked and dastardly attack by Japan on Sunday, December seventh, a state of war has existed between the United States and the Japanese empire.[9]

Congress declared war on December 8, 1941, at 4:10 p.m., Washington time.[10]

Fast-forward approximately 60 years to September 11, 2001. At 8:46 a.m., an American Airlines jet sliced through the World Trade Center's North Tower.[11] Seventeen minutes later, a second jet crashed through the South Tower,[12] confirming fears that the first crash was not an accident. As the sheer terror of the implications of these attacks entered the minds of people in New York City, as well as those witnessing the unfolding events from their television sets, 2 more hijacked jets crashed—one into the Pentagon and one into a field in Pennsylvania.[13] The horror continued. Stunned onlookers could never have anticipated what happened that day—the dramatic crumbling of the South Tower at 10:05 a.m., a large section of one side of the Pentagon at 10:10 a.m., and, eighteen minutes later, the North Tower.[14] When all was said and done, 2,843 people died from the September 11th World Trade Center attacks.[15] The attacks also destroyed six buildings containing 13.3 million square feet of commercial space and damaged eleven buildings containing 16.5 million additional square feet of commercial space.[16] Meanwhile, the Pentagon attack killed 189 people and injured 110 more.[17]

In a speech reminiscent of President Roosevelt's speech over half a century earlier, President Bush addressed the nation.

> The deliberate and deadly attacks which were carried out yesterday against our country were more than acts of terror. They were acts of war. This will require our country to unite in steadfast determination and resolve. Freedom and

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[9] U.S. Constitution, Franklin D. Roosevelt's Day of Infamy Speech (December 8, 1941), http://www.usconstitution.com/FDRInfamySpeech.htm (last visited Oct. 13, 2004) [hereinafter Day of Infamy].

[10] New York Life Ins. Co. v. Bennion, 158 F.2d 260, 261 (10th Cir. 1946).

[11] Timeline & Images on the Morning of September 11, 2001, http://www.september11news.com/AttackImages.htm (last visited Oct. 13, 2004) [hereinafter Timeline].

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] Lucien J. Dhooge, *A Previously Unimaginable Risk Potential: September 11 and the Insurance Industry*, 40 AM. BUS. L.J. 687, 689 & n.9. (2003).

[16] *Id.* at 689-90 & n.9.

[17] *Id.* at 690 & n.12. Two million square feet of office space was destroyed or damaged. *Id.*

> democracy are under attack . . . . This enemy attacked not just our people, but all freedom-loving people everywhere in the world . . . [the United States] will rally the world. We will be patient, we will be focused, and we will be steadfast in our determination. This battle will take time and resolve. But make no mistake about it: we will win.[18]

Congress, in response, did not declare war pursuant to Article I of the Constitution[19] but instead issued a Joint-Resolution on September 14, 2001, authorizing the use of the United States Armed Forces against those responsible for the recent attacks launched against the United States.[20] Subsection (a) gave the President the power to use necessary and appropriate force against those responsible for the September 11th attacks.[21]

In the spring of 2001, just months before the horrific attacks, Silverstein Properties won a bid to lease the World Trade Center ("WTC") complex from the Port Authority of New York and New Jersey ("Port Authority") for a term of 99 years.[22] Subsequently, "[i]n July 2001, Silverstein Properties obtained primary and excess insurance coverage for the WTC complex from about two dozen insurers . . . in the total amount of approximately $3.5 billion 'per occurrence.'"[23] The issue of whether the September 11th attacks constituted one or two occurrences is the subject of pending litigation and a great deal of

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[18] President George W. Bush, Remarks by the President in a Photo Opportunity with the National Security Team (Sept. 12, 2001), http://www.whitehouse.gov/news/releases/2001/09/20010912-4.html (last visited Oct. 13, 2004) [hereinafter Remarks by the President].

[19] U.S. CONST. art. I, § 8, cl. 11; *see also* Jeffrey F. Addicott, *Legal and Policy Implications for a New Era: The "War on Terror"*, 4 SCHOLAR 209, 221 & nn.74-75 (2002). Certain statutory consequences arise in the event of a Congressionally declared war. "For example, 50 U.S.C. § 21 provides that '[w]henever there is a declared war . . . all natives, citizens, denizens, or subjects of the hostile nation or government . . . shall be liable to be apprehended, restrained, secured, and removed as alien enemies.'" *Id.* at n.74 (alteration in original).

[20] Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. (2001); *see also* The Joint Resolution Authorizing the Use of Force Against Terrorist Passed by the Senate and House of Representatives on Sept. 14, 2001, *available at* http://www.september11news.com/PresidentBush.htm (last visited Oct. 13, 2004) [hereinafter Joint Resolution]. The resolution passed with votes from every member of the Senate and all but one member of the House of Representatives. Addicott, *supra* note 19, at 221.

[21] Section (a) states:

> That the president is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on Sept. 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

S.J. Res. 23, 107th Cong. (2001).

[22] World Trade Ctr. Props. v. Hartford Fire Ins. Co., 345 F.3d 154, 158 (2d Cir. 2003).

[23] *Id.*

ongoing debate.[24] Further complicating the matter is the fact that only one of the insurance policies was settled at the time of the attacks.[25]

Both attacks drastically affected thousands of Americans and left indelible impressions that continue to affect many millions across the world. In some respects, September 11th resembles Pearl Harbor. Both attacks employed aircraft and took their victims by surprise early in the day. Both involved staggering numbers of fatalities. Yet there are also legally significant differences. First, Pearl Harbor involved a military attack on United States military targets. Conversely, September 11th concerned terrorists targeting private, civilian interests.[26] Second, the terrorists utilized American commercial airliners as weapons to destroy American symbols of prosperity and economic freedom. A handful of terrorists, not members of a military force, hijacked four aircraft with the intention of hitting their specified targets and dying as martyrs for their cause.[27]

This Comment examines the impact on the insurance industry following both attacks as well as the government's response in dealing with tragedies of such colossal magnitude. Additionally, this Comment contends that both the Pearl Harbor and WTC attacks constituted multiple "occurrences." Part II discusses the contributing causes of, legislative responses to, and political/social/

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[24] *See infra* Part III.C.

[25] *World Trade*, 345 F.3d at 158-60. "Silverstein Properties engaged Willis of New York ("Willis"), an insurance broker, to set up a multi-layered insurance program." *Id.* at 159. Willis negotiated with various insurers but "[a]s of September 11, 2001, none of the appellees-insurers had issued a final [insurance] policy form." *Id.* at 160.

[26] "There is no doubt that the 9-11 atrocities were an event of historic importance, not—regrettably—because of their scale, but because of the choice of innocent victims." NOAM CHOMSKY, 9-11 119 (2002).

[27] What is extraordinary about this episode is that these people were preparing for their mission for months, leading normal lives with wives, taking the garbage out, taking their kids to McDonalds, taking flying lessons, living in comparatively pleasant places, all the while knowing that at some future date they were going to kill themselves and thousands of people.

CHRISTOPHER HEWITT, UNDERSTANDING TERRORISM IN AMERICA: FROM THE KLAN TO AL QAEDA 2 (Roger Eatwell & Cas Mudde eds., 2003) (citing Karen De Young & Michael Dobbs, *Bin Laden: Architect of New Global Terrorism*, WASH. POST Sept. 16, 2001, at A8).

A comparison can be made between the September 11th terrorists and the infamous Kamikaze, or suicide, World War II pilots from Japan. Japanese officials turned to unconventional means once they "understood the virtual impossibility of crushing the might of America's forces." ALBERT AXELL & HIDEAKI KASE, KAMIKAZE: JAPAN'S SUICIDE GODS 33 (2002). "[T]he decision to adopt Kamikaze tactics was approved in a matter of minutes but [its] psychological foundations had been built up over many centuries." *Id.* A suicide manual prepared the kamikaze pilots for their missions. *Id.* at 77. The manual included sections describing how to maximize damage, detailed calculations of how to attack, and how to cope and feel moments before the crash, and ultimately, death. *Id.* at 78-83.

economic climate following both attacks. Part III examines the historical application of war risk exclusions and their inapplicability today. This section also discusses different tests used by courts to define "occurrence." Part IV considers the degree to which the government should intervene after substantial attacks and how this government intervention, when combined with reinsurance, may best protect the insurance industry in the wake of catastrophic events. Finally, Part V concludes that insurance law will continually require adjustment and modification because of the ever-changing face of 21st century warfare.

II. BACKGROUND

In the context of both the September 11th and Pearl Harbor attacks, the government has been subjected to a significant amount of scrutiny. Many have accused the government of knowing about the attacks in advance,[28] and in the most extreme viewpoints, of causing the attacks. Regardless of who is to blame, an examination of the political, social, and economic climate leading up to the attacks offers insight into how the two horrific tragedies could have occurred.

The legislative response to the attacks, in turn, sheds light on the changes that follow catastrophic events and how these changes shape the American way of life. An unprecedented degree of collateral damage and personal injury resulted from each attack, which thereby pressured Congress to act quickly. Issues of liability and insurance coverage seemed to dominate the legislature's focus. To quash a potential collapse of the insurance industry (due to the extensive property damage and loss of life) and to preserve the air-

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[28] "The September terrorist attacks created such a serviceable pretext for reactionism at home and imperialist expansion abroad as to leave many people suspecting that US government itself had a hand in the event." MICHAEL PARENTI, THE TERRORISM TRAP: SEPTEMBER 11 AND BEYOND 69 (2002). It is "hard to believe that the White House or the CIA actively participated in a conspiracy to destroy the World Trade Center and part of the Pentagon," killing thousands. *Id.* at 70. "But this does not preclude the possibility that they expected *something* to happen and looked the other way—without anticipating the magnitude of the destruction." *Id.*

A charge was "made that President Franklin Delano Roosevelt was aware that Pearl Harbor was going to happen and did nothing to stop it because he wanted a casus belli that would galvanize a reluctant US public into entering World War II." *Id.* at 69. It could be believed "that Roosevelt knew the Japanese were up to something . . . [on] December 7, 1941. But there is no reason to think he anticipated—let alone collaborated in or welcomed—the destruction of the entire US Pacific fleet and the death of 2500 Americans." *Id.* at 70. U.S. Secretary of the Navy Knox described Roosevelt as "a man of supreme self-confidence," except on December 7th. *Id.* Knox went to the White House on the afternoon of Pearl Harbor "'and [Roosevelt] was in the Oval Office. When I went in he was seated at his desk and was as white as a sheet. He was visibly shaken. You know, I think he expected to get hit; but he did not expect to get hurt.'" *Id.* at 70, 107 n.71.

line industry, Congress enacted several key pieces of legislation to stabilize the economy.

Finally, everyone's lives changed following the attacks. The economy suffered, social life changed, and the political realm had to make significant judgment calls, not all of which may be remembered proudly. Nonetheless, the United States' ability to cope in the aftermath of inexplicable tragedy reflects the determination of Americans to move forward with their lives as well as the resilience of countless institutions upon which Americans rely.

A. Pre-September 11, 2001

The September 11 Commission ("9/11 Commission") recently released its findings about the country's preparedness prior to the September 11th attacks and its recommendations to "make America safer and more secure."[29] Specifically, the 9/11 Commission discussed the following causes of the attacks: (1) unsuccessful diplomacy; (2) lack of military options; (3) problems within the intelligence community; (4) problems in the FBI; (5) permeable borders and immigration controls; (6) permeable aviation security; (7) financing; (8) an improvised homeland defense; (9) emergency response; and (10) Congress.[30] Consistent with the 9/11 Commission's findings, the following incidents and circumstances can be said to have contributed to the attacks.

1. al-Qaeda's early plans

As early as 1993, an expert panel, commissioned by the Pentagon, investigated "the possibility of an airplane being used to bomb national landmarks."[31] Driven by fear of providing terrorists with ideas, the government opted not to publish the findings.[32] Additionally, the idea of such an attack was considered

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[29] *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States—Executive Summary*, http://www.gpoaccess.gov/911/ (last visited Oct. 13, 2004) [hereinafter *9/11 Commission Report*].

[30] *Id.* These specific findings basically confirmed what most people probably suspected—that the government, despite being aware of potential terrorist threats and taking some action to prevent attacks, was unprepared. The 9/11 Commission also cited a lack of communication (both within and between various governmental agencies), the terrorists' use of U.S. resources to effectively plan and execute their attacks, and lapses in security as contributory factors to the events of September 11th. *Id.*

[31] NAFEEZ MOSADDEQ AHMED, THE WAR ON FREEDOM: HOW AND WHY AMERICA WAS ATTACKED SEPTEMBER 11, 2001 81 (2002).

[32] *Id.* at 82. A draft of the results was circulated through the Justice Department, Pentagon, and the Federal Emergency Management Agency. *Id.*

to be "radical thinking."[33] Only one year later, however, there were three attempts to destroy buildings/landmarks using aircraft.[34]

The threat of aircraft used as weapons did not end there. Numerous sources reveal that officials discovered an al Qaeda plan, dubbed Project Bojinka, in the Philippines in 1995, following the arrest of Ramzi Yousef and Abdul Hakim Murad, two bin Laden agents.[35] Originally, the plot involved blowing up 11 airlines over the Pacific Ocean within a 48-hour period.[36] The alternative plot involved crashing 11 planes into targets in the United States, including the WTC in New York, the Sears Tower in Chicago, the TransAmerica Tower in San Francisco, the White House in Washington D.C., and the CIA headquarters in Langley Virginia.[37]

2. Islamic fundamentalists and their hatred for all things American

The prevailing theory behind the enmity of many Muslims "towards the United States is often attributed to their distaste for its modern, secular, plural values and way of life."[38] In the alternative, "[a] variant of this theory argues that hatred of the West results from the failure of Arab societies to modernize successfully."[39] Terrorists themselves cite to U.S. foreign policy, most particularly American support for Israel, as a key motivating factor behind their actions.[40]

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[33] *Id.* at 81.

[34] *Id.* at 82. In April of 1994, a disgruntled Federal Express employee attempted to overtake the cockpit of a DC-10 in the hopes of crashing the plane into a company building. *Id.* In September, an individual piloting a small plane managed to crash into a tree on the grounds of the White House, narrowly missing the President's bedroom. *Id.* Finally, in December, members of the Armed Islamic Group hijacked an Air France flight in the hopes of crashing it into the Eiffel Tower. *Id.*

[35] *Id.* at 85.

[36] *Id.* at 84.

[37] *Id.* at 84, 134 n.158. Ramzi Yousef, mastermind behind the plans, was convicted on September 11, 1996, for complicity in the 1993 WTC attack. "[G]iven the fascination terrorists have with anniversaries, 11 September should surely have become a watch date." *Id.* at n.160 (quotations omitted).

[38] HEWITT, *supra* note 27, at 43; *see also* CHOMSKY, *supra* note 26, at 122 ("Commentators generally prefer a more comforting answer: their anger is rooted in resentment of our freedom and love of democracy, their inability to take part in the form of 'globalization' (in which they happily participate), and other such deficiencies.").

[39] HEWITT, *supra* note 27, at 43.

[40] *Id.* Following the 1993 WTC bombing by Islamic fundamentalists, a NEWSWEEK writer "pronounced himself puzzled by the lack of 'a coherent reason for bombing the World Trade Center . . . the best we have are vague references to US support for Israel.'" *Id.* (quoting T. Morgenthau, *A Terrorist Plot Without a Story*, NEWSWEEK, Feb. 28, 1994, at 28-29). "[S]cholarship is virtually unanimous in taking the terrorists['] . . . word, which matches their deeds for the past twenty years: their goal, in their terms, is to drive the infidels from Muslim

At least two factors have contributed to the ability of Islamic fundamentalists to strike *domestic* American targets: (1) insufficient immigration control at American borders and (2) the Islamic community's growth within the United States.[41] It should be noted, however, that "only a small minority of American Muslims support terrorism."[42] The political background of terrorist acts prior to September 11th can be generalized as follows:

> First, sustained outbreaks of terrorism are associated with the existence of a substantial body of sympathizers and supporters. In every one of the cases examined, a sizeable number of people felt very strongly about some social/political issue, and also felt that the political system ignored, or was hostile to, their concerns. The timing of each outbreak of terrorism coincides, at least approximately, with the rise of extremist sentiments and with various indicators of extremist mobilization.[43]

In the case of September 11th, the "perpetrators were . . . propelled by the fanatical conviction that they were operating directly under God's command."[44]

B. Pre-Pearl Harbor

Unlike the period leading up to the September 11th attacks, Hawai'i residents frequently discussed the possibility of an attack prior to the Pearl Harbor attack. After all, World War II had already begun. But as quickly as the topic came up, people dismissed the idea as ridiculous and impossible. In contrast to the government's concern (albeit minimal) preceding September 11th, the attitude pervading Hawai'i and the mainland prior to Pearl Harbor can be best described as arrogant ignorance.

1. Overconfidence

Some consider overconfidence to be "one of many failings contributing to the Pearl Harbor catastrophe."[45] Several key officials boasted about the

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lands, to overthrow the corrupt governments they impose and sustain, and to institute an extremist version of Islam." CHOMSKY, *supra* note 26, at 121.

[41] HEWITT, *supra* note 27, at 44. "A combination of immigration and conversion resulted by the late 1990s in a Muslim population estimated at between 2 million and 6 million, of whom about a third are Arabs, and a third American-born converts (mainly blacks)." *Id.* The remaining third are comprised of Iranians and Pakistanis. *Id.*

[42] *Id.* (citing N. Adams, *The Terrorists Among Us*, READERS DIG., Dec. 1993, at 74-80).

[43] *Id.* at 45.

[44] PARENTI, *supra* note 28, at 35.

[45] THURSTON CLARKE, PEARL HARBOR GHOSTS: THE LEGACY OF DECEMBER 7, 1941 64 (2001)(1991). "[T]he more you examine the attitude of the civilians and military, on Hawai[']i

strength and capability of Pearl Harbor and the Pacific Fleet.[46] Journalists also portrayed Pearl Harbor as an indestructible force in the Pacific, prepared to defeat anyone who might dare to challenge its superiority.[47] These continued misrepresentations deluded Hawai'i residents into a false sense of security and the belief that Japan could never attack.

On December 6, 1941, Maine Senator Ralph Brewster delivered a speech claiming that "[t]he United States Navy can defeat the Japanese navy, any place and at any time."[48] What is more, officials convinced the public that any attack was an improbability because of the sheer distance from Japan to Oahu.[49] In 1940, Major General Charles Herron, commander of the Hawaiian Department, announced that "Oahu will never be exposed to a blitzkrieg attack. This is why: we are more than two thousand miles away from land whichever way you look, which is a long way for an enemy force to steam. And besides, it would have to smash through our Navy."[50] These reassurances became so engrained in the public's mind that "a Japanese raid was considered so improbable and suicidal it had become a long-standing joke."[51] Even Japanese Americans in Hawai'i did not believe that Japan would attack.[52]

2. Defense boom and a thriving economy

The overconfidence of most Hawai'i residents was not only fueled by journalists and officials but also by the defense boom and thriving economy in Hawai'i. In fact, the "Depression scarcely touched Honolulu, and in 1941 a defense boom was making it as rich as it was beautiful."[53] The defense

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and the mainland, the more it appears that calling this state of mind 'overconfidence' is a kindness, and it is better described as deluded or arrogant." *Id.*

[46] *Id.* at 65. Army Chief of Staff General George C. Marshall to President Roosevelt in May 1941—"Pearl Harbor is the strongest fortress in the world . . . a major attack is impractical;" Minnesota congressman Melvin J. Mass and colonel in the Marine Corps Reserves—"Japan is deathly afraid of the American fleet." *Id.*

[47] *Id.* at 65-66.

[48] *Id.* at 66 (quotations omitted).

[49] "On September 6, 1941, a Honolulu Star-Bulletin reporter wrote that 'A Japanese attack in Hawai[']i is regarded as the most unlikely thing in the world, with one chance in a million of being successful. Besides having more defenses than any other post, it is protected by distance.'" *Id.* at 37.

[50] *Id.* at 66-67 (quotations omitted).

[51] *Id.* at 67. The phrase "here come the Japanese" was used in the same way one would say "here comes the bogeyman" to a child. *Id.*

[52] A writer for the local Japanese newspaper said that he "never imagined that the Japanese would be so stupid as to attack America directly." *Id.*

[53] *Id.* at 33.

In the Honolulu of 1941, there was not a single practicing psychiatrist, perhaps because the profession was considered unnecessary in paradise. Crimes were infrequent and

boom brought with it thousands of defense workers and servicemen and huge new military installations.[54] Many Hawai'i residents did not appreciate the sudden consequences that accompanied the influx of mainlanders—traffic, industrial smoke, housing shortages, hustle, and new wealth.[55] In spite of the drastic changes shaping Hawai'i, however, residents maintained a sense of security because of Hawai'i's isolation.[56] Furthermore, "Honolulu's small-town customs also made war and destruction seem inconceivable."[57] Sadly, on the morning of December 7, 1941, the "impossible" occurred.[58]

Despite the government's inability to prevent either attack, it is fair to say that the government expeditiously enacted legislation to minimize the detrimental effects of the attacks. The legislation also established mechanisms for coping with future attacks. Although some might argue that the legislation resulted in too much governmental intervention in private industries, the detriment to the American public would have been far greater had the government not taken control of the situation.

C. Legislative Response to Liability and Insurance Issues Stemming From September 11th

In light of the attacks on September 11th, Congress passed several acts to deal with the anticipated turmoil left in their wake. Fears of subsequent attacks escalated.[59] At the same time, the capacity to insure for terrorism dramatically declined.[60] As a result, many people were left wondering how they would deal with personal injuries, deaths, and property damage. High-risk property owners and developers struggled to obtain terrorism insurance

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> minor . . . a "crime wave" consist[ed] of a stolen car, a man pummeled by sailors in a street brawl, an attempted suicide with a pocketknife, a missing piggybank, and the theft of some bananas.

Id. at 33-34.

[54] *Id.* at 35. By December of 1941, "the boom had increased the population by 10 percent in a single year, and increased construction expenditures tenfold in two years." *Id.* at 36.

[55] *Id.* at 36-37.

[56] *Id.* at 37.

[57] *Id.* at 35. "Doors were so seldom locked that many house keys had been mislaid . . . . At bars and parties, people entertained themselves by singing. The piano was popular, and children gave recitals and servicemen played in hotel parlors." *Id.* at 35-36.

[58] *See supra* Part I.

[59] Jeffrey Manns, Note, *Insuring Against Terror?*, 112 YALE L.J. 2509, 2511 & n.14 (2003).

[60] *Id.* & n.15.

at any price.[61] Numerous parties directly affected by the September 11th attacks lobbied the government for assistance and intervention.

1. Air Transportation Stabilization Safety and System Stabilization Act/September 11th Victim Compensation Fund of 2001

On September 22, 2001, President Bush signed the Air Transportation Safety and System Stabilization Act ("ATSSSA") into law.[62] The ATSSSA granted $15 billion to the airline industry for the purpose of "compensat[ing] air carriers for losses incurred . . . as a result of the terrorist attacks on the United States that occurred on September 11, 2001."[63]

Congress also created the September 11th Victim Compensation Fund of 2001[64] ("Fund") as a component of the ATSSSA. The Fund's purpose is "to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2001."[65] Alternatively, the Fund "provides a less complicated, non-adversarial way to compensate victims and their families."[66] Those who opt to receive compensation from the Fund waive "all litigation rights regarding the Sept. 11 attacks."[67] Claimants who instead choose to litigate are limited to a federal cause of action that can only be brought in the United States District Court for the Southern District of New York.[68]

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[61] *Id.* & n.17. Terrorism insurance does not come cheap. Policies "can cost five to 20 times the rate of Special Perils or 'All-Risk' coverage. In major cities with high-rise buildings such as New York, Chicago, San Francisco, Los Angeles, Dallas, and Atlanta, insurers charge a premium rate from ¾ percent to 1.5 percent of the limit." James E. Branigan, *Insurance Issues Resulting from the Attack on America—September 11, 2001*, 489 PLI/REAL 123, 134 (2003). "For a high-rise building requiring $100 million terrorist risk limit, a premium of $750,000 to $1,500,000 will be required." *Id.*

[62] Carl J. Pernicone & James T.H. Deaver, *Insurance Implications of the World Trade Center Disaster*, 31 SPG BRIEF 23 (2002); *see also* Air Transportation Safety and System Stabilization Act of 2001, Pub. L. No. 107-42, 115 Stat 230 (codified at 49 U.S.C. § 40101 note) (2001) [hereinafter ATSSSA].

[63] ATSSSA § 101(a); *see also* Pernicone & Deaver, *supra* note 62, at 23.

[64] ATSSSA §§ 401-09.

[65] *See id.* § 403.

[66] Linda S. Mullenix & Kristen B. Stewart, Symposium Article, *The September 11th Victim Compensation Fund: Fund Approaches to Resolving Mass Tort Litigation*, 9 CONN. INS. L.J. 121, 130 & n.25 (2002) (internal quotations omitted).

[67] *Id.* & n.29 (internal quotations omitted).

[68] *Id.* "Claimants have two years from the date of publication of the Victim Compensation Fund Regulations within which to make their choice between joining the fund or litigating." *Id.* & n.28. Those who opt to take advantage of the Fund in lieu of litigation must fill out a specified form, "state the factual basis for eligibility for compensation, and the amount of compensation sought," and file the claim with the Fund's Special Master, Kenneth Feinberg. ATSSSA § 405(a). ATSSSA's three-part formula for determining the amount to be rewarded

The eligible parties covered by this Fund include those injured[69] or killed at the WTC, the Pentagon, and the site of the aircraft crash in Pennsylvania, whether present at one of these locations or a passenger or crewmember on one of the aircraft.[70] The Fund additionally provides compensation to personal representatives of those killed as a result of the September 11th attacks who file on behalf of their decedents.[71] A secondary feature of the Fund limits the liability of the two airline carriers involved in the attacks with regard to all claims arising from the September 11th tragedy.[72]

As of October 13, 2004, the Fund had issued 2,681 personal injury claims.[73] The awards have ranged from $500 to $8.6 million after offsets.[74] With regard to compensation for deceased victims, a total of 7,402 claims had been submitted as of October 13, 2004.[75] Of those, the Office of the Special Master

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is as follows: "First, ATSSSA provides for a determination of the amount a victim would have earned over his or her lifetime, subject to certain limitations. Secondly, compensation for pain and suffering is added to the projected earnings . . . . Finally, each award is adjusted from collateral sources except for money received from charities." Mullenix & Stewart, *supra* note 66, at 131 & n.33-35.

[69] The general guiding principles for personal injury claims as provided by Special Master Kenneth Feinberg:

> First, in the event that Personal Injury claimant is totally and permanently disabled, the Fund will, in most cases, calculate economic loss due to lost income using a presumed award methodology similar to that published for deceased victims. The Special Master will not apply any deduction for consumption. Any compensation for the lost earnings will be treated as a collateral source offset.
>
> Second, the non-economic award to Personal Injury claimants will be based on the nature, severity, and duration of the injury. Claimants with less severe injuries that were resolved quickly should anticipate modest non-economic awards. Claimants with severe, long-term injuries should anticipate more substantial awards for non-economic loss. The Special Master anticipates that those victims who suffered severe burns will receive the largest non-economic awards. For those who suffered the most severe burns and are likely to face permanent pain or disfigurement, non-economic losses could even exceed the non-economic award for a deceased victim.

September 11th Victim Compensation fund of 2001, Compensation for Personal Injury Victims, Award Payment Statistics, http://www.usdoj.gov/victimcompensation/payments_injury.html (last visited Oct. 13, 2004) [hereinafter Personal Injury Fund].

[70] ATSSSA § 405(c)(2)(A)-(B).

[71] ATSSSA § 405(c)(2)(C). Since the creation of the September 11th Victim Compensation Fund, Congress has expanded its coverage to the victims of the 1993 World Trade Center Bombing, 1995 Oklahoma City Bombing, and 1998 West African embassy bombings. Also included in this broadened coverage are the anthrax attack victims. Mullenix & Stewart, *supra* note 66, at 128 & n.20.

[72] Pernicone & Deaver, *supra* note 62, at 23.

[73] Personal Injury Fund, *supra* note 69.

[74] *Id.*

[75] September 11th Victim Compensation Fund of 2001, Compensation for Deceased Victims, Award Payment Statistics, Table 1, http://www.usdoj.gov/victimcompensation/

has issued 5,559 award letters.[76] The average award for death (after offsets) is $2,081,844 and the median award for death (after offsets) is $1,677,633.[77]

2. Terrorism Risk Insurance Act

In addition to compensation for personal injury and death, the government also focused on assisting the insurance industry with exorbitant costs associated with terrorist attacks. On November 26, 2002, President Bush signed the Terrorism Risk Insurance Act ("TRIA").[78] TRIA "provides for federal cost sharing for commercial property and casualty insurers in the event of a certified terrorist attack."[79] TRIA's goal is "to ensure the widespread availability and affordability of property and casualty insurance for terrorism risk at reasonable and predictable prices."[80] Perhaps more important, TRIA "was designed to address an alleged economic 'crisis' caused by the unwillingness of insurers to issue terrorism insurance except on prohibitively expensive terms in the wake of the World Trade Center attacks."[81] Congress designed the program to run until December 31, 2005.[82]

Under TRIA, private insurers wishing to receive federal assistance require satisfaction of a four-part definition of an occurrence of an act of terrorism: (1) "a violent act or an act that is dangerous to human life, property, or infrastructure";[83] (2) "the act must result in damage within the United States or outside of the United States in the case of air carriers, vessels and U.S.

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payments_deceased.html (last visited Oct. 13, 2004) [hereinafter Deceased Fund].

[76] *Id.*

[77] *Id.*; *see also* Devlin Barrett, *9/11 Families Near Compensation Deadline*, HONOLULU ADVERTISER, Dec. 14, 2003, at A6.

[78] Dhooge, *supra* note 15, at 720 & n.208.

[79] *Id.* at 722.

[80] Manns, *supra* note 59, at 2510 & nn.6-7 (2003) (internal quotations omitted); *see also* Terrorism Risk Insurance Act of 2002, Pub. L. No. 107-297, 116 Stat. 2322 (codified at 15 U.S.C. § 6701 note)(2002) [hereinafter TRIA]. TRIA's purpose is:

> (b) PURPOSE—The purpose of this title is to establish a temporary Federal program that provides for a transparent system of shared public and private compensation for insured losses resulting from acts of terrorism, in order to—
>
> (1) protect consumers by addressing market disruptions and ensure the continued widespread availability and affordability of property and casualty insurance for terrorism risk; and
>
> (2) allow for a transitional period for the private markets to stabilize, resume pricing of such insurance, and build capacity to absorb any future losses, while preserving State insurance regulation and consumer protections.

TRIA § 101(b).

[81] Manns, *supra* note 59, at 2509 & n.2.

[82] TRIA § 108(a).

[83] Dhooge, *supra* note 15, at 720 & n.209.

missions";[84] (3) "the act in question must be committed by an individual or individuals acting on behalf of foreign interests in 'an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion";[85] and (4) "the act in question must be certified as such by the Secretary of the Treasury in concurrence with the Secretary of State and the Attorney General."[86] Acts excluded from coverage under TRIA (in other words, not certified by the Secretary as an act of terrorism) include: (1) acts "committed as part of the course of a war declared by the Congress"[87] and (2) "property and casualty insurance losses resulting from the act, in the aggregate, [not exceeding] $5,000,000."[88]

In the event that the government must pay out on claims, insurers may have to collect "terror premium[s] from their insureds upon the direction of the Secretary."[89] This essentially functions to allow the government to recover some of the money that it may possibly spend over the course of TRIA's three-year existence.[90] In addition to planning for potential costs facing the insurance industry in the event of another terrorist attack, the government also sought to limit the liability of entities closely involved with September 11th.

3. Aviation Security Act

The Aviation Security Act ("ASA") is a prime example of the government's effort to protect the parties most closely involved with the September 11th attacks. Passed on November 19, 2001, the ASA "provides for the eventual takeover of airport security by the federal government."[91] The ASA also limits potential liabilities for the following entities: Larry Silverstein (WTC leaseholder); the Port Authority (owner of WTC); Boeing Company; General Electric Aircraft Engines; and airport authorities for Boston's Logan Airport

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[84] *Id.* & n.210.

[85] *Id.* & n.211. The requirement that TRIA will only apply to terrorist events from foreign sources is particularly interesting given that the United States has suffered terrorist attacks perpetrated by domestic sources, i.e., Timothy McVeigh and the Oklahoma City bombing. Mark Boran, Note, *To Insure or Not to Insure, That is the Question: Congress' Attempt to Bolster the Insurance Industry After the Attacks on September 11, 2001*, 17 ST. JOHN'S J. LEGAL COMMENT. 523, 579-80 & n.325 (2003).

[86] Dhooge, *supra* note 15, at 720 & n.212.

[87] TRIA § 102(1)(B)(i).

[88] *See id.* § 102(1)(B)(ii).

[89] Boran, *supra* note 85, at 582 & n.342.

[90] *Id.* & n.341.

[91] Pernicone & Deaver, *supra* note 62, at 24.

and Washington's Dulles Airport (locations where the terrorists boarded planes).[92]

The losses sustained as a result of September 11th were so widespread that it is difficult to assign an exact monetary value. Estimates for the insured losses from the WTC alone range from $35 billion to $75 billion.[93] Most of the victims had life insurance, many businesses invoked business interruption coverage,[94] and those airline passengers killed most likely have representatives who will sue the airline companies.[95] The property damage sustained from the attacks, however, arguably affected the insurance industry most significantly.[96]

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[92] *Id.* This limitation of liability will not preclude liability, however, because Judge Hellerstein, a U.S. District Court Judge, entered judgment in favor of the families of the victims of the September 11th attacks. *See In re* September 11 Litigation, 280 F. Supp. 2d 279 (S.D.N.Y. 2003) (The judgment allows victims' families to proceed with lawsuits against the parties most closely tied to September 11th, including the airlines, airport security companies, WTC owners and operators, and airplane manufacturer. Judge Hellerstein held that (1) the airline and airport security duty to secure against terrorist attacks extended to ground victims under New York law; (2) plane crashes of hijacked planes was a foreseeable hazard of airlines' negligently performed security screenings; (3) plaintiff's negligence claim is not preempted by federal statutes and regulations that protect passengers and property on aircraft in the event of air piracy under New York law; (4) owners and operators of office buildings have a duty under New York law to provide fire safety measures to building occupants; (5) plaintiffs' claims sufficiently alleged proximate cause (legal) against owners and operators; (6) plaintiffs sufficiently established manufacturer's duty under Pennsylvania and Virginia law; and (7) manufacturer's failure to design impenetrable cockpit door proximately caused the crashes.).

[93] Jeffrey W. Stempel, *The Insurance Aftermath of September 11: Myriad Claims, Multiple Lines, Arguments Over Occurrence Counting, War Risk Exclusions, the Future of Terrorism Coverage, and New Issues of Government Role*, 37 TORT & INS. L.J. 817, 818 & n.3 (2002). *See also* Steven Plitt, *The Changing Face of Global Terrorism and a New Look of War: An Analysis of the War-Risk Exclusion in the Wake of the Anniversary of September 11, and Beyond*, 39 WILLAMETTE L. REV. 31, 35 & n.46 (2003). Prior to September 11, Hurricane Andrew produced the single largest insurance loss within the United States, with insurers paying out around $15 billion ($19 billion today). *Id.* & nn. 47-48.

[94] In order to qualify for business interruption coverage, the majority of courts require "a complete suspension of operation as a result of a covered damage or loss." Pernicone & Deaver, *supra* note 62, at 25 & n.1.

> Business and Rental Interruption Insurance are endorsements to the property insurance policy that provide the insured with indemnification for lost net profit and continuing fixed expenses from the time of the occurrence until, using 'due diligence and dispatch,' the premises can be restored to a condition that existed prior to the occurrence.

Branigan, *supra* note 61, at 128.

[95] Stempel, *supra* note 93, at 818 & n.4.

[96] Many business policies contain the following types of coverage in addition to "occurrence" and business interruption coverage: (1) extended period of indemnity—providing additional time for landlords to find tenants; this extends the business interruption/rental income coverage period and is purchased in 30-day increments and (2) extra expense endorsement—covers the additional costs incurred by the insured to "maintain operations as close as possible to those existing prior to loss." Branigan, *supra* note 61, at 128.

With the incredible pressure placed so suddenly on the insurance industry, the government's intervention seemed to be the most prudent short-term solution. While Americans struggled through an unpredictable time, the government took initiative and made available the necessary funds to sustain those most affected by the tragic events of September 11th.

D. Legislative Response Following Pearl Harbor

Although the attacks on Pearl Harbor did not directly impact civilians to the same degree as did the September 11th attacks, fears of enemy bombing were widespread along the coasts of the continental United States.[97] Property owners were uninsured with respect to losses from enemy attack and could not purchase such insurance through private companies.[98] In response, Congress created an amendment to the Reconstruction Finance Corporation Act, known as the War Damage Insurance Act ("WDIC"), which became law on March 27, 1942.[99]

1. War Damage Insurance Act

WDIA authorized the War Damage Corporation ("WDC") "to provide, not later than July 1, 1942, insurance protection against loss or damage to property as a result of enemy attack . . . upon the payment of premiums or charges."[100] The statute, however, limited the application of insurance protection to property "in the United States, the Philipine [sic] Islands, the Canal Zone,

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Some property insurance coverage extensions include: (1) prevention of ingress and egress & act of civil authority—coverage for this is typically limited to two weeks and included in nearly all insurance policies (it was of primary importance to businesses who were unable to gain access to lower Manhattan—below 14th Street—for around two weeks or longer, in some cases); (2) law and ordinance—coverage for increased construction costs resulting from the passage of more stringent building codes than those existing at the time of loss; (3) debris removal—coverage for debris removal limited to around 10 percent of the policy limit; (4) off-premises service interruption—coverage for loss of business income resulting from utility service interruption; and (5) contingent business interruption—coverage for "the insured's business interruption loss if the damage is of the type covered [by] the policy and prevents the insured from doing business due to loss at a customer or supplier location." *Id.* at 129.

[97] Matson Nav. Co. v. War Damage Corp., 74 F. Supp. 705, 706 (N.D. Cal. 1947).

[98] *Id.*

[99] *Id.* at 705 (citing 15 U.S.C.A. § 606b–2, 56 Stat. 175, § 5g) (repealed 1947); *see also id.* at 710-11 for full text of cited statute.

[100] *Id.* at 705. "The Act defines war damage as real or personal property loss resulting from enemy attack or any action taken by our armed forces in resistance to it." *War Damage Insurance*, 51 YALE L.J. 1160, 1165 (1942). "In delimiting the concept of damage, the Act clearly authorized the compensation for direct damage and all of its proximate causes." *Id.* at 1167.

territories and possessions of the United States and such other places as the President might determine to be under the dominion or control of the United States and also to such 'property in transit' between . . . the localities designated."[101] Congress further provided that losses occurring during the interval of time between December 8, 1941, and the time at which the WDC would become operational, should be compensated by the WDC.[102] This is notable because those parties suffering losses could receive compensation "without any contract of insurance, payment of premium or other charge, in the same manner as if there were insurance contract coverage."[103]

The government's timely response following the Pearl Harbor attacks demonstrates that even in times of war/military action, it might be appropriate to provide the American public with a sense of financial security. The number of civilian losses from the Pearl Harbor attacks pales in comparison to the September 11th attacks, but it was nonetheless essential for the government to offer a form of subsidiary insurance to those who had already suffered damage from the attacks in addition to those afraid of sustaining future losses.

2. War Risk Insurance Act

One other piece of legislation, known as the War Risk Insurance Act ("WRIA"),[104] focused on coverage for the active duty members of the military. WRIA provided that "every soldier, sailor, marine, coast guardsman, and Nurses, both Army and Navy, who are on active duty in the service of their country may take out an insurance policy."[105] This type of insurance can be best described as "a form of state insurance devised by Federal enactment to meet the emergencies of a great war. It is completely statutory and the rights of the parties are made dependent upon the statute and regulations in force, or afterwards adopted."[106]

Congress's two-fold purpose in passing WRIA was (1) to protect eligible military persons and their dependents and (2) to substitute veterans' compensation or endowment following the war.[107] Those individuals seeking insurance coverage had to apply within one hundred twenty days after enlist-

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[101] *Matson*, 74 F. Supp. at 705.
[102] *Id.* at 706.
[103] *Id.*
[104] 38 U.S.C. § 802 (repealed).
[105] Hal Hunter, Note, *War Risk Insurance*, 19 NOTRE DAME LAW. 191, 191 (1943).
[106] *Id.* at 192.
[107] *Id.*

ment.[108] Coverage available to those eligible under WRIA[109] was as follows: "any multiple of five hundred dollars ($500.00), and not less than one thousand dollars ($1,000.00) or more than ten thousand dollars ($10,000.00)."[110]

Because of WRIA's administration by the government, courts construed it differently from "old line" insurance contracts.[111] The courts held that the U.S. government is not "an insurer in a commercial sense, for gain, and can be held on its contracts only to the extent that it has expressly consented to be bound."[112] The courts further stated that "War Risk Insurance should be liberally construed but subject always to the statute and proper regulations made by directors acting pursuant to the act."[113]

The enactment of the aforementioned insurance schemes, most of which involve governmental funding, demonstrates the feasibility of governmental subsidies in times of need. In the case of Pearl Harbor, it is easier to recognize the value of governmental involvement due to Pearl Harbor's relationship to World War II. The September 11th attacks, like the Pearl Harbor attacks, resulted in such drastic damage and loss of life that the government properly intervened.

E. Post-September 11, 2001

Both attacks profoundly changed the people directly and indirectly affected. Fear rippled through the country as the American people wondered how something so horrific could have happened on domestic soil. All sense of security had been compromised. Suffice it to say, everyone's lives changed that day.

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[108] *Id.*

[109] The persons eligible for War Risk Insurance are set out in the statute. The statute says that every commissioned officer and enlisted man and every member of the Army Nurses Corps (female) and of the Navy Nurses Corps (female) when employed in active service under the War Department or the Navy Department may, upon application to the Veterans Administration, payment of premiums and evidence satisfactory time of the application, be eligible for War Risk Insurance.

Id.

Provisions in the statute also designate which beneficiaries are eligible should the insured party name a beneficiary. Permissible beneficiaries include: "widow, widower, child (including a stepchild or illegitimate child if designated as beneficiary by the insured), parent (including person in loco parentis if designated as beneficiary by the insured), [and] brother or sister of the insured." *Id.* at 192-93 & n.4.

[110] *Id.* at 192.

[111] *Id.* at 193. "The courts h[e]ld that War Risk Insurance is a special statutory kind of insurance and contracts issued thereunder are not to be interpreted and construed according to principles of law governing other contracts of insurance." *Id.*

[112] *Id.*

[113] *Id.* at 194.

1. The public responds

Immediately following September 11th, panic, terror, and fear[114] describes the mood pervading the United States. The wave of attacks caused people to speculate whether additional attacks would follow. Many people fled New York City and Washington D.C.[115] In spite of this initial panic, however, the American public mood quickly shifted to patriotism. Americans proudly displayed American flags on their cars and homes.[116] Phrases such as "God bless America," "Pray for America," and "United We Stand," could be seen everywhere and "Proud to be an American" broadcast across the nation on the radio.[117] Countless Americans donated blood, temporarily ending the nation's shortage.[118] In fact, the inventory of blood tripled in one week's time.[119] Furthermore, "a television fund-raiser for the families of those killed or injured generated more than $150 million in pledges."[120]

While the public response was impressive, it was sometimes overshadowed by racial profiling. Those individuals perceived as Arab or Muslim were often the target of threats, assaults, and harassment.[121] Sikhs became common

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[114] The September 11 attacks generated widespread fear throughout the country, not just in the areas where the planes crashed. One study found that nine out of ten adults showed clinical signs of stress, half of them reporting symptoms of major stress such as insomnia. More than a third of children reported having nightmares. New prescriptions for tranquilizers such as Xanax and Valium rose sharply, especially in New York City and Washington DC, in the weeks following the attacks. Psychiatric hot lines also recorded a significant increase in the number of callers, although the number had begun to taper off by mid-October. This trend, which parallels the results of several surveys on anxiety and stress, suggests that public fears will gradually decline if there is no new major terrorist attack. If the public become less fearful, then presumably there will be no major permanent disruption of American life styles.

HEWITT, *supra* note 27, at 109, 118 n.7 (citations omitted).

[115] *Id.* at 4.

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.* In Arizona, a gunman shot and killed a Sikh owner of a gas station, shot at a Lebanese clerk who worked at a gas station nearby, and finally fired at a home owned by an Afghan family. *Id.* A man attempted to run over a Pakistani woman in New York. *Id.* In Cleveland, a man caused $100,000 in damages when he crashed his car through the door of the Islamic Center. *Id.* Mosques in Chicago, Cleveland, Seattle, Denton TX, and Smithtown NY were firebombed. *Id.*

targets because of their beards and turbans, with over 200 incidents reported against them.[122]

2. Social interruptions

Beyond the public reaction to the attacks, a number of unprecedented social and economic impacts immediately followed September 11th.[123] Sports and cultural events were cancelled. The National Football League did not hold any of its scheduled games for the weekend, "and Major League Baseball, the PGA tour, auto racing and other sports followed suit."[124] The television and movie industry made changes to its schedules as well. ABC, NBC, and CBS "postponed the start of their fall season premiers for a week, while the Emmy Awards, the Latin Grammy Awards, and New York fashion shows were canceled indefinitely."[125] Movies containing explosions and hijackings were not released and instead replaced with comedies, family dramas, and patriotic stories.[126]

3. Economic repercussions

More significant changes took place from an economic perspective. Most obvious was the immediate effect on the airline industry, which has still not completely recovered. The industry, "already in bad financial straits . . . announced layoffs and warned that it might file for bankruptcy protection."[127] Other segments of the travel industry also suffered major losses. Hotels, resorts, convention centers, cabs, and auto rental companies lost a substantial amount of business from the flight cancellations.[128] Financial markets and the

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[122] *Id.* "One public opinion poll found that 43 percent of those surveyed reported that they were 'personally more suspicious of people of Arab descent.'" *Id.* (citing Thomas B. Edsall, *Anti-Muslim Violence Assailed*, WASH. POST, Sept. 15, 2001, at A9). "Another poll found that 58 percent backed more intensive security checks for Arabs (including US citizens), while 49 percent favored special identification cards, and 32 percent wanted special surveillance of them." *Id.* (citing Sam H. Verhovek, *Once Appalled by Race Profiling, Many Find Themselves Doing It*, N.Y. TIMES, Sept. 16, 2001, at A1).

[123] "The long-term effects of terrorism on consumer psychology are still unknown, but people are concerned about their personal safety, reluctant to travel, and cutting back on major purchases." *Id.* at 107.

[124] *Id.* at 3.

[125] *Id.*

[126] *Id.*

[127] *Id.* Prior to September 11th, airline passenger numbers ranged around 9 million per week and decreased to 7.5 million at the end of November. *Id.* at 107.

[128] *Id.* at 3.

insurance industry did not escape unscathed.[129] Even many outside the travel industry found themselves without jobs.[130] The stock market closed for the remainder of the week following September 11th and, upon reopening, "the Dow Jones average plunged 1,370 points (14.3 percent) in the week—the worst decline ever."[131] Last, but not least, the agricultural sector faced uncertainty when the government grounded crop duster planes for fear that terrorists might use them to spread toxic chemicals or deadly diseases.[132] Around 5,000 pilots could not fly and farmers worried about the well-being of their crops.[133]

4. The political reaction

Contrasting the immediate and apparent economic repercussions of the attacks, the political response effectively allayed fears and promoted stability a time of great uncertainty. On September 11th, President Bush's safety was of primary concern. In fact, authorities kept him out of Washington D.C. until the area was deemed safe for his return.[134] Determined to punish those responsible for the attacks, President Bush quickly launched a military attack, deploying warships to the Persian Gulf and Special Forces to Afghanistan.[135] On October 8, 2001, bombing by American and British planes commenced in Kabul, Jalalabad, and Kandahar, the three largest towns in Afghanistan.[136] Meanwhile, "on the diplomatic front, the United States sought successfully to build a broad coalition against terrorism."[137] These efforts resulted in: (1) the United Arab Emirates severing relations with Afghanistan; (2) the sealing of the Iran and Pakistan borders; and (3) the agreement by Russian to share intelligence and authorize the United States to use its airspace.[138] By late

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[129] "The perceived (and probably exaggerated) risk of terrorism leads to higher insurance costs, increasing prices to consumers and reducing profits to firms." *Id.* at 107.

[130] The unemployment rate "jumped from 4.9 percent in September to 5.4 percent in October—the largest monthly increase in two decades." *Id.*

[131] *Id.* at 3.

[132] *Id.*

[133] *Id.*

[134] *Id.* at 5.

[135] *Id.* "A *New York Times* poll found overwhelming support for military retaliation against the terrorists, even if 'many thousands of innocent people' were killed." *Id.* at 4.

[136] *Id.* at 5.

[137] *Id.*

[138] *Id.*

December of 2001, through collaborative efforts with the Northern Alliance[139] and others, the United States had overthrown the Taliban.[140]

The President took further action against those believed to be responsible for September 11th by freezing the assets "of all suspected Islamic terrorist groups in the United States."[141] Perhaps more significantly, "the Treasury Secretary was given broad powers to impose sanctions on foreign financial institutions if they did not cooperate in sharing information about suspected terrorist accounts and funding."[142] Other legislation dealing with law enforcement and intelligence agencies included the anti-terrorism bill (known as the USA Patriot Act), which "expanded the ability of law enforcement and intelligence agencies to wiretap phones and monitor internet messages."[143]

Additional features of the USA Patriot Act[144] include: (1) increased "penalties for committing terrorist acts or sheltering or funding terrorists;"[145] (2) the creation of a federal crime for the act of terrorism against a mass transit system; (3) the power of the Attorney General to detain non-citizens without charge; (4) the use by federal agents of "roving wiretaps" to tap any phone used by a suspect; and (5) "new powers of surveillance over internet and e-mail communications."[146] Moreover, the President, by executive order,[147] created the Office of Homeland Security and appointed director Tom Ridge to develop "a national strategy and coordinat[e] the domestic response to the terrorism threat."[148] To deal with international terrorists, the President also issued another executive order in November of 2001 that empowered him to order military trials for terrorists and their collaborators.[149]

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[139] The Northern Alliance was the anti-Taliban coalition in Afghanistan to whom the United States supplied weapons and air support. *Id.* at 6.

[140] *Id.*

[141] *Id.* at 5. President Bush characterizes money as "the lifeblood of terrorist operations." *Id.*

[142] *Id.* at 5-6 (citing David E. Sanger & Joseph Kahn, *Bush Freezes Assets Linked to Terror Net*, N.Y. TIMES, Sept. 25, 2001).

[143] *Id.* at 6. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272. "The bill passed the Senate unanimously, and the House by a vote of 357 to 66." HEWITT, *supra* note 27, at 7.

[144] "The Act created the foundation for a domestic intelligence-gathering system on a scale never before seen in the United States, and both conservatives and liberals criticized the bill as a threat to civil liberties." HEWITT, *supra* note 27, at 115.

[145] *Id.*

[146] *Id.*

[147] Exec. Order No. 13,228, 66 Fed. Reg. 51,812 (Oct. 8, 2001).

[148] HEWITT, *supra* note 27, at 115.

[149] 66 Fed. Reg. 57,833 (Nov. 13, 2001).

F. December 7, 1941 and Beyond

1. Political response

Political changes similarly took place immediately following the attack on Pearl Harbor. On December 7th,

> the Governor of Hawai[']i issued a proclamation turning over all the functions of government, territorial and county, including the functions of judicial officers, to Lt. Gen. Walter C. Short, Commanding General, Hawaiian Department, who on the same day proclaimed that he had "assumed" the role of "Military Governor"—a title that hitherto in American history had been reserved for conquered nations or rebellious territory.[150]

The Governor also declared martial law.[151] Eventually, the military government took over many aspects of Hawai'i's judiciary and other civilian agencies, including: "the District Courts in Honolulu and throughout the Territory to house the provost courts; certain other territorial and county buildings such as schools, hospitals, and administrative buildings . . . for OMG or military purposes."[152] Jury trials and grand jury indictments were abolished and courts were prohibited from exercising their normal functions.[153] In addition, military authorities in Hawai'i suspended the writ of habeas corpus "in part to accomplish the detention of 'suspicious' citizens."[154]

An Executive Order on February 19, 1942, authorized the Secretary of War to prescribe military areas and established military areas and zones along the West Coast, East Coast, and the Gulf of Mexico and Alaska.[155] The order did not include Hawai'i; "however, General Orders No. 7, 3.01, dated March 10, 1943 . . . establishe[d] Hawai[']i as such an area."[156] This essentially designated areas "from which all persons might be excluded, and to

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[150] Garner Anthony, *Martial Law, Military Government and the Writ of Habeas Corpus in Hawaii*, 31 CAL. L. REV. 477, 477 (1943) (citations omitted).

[151] *Id.* at 478. Martial law "is said to be, '[a] government temporarily governing the civil population of a locality through its military forces without the authority of written law as necessity may require.'" *Id.* at 480 & n.12.

[152] *Id.* at 480-81.

[153] *Id.* at 481.

[154] Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175, 178 (1945). The privilege was suspended on December 7, 1941, by the Governor of Hawai'i pursuant to section 67 of the Hawaiian Organic Act. Anthony, *supra* note 150, at 478.

[155] Anthony, *supra* note 150, at 502. *See* Exec. Order No. 9,066, 7 Fed. Reg. 1,407 (Feb. 19, 1942).

[156] Anthony, *supra* note 150, at 502-03 (citations omitted).

promulgate regulations concerning the right of any person to enter, remain in, or leave such areas."[157]

Proclamations issued by the Secretary of War, Lieutenant General John H. DeWitt, "provided that any Japanese, German, or Italian alien, or any person of Japanese ancestry, then resident in the designated areas, who desired to change his place of habitual residence, was required to execute a change of residence notice."[158] In furtherance of the government's desire to relocate, maintain, and supervise designated groups of people, the President created the War Relocation Authority.[159] General DeWitt issued a curfew proclamation shortly thereafter, "requiring all alien Germans and Italians, and all Japanese, whether citizen or alien, who resided in the military areas heretofore designated, to be within their places of residence between the hours of 8 P. M. and 6 A.M."[160] This sequence of events ultimately paled in comparison to what followed: internment.

2. Internment

For the first time, the "Japanese ancestry program brought to our law [a] Federal measure of racial discrimination applicable to citizens; that is, the first instance in which the applicability of a deprivation or restraint imposed by the Federal Government depended solely upon the citizen's race or ancestry."[161] Japanese, primarily American citizens, were held for several years far from home, in uncomfortable camps, under prison conditions.[162] Despite Hawai'i's fairly substantial Japanese population, "only 700 to 800 Japanese aliens were arrested and sent to the mainland for internment."[163] Additionally, "fewer than

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[157] Maurice Alexandre, *Wartime Control of Japanese-Americans: The Nisei—A Casualty of World War II*, 28 CORNELL L. Q. 385, 386 (1943).

[158] *Id.*

[159] *Id.*; *see also* Exec. Order No. 9,102, 7 Fed. Reg. 2,165 (Mar. 18, 1942).

[160] Alexandre, *supra* note 157, at 387.

[161] Dembitz, *supra* note 154, at 176. "Actually, the exclusion program was undertaken not because the Japanese were too numerous to be examined individually, but because they were a small enough group to be punished by confinement." Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 YALE L.J. 489, 508 (1945). "Over one hundred thousand men, women and children have been imprisoned, some seventy thousand of them citizens of the United States, without indictment or the proffer of charges, pending inquiry into their 'loyalty.'" *Id.* at 490. "They were taken into custody as a military measure on the ground that espionage and sabotage were especially to be feared from persons of Japanese blood." *Id.*

[162] These relocations resulted in severe property losses for many. Rostow, *supra* note 161, at 490.

[163] *Id.* at 494. Approximately 160,000 of Hawai'i's 500,000 person population was of Japanese descent at the time. *Id.* The government strongly desired to send this author's great-grandfather, Kanae Kajiwara, to an internment camp because of his affiliation with a Japanese school P.T.A. Fortunately, Kajiwara had a good reference, a Lieutenant Commander in the

1,100 persons of Japanese ancestry were transferred to the mainland to relocation centers."[164]

In spite of President Roosevelt's push for the mass internment of Hawai'i's Japanese Americans, his military advisors counseled otherwise.[165] These advisors sought to prevent mass internment not because of a desire to protect Japanese Americans' rights, but rather because of the key economic role of the Japanese Americans in Hawai'i.[166] A removal of the "Japanese population would have left a dangerous void in the labor pool."[167] Furthermore, the military governor refuted allegations of disloyalty by Japanese Americans as a group.[168] For the most part, Hawai'i's Japanese Americans "suffered less than their west coast counterparts, [but] the islands' entire population was forced to live the duration of the war under strict military control over almost all aspects of life."[169]

3. Social relations and the air of suspicion

In addition to living under military control, the Japanese in Hawai'i endured constant suspicion of disloyalty. The Caucasian population feared sabotage and attack by the local Japanese. In fact, "Hawai[']i's military commanders

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Navy, who helped to prevent this injustice. Kajiwara owned a farm, from which the Lieutenant Commander frequently purchased goods. Interview with Tokio Jodoi in Honolulu, Haw. (Apr. 11, 2004).

[164] Rostow, *supra* note 161, at 494. "These Japanese were arrested on the basis of individual suspicion, resting on previous examination or observed behavior, or they were families of interned aliens, transferred voluntarily." *Id.*

[165] Joel B. Grossman, *The Japanese American Cases and the Vagaries of Constitutional Adjudication in Wartime: An Institutional Perspective*, 19 U. HAW. L. REV. 649, 653 & n.15 (1997).

[166] *Id.* at 653-54 & n.16. The Japanese presence in Hawai'i dominated.

> [The] Japanese owned half of Honolulu's restaurants and food stores, built most of its houses, repaired most of its cars, and worked behind the counters of most of its retail shops. Japanese fishermen with fast boats and powerful shortwave radios caught all the Islands' fish. Japanese cooks owned lunch wagons topped with overhanging Japanese roofs . . . .
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> Honolulu had dozens of Japanese teahouses, two fish-cake factories, two shops selling nothing but kimonos, and the only sake brewery outside Japan. There were movie theaters showing only Japanese movies, two Japanese-language newspapers, a Japanese Chamber of Commerce, Japanese professional and charitable associations, associations for Japanese from the same prefecture, and language schools that 85 percent of all Japanese children attended after school and where they received instruction in Japanese language and culture.

CLARKE, *supra* note 45, at 53.

[167] Grossman, *supra* note 165, at 654.

[168] *Id.*

[169] *Id.*

believed that if war broke out in Asia, Oahu's Japanese shopkeepers, maids, and gardeners would attack civilian and military installations with guns and dynamite, destroying aircraft on the ground, slapping mines to the hulls of warships, and blowing bridges and electric lines."[170] This scenario never transpired and there were no instances of sabotage.[171]

G. First-hand Personal Accounts

Life was perhaps the most challenging for those serving in the military in Hawai'i who were also Japanese American. These people dutifully served the United States. Yet they faced discrimination and distrust merely because of their ethnicity, which happened to be the same as the enemy.

1. Tokio Jodoi, a Japanese American Hawai'i resident

This author's grandfather, Tokio Jodoi, a Japanese American, was one of those people. Jodoi served in the army for four years,[172] commencing in February of 1942.[173] The 1,000 draftees who entered the army on the same day as Jodoi included 750 Asians—Japanese and a few Chinese—and 250 "Cosmopolitans"—Hawaiians and Portuguese.[174] Only the Cosmopolitans were given weapons so that they could guard their fellow "suspicious" Asian draftees.[175]

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[170] CLARKE, *supra* note 45, at 55. "Walter Dillingham, Senior, told the Army Pearl Harbor Board 'that the most serious thing that could happen to us [Army and Navy officers] in the event of war would be what the [local] Japanese would do, whether we would be knifed in bed.'" *Id.*

[171] *Id.*

> As it turned out, none of these fears came close to describing what happened on December 7 when, instead of charging into haole neighborhoods waving samurai swords, or slinking toward piers and bridges with satchels of dynamite, the Japanese of Hawai[']i began to dismantle their former lives so determinedly and completely that within two days many signs of their culture and influence had vanished as if sucked into a tornado.

Id. at 54.

[172] Throughout his service, Jodoi was stationed at various locations on Oahu, including: Schofield, Ka'a'awa, Coconut Island, and Haleiwa. During this time, he lived in tent cities with the other draftees. He worked from Monday through Saturday (half day on Saturday) and obtained passes that enabled him to return to town on Saturday afternoon. Jodoi stayed with his Uncle in Kapahulu on Saturday nights then returned to his designated station on Sunday evenings. Interview with Jodoi, *supra* note 163.

[173] *Id.*

[174] The 750 Asians were divided into three companies (of 250 people) and the Cosmopolitans composed the fourth company. The Asian companies were primarily comprised of professional surveyors, contractors, electricians, carpenters, and journeymen. *Id.*

[175] *Id.* The Cosmoplitans became part of the National Guard. It took three years for the Asians to get weapons because the government did not trust them. *Id.*

Jodoi and the other Asians were restricted to labor and construction work, primarily transporting materials to Mokuleia,[176] for the construction of an airfield and warehouses.[177] On one occasion, Jodoi and his company were sent to Pearl Harbor following a request for more man-power.[178] But a marine guard turned them away because of their ethnicity.[179] This response typifies the general sentiment against Japanese Americans in Hawai'i at the time,[180] even in the case of those individuals serving in the U.S. military.

When asked about the public reaction to the Pearl Harbor attack itself, Jodoi commented that there was little panic.[181] On the morning of December 7, 1941, he was on Harding Avenue, returning home from a delivery,[182] when he noticed a group of people looking in the direction of Pearl Harbor.[183] He saw billowing smoke coming from Pearl Harbor, but did not realize at the time that we were at "war."[184] Jodoi observed that people only panicked when the enemy planes were bombing Pearl Harbor and the Americans fired at the planes.[185] The Americans did not properly time the shooting and the anti-aircraft fire fell back upon the city.[186]

1. Cathy Yasuda's experience at ground zero

Hawai'i residents may not have panicked in a significant way, but that certainly cannot be said of some New Yorkers on September 11, 2001. Cathy Yasuda[187] was at ground zero on that fateful day and should have been in the South Tower of the WTC when the second plane crashed.[188] Yasuda's day began normally except that she showed up for her 9:00 a.m. meeting at the WTC South Tower almost forty minutes early.[189] Rather than going up to the

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[176] Mokuleia is located on the north shore of Oahu.

[177] Interview with Jodoi, *supra* note 163.

[178] *Id.*

[179] *Id.*

[180] Jodoi noted that even though people were very suspicious of Japanese in Hawai'i, no big spy cases ever materialized. *Id.*

[181] *Id.*

[182] At the time, he worked for Cameron's Hatchery. He delivered eggs and determined the sex of chicks. *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.* As Jodoi recalls, some anti-aircraft fire fell near King Street and McCully Street and others fell downtown. Additionally a big B-25 crashed over Kalihi and the wreckage fell near Mokauea Street and Dillingham Boulevard. *Id.*

[187] Yasuda was a member of the 2003 entering class of William S. Richardson School of Law, University of Hawai'i at Manoa.

[188] Interview with Cathy Yasuda in Honolulu, Haw. (Apr. 25, 2004).

[189] *Id.*

meeting location, she and a colleague decided to go to a Starbucks across the street (even though there was a Starbucks located in the WTC complex).[190] As she crossed the street, she was jolted by what felt like an earthquake.[191] Moments later, Yasuda felt debris fall upon her and realized that something might be wrong.[192]

As people came out of their buildings to rubberneck, Yasuda and her colleague opted to wait out the situation in a deli.[193] She observed that people became hysterical when the second plane hit.[194] By this point, so many people were trying to get out of the immediate area that traffic became gridlocked.[195] Yasuda attempted to catch a cab back to her office at Rockefeller Center to no avail.[196] She then tried to catch the subway at Fulton station but as she descended to the platform, she heard a mob of people screaming as they literally climbed over one another to get into the subway station.[197] It turned out that they were running from the cloud of dust and debris that enveloped the immediate area following the collapse of the South Tower.[198] At the same time, however, smoke poured out of the subway tunnels because of the fires from the WTC.[199]

Incredibly, Yasuda managed to walk through what she characterized as a "twilight zone"—dust so thick that she could not see her hands in front of her—and eventually ended up in Chinatown (more than a mile away), where she could finally breathe again.[200] At this point, she was surrounded by the quietest crowd she had ever encountered.[201] Eventually, she ended up at Astor Place, where the city provided northbound transportation.[202] Not until around 1:00 p.m. did Yasuda make it back to her office at Rockefeller Center, only to find out that it had been evacuated at 10:00 a.m.[203]

In the weeks that followed, Yasuda commented that New Yorkers were exceptionally kind to one another.[204] Crime rates declined and people took the

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[190] *Id.*

[191] *Id.*

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *Id.*

[196] *Id.* Interestingly, it was not until Yasuda got into the cab that she had a chance to assess the damage inflicted on the WTC; prior to that, she did not look up due to the continuous sprinkle of debris falling upon the city. *Id.*

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] *Id.* This wave of kindness only lasted for one month. *Id.*

time to help each other.[205] Although people who still had offices to go to went to work, little to no business got done in the month following September 11th.[206] People went to work because of a "can do" attitude and a refusal to succumb to the terrorists' wishes—to disrupt and debilitate the United States.[207] But the once simple task of going to work had become an ordeal for some. Commutes became much more complicated because of the number of subway lines disrupted by the attack.[208] To get into buildings, all workers had to show identification.[209] As if matters could not get any worse, Yasuda also had to endure the anthrax attacks that followed September 11th because tenants in Rockefeller Center received some of the anthrax-laced letters.[210]

In addition to detailing these well-publicized events, Yasuda shed light on the forgotten people. Small business owners and displaced workers suffered significant losses on September 11th, and many have still not recovered nearly three years later.[211] Many successful companies had to relocate and start from scratch because all of their computer hard drives, back-ups, and hard copies had been destroyed.[212] Residential tenants of buildings near the WTC lost everything.[213] The list is endless, but it paints an important picture. No monetary value can ever be placed on the losses incurred on September 11th, nor on the residual losses caused by the attacks and their aftermath. Moreover, perhaps the biggest victims of the attack are those who survived; those who must get up everyday to a life forever changed by the events of September 11th.

These compelling stories offer great insight into what it felt like to live in the midst of two atrocious, pivotal moments in history. Unfortunately, while survivors of these attacks struggle to pick up the pieces of their lives, many legal battles also ensue. This Comment focuses primarily on the comparative insurance aspects arising out of Pearl Harbor and September 11th.

III. INSURANCE ANALYSIS

In both the Pearl Harbor and September 11th attacks, two very important legal questions arose to determine the amount of money to be disbursed by

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[205] *Id.*

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] *Id.*

[210] *Id.* For two weeks, the FBI was in the building everyday. The mail staff had to wear gloves in triplicate. *Id.*

[211] *Id.*

[212] *Id.*

[213] *Id.*

various insurers. The first was whether the war risk exclusion—an exclusion typically included in insurance agreements—was properly invoked. If the answer to the first question was "no," the second was whether the two attacks each constituted one or two occurrences for the purpose of assessing covered property damage.

A. War Risk Exclusion

Commercial insurance policies traditionally contain exclusions.[214] One of those common exclusions is war risk,[215] which precludes reimbursement by the insured for losses resulting from war and military actions.[216] Insurers need to implement exclusions such as war risk because they are unable to "assess the actuarial likelihood of the occurrence ahead of time."[217] Additionally,

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[214] Annemarie Sedore, Note, *War Risk Exclusions in the 21st Century: Applying War Risk Exclusions to the Attacks of September 11th*, 82 B.U. L. REV. 1041, 1043 (2002).

[215] A typical war risk exclusion states:

> The insurer will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
>
> (1) War, including undeclared or civil war;
>
> (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
>
> (3) Insurrection, rebellion, revolution, usurped power or action taken by governmental authority in hindering or defending against any of these.

Id. at 1044 n.10.

[216] *Id.* at 1043. Other exclusions now include: (1) strikes exclusion—"loss caused by any terrorist or any person acting from a political motive"; (2) malicious acts exclusion—"any person acting maliciously or from a political motive"; (3) radioactive contamination motive—"losses caused by certain weapons, regardless of motive"; and (4) chemical, biological, bio-chemical, electromagnetic weapons and cyber attack exclusion. GRAYDON S. STARING, LAW OF REINSURANCE § 23:3 (1993) (internal quotations omitted).

[217] Sedore, *supra* note 214, at 1043. Following the September 11th attacks, the insurance industry did not waste any time adding an express terrorism exclusion to new policies as well as those up for renewal. Richard Allyn & Heather Mcneff, *The Fall and Rise of Terrorism Insurance Coverage Since September 11, 2001*, 29 WM. MITCHELL L. REV. 821, 828 (2003). In November 2001, the Insurance Services Office, Inc. ("ISO") proposed an exclusion for terrorist acts:

> Terrorism means activities against persons, organizations or property of any nature:
>
> (1) that involve the following or preparation for the following:
>
> use or threat of force or violence; or commission or threat of a dangerous act; or commission or threat of an act that interferes with or disrupts an electronic, communication, information or mechanical system; and
>
> (2) when one or both of the following applies:
>
> the effect is to intimidate or coerce a government or the civilian population or any segment thereof or to disrupt any segment of the economy; or it appears that the intent is

"[b]ecause the insurer is unable to spread the risk over premiums received from multiple insureds or transfer the risk to reinsurers, the parties simply agree that the policy does not cover losses from these causes."[218] Many policies today do not entirely bar recovery for death from war risks or war related activities.[219] Instead, disputes involve the double indemnity clause contained in insurance contracts.[220] Policies with this clause typically include a war risk exclusion clause "that prevent[s] double recovery where the insured dies as a result of war."[221]

Over time, the war risk exclusion has triggered a significant amount of litigation. The notion of war risk and causation—that an injury "be causally related to a military operation or act of warfare"[222]—developed from maritime collision cases[223] involving ship losses during the Civil War, World War I, and

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to intimidate or coerce a government, or to further political, ideological, religious, social or economic objectives or to express (or express opposition to) a philosophy or ideology.

Id. at 829 & n.44.

"ISO subsequently amended its filing to narrow the application of the terrorism exclusion by establishing a $25 million damage threshold for the exclusion to take effect." *Id.* at 829. Terrorist attacks utilizing nuclear, chemical, or biological materials were entirely excluded and therefore not governed by this threshold. *Id.*

Forty-five states, plus the District of Columbia and Puerto Rico approved the terrorism exclusion by February 22, 2002. *Id.* at 830. The states opting not to approve the terrorism exclusion expressed the following concerns:

> The low thresholds for the exclusion ($25 million or 50 serious casualties); the all-or-nothing nature of the threshold (insurers pay nothing if either threshold is reached); the aggregation of all losses from multiple incidents within a 72-hour period and across most of North America into one event if they "appear to be carried out in concert or to have a related purpose or common leadership"; fear that the exclusion would leave some small and medium-size businesses that could least afford the losses from a terrorist attack totally unprotected; and worry that the included definition of terrorism is overly broad.

Id. at 830-31 & n.58.

[218] Sedore, *supra* note 214, at 1043.

[219] Jason B. Libby, Comment, *War Risk Aviation Exclusions*, 60 J. AIR L. & COM. 609, 625 & n.130 (1994-95).

[220] *Id.* & n.133.

[221] *Id.* & n.134.

[222] Plitt, *supra* note 93, at 50.

[223] In *Queen Insurance Co. of America v. Globe & Rutgers Fire Insurance Co.*, 263 U.S. 487 (1924), two merchant ships traveling in convoys collided while trying to avoid submarine attacks during World War I. Plitt, *supra* note 93, at 51 & n.143. The U.S. Supreme Court narrowly construed a causation rule, holding that the collision, not war, caused the damage. *Id.* at 51. The Court decided to restrict the inquiry to the immediate cause of the loss rather than employing a broader viewpoint. *Id.* at 52.

In *Standard Oil Co. of New Jersey v. United States*, 340 U.S. 54 (1950), the U.S. Supreme Court revisited the issue of wartime maritime collision. Plitt, *supra* note 93, at 52. This case involved a collision between a U.S. Navy minesweeper and a steam tanker. *Id.* The Court classified losses from collisions as perils of the sea, thereby covered by standard marine

World War II.[224] In the older cases, the risk of war must have caused the injury or death.[225] Prior to World War I, most policies did not contain such exclusion clauses.[226] The losses sustained from World War I prompted insurers to add war risk exclusion clauses to life insurance policies.[227] Difficulties in invoking exclusion arose following the Pearl Harbor attack particularly because Congress had not declared a state of war at the time Japan committed the attacks/acts of war.

Claimants' attempts to collect monies from insurance policies tend to raise knotty questions about when substantial attacks occurred, including, but not limited to: How do you deal with attacks when Congress has not formally declared war? What about terrorist hijackings and collateral damage cause by terrorists? Following the Pearl Harbor attacks as well as other conflicts, such as the Korean conflict, courts split. Some courts held that a war exists (for the purpose of insurance policies) only when formally declared by Congress.[228]

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risk policies. Consequently, "to take the loss out of the marine policy and to bring it within the coverage of the provision insuring 'all consequences of' warlike operations, common sense dictate[s] that there must be some causal relationship between the war like operation and the collision." *Id.* at 53.

"To be considered a warlike risk, the peril must be due directly to some hostile action. If the peril is a maritime risk, it is not a war risk, even though it may be aggravated or increased by a warlike operation." *Id.* at 54 & nn.171-72.

[224] Plitt, *supra* note 93, at 54 & nn.171-72. "The historical development of modern insurance has been closely linked with maritime commercial activities." Andrew J. Nocas, *Are You Covered When We're at War? Are You Sure?*, 20-SUM BRIEF 10, 13 (1991). Given the role of ocean transport "in the conduct of the world's trade and wars, it is understandable that the most complex war exclusion clauses and the largest collection of cases interpreting them involve marine policies." *Id.* In fact, as far back as 1780, battles involving ships can be said to have influenced the development of the war risk exclusion. *Id.* at 10. "For example, in the battle of Cape St. Vincent . . . a British convoy of 63 merchant ships met the combined fleets of France and Spain; only 8 ships escaped undamaged." *Id.* The catastrophic impact on underwriters at Lloyd's resulted in "the practice of placing war exclusions in standard policies and providing coverage for war-related losses, if at all, at a separate premium." *Id.*

[225] Plitt, *supra* note 93, at n.140.

[226] Daniel James Everett, *The "War" on Terrorism: Do War Exclusions Prevent Insurance Coverage for Losses Due to Acts of Terrorism?*, 54 ALA. L. REV. 175, 181 & n.45 (2002).

[227] *Id.* at 181-82 & n.46.

[228] A majority of cases involving the interpretation of "war" have held that war did not exist on December 7, 1941, thereby allowing beneficiaries of life insurance policies to recover benefits and/or double indemnity. *See, e.g.*, West v. Palmetto State Life Ins. Co., 25 S.E.2d 475, 477 (S.C. 1943) (holding that "the declaration by Congress of war on Japan on December 8th was the only legal way in which this country could be placed in a state of war with that aggressor nation." Therefore, the insurers were held to be bound by their policy); Rosenau v. Idaho Mut. Benefit Ass'n., 145 P.2d 227, 232 (Idaho 1944) (holding that "under the facts of this case, [this court] can not hold that this nation was at war on December 7th, 1941, at the time of the death of the insured, or at any time prior to the declaration by the Congress on December 8, 1941"); Savage v. Sun Life Assurance Co. of Canada, 57 F. Supp. 620 (W.D. La. 1944)

This is sometimes referred to as the "technical meaning" doctrine.[229] Conversely, some courts maintain that an undeclared war may still be a "war" under the meaning of "war" in insurance policies.[230] This is referred to as the "common meaning doctrine."[231] Several cases assist in highlighting these two

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(Plaintiff may recover double indemnity for deceased, who was killed by the Japanese attack on Pearl Harbor because formal war had not been declared.). *See also* Harding v. Pennsylvania Mut. Life Ins. Co., 90 A.2d 589, 597 (Pa. 1952) (holding that "even if the action in Korea should be held to be a war, it is at most an undeclared war"); Beley v. Pennsylvania Mut. Life Ins. Co, 95 A.2d 202 (Pa. 1953), *cert. denied*, 346 U.S. 820 (1953) (holding that the Korean conflict was not a declared war by Congress, but merely a dispatch of armed forces to Korea by the President. Therefore, the beneficiary of an insurance policy could collect on the policy). "The existence or nonexistence of a state of war is a political, not a judicial, question, and it is only if and when a formal declaration of war has been made by the political department of the government that judicial cognizance may be taken thereof." *Id.* at 205.

[229] Libby, *supra* note 219, at 625 & n.126. "[W]ar means war in the legal sense and must be declared." *Id.* The technical meaning doctrine defines "'war' in its constitutional sense of formally declared war." Everett, *supra* note 226, at 182 & n.50. Some reasons that courts adhere to this doctrine include: (1) a feeling that a political determination of the existence of a state of war is necessary for the courts to take judicial notice of "war"; (2) the uncertainty of establishing when a war exists; and (3) the ambiguities of policy language that should be construed in favor of the insured. *Id.* at 182-84 & nn.59, 69 & 72.

[230] These cases construe "war" in a popular sense, not requiring formal recognition of a "war" already known to be in existence. *See, e.g.*, New York Life Ins. Co. v. Durham, 166 F.2d 874, 876 (10th Cir. 1948) (construing "war" in a "practical and realistic sense in which it is commonly used and understood—in the sense it bears to the hazards to human life" and adding that "[i]f the insured had died from non-military causes outside the home areas after the Pearl Harbor attack but before the formal declaration of war . . . death occurred [while the insured] was in the military service of a 'country engaged in war' within the meaning of the policy"); Stinson v. New York Life Ins. Co., 167 F.2d 233 (D.C. Cir. 1948) (same). Courts have held that "in private matters, unaffected by a public interest, the courts are free to take judicial notice of the existence of a war although no formal declaration of war has been made by the Federal government." Christensen v. Sterling Ins. Co., 284 P.2d 287, 289 (Wash. 1955); *see also* Western Reserve Life Ins. Co. v. Meadows, 261 S.W.2d 554 (Tex. 1953); Langlas v. Iowa Life Ins. Co., 63 N.W.2d 885 (Iowa 1954); Stanbery v. Aetna Life Ins. Co., 98 A.2d 134 (N.J. 1953); Weissman v. Metro. Life Ins. Co., 112 F. Supp. 420 (S.D. Cal. 1953); Gagliormella v. Metro. Life Ins. Co., 122 F. Supp. 246 (D.C. Mass. 1954).

[231] Libby, *supra* note 219, at 625 & n.127. "[W]ords used in an insurance policy are construed in their plain, ordinary, common and popular sense. The only exception is when it is apparent from the face, scope, and purpose of the contract, that the words were have some other special meaning." *Id.* & nn.128-29. Furthermore, the common meaning doctrine "looks to the reality of the situation and defines the term 'war' based on the specific facts in any given situation." Everett, *supra* note 226, at 182 & n.51. Predominantly accepted by contemporary courts, this approach focuses on the big picture. It considers factors beyond action by the government, including: (1) uniforms of the combatants; (2) weaponry used; and (3) organization of the operation. *Id.* at 185 & nn.84-86. In other words, "while Congress may choose not to declare war formally, it can do so informally by ratifying existing operations." *Id.* at 185.

trains of thought. In light of the non-traditional "wars" prevalent at the start of the 21st century, there undoubtedly will be continued debate on the subject.

1. Pan America, Inc. v. Aetna Casualty & Surety Co.[232]

In *Pan Am*, members of the Popular Front for the Liberation of Palestine ("PFLP") hijacked a Pan American flight en route from Brussels to New York.[233] The hijackers forced the crew to fly to Beirut.[234] There, the hijackers brought a demolitions expert and explosives on board.[235] The plane was then flown to Cairo, Egypt, where the plane was destroyed after the release of the passengers.[236]

At issue in the case was whether an act that could be considered "war" for the purposes of war risk caused the destruction of the aircraft. The United States District Court for the Southern District of New York held that the exclusion did not apply and therefore that the insurance policies covered the loss of the aircraft.[237] The Second Circuit affirmed, holding that the hijacking was not a "war" consistent with any definition of the term.[238] It established the definition of war as "hostilities carried on by entities that constitute governments at least de facto in character."[239] The court further established "that war is a course of hostility engaged in by entities that have at least significant attributes of sovereignty."[240]

Given these definitions of war, Judge Hays concluded that the destruction of the aircraft "was not caused by an act that is recognized as a warlike act . . . [the hijackers'] acts had criminal rather than military overtones. They were the agents of a *radical* political group, rather than a sovereign government."[241] In assessing the PFLP's governmental status, Judge Hays looked to the status accorded the PFLP by Middle Eastern states.[242] The PFLP did not have rights of a government and was only negotiated with "in the sense that any

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[232] 505 F.2d 989 (2d Cir. 1974).

[233] *Id.* at 993.

[234] *Id.*

[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] *Id.* at 1012-22.

[239] *Id.* at 1012. Similarly, "[t]he district court found that the term war has been defined almost always as the employment of force between governments or entities essentially like governments, at least de facto." Pan America, Inc. v. Aetna Cas. & Sur. Co., 368 F. Supp. 1098, 1130 (S.D.N.Y. 1973) (quotations omitted).

[240] *Pan Am*, 505 F.2d at 1012.

[241] *Id.* at 1015 (emphasis added).

[242] *Id.*

government negotiates with a terrorist who holds hostages."[243] Although Judge Hays in this case did not find the requisite elements of war,[244] an earlier Tenth Circuit case had found that war existed without a formal declaration from Congress.

2. New York Life Insurance Co. v. Bennion[245]

In *Bennion*, Captain Mervyn S. Bennion ("Bennion") was killed when the Japanese attacked Pearl Harbor on the morning of December 7, 1941.[246] At the time, Bennion commanded the Battleship *West Virginia*, which lay in anchor at the harbor.[247] The insurance policy at issue provided "double indemnity for accidental death, but specifically exclud[ed] from its coverage, death, resulting from war or any incident thereto."[248] New York Life paid the face amount of the policy, but refused to cover the double indemnity, contending that the "death resulted from war or an act incident thereto within the meaning of the policy."[249]

The Tenth Circuit, reversing the district court, held that Bennion's "death resulted from war or an incident thereto within the meaning and purpose of the insurance policy."[250] Judge Murrah's majority opinion carefully analyzed the events surrounding December 7, 1941. First, he noted that although President Roosevelt actually asked Congress to declare that a state of war existed from December 7, 1941, a formal declaration did not become effective until December 8, 1941 at 4:10 p.m. Washington time.[251] Despite this delayed declaration of war, however, Judge Murrah stated that:

> [w]hen one sovereign nation attacks another with premeditated and deliberate intent to wage war against it, and that nation resists the attacks with all the force as its command, we have war in the grim sense of reality. It is war in the only

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[243] *Id.* (quotations omitted).

[244] In another case, *Holiday Inns, Inc. v. Aetna Ins. Co.*, Holiday Inns brought an action against Aetna for damages incurred to Holiday Inns' hotel in Beirut, Lebanon, 571 F. Supp. 1460, 1461 (S.D.N.Y. 1983). Aetna attempted to show that the damages suffered by Holiday Inns resulted from "insurrection," "civil war," or "war." *Id.* at 1503. They failed to do so and the United States District Court for the Southern District of New York held that "Holiday Inn was damaged by a series of factional 'civil commotions' of increasing violence . . . and there was no 'war' in Lebanon between sovereign or quasi-sovereign states." *Id.* Consequently, the court found Aetna liable under the policy. *Id.*

[245] 158 F.2d 260 (10th Cir. 1946).

[246] *Id.* at 261.

[247] *Id.*

[248] *Id.* (quotations omitted).

[249] *Id.*

[250] *Id.* at 265.

[251] *Id.* at 262 (citing 55 Stat. 795, 50 U.S.C.A. Appendix, note preceding section 1).

> sense that men know and understand it. Mankind goes no further in his definitive search-he does not stand on ceremony or wait for technical niceties. To say that courts must shut their eyes to realities and wait for formalities, is to cut off the power to reason with concrete facts.[252]

This ultimately led to his conclusion that "the formal declaration by the Congress on December 8th was not an essential prerequisite to a political determination of the existence of a state of war commencing with the attack on Pearl Harbor."[253] Judge Murrah did not stop there, however. He continued by focusing on the intent of the parties and determined that no evidence indicated that the parties intended war to mean only a formally declared war.[254]

In a dissenting opinion, Judge Huxman expressed concern about the many meanings of the word "war" and the resulting ambiguity. He argued that "[i]n a legal sense, we are not and cannot be at war with another nation until Congress has declared war, either by a formal declaration of war or by an Act of Congress evidencing its consent to the waging of war."[255] For these reasons, Judge Huxman held that in cases where ambiguity exists, the court should adopt the meaning of the word "most beneficial to the insured, and construe the contract most favorably to him."[256]

3. Gladys Ching Pang v. Sun Life Assurance Co. of Canada[257]

Offering a result best described as opposite the *Bennion* majority's view and somewhat similar to the *Bennion* dissent, the Supreme Court of the Territory of Hawai'i found "it impossible . . . to agree with the defendant's contention that the death of the insured resulted from war within the meaning of the exclusion clause of the policy."[258] In *Pang*, the plaintiff Gladys Ching Pang was the beneficiary named in her husband Tuck Lee Pang's ("Tuck") $1,000 life insurance policy, which carried a double-indemnity clause.[259] The clause gave "double the face of the policy for death caused solely by external,

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[252] *Id.* at 264.

[253] *Id.*

[254] *Id.* at 265; *see also* Lynch v. The Nat'l Life and Accident Ins. Co., 278 S.W.2d 32 (Mo. Ct. App. 1955) (holding that war exclusion is invoked when the war at issue constituted a war within the contemplation and intention of the parties).

[255] *Bennion*, 158 F.2d at 266 (Huxman, J., dissenting). Examples include "providing for the raising and equipping of armed forces, and equipping the President to use them in combat with an aggressor nation." *Id.*

[256] *Id.* at 267-68.

[257] 37 Haw. 208 (Hawai'i Terr. 1945).

[258] *Id.* at 222.

[259] *Id.* at 208-09.

violent, and accidental means, but this clause expressly excluded death resulting from riot, insurrection, or war, or any act incident thereto."[260]

On the morning of December 7, 1941, Tuck, an employee of the Honolulu Fire Department, died while on duty at Hickam Field as a result of the Japanese attack.[261] The question before the Hawai'i court, therefore, was whether the United States and Japan were at war within the meaning of the policy on December 7, 1941.[262] Defendant insurance company contended that the United States was at war, thereby invoking the exclusion clause.[263] Gladys maintained that "there must be some recognition, acknowledgment or creation of the existence of war by the political department of the Government—not necessarily by formal declaration—before the courts can or will take judicial notice of its existence."[264]

The trial court adopted the defendant's position, "holding that the assured's death was a death resulting from war and that recovery was barred under the exclusion clause."[265] The Hawai'i Supreme Court disagreed, however, noting that "the attack by the Japanese air and naval forces on the morning of December 7, 1941, constituted 'an act of war,' but an 'act of war' and 'a state of war' are two different things. An act of war may or may not lead to a state of war."[266] It follows, therefore, that "not until December 8, 1941, did the political department of our Government or the Japanese Government do any act of which judicial notice can be taken creating 'a state of war' between the two countries."[267]

The Supreme Court of Hawai'i fell within the category of courts requiring a formal declaration of war by Congress before taking judicial notice that a state of war exists.[268] While many other courts adhered to similar principles, it is fair to say that courts generally have split with regard to whether war risk exclusion clauses should be interpreted under the common or technical meaning doctrines.

4. Application of the war risk exclusion following September 11th

In the wake of September 11th, "the insurers most directly affected by the attacks unanimously stated that they would not invoke war risk exclusions to

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[260] *Id.* at 208.
[261] *Id.* at 208-09.
[262] *Id.* at 210.
[263] *Id.* at 209.
[264] *Id.*
[265] *Id.*
[266] *Id.* at 216.
[267] *Id.*
[268] *See* cases cited *supra* note 228.

deny coverage."[269] Fortunately this means that the thousands of individuals affected by the attacks, whether in time of injury or death or property damage, will not be deprived of recovery. Had insurers decided to invoke the war risk exclusions, many people would be forced to challenge large insurance companies to collect on their insurance policies, as was the case following the Pearl Harbor attacks.

Although Congress has still not declared war, a *Pan Am*–type analysis would likely place September 11th within the definition of "war." The concerns articulated by the *Pan Am* court—that the PFLP was not a de facto government; that they were not recognized as anything more than a terrorist group by Middle Eastern governments; and that the PFLP's actions were more criminal than warlike[270]—could be satisfied by the actions of al Qaeda against the United States. Although al Qaeda is not a recognized government, it had ties to the Taliban, which governed Afghanistan at the time of the attacks.[271] Secondly, the atrocious acts of September 11th can in no way be described as merely criminal. President Bush characterized them as acts of war.[272] Furthermore, al Qaeda declared war against the United States, to which the United States responded quickly by deploying a significant military contingent in retaliation of the attacks.[273] President Bush has adamantly insisted that the United States will go after and conquer the groups responsible for the attacks.[274] All of these elements, taken together, strongly suggest that a court following *Pan Am* would construe the September 11th attacks as "war" for exclusion purposes.

As evidenced by the aforementioned case law,[275] "war" is an ambiguous term construed differently depending upon the court before which it appears. It is sometimes viewed broadly and is dependent on the circumstances of the case.[276] In other cases, however, courts require a Congressional declaration of war before applying the exclusion clause.[277]

The notion of war in its traditional sense will create problems for many insurers and their insured. Wars, or at least the definition of "war," are no

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[269] Sedore, *supra* note 214, at 1043 & n.7.

[270] *See supra* text accompanying notes 241-43.

[271] Everett, *supra* note 226, at 187.

[272] *See supra* note 18.

[273] Everett, *supra* note 226, at 188.

[274] "Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated." President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html (last visited Oct. 13, 2004) [hereinafter Address].

[275] *See supra* Part III.A.1-3.

[276] *See supra* notes 230-31.

[277] *See supra* notes 228-29.

longer as clear as they once were. Without a more specific, revised definition of "war," courts will be clogged with claims over the meaning of the word in insurance policies. Judges will also struggle with the point at which they should take judicial notice of a war. Unfortunately, the world is bound to be plagued by war-like acts committed by perpetrators who do not represent sovereign nations.[278] On the one hand, it seems unfair to burden insurers with the responsibility to compensate their insureds for incalculable risks. But it is perhaps even more unfair for those insured to receive little or no compensation for losses or injuries that may result from war-like acts that fall under the war-risk exclusion clauses of the insureds' policies.

5. A solution for war risk exclusion

It is unlikely that a formal definition of war will benefit either insurers or their insured. Rather, a flexible definition with a series of factors for consideration might be more useful. After all, wars of the 21st century have a very different face from most wars in the 19th and 20th centuries. Our enemies are not as clearly defined and "wars" are likely to arise in the form of terrorist attacks on civilians, as compared to organized military operations against United States Armed Forces. Courts therefore need to adopt a flexible definition of "war" in determining when exclusion clauses should apply. The American public will probably not again benefit from insurers collectively deciding not to invoke a war risk exclusion for an attack with such a costly aftermath.

The factors taken into account by the *Pan Am* court are instructive. There, the Second Circuit looked at whether PFLP was a state, or a de facto government.[279] Additionally, the court considered whether the acts of PFLP were warlike in character (versus criminal).[280] Another factor was how other governments dealt with the PFLP.[281] In addition, a court might give weight to (1) the relationship between the attacking group and established governments; and (2) the amount of funding the attacking group may receive from established governments. Even with a list of factors, however, the outcome of cases would vary greatly depending on which judge hears the case. With any set of factors, subjectivity and an inconsistent application of facts can result. For these reasons, one could ask whether it is fair for insurers to

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[278] One such group is al Qaeda, which is not a sovereign nation, but certainly organized internationally and functions as a military organization. Al Qaeda's leader also had a close relationship with the government of a sovereign nation, Afghanistan. Everett, *supra* note 226, at 187.

[279] Pan America, Inc. v. Aetna Cas. & Sur. Co., 505 F.2d 989, 1012-13 (2d Cir. 1974).

[280] *Id.* at 1015.

[281] *Id.*

include exclusions such as war risk in policies at all, given the unpredictability of terrorist attacks.

War risk exclusions used to be more easily adjudicated. In recent decades, however, civilians, not members of the armed forces, are often the prime target of such attacks.[282] To subject millions of Americans to exclusions would undermine the purpose of insurance coverage. A more liberal construction of "war" adopted by some judges[283] could leave many insured parties with no coverage. It is highly probable that insurers originally intended war risk exclusions to apply to members of the armed forces, who understand and sometimes willingly undertake the risks that go with their jobs. On the other hand, unsuspecting civilians, such as those killed in the WTC attacks, do not expect to be killed during the course of an office work day. To deny coverage via exclusions for terrorist attacks does not make sense. Therefore, a war risk exclusion should not apply to terrorist attacks or the new breed of "war" now plaguing the United States.

Given this conclusion, however, what should be done? First of all, fairness to both parties is essential. No single entity should have to shoulder the burden of attacks for which the risk is incalculable. Insured parties pay a significant amount of money to ensure that they are covered in the event of injury, death, or property damage resulting from certain events. When such events occur, it seems patently unfair to deny compensation to the insured. Yet insurers also require some measure of security and predictability. That is, they should not necessarily have to pay for the thousands of claims arising out of catastrophic events if the amount of compensation required far exceeds their financial capacity.

What then, is a feasible solution? Both parties will have to compromise. The necessity for exclusions stems primarily from the inability to calculate the risk of certain catastrophic events.[284] Perhaps now that September 11th can offer ballpark figures of the risk involved, however, insurers can better adjust their premiums to account for future attacks. Unfortunately, this could result in astronomical premiums for parties who are classified as high-risk, such as owners of buildings considered to be possible targets of attacks.

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[282] On September 11th, enemies of freedom committed an act of war against our country. Americans have known wars—but for the past 136 years, they have been wars on foreign soil, except for one Sunday in 1941. Americans have known the casualties of war—but not at the center of a great city on a peaceful morning. Americans have known surprise attacks—but never before on thousands of civilians. All of this was brought upon us in a single day—and night fell on a different world, a world where freedom itself is under attack.

Address, *supra* note 274.

[283] *See supra* Part III.A.2; *see also* cases cited *supra* note 230.

[284] Sedore, *supra* note 214, at 1043.

One solution would be for insurers to increase their premiums but also to ensure that terrorism insurance is available to the American public. Everyone is aware of the costly aftermath of terrorist attacks and some might even be willing to shoulder a piece of the cost to ensure their security in the event of another attack. In addition to the increase in premiums, the government may have to supplement the insurance industry in the event of large-scale attacks resulting in exorbitant losses.[285] Supplements might include subsidies, bail outs, and laws limiting liability. Reinsurers also may have to assume more significant roles.[286] The battle does not end there. Even when war risk exclusions do not apply, other insurance key issues arise, namely whether an attack constitutes more than a single occurrence.

B. Tests Used by Courts to Determine the Number of Occurrences that Took Place

In light of the fact that insurers have opted not to invoke war risk exclusion for the WTC attacks, the next battle facing insureds (most particularly Silverstein) concerns the number of occurrences[287] that took place on the morning of September 11th. Three tests guide courts in defining "occurrence."[288] The majority test is referred to as the "cause" test.[289] A second, minority test is the "effects" test.[290] The third test, utilized by New York courts, is the "unfortunate event" test.[291]

1. "Cause" test

The "cause" test "examines the cause or causes of bodily injury or property damage."[292] Losses that arise from the same "cause" are considered one occurrence.[293] The word "cause" is problematic because of its many mean-

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[285] *See infra* Part IV.A; *see also supra* Part II.C.2, D.1-2.

[286] *See infra* Part IV.B.

[287] Property insurance policies pay a limit of insurance on a per occurrence basis. Other conditions that determine how a loss is paid and on what terms, include replacement cost or actual cash value, application of co-insurance penalties, imposition of sub limits and other terms and conditions that would potentially limit a policy response. Branigan, *supra* note 61, at 128.

[288] Jon A. Baumunk, Comment, *New York's "Unfortunate Event" Test: Its Application Prior to the Events of 9/11*, 39 CAL. W. L. REV. 323, 328 & n.39 (2003).

[289] *Id.* & n.40.

[290] *Id.* at 328.

[291] *Id.*

[292] *Id.*

[293] Michael F. Aylward, *Twin Towers: The 3.6 Billion Question Arising From the World Trade Center Attacks*, 69 DEF. COUNS. J. 169, 172 (2002).

ings. Of course, "this very elasticity has permitted courts to adopt different meanings of 'cause' to maximize coverage for policyholders in different types of cases, while still purporting to be true to the 'cause' test."[294] As a result, "cause" can be said to have three basic usages: (1) physical cause (proximate cause); (2) remote cause (legal cause); and (3) inherent (root) cause or causes.[295]

Physical cause (proximate cause) can be described as that which "is the immediate cause of the plaintiff's injuries."[296] Generally speaking, "where two losses occur close to each other in time and space as the result of a continuous physical cause, most courts have ruled that they should be treated as arising out of the same 'occurrence.'"[297] Remote cause (legal cause) looks to the conduct of the insured, and what role that conduct (as a cause) may have played in the suits brought against the insured.[298] Inherent (root) causes are those underlying conditions, "without which the claims would not have arisen."[299] In other words, "'causes' that are based on some thematic linkage and not direct, physical causes or even legal causes."[300]

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[294] *Id.* & n.9.

[295] *Id.* at 172-74.

[296] *Id.* at 172. In cases where the insured's conduct was the immediate cause of the injuries, court typically define "cause" in a manner similar to the tort conception of "proximate cause." These cases tend to look to the direct, physical cause of the injuries as the yardstick for measuring whether the claims had a common origin. *Id.* (quotations omitted).

"[T]he Fifth Circuit ruled in [*H.E. Butt Grocery Co. v. National Union Fire Insurance Co.*], that two separate sexually [sic] assaults by a store employee were separate 'occurrences' for the purposes of applying a self-insured retention." *Id.* "Even though the claims were based on the insured's negligent failure to supervise the employee, the court declared that the 'immediate cause' of the underlying injuries was the intervening intentional tort of the employee and therefore that each separate assault was a separate 'occurrence.'" *Id.*

In a case where two buses overturned in the same rainstorm, "the Louisiana Court of Appeals held that each upset was a separate 'occurrence' since the accidents were caused in large part by the independent acts of negligence of each bus driver." *Id.* at 173. In a subsequent ruling, the same court determined that two car collisions occurring 15 minutes apart "arose from a single 'occurrence,' where both collisions were caused by smoke from a 'controlled burn' the insured was conducting in a forest adjacent to the highway." *Id.*

[297] *Id.*

[298] *Id.* Most general liability policies provide that "bodily injury and property damage arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one occurrence." *Id.* at 173 & n.14 (quotations omitted).

[299] *Id.* at 174.

[300] *Id.*

2. "Effects" test

The "effects" test "focuses on each injury or incident of damage to determine the number of occurrences."[301] The minority of courts that apply this test "look at the individual claimants or instances of property damages to determine the number of occurrences."[302] In some cases, courts consider this test to be the most suitable "where the injuries or damage complained of arise at different locations and at different times."[303]

3. "Unfortunate event" test

Finally, New York courts employ yet another test, known as the "unfortunate event" test. The principle behind this test is "that the cause of the injury or damage must be an event close to the injury or damage itself."[304] Unlike the traditional "cause" test, in the "unfortunate event" test, the "cause" is the "immediate unfortunate event," or one that is "close[st] to the actual injury or loss, resulting in the harm."[305]

C. Recent Court Decisions Concerning the Number of Occurrences that Took Place on September 11th

The United States District Court for the Southern District of New York is currently flooded with cases relating to the September 11th attacks. Some of the most prominent cases involve various insurers and WTC Properties, L.L.C., battling over the term "occurrence."

1. SR International Business Insurance Co., Ltd. v. World Trade Center Properties, L.L.C.[306]

In *SR International*, Allianz Insurance Company ("Allianz") moved for summary judgment against the Silverstein parties ("Silverstein").[307] Silverstein and Allianz disagreed over the meaning of "occurrence" in the Allianz policy.[308] Under the terms of the policy, "occurrence" is: "[A]ny one loss, disaster or casualty, or series of losses, disasters or casualties arising out

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[301] Baumunk, *supra* note 288, at 328 & n.43 (internal quotations omitted).

[302] *Id.* & n.44 (internal quotations omitted).

[303] *Id.* & n.45 (internal quotations omitted).

[304] *Id.* & n.48 (internal quotations omitted).

[305] *Id.* & n.49 (quotations omitted).

[306] No. 01 CIV.9291, 2003 WL 554768 (S.D.N.Y. Feb. 26, 2003).

[307] *Id.* at *1.

[308] *Id.* at **2-6; *see supra* notes 22-25, and accompanying text for background facts.

of one event."[309] Allianz contended that the plain meaning of this language dictates that the WTC attack was one event.[310] Silverstein countered that Allianz's provision is ambiguous, thereby requiring the determination of its meaning by a jury.[311]

The district court reasoned that the WTC attacks could just as easily be viewed as two "occurrences" as one.[312] In response to Allianz's argument that considering the attack as two events would require a person "to ignore that part of the definition of 'occurrence' that includes a 'series of losses . . . arising out of one event,'"[313] the court noted that "this language is consistent with treating the attack on each building as a single event resulting in a series of losses to the surrounding buildings which were damaged by the collapse of that one tower."[314]

The court, therefore, held that "occurrence," as defined in the Allianz policy, "supports the argument that the attack on the World Trade Center should be considered one occurrence, [but] that is not the only reasonable construction of the definition."[315]

2. World Trade Center Properties, L.L.C. v. Hartford Fire Insurance Co.[316]

In another of the WTC cases, the Second Circuit similarly had to decide "what the term 'occurrence' means under the specific binders that appellees issued and that were in force when the planes destroyed the WTC on September 11, 2001."[317] Here, Silverstein "assert[ed] that the mere fact that the word 'occurrence' was not defined in the binder is not enough to render it ambiguous."[318] Silverstein further contended that the court should look to New York jurisprudence when attempting to construe the meaning of "occurrence" in the absence of a definition in the binder.[319] In its assessment

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[309] *SR Int'l*, 2003 WL 554768, at *4.

[310] *Id.* at *5.

[311] *Id.*

[312] *Id.*

[313] *Id.*

[314] *Id.*

[315] *Id.* at *6.

[316] 345 F.3d 154 (2d Cir. 2003).

[317] *Id.* at 169. One of the insurers defined "occurrence" as follows:

> "[o]ccurrence" shall mean all losses or damages that are attributable directly or indirectly to one cause or to one series of similar causes. All such losses will be added together and the total amount of such losses will be treated as one occurrence irrespective of the period of time or area over which such losses occur.

Id. at 160 (citing SR Int'l Bus. Ins. Co. v. World Trade Ctr. Props., L.L.C., 222 F. Supp. 2d 385, 398 (S.D.N.Y. 2002)).

[318] *Id.* at 186.

[319] *Id.*

of "occurrence," Silverstein maintained that "under New York law, there is but one meaning . . . which is the direct, physical cause of a loss and not more remote causes."[320] It then follows that "because the destruction of the WTC was the result of two physical impacts from two separate planes, there were two occurrences as a matter of law."[321]

Based on the fact that there is no uniform meaning of "occurrence" under New York law, the Second Circuit found that this argument failed.[322] The court also aptly noted that public policy concerns influence "occurrence" in a liability insurance context to ensure adequate compensation for injured third-parties who were not parties to the insurance contract.[323] As to the meaning of "occurrence," the court ultimately held that "the district court properly concluded that the meaning of 'occurrence' . . . is sufficiently ambiguous under New York law to preclude summary judgment and to warrant consideration by the fact finder of extrinsic evidence to determine the parties' intentions."[324] The court based its conclusion on the "distinction between first-party and third-party insurance policies, the fact-specific nature of the inquiry, and the fact that it is the parties' intent that controls."[325]

D. Application of the "Occurrence" Tests to September 11th

Given the ambiguity of "occurrence," the September 11th attacks could easily be viewed as one or more than one occurrence under the "occurrence" tests. The outcome of the tests, however, could result in a $3.5 billion difference.[326] This is a difference that is certain to influence future insurance claims for collateral damage resulting from catastrophic events. While the American public may not be ready to contemplate the possibility of another attack of similar proportions to September 11th, the insurance industry ought to be prepared to face such disasters and to plan accordingly.

In the past, the New York Court of Appeals, applying the "unfortunate event" test, found two different accidents in the collapse of separate walls of separate buildings at different times.[327] It viewed the separate and negligent construction of each wall to be the proximate cause, not the heavy rainfall that

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[320] *Id.*

[321] *Id.*

[322] *Id.*

[323] *Id.* at 187.

[324] *Id.* at 190.

[325] *Id.*

[326] *See supra* text accompanying note 23.

[327] Baumunk, *supra* note 288, at 330 n.67. The case was *Arthur A. Johnson Corp. v. Indemnity Insurance Co. of North America*, 164 N.E.2d 704, 706 (N.Y. 1959).

caused the collapse of the walls.[328] Additionally, no evidence suggested that the collapse of the first wall contributed to the collapse of the second.[329]

If the WTC attacks are viewed under this standard, the attacks constitute two occurrences. First, the construction of each building, even if by the same company, was completed separately. Second and more important, each plane was piloted by different men. Therefore, in the context of the WTC attacks, the proximate cause is arguably the deliberate and separate piloting of commercial aircraft into the north and south towers of the WTC complex, which ultimately resulted in their separate collapses.[330] The collapse of the South Tower did not cause the collapse of the North Tower. For these reasons, there were two occurrences.

Another test that produces a similar outcome is the "effects" test. Employing a far less complicated analysis, the "effects" test would simply look to the number of instances of property damage to determine the number of occurrences.[331] Under this test, the WTC attacks could constitute at least two occurrences. The problem is that if one looks to *all* of the instances of property damage, there would be far more than two occurrences.

In a case of September 11th magnitude, therefore, it would be neither prudent nor economically reasonable for a court to employ this test. The WTC complex alone sustained significant property damage. Imagine the hundreds, and even thousands of instances of property damage that resulted from the collapse of the WTC.[332] If each of those were classified as an "occurrence" and therefore worthy of monetary compensation, the insurance industry would quickly become insolvent. Additionally, because the "effects" test is followed by a minority of courts, it is unlikely that a New York federal district court would give serious weight to such a test for a determination of the "occurrence" issues at the forefront of September 11th litigation, which are sure to become precedent-setting cases.

On the other hand, the "cause" test will likely be closely scrutinized. The resolution of the WTC cases, in particular, will likely present challenges due to the inherent ambiguity of the word "cause." To clarify the "cause" test, a New York court articulated the following standard: "where . . . one negligent

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[328] Baumunk, *supra* note 288, at 330 & n.68.

[329] *Id.* at 329 & n.54.

[330] The south tower of the WTC collapsed at 10:05 a.m., before the collapse of the north tower at 10:28 a.m., even though the south tower was the second to be hit. Timeline, *supra* note 11.

[331] *See supra* text accompanying note 302.

[332] "The damage around the Towers caused by falling debris was substantial. Buildings directly damaged were likely covered for physical restoration expenses (replacement cost) and loss of business income/rental income until the premises [were] 'with due diligence and dispatch' restored to a condition that existed prior to the loss." Branigan, *supra* note 61, at 126-27.

act or omission is the sole proximate cause, or causa causans, there is, as a general rule, but one accident, even though there be several resultant injuries or losses."[333]

On the most technical level, one can argue that there were indeed two "causes" because one airplane crashed into the North Tower and a different airplane crashed into the South Tower seventeen minutes later.[334] Another point of view is, however, that there was a single "cause"—the terrorist plot. These varying interpretations under the same test exemplify the inconsistency with which this test can be applied. The sub-tests offer some clarification, but are also not without flaws.

As a physical (proximate) cause, each airplane crash was the immediate cause of the ultimate collapse of the towers. The separate crashes were not one continuous physical cause even though they occurred within a very short time period of one another. Each crash caused the later collapse of each separate tower. Had one of the terrorist-piloted aircraft not succeeded in striking its designated tower, that tower would not have collapsed. Therefore, the attacks represent two occurrences.

While physical (proximate) cause seems to be one of the more straight forward tests, like the other tests, it is susceptible to multiple interpretations depending on the party construing the facts of a case.[335] Most cases are not cut and dried. Multiple interpretations accordingly could lead to conflicting decisions. Nonetheless, physical (proximate) cause is a good starting point for an "occurrence" analysis.

Though not particularly relevant in the September 11th "occurrence" debate, remote cause (legal cause) can nonetheless prove useful in other analyses. Remote cause (legal cause) would require an examination of Silverstein's (as the insured) conduct. Having just commenced a 99 year lease from the Port Authority with incomplete insurance policies, Silverstein exhibited no questionable conduct that would raise any flags. The insured in this case, Silverstein, did not contribute to the attacks or subsequent collapse of the WTC towers. This particular definition of "cause," then, is not really relevant in this case. Even though remote cause has no bearing on the WTC "occurrence" issue, it could be an important consideration in other instances of property damage. Certainly, if the insured were partly liable, this would be a significant factor for courts and juries to consider.

Perhaps a bit more on point with regard to the WTC attacks is the identification of inherent (root) causes. There may be several underlying causes without which the claims would not have arisen. The primary underlying cause is

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[333] Baumunk, *supra* note 288, at 329 & n.58 (internal quotations omitted).

[334] *See* Timeline, *supra* note 11.

[335] *See supra* note 296.

arguably terrorism and the constant threat posed by terrorists against the United States, namely against landmarks that stand for democracy and capitalism.[336] As the 21st century proceeds, the threat against the United States appears to be increasing. More factions and groups such as al Qaeda are training to perpetrate attacks against those with whom their beliefs differ sharply.[337]

Despite the value of inherent cause analyses to different factual circumstances, there are significant problems with a test that gives too much weight to underlying conditions, as would be the case here. Per the discussion in Part II.A, several key aspects of the context of the September 11th attacks (i.e. religious fanaticism, distaste for American way of life) shed light on how and why the attacks took place. But these same considerations are not proper in the context of the "occurrence" tests because they would lead to overly-broad readings of the test. One can arguably find underlying causes in any instance of property damage (even when the damage is on a far smaller scale than that created by the September 11th attacks). Any event that clearly involves multiple "occurrences," then, can be improperly construed as a single "occurrence" based on an underlying cause.

Notwithstanding the flaws in the existing "occurrence" tests, it seems more likely than not that the WTC attack constitutes two "occurrences" under these tests. As matters now stand, a jury in New York City recently found, in a partial verdict, "that the majority of insurers, who hold more than a billion dollars of the [$3.5 billion insurance] policy, are bound by a form that defined the Sept. 11 terrorism as one event."[338] Two more trials have yet to take place. One, to determine the occurrence issue—whether there was one or two attacks—and two, to determine the amount insurers will pay.[339] It is hard to imagine, however, that anything but two "occurrences" could be construed from the attacks on the WTC.

E. Application of the "Occurrence" Tests to Pearl Harbor

Pearl Harbor, if analyzed under the "occurrence" tests, can be construed as one occurrence only if the coordinated military attack by the Japanese is viewed as one event. The fact that there were two waves of attacks, each involving over one hundred planes, suggests multiple occurrences. Unlike the focus of the September 11th attacks—the North and South Towers of the

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[336] *See supra* Part II.A.1.

[337] *See supra* Part II.A.2.

[338] Associated Press, *Jury Issues Partial Verdict in Trade Center Insurance Case* (April 29, 2004), http://www.nytimes.com/2004/04/29/business/29WIRE-WTC.html?hp (last visited Oct. 13, 2004).

[339] *Id.*

WTC—the damage from Pearl Harbor was widespread, directly caused by hundreds of planes and extending across military bases on Oahu. Consequently, the number of occurrences, if there is more than one, will be extremely difficult to determine.

Under the "cause" test, the number of occurrences will differ depending on whether one interprets the cause of injuries, deaths, and property damage to be from a unified military operation, from two waves of planes, or from each attacking Japanese aircraft. In the case of the latter, there could be hundreds of occurrences, which insurers did not likely intend "occurrence" to encompass. According to the physical (proximate) cause prong, there would probably only be one occurrence. While it is clear that the immediate cause of the deaths and damage suffered on December 7th was bombing by Japanese aircraft, no plane can be singled out as having caused a particular injury or damage. It presumably would be difficult even to determine whether some of the damage occurred as a result of the first or second wave of attacks. The remote (legal) cause is not particularly relevant to this analysis. Neither is the inherent (root) cause, although it is important to note that while Americans frequently speculated about an attack by Japan,[340] Japan and the United States were maintaining diplomatic relations in Washington even on December 7th.[341]

Contrary to the result under the "cause" test, the "effects" test dictates that hundreds, and possibly thousands of occurrences took place on December 7th. As noted earlier, the application of this test to an attack of such magnitude seems impractical. Each instance of property damage would constitute an "occurrence" and insurers would suffer massive financial losses.

On the other hand, an application of the "unfortunate event" test would yield a result somewhere between the "cause" and "effects" tests. By defining "occurrence" as the "immediate unfortunate event," or one that is "close[st] to the actual injury or loss, resulting in the harm,"[342] the Japanese attack on Pearl Harbor could be construed as two occurrences. There were two waves of attacks, each an "immediate unfortunate event." But, as with all the tests, considerable room for subjectivity remains. The fact that the two waves of attacks were part of a larger single plan means that the two attacks could as easily be viewed as one occurrence.

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[340] *See supra* Part II.B.1.

[341] Gladys Ching Pang v. Sun Life Assurance Co. of Canada, 37 Haw. 208, 215 (Hawai'i Terr. 1945). "In fact . . . the two countries were engaged in peaceful negotiations, Japan's Kuruso, special ambassador of so-called 'good will' being even then present in Washington ostensibly trying to obtain a peaceful settlement of the controversies between the two governments." Rosenau v. Idaho Mut. Benefit Ass'n., 145 P.2d 227, 232 (Idaho 1944).

[342] Baumunk, *supra* note 288, at 328 & n.49 (quotations omitted).

In looking at the three "occurrence" tests, there is little doubt that they offer valuable guidance to the courts. Additionally, some standard is necessary in light of the property damage suffered as a result of September 11th. But it is equally clear that these tests can be difficult to apply and that each one may leave a considerable amount of room for interpretation. As with war risk exclusion, the tests will require fine tuning and/or replacement as the means by which terrorist attacks and the damage caused by the attacks evolve.

IV. SOLUTION

Twenty-first century warfare will necessitate innovative ways for insurers to provide coverage for the American public. The inapplicability of war risk exclusion and the problematic application of the "occurrence" tests means at least one thing: insurers had better prepare to pay out a significant amount of money. No longer should they be able to shield themselves from liability for catastrophic events. Nor should they be able to construe multiple occurrences as one occurrence. In all fairness, however, placing this burden on insurers could easily bankrupt the industry. The government should therefore continue to work with the insurance industry via legislation to devise a solution for dealing with mass terrorist attacks that offers security to both insurers and their insured. Moreover, reinsurance can defray some of the costs and might help spread the risk to avoid industry collapse.

A. The Government's Role Following Catastrophic Events

In Part II, this author discussed the legislative response to September 11th. Having introduced some of the most significant insurance issues surrounding both Pearl Harbor and September 11th, this author suggests that the next issue for consideration is the government's involvement following terrorist attacks. In the case of both September 11th and Pearl Harbor, some have argued that the government possessed intelligence about the attacks before they occurred, but did little about it.[343] If this is true, the government could arguably have prevented the attacks. It would follow that the government's share of the responsibility should be in the form of intervention and assistance to restabilize the economy and the insurance industry.

As evidenced by the earlier discussion about changes in the way of life following the Pearl Harbor and September 11th attacks,[344] the American people suffer the greatest losses from these horrific attacks. Many people lose

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[343] *See supra* Part II.A-B. This was a primary issue behind the Roberts Report and the September 11th commission report.

[344] *See supra* Part II.E-F.

loved ones and can never again regain their pre-attack sense of security. But the insurance industry also sustains considerable losses because of its stake in real property, personal property, and Americans' lives by way of insurance policies.

The main problem facing insurers with respect to terrorist attacks is the basic two-fold unpredictability of attacks: (1) when they might occur and (2) how much damage they may cause. Given that the government has considerable financial resources as well as the capability to assess intelligence information unavailable to the insurance industry, the government is in a far better position to predict the probability of attacks and to calculate risk estimates.[345] Furthermore, one could argue that in certain respects, "the federal government may be at least partly responsible for 'creating' many of the risks posed by terrorism."[346]

In addition to the government's access to intelligence and financial resources, the government's role should be to protect the American public. If security lapses result in catastrophic events, the American people should not bear the brunt of the government's negligence by enduring additional losses in the form of insurance coverage denial. At the same time, however, if the government were to demand that the insurance industry uphold every insurance policy of those affected by the attacks (without subsidizing some of the cost involved), the insurance industry would collapse. The best solution then—to ensure solvency of the industry—is through legislation that involves government funding to support victims and the insurance industry in times of crisis.[347]

B. Reinsurance

While government assistance has enjoyed some historical success here and abroad,[348] an alternative or additional means by which primary insurers may

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[345] Manns, *supra* note 59, at 2521.

[346] *Id.* at 2520-21.

[347] The government has historically assumed a role assisting the insurance industry (by assuming the role of insurer) following attacks. *See supra* Part II.D.

[348] After dealing with terrorist bombings perpetrated by the Irish Republican Army, the British Government involved itself with the insurance industry by establishing the Pool Reinsurance Company ("Pool Re"). Boran, *supra* note 85, at 549 & n.147. Pool Re, comprised of 181 insurance companies, was a mutual insurance company designed solely to cover losses from terrorism. *Id.* at 549-50 & nn.148 & 153. Prior to Pool Re's establishment, insurers, namely reinsurers, began to exclude coverage for "losses due to terrorist actions." *Id.* at 549 & n.144. The government serves as Pool Re's reinsurer, responding only when the company cannot meet its liabilities. *Id.* at 549-50 & n.149. Insurers have the option of obtaining reinsurance through Pool Re or the private market. *Id.* at 550 & n.152. Pool Re "is to ensure that the British economy does not suffer for lack of insurance. Without reinsurance, primary

defray their costs is reinsurance. Reinsurance has been used as a "device . . . by insurers for spreading the risk of potentially catastrophic losses, such as those due to terrorism, that might exceed the amount which could be withstood solely on the basis of the insurers' own financial capacities."[349] Generally speaking, "[r]einsurance is a market mechanism that allows insurers to accept more risk than would otherwise be permitted by regulators monitoring their financial solvency."[350]

Reinsurance works as follows: a primary insurance writer transfers some of its risk to a reinsurance company through a reinsurance agreement.[351] The reinsurance company may then transfer some of its risk to other companies through retrocession.[352] Consequently, "[e]ach insurer in the chain thus limits, at least in theory, the liability it retains to a specified dollar amount or percentage of the total potential loss."[353] For some time, however, "the reinsurance market has grappled with a problem of its capacity to assume and adequately spread risk."[354]

There are other drawbacks in the scheme of reinsurance. These arise when unanticipated and unpredictable events of catastrophic proportions, known as clash events, occur, which directly affect many areas of insurance and insurers.[355] Another problem that often arises with clash events is the duty of

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insurers would not write policies and banks would not lend money because of the possible catastrophic losses." *Id.* at 552 & n.162.

"The Spanish Government has established the Consorcio de Compensacion de Seguros . . . an independent entity with separate legal status. Its role is to cover losses due to natural catastrophes, army and police interventions in peacetime, terrorism and other extraordinary events." *Id.* & nn.164-65.

"The South Africa Special Risks Insurance Association . . . was set up to deal with local riots, insurrection, and terrorism in South Africa. Established in 1976, the Association is considered the forbearer of Pool Re in the United Kingdom." *Id.* at 555 & nn.182-84.

"The State of Israel has a bifurcated system for dealing with losses due to terror. The first level is the Property Tax and Compensation Fund. The second is the Law for the Victims of the Enemy Action. Each level deals with a different part of the insurance system." *Id.* at 558 & nn.199-202. The Property Tax and Compensation Fund primarily covers property and casualty insurance while the Law for the Victims of the Enemy Action covers life and health insurance. *Id.* at 559-60 & nn.204 & 214-15.

[349] Jane Kendall, Comment, *The Incalculable Risk: How the World Trade Center Disaster Accelerated the Evolution of Insurance Terrorism Exclusions*, 36 U. RICH. L. REV. 569, 579 (2002).

[350] *Id.* & n.45.

[351] *Id.* & n.46.

[352] *Id.* at 579.

[353] *Id.* & n.47.

[354] Paul E. Traynor, *Will the Historic Relationship Between Cedent and Reinsurer Become a Casualty on the War of Terrorism?*, 9 CONN. INS. L.J. 179, 183 (2002).

[355] Kendall, *supra* note 349, at 580 & n.51. The WTC disaster is the "most catastrophic clash event in insurance history, . . . generating claims in aviation, property, liability, life,

the reinsurers to follow settlement actions agreed to by the reinsured under the "follow the fortunes" doctrine.[356] Reinsurers are typically bound by contract "to those settlements made while exercising the duty of utmost good faith by the cedent [or reinsured] company."[357] In the case of September 11th, this could potentially result in significant losses to reinsurers, as they will be bound to settlements for which they had not bargained. Further areas of conflict include the reinsurers' liability due to the primary insurers' decision not to invoke the war risk exclusion for the September 11th attacks.

These collective drawbacks, however, should not preclude consideration of the possible benefits of using reinsurance to ensure the availability of terrorism insurance or other protection to deal with future attacks upon American soil. Rather, a combination of government intervention and reinsurance will arguably best serve all parties. This solution would require: (1) an agreement between the government and both primary insurers and reinsurers; (2) government subsidization of the industry, thereby bolstering it in the event of future attack; and (3) preservation of insurance as a private industry. Without a balanced approach, either the American public or the insurance industry—or perhaps both—will suffer even more catastrophic losses than those already endured.

V. CONCLUSION

The only well-settled principle stemming from September 11th is that many issues have yet to be resolved. In spite of the fact that there is a significant amount of established law regarding the most fundamental unsettled issues,[358] the application of the law to the circumstances surrounding September 11th is far from clear. The factual circumstances resulting from a tragedy of cataclysmic proportions seem not to fit into many traditional legal principles. War risk exclusion, for example, functioned at one time to determine when insurance coverage would apply. Even in the context of Pearl Harbor more than 60 years ago, however, its application proved difficult in light of the many definitions of "war."[359]

As decades roll by and traditional notions of warfare cease to exist, it is apparent that these once-conventional terms no longer should apply, at least not to terrorist attacks. Courts or the legislature need to formulate new defini-

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workers' compensation, business interruption, health, disability, automobile, and other miscellaneous lines of insurance, all centralized within one concentrated area." *Id.* & n.52. Lloyd's estimated its 2001 losses to equal $4.51 billion. More than half of that, or around $2.87 billion was attributable to September 11th losses. Traynor, *supra* note 354, at 183 & nn.17-18.

[356] Traynor, *supra* note 354, at 186 & n.32.

[357] *Id.* & n.31.

[358] *See supra* Part III.

[359] *See supra* Part III.A.1-3.

tions and tests that reflect the current state of "war." While on one hand, the unpredictability of terrorist attacks is the very reason that insurers do not want to offer coverage, it also should be the strongest policy reason behind the inapplicability of exclusions. The American people should not be denied insurance coverage when they suffer drastic and unexpected losses, as they are always the innocent victims affected by terrorist attacks.

Likewise, insurers should not be able to group several "occurrences" into one, thereby reducing the amount of coverage payable to insureds. Terrorist attacks are likely to force this issue to be litigated repeatedly. Each attack will likely involve circumstances that do not fit neatly into a definable category. Despite the varying interpretations of the number of "occurrences" stemming from the September 11th attacks, for example, the destruction of the North and South Towers of the WTC and should be resolved as two "occurrences." Insurers have the means as well as the relationship with the government to assure some degree of financial stability, even in the context of the significant losses incurred from September 11th. Americans, on the other hand, do not.

This Comment does not contend that the insurance industry should shoulder everyone's burden. Rather, the insurers have the means to create a collaborative solution with the government that will benefit all. While it is probably impossible to completely prevent another September 11th type attack, there is no reason to repeatedly injure those who have already suffered by denying insurance coverage when they need it most.

Aimee Jodoi Lum[360]

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[360] J.D. Candidate 2005, William S. Richardson School of Law, University of Hawai'i at Manoa. I would like to express my sincerest gratitude to my grandfather, Tokio Jodoi, and Cathy Yasuda, for sharing their very personal stories, which have provided glimpses into America's two most infamous days in history. Many thanks also to Dean Aviam Soifer for his invaluable insight and guidance during the composition of this Comment. Last but not least, thanks to my husband and family for always believing in me.

To See or Not to See?[1] The Real Question Behind the Supreme Court's *Grutter & Gratz* Decisions

I. INTRODUCTION

In issuing the companion decisions of *Grutter v. Bollinger*[2] and *Gratz v. Bollinger*[3] on June 23, 2003, the United States Supreme Court answered several questions regarding affirmative action in higher education that had remained unanswered since the Court's fragmented decision in *Regents of the University of California v. Bakke*[4] more than twenty-five years ago. The Court confirmed that educational diversity is a compelling government interest justifying the use of race in admissions.[5] It also set forth the following requirements for universities to ensure that their admissions programs are narrowly tailored to fit the diversity interest: a program must (1) offer competitive review of applications; (2) provide flexible, individualized consideration of applicants; (3) consider race-neutral alternatives; (4) not unduly burden non-minorities; and (5) be limited in time.[6] Many observers believe that taken together, the two opinions provide clear directives on the constitutional boundaries of race-conscious admissions policies.

Despite the Court's purported guidelines, however, the seemingly split decisions of *Grutter* and *Gratz*, as well as the conflicting language used throughout the two majority and numerous concurring and dissenting opinions, raise as many questions as they answer. Instead of clearly defining educational diversity, the Court in *Grutter* merely cited its substantial benefits and concluded that diversity is a compelling government interest.[7] Furthermore, by overlooking the heavy advantages whites receive in the admissions process,

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[1] This phrase is borrowed from the Prologue of a law review article in which the authors discuss the impact of "whiteness" on our history of race equality and discrimination. The authors used the phrase in acknowledging that "being white means confronting the choice." Robert L. Hayman, Jr. & Nancy Levit, *The Constitutional Ghetto*, 1993 WIS. L. REV. 627, 628-30 (1993).

[2] 539 U.S. 306 (2003).

[3] 539 U.S. 244 (2003).

[4] 438 U.S. 265 (1978).

[5] *Grutter*, 539 U.S. at 330.

[6] REAFFIRMING DIVERSITY: A LEGAL ANALYSIS OF THE UNIVERSITY OF MICHIGAN AFFIRMATIVE ACTION CASES – A JOINT STATEMENT OF CONSTITUTIONAL LAW SCHOLARS 8 (The Civil Rights Project at Harvard University ed., 2003), *available at* http://www.civilrightsproject.harvard.edu/policy/legal_docs/Diversity_%20Reaffirmed.pdf [hereinafter REAFFIRMING DIVERSITY JOINT STATEMENT].

[7] *See Grutter*, 539 U.S. at 327-33.

as well as the resulting practical disadvantages to minorities, the Court leaves us to wonder whether it comprehensively considered real-world conditions in reaching its decisions. The Court also did not address whether points-based admissions programs are inherently unconstitutional, and if not, how to structure such programs to ensure they remain within constitutional boundaries.

This Comment addresses these ambiguities resulting from the *Grutter* and *Gratz* opinions. In addition, it illustrates the error of the *Gratz* holding that Michigan's points-based admissions program was unconstitutional, and explores a possible rationale for why the Court wrongly reached that conclusion. Part II.A provides a brief history of race discrimination in the United States as a foundational framework for the development of affirmative action, and illustrates the effects of this history on the contemporary conditions surrounding minorities in the United States. Parts II.B, C, and D provide background on the facts and decisions of the three Supreme Court cases which have addressed affirmative action in higher education: *Bakke*, *Grutter*, and *Gratz*. Part III.A discusses the Court's findings related to diversity as a compelling government interest and the Court's failure to provide a clear definition of educational diversity.

Parts III.B and C comprise the foci of this paper. Part III.B addresses the Court's guidance regarding the narrow tailoring requirement and the related uncertainties and practical concerns that arise as a result of the decisions. In particular, it: (1) articulates why the *Gratz* holding was incorrect in light of surrounding facts and circumstances, such as the substantial disadvantages to minorities under the traditional admissions process; (2) addresses the Court's ambiguity as to whether a lower amount of points would have been narrowly tailored under the circumstances and explains why the admissions program reviewed in *Gratz* was in fact within the boundaries of narrow tailoring; and (3) discusses why the *Gratz* opinion should not be read to render the use of points-based admissions systems per se unconstitutional.

Finally, Part III.C discusses whether unconscious racism and the transparency phenomenon might explain the Court's lack of consideration of the practical facts and circumstances surrounding Michigan's undergraduate admissions program. The theories of unconscious racism and transparency are built upon the notion that our white-dominated society tends to instinctively perceive norms, behaviors and, experiences, from a white point of view, based on the tenuous presumption that white is the defining standard.[8] Over time, this racially biased posture has inevitably become rooted in our equal protection jurisprudence as well, resulting in constricted discrimination laws

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[8] Sylvia A. Law, *White Privilege and Affirmative Action*, 32 AKRON L. REV. 603, 604-05 (1999); Barbara J. Flagg, *"Was Blind, But Now I See": White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 957 (1993).

and unjust results.[9] Part III.C addresses the impact of these transparent perspectives on the Supreme Court's *Gratz* decision, and more generally, on the Court's views and jurisprudence on race itself.

II. BACKGROUND

The United States has a long history of racism and discrimination, the effects of which are still apparent in the substantial inequalities between whites and minorities today.[10] Affirmative action developed in the United States as a necessary response to remedy this imbalance.[11] Although initially implemented as a policy directive in the employment arena, over time, affirmative action has extended into other areas as well, including higher education.[12] The constitutionality of considering race in higher education admissions has been repeatedly challenged in the courts, and has been directly addressed by the Supreme Court on three occasions, most recently in *Grutter* and *Gratz*.[13]

A. Contemporary and Historical Framework of Affirmative Action

The effects of the history of race discrimination in the United States are evident in the vast disparities in economic, educational, political, and social status between whites and blacks today.[14] The average net worth of a white family is $84,400, which is twelve times more than the average of $7,000 for a black family.[15] The per capita income of blacks is approximately 65 percent that of whites,[16] and the unemployment rate for blacks is over twice the rate for whites.[17] College enrollment and completion rates for blacks are approximately 31 and 16 percent, respectively, while the corresponding rates for

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[9] *See* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317, 323-25 (1987); Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821, 845-46 (1997).

[10] *See infra* Part II.A for discussion.

[11] *See infra* notes 41-46 and accompanying text.

[12] *See infra* notes 46-50 and accompanying text.

[13] *See infra* Part II.B-D for discussion; *see also infra* note 70.

[14] *See* Kevin D. Brown, *Brown v. Board of Education: Reexamination of the Desegregation of Public Education from the Perspective of the Post-Desegregation Era*, 35 U. TOL. L. REV. 773, 780-82 (2004); Hayman & Levit, *supra* note 1, at 677-87.

[15] Eric K. Yamamoto et al., *American Racial Justice on Trial—Again: African American Reparations, Human Rights, and the War on Terror*, 101 MICH. L. REV. 1269, 1328 n.307 (2003) (statistics are for the year 1999).

[16] Brown, *supra* note 14, at 780 n.18 (statistics are for the year 2000).

[17] Hayman & Levit, *supra* note 1, at 678 n.231 (based on statistics for the years 1980-87).

whites are approximately 39 and 28 percent.[18] More than 10 percent of young black men are incarcerated, compared with less than 2 percent of white men.[19] While approximately 23 percent of blacks live below the poverty line, less than 8 percent of whites do.[20]

The roots of the substantial inequities between the conditions of blacks and whites today are entrenched in America's history of racism and discrimination.[21] Race discrimination has a long and agonizing history in the United States. The Declaration of Independence and the U.S. Constitution, documents upon which our country and its government were founded, speak of freedom, equality, and justice for all.[22] At the time they were created, however, the United States was involved in the practice of trading and enslaving Africans in our country.[23] The Constitution itself contained a number of clauses which not only demonstrated the acceptance of slavery by our Founding Fathers, but also integrated racism into our legal foundation.[24] Even free blacks were not considered equal to whites nor citizens deserving of constitutional rights and protections.[25]

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[18] Brown, *supra* note 14, at 781 nn.29-32 (statistics are for the years 2000-01).

[19] *Id.* at 782 n.39 (statistics refer to men between the ages of 25-29 during the year 2002).

[20] *Id.* at 780 nn.21 & 23 (statistics are for the year 2001). Further, distinct residential segregation exists in U.S. communities as a direct result of discriminatory government practices in areas such as zoning, lending, and government-sponsored housing. Hayman & Levit, *supra* note 1, at 679-80 nn.236-41.

[21] *See generally* Hayman & Levit, *supra* note 1, at 656-66; Deseriee Kennedy, *Radicalism, Racism and Affirmative Action: In Defense of a Historical Approach*, 27 CAP. U.L. REV. 61, 62-63 (1998).

[22] Jeffrey J. Wallace, *"John Bingham and the Meaning of the Fourteenth Amendment": Idealogy vs. Reality: The Myth of Equal Opportunity in a Color Blind Society*, 36 AKRON L. REV. 693, 698 (2003); *see also* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness."); U.S. CONST. amend. XIV § 1 ("No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

[23] Wallace, *supra* note 22, at 698.

[24] *See generally id.* For instance, the Three-fifths Clause assigned slaves three-fifths the value of whites for representation purposes, the Fugitive Slave Clause mandated the return of runaway slaves to their owners and prohibited them from emancipation in non-slavery states, and the Slave Importation Clause allowed for the importation and trading of slaves until 1808. Alexander Tsesis, *Book Review: Justice at War and Brown v. Board of Education: Justice at War: Civil Liberties and Civil Rights During Times of Crisis*, 47 HOW. L.J. 361, 377 n.110 (2004).

[25] Wallace, *supra* note 22, at 700-01 (citing Dred Scott v. Sandford, 60 U.S. 393 (1856)). In *Dred Scott*, the Supreme Court stated:

> We think [blacks] are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and

The practice of slavery continued in the United States until it was abolished during the 1860s.[26] Following its termination, various congressional enactments were passed in an attempt to remedy the disparaging effects of slavery and to grant blacks the rights and protections of the Constitution.[27] Despite such efforts, however, the "stigma of slavery"[28] remained. Blacks continued to be denied equality and considered inferior to whites.[29] States adopted laws and practices ("Jim Crow" laws) that sought to eradicate the rights of black citizens, and to perpetuate the segregation of blacks and whites in schools, accommodations, and transportation.[30]

Moreover, the Supreme Court itself actively eviscerated the rights and protections being conferred to African Americans.[31] During the "First Reconstruction" period, the Court interpreted and applied the Fourteenth Amendment and other protective legislation so narrowly that it "render[ed] the promised protection meaningless in virtually all situations."[32] In the *Slaughterhouse Cases*,[33] the Court limited the range of "national rights" protected by the Privileges and Immunities Clause, thus allowing states to discriminate in many

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inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them. *Dred Scott*, 60 U.S. at 404-05.

[26] Wallace, *supra* note 22, at 700. In 1863, President Abraham Lincoln signed into law the Emancipation Proclamation, which declared that all persons held as slaves shall be free. DANIEL A. FARBER ET AL., CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY 20 (3d ed. 2003). Following the Civil War, in 1865, the Thirteenth Amendment was ratified making slavery and all involuntary servitude illegal. *Id.* at 21; U.S. CONST. amend. XIII, § 1.

[27] *See* FARBER ET AL., *supra* note 26, at 21-22. The Civil Rights Act of 1866 gave all citizens the same rights as white citizens, including the right to contract, to pursue lawsuits, and to hold property; the 1875 Civil Rights Act sought to further expand the protections afforded to African Americans. *Id.* at 21-22, 61. The Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution granted freedom, citizenship, and voting rights to African Americans. *Id.* at 21-22; Wallace, *supra* note 22, at 702.

[28] Wallace, *supra* note 22, at 700.

[29] *Id.* at 702-03.

[30] FARBER ET AL., *supra* note 26, at 62-63. A number of states maintained, for example, separate schools, washrooms, parks, playgrounds, theatres, and railroad cars for blacks and whites. *Id.* at 73-74. In 19 states, segregation was not only practiced but was actually required by law. Hayman & Levit, *supra* note 1, at 663 n.164.

[31] *See* Eric K. Yamamoto et al., *Civil Right in the New Decade: Dismantling Civil Rights: Multiracial Resistance and Reconstruction*, 31 CUMB. L. REV. 523, 535-36 (2000).

[32] DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW § 1.10, at 33 (2d ed. 1980). Professor Bell cites the following cases as examples: United States v. Reese, 92 U.S. 214 (1876); United States v. Cruikshank, 92 U.S. 542 (1876); Civil Rights Cases, 109 U.S. 3 (1883); United States v. Harris, 106 U.S. 629 (1883); Plessy v. Ferguson, 163 U.S. 537 (1896); James v. Bowman, 190 U.S. 127 (1903). *Id.* at 33 n.14.

[33] 83 U.S. 36 (1872).

areas.[34] The Court then specifically held in *The Civil Rights Cases*[35] that segregation and discrimination in public accommodations based on race or color were not state action but involved private conduct, and were therefore not proscribed by the Fourteenth Amendment.[36] Perhaps most infamously, in *Plessy v. Ferguson*,[37] the Court patently endorsed segregation by upholding a state statute that required "equal but separate" accommodations in railroads as "reasonable regulation."[38]

Beginning in the early 1900s and through the "Second Reconstruction" in the 1950s and 1960s, segregation and the notion of "separate but equal" were repeatedly challenged and eventually overcome in *Brown v. Board of Education*.[39] In spite of *Brown*'s command of desegregation and integration, however, anti-black sentiment and racial discrimination persisted.[40] Even with the enactment of the Civil Rights Act of 1964, which made overt racial discrimination illegal in the employment arena, employers still suppressed advancement of minorities by not promoting them, compensating them at lower levels, or firing them before their white counterparts.[41] Thus, the need for action designed to overcome these substantive inequalities resulting from "the stigmatizing effect of 'the image of inferiority stamped upon . . . [African Americans] by slavery'"[42] and to "level [the] grossly unequal playing field" was clear.[43]

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[34] Yamamoto et al., *supra* note 31, at 535.

[35] 109 U.S. 3 (1883).

[36] Yamamoto et al., *supra* note 31, at 535-36. In so holding, the Court excluded "social rights" from the scope of civil rights law and nullified the related provisions of the 1875 Civil Rights Act. *Id.*

[37] 163 U.S. 537 (1896), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[38] *Id.* at 540, 550-51; *see also* Kennedy, *supra* note 21, at 63-64; Martha S. West, *The Historical Roots of Affirmative Action*, 10 LA RAZA L.J. 607, 608-09 (1998).

[39] 347 U.S. 483 (1954); *see* FARBER ET AL., *supra* note 26, at 69-80.

[40] Wallace, *supra* note 22, at 704.

[41] Thomas E. Hanson, Note, *Rising Above the Past: Affirmative Action as a Necessary Means of Raising the Black Standard of Living as Well as Self-Esteem*, 16 B.C. THIRD WORLD L.J. 107, 111 (1996). *See also* TERRY H. ANDERSON, THE PURSUIT OF FAIRNESS: A HISTORY OF AFFIRMATIVE ACTION 54-57 (2004) (providing an in-depth discussion on the plight of blacks in the workforce during the 1950s and 1960s and through the present day).

[42] Hanson, *supra* note 41, at 112 n.40 (quoting Ray Marshall, *The Job Problems of Negroes*, THE NEGRO AND EMPLOYMENT OPPORTUNITY 7-8 (Herbert R. Northrup & Richard L. Rowan eds., 1965)).

[43] Yamamoto et al., *supra* note 31, at 531.

Although the initial origin of affirmative action is debatable,[44] most agree that affirmative action in its contemporary form can at least be traced back to President John F. Kennedy's Executive Order 10925 issued in 1961.[45] The Order required federal contractors to "take affirmative action to ensure that the applicants are employed, and that employees are treated during employment, without regard to race, creed, color, or national origin."[46] After passage of the Civil Rights Act of 1964,[47] in 1965, President Lyndon B. Johnson issued Executive Order 11246 which expanded affirmative action by requiring "equal opportunity in Federal employment for all qualified persons" and "prohibit[ing] discrimination in employment because of race, creed, color, or national origin."[48] A few years later, Congress passed the Equal Employment Opportunity Act of 1972, which gave the Equal Employment Opportunity Commission jurisdiction over all governmental employees (state, local, and federal), as well as employers and unions with more than fifteen members.[49] Over the years, affirmative action has extended into other areas besides employment, including higher education admissions.[50] As it has expanded, affirmative action has been continually challenged in the courts.[51]

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[44] *Compare, e.g.*, Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 46-47 (2002) (stating that "[a]ffirmative action as a policy directive first appeared in the 1935 National Labor Relations Act"), Harvey Gee, *Why Did Asian Americans Vote Against the 1996 California Civil Rights Initiative?*, 2 LOY. J. PUB. INT. L. 1, 13 n.50 (2001) (tracing the historical origins of affirmative action to Executive Order 8802 issued in 1938, which prohibited employment discrimination based on race), *and* Corinne E. Anderson, Comment, *A Current Perspective: The Erosion of Affirmative Action in University Admissions*, 32 AKRON L. REV. 181, 185 n.23 (1999) (stating that "[n]otions of affirmative action originated in the passage of the Fourteenth Amendment").

[45] CARL COHEN & JAMES P. STERBA, AFFIRMATIVE ACTION AND RACIAL PREFERENCE: A DEBATE 191 (2003); SAMUEL LEITER & WILLIAM M. LEITER, AFFIRMATIVE ACTION IN ANTIDISCRIMINATION LAW AND POLICY: AN OVERVIEW AND SYNTHESIS 40 (2002); Schuck, *supra* note 44, at 47.

[46] Schuck, *supra* note 44, at 47 (citing Exec. Order No. 10925, 3 C.F.R. 448 (1961)).

[47] *See supra* text accompanying note 41.

[48] Anderson, *supra* note 44, at 190-91 & n.42 (citing Exec. Order No. 11246, 3 C.F.R. 339 (1964-65), *reprinted as amended in* 42 U.S.C.A. § 2000e (West 1994)); *see* West, *supra* note 38, at 613 nn.21-23. The Order also created the Office of Federal Contract Compliance to monitor and enforce affirmative action and related employment practices. *Id.*

[49] Schuck, *supra* note 44, at 49; *see also* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

[50] Anderson, *supra* note 44, at n.46.

[51] Schuck, *supra* note 44, at 49.

B. Regents of the University of California v. Bakke

Before *Grutter* and *Gratz*, the only Supreme Court case that had addressed affirmative action in higher education admissions was the split decision in *Bakke* issued more than twenty-five years ago.[52] The plaintiff Allan Bakke, a white male, applied twice to the University of California Davis Medical School and was rejected both times.[53] He filed an action challenging the constitutionality of the school's "special admissions program," which reserved 16 of the 100 seats in its entering class for disadvantaged minority students.[54] All applicants were asked on the application form whether they wished to be considered a "minority," which the school defined as "Blacks, Chicanos, Asians, and American Indians."[55] If the applicant answered yes, his or her application was forwarded to a special admissions committee for review.[56] "Special" candidates did not have to meet the minimum grade point average (GPA) requirements imposed on regular candidates, nor were they evaluated against the general pool of applicants.[57] Bakke claimed that the special admissions program violated the Equal Protection Clause[58] because it reserved a specific number of seats for disadvantaged minorities and excluded (thereby discriminating against) white students with higher GPAs and test scores.[59] The trial court held that a university may not consider race in making admissions decisions and that the special admissions program operated as an unconstitutional racial quota; on appeal, the California Supreme Court upheld the trial court's findings.[60]

The U.S. Supreme Court granted certiorari and issued a decision containing no majority opinion, affirming in part and reversing in part the lower court's decision. Four Justices (Chief Justice Burger and Justices Stevens, Stewart, and Rehnquist) concluded that the admissions program violated Title VI of the 1964 Civil Rights Act by excluding Bakke on the basis of race; they did not address the constitutional question.[61] Four other Justices (Justices Brennan, White, Marshall, and Blackmun) found that the school's goal of admitting

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[52] *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[53] *Id.* at 276-77.

[54] *Id.* at 272, 276-79.

[55] *Id.* at 274.

[56] *Id.*

[57] *Id.* at 275.

[58] The Equal Protection Clause embedded in the Fourteenth Amendment provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

[59] *Bakke*, 438 U.S. at 277-79.

[60] *Id.* at 278-80; Bakke v. Regents of the Univ. of Cal., 553 P.2d 1152 (Cal. 1976), *aff'd in part and rev'd in part by Bakke*, 438 U.S. 265 (1978).

[61] *Bakke*, 438 U.S. at 421 (Stevens, J., concurring in part and dissenting in part).

minority students to remedy the effects of past discrimination was "sufficiently important" to justify its special admissions program.[62] Perhaps more importantly, these Justices reversed the lower court's judgment that race-conscious admissions programs are impermissible, and also concluded that an intermediate level of scrutiny requiring "an important and articulated purpose for its use" was more appropriate to determine the constitutionality of "benign" racial classifications.[63]

Justice Powell, writing for himself, penned an opinion providing the fifth vote for striking the school's special admissions program, as well as for upholding the use of race in university admissions.[64] He agreed that ameliorating the effects of identified past discrimination was a constitutionally sufficient state interest, but also found compelling the Medical School's goal of attaining a diverse student body, premised on the First Amendment freedom of a university to determine its own educational goals and decisions.[65] According to Justice Powell, diversity is not mere racial diversity, but a diversity which "encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[66] In addition, Justice Powell defended strict scrutiny as the proper level of review for all racial classifications, stating: "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."[67]

Justice Powell concluded, however, that the school's special admissions program was not narrowly tailored to serve the interests of remediation or educational diversity. He found that the fixed number of places reserved for minorities acted as an unconstitutional quota, and that the separate admissions "tracks" insulated some applicants from comparison with the general pool for available seats.[68] Justice Powell made positive reference to the Harvard College admissions program, which considered race a "plus" factor among numerous different factors such that race may "tip the balance in [an applicant's] favor," but still allowed for competitive review of each applicant's qualifications.[69]

The Court's *Bakke* decision left us without any definite standards regarding the use of race in university admissions. For more than twenty-five years, universities and the lower courts grappled with the lack of clear precedent and

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[62] *Id.* at 368-69 (Brennan, J., concurring in the judgment in part and dissenting in part).
[63] *Id.* at 326, 361.
[64] *Id.* at 320 (opinion of Powell, J.).
[65] *Id.* at 307, 311-12.
[66] *Id.* at 315.
[67] *Id.* at 291, 305.
[68] *Id.* at 315-18.
[69] *Id.* at 316-18.

the split decisions within the circuits regarding affirmative action in higher education.[70] Finally, in 2002, the Supreme Court granted certiorari to two University of Michigan affirmative action cases that the Sixth Circuit had adjudicated with conflicting outcomes. The district court had upheld the University of Michigan undergraduate college's race-conscious admissions policy in *Gratz*.[71] That same court (with a different judge presiding) later found the University of Michigan Law School's race-conscious admissions program unconstitutional in *Grutter*.[72] The Sixth Circuit Court of Appeals reversed the lower court's holding in *Grutter* and concluded that the Law School's admissions policy was in fact constitutional.[73]

C. Grutter v. Bollinger

In *Grutter*, the Supreme Court reviewed the constitutionality of the University of Michigan Law School's race-conscious admissions program.[74] The University of Michigan Law School is extremely competitive and is considered one of the top law schools in the country.[75] Its admissions are

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[70] Subsequent cases which addressed the issue of race-based admissions policies at institutions of higher education included: Hopwood v. Texas, 78 F.3d 932, 934 (5th Cir. 1996) (striking the race-based admissions program at the University of Texas School of Law and holding that the 14th Amendment does not permit law schools "to continue to elevate some races over others, even for the wholesome purpose of correcting perceived racial imbalance in the student body"); Wessman v. Gittens, 160 F.3d 790, 798 (1st Cir. 1998) (finding the Boston Latin School's admissions policy of filling half the available seats based on "flexible racial/ethnic guidelines" unconstitutional for lack of narrow tailoring); Smith v. Univ. of Wash. Law School, 233 F.3d 1188 (9th Cir. 2000) (upholding the law school's race conscious pre-initiative admissions program); Johnson v. Bd. of Regents of Univ. of Ga., 263 F.3d 1234 (11th Cir. 2001) (striking the University's undergraduate admissions policy of automatically awarding points to non-white and male applicants). Barbara Lauriat, Note, *Trump Card or Trouble? The Diversity Rationale in Law and Education*, 83 B.U. L. REV. 1171, 1176-80 (2003).

[71] Susan E. Eckes, *Race-Conscious Admission Programs: Where Do Universities Go From Gratz and Grutter?*, 33 J.L. & EDUC. 21, 32 n.80 (2004); Gratz v. Bollinger, 122 F. Supp. 2d 811 (E.D. Mich. 2000), *rev'd in part by* Gratz v. Bollinger, 539 U.S. 244 (2003).

[72] Eckes, *supra* note 71, at 32 n.81; Grutter v. Bollinger, 137 F. Supp. 2d 821 (E.D. Mich. 2001), *rev'd in part & vacated in part by* Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002).

[73] Eckes, *supra* note 71, at 32 n.82; Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002), *aff'd by* Grutter v. Bollinger, 539 U.S. 306 (2003).

[74] *See Grutter*, 539 U.S. at 311-16.

[75] In 2004, the University of Michigan Law School was ranked seventh in the United States. *Special Report: America's Best Graduate Schools – Schools of Law*, U.S. NEWS & WORLD REPORT, Apr. 12, 2004, at 69. U.S. News & World Report rankings are the most recognized evaluation of educational institutions and therefore exercise considerable influence over universities and graduate programs. Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 144-45 (2003). These rankings affect the "prestige" of the school and thus matter to alumni, trustees, and politicians who

therefore highly selective. The Law School's admissions policies were based on its goal of "admit[ting] a group of students who individually and collectively are among the most capable."[76] The Law School thus "look[ed] for individuals with substantial promise for success in law school and a strong likelihood of succeeding in the practice of law and contributing in diverse ways to the well-being of others."[77]

In its efforts to achieve and maintain its goal of diversity, the Law School modeled its admissions program after the Harvard College admissions plan endorsed by Justice Powell in *Bakke*, which made race a "plus" factor in deciding admissions into its undergraduate freshman class.[78] The Law School employed a flexible assessment of each applicant by requiring admissions officials to evaluate each individual based on all information available in the application file (including a personal statement, letters of recommendation, and an essay).[79] The admissions process aimed to determine each individual's talents, experiences, potential for contribution, and other "soft" variables, in addition to academic ability (primarily determined by LSAT score and undergraduate GPA).[80] Race and ethnicity were also factors considered in the admissions process, based on the school's longstanding commitment to racial and ethnic diversity.[81] The Law School considered race and ethnicity alongside numerous other factors and sought to enroll a critical mass[82] of underrepresented minority students, which it defined to include African Americans, Mexican Americans, Native Americans, and Puerto Ricans raised on the U.S. mainland.[83]

The Supreme Court, in a 5-4 decision, adopted Justice Powell's view in *Bakke* that the attainment of a diverse student body is a compelling

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who determine budgets for college universities. *Id.* at 145. They heavily influence a school's admissions policies, often pressuring institutions to focus on factors that would otherwise be less pertinent based solely on the school's particular educational goals and objectives. *Id.*

[76] *Grutter*, 539 U.S. at 313 (citation omitted).

[77] *Id.* at 313-14 (citation and internal quotations omitted).

[78] REAFFIRMING DIVERSITY JOINT STATEMENT, *supra* note 6, at 11; *see also supra* Part II.B.

[79] *Grutter*, 539 U.S. at 315.

[80] *Id.* In the Law School's case, "soft" variables included the enthusiasm of recommenders, quality of the undergraduate institution, undergraduate course selection, and quality of the essay. *Id.*

[81] *Id.* at 316.

[82] The phrase "critical mass" was explained by Law School Administrators as "meaningful numbers or meaningful representation," or "numbers such that underrepresented minority students do not feel isolated or like spokespersons for their race." *Id.* at 318-19 (internal quotations omitted). Critical mass did not refer to a specific quantity, such as a specific number, percentage, or range of numbers or percentages. *Id.* However, admissions officials did maintain and regularly consult "daily reports" that tracked the racial and ethnic composition of the incoming admittees. *Id.* at 318.

[83] *Id.* at 316-18; Lauriat, *supra* note 70, at 1201 n.214.

government interest which can justify the use of race in public university admissions.[84] The Court deferred to the Law School's educational judgment that diversity is essential to its educational mission.[85] It also relied on substantial evidence presented by the Law School and numerous amici curiae that the benefits of diversity in education are real and are essential to our workforce and economy.[86]

The Court further found that the Law School's admissions program was sufficiently narrowly tailored to be upheld as constitutional.[87] It established guidelines as to what policies and procedures a university must implement to ensure that the means chosen remain within the boundaries of the constitution, emphasizing that an admissions program must allow for "truly individualized consideration" and must use race in a "flexible, nonmechanical way."[88] The Court's guidelines allow programs to consider race and even allow for "some attention to numbers."[89] They prohibit, however, the establishment of predetermined number or percentage quotas, as well as the use of separate admissions tracks for different groups.[90] Under *Grutter*, narrow tailoring requires a "serious, good faith consideration of workable race-neutral alternatives," but does not require "exhaustion of every conceivable race-neutral alternative."[91]

D. Gratz v. Bollinger

Despite finding that diversity in education is a compelling state interest for race-conscious admissions programs, the Court, in its companion case to *Grutter*, held that the admissions procedures employed by the University of Michigan's College of Literature, Science, and the Arts (undergraduate college) were not narrowly tailored to achieve that interest.[92] Similarly to the Law School, the undergraduate college considered a number of different factors in its admissions process in order to attain one of its stated objectives of a student body composed of diverse races, cultures, and socioeconomic backgrounds.[93] These factors included (but were not limited to) high school grades, standardized test scores, high school quality, curriculum strength,

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[84] *Grutter*, 539 U.S. at 325.

[85] *Id.* at 328. The Court cited Justice Powell's statement in *Bakke* that "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body." *Id.* at 330.

[86] *Id.* at 330-33.

[87] *Id.* at 334.

[88] *Id.* at 333-34.

[89] *Id.* at 336.

[90] *Id.* at 334.

[91] *Id.* at 339.

[92] Gratz v. Bollinger, 539 U.S. 244 (2003).

[93] Lauriat, *supra* note 70, at 1182 n.87; *see also Gratz*, 539 U.S. at 253.

geography, alumni relationships, leadership, race, and socioeconomic background.[94] The college utilized a point system whereby applicants were assigned a preset number of points for each factor, and 100 points of the total 150 possible points guaranteed admission.[95] Underrepresented minorities, which the University defined as African Americans, Hispanics, and Native Americans, were awarded 20 points (or one-fifth of the points needed for guaranteed admission).[96] Such an award, however, precluded minority applicants from receiving points in the remaining 20-point categories: socioeconomic disadvantage, attendance at a predominantly minority or disadvantaged high school, athletic ability, or at the Provost's discretion.[97] The Court found the automatic award of 20 points for race inflexible in that it disallowed truly individualized consideration of each applicant.[98] The Court therefore held that the undergraduate college's admissions program was not sufficiently narrowly tailored to further the interest of diversity.[99]

III. ANALYSIS

Grutter and *Gratz* addressed issues regarding the use of race in higher education admissions that had remained unresolved since *Bakke*. The Court confirmed that educational diversity is a compelling interest which justifies the consideration of race in the university admissions process.[100] The Court also set forth specific requirements for a race-conscious admissions program to be narrowly tailored to fit the diversity interest.[101]

These guidelines, however, are ambiguous at best. In reaching the conclusion that diversity is a compelling government interest, the Court simply cited its substantial benefits, but failed to clearly define what educational diversity encompasses.[102] Furthermore, the conflicting outcomes of *Grutter* and *Gratz*, as well as the Court's lack of consideration of numerous practical circumstances surrounding the university admissions process, obscure the Court's seemingly straightforward narrow tailoring guidelines.[103] This section addresses the ambiguities resulting from the *Grutter* and *Gratz* opinions, and

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[94] *Gratz*, 539 U.S. at 253, 255.

[95] *Id.* at 255.

[96] *Id.* at 253-55.

[97] Tim Wise, *Whites Swim in Racial Preference*, ALTERNET, Feb. 20, 2003, *available at* http://www.alternet.org/story/15223 (last visited Dec. 28, 2004) (copy on file with author); *see Gratz*, 539 U.S. at 255; 294-95 (Souter, J., dissenting).

[98] *Gratz*, 539 U.S. at 271.

[99] *Id.* at 275.

[100] Grutter v. Bollinger, 539 U.S. 306, 330 (2000).

[101] *See infra* notes 114-15 and accompanying text.

[102] *See infra* Part III.A for discussion.

[103] *See infra* Part III.B for discussion.

explores the theories of unconscious racism and transparency and their impact on the *Grutter* and *Gratz* decisions, as well as the Court's equal protection jurisprudence in general.

A. Diversity as a Compelling Government Interest

The one seemingly clear guideline regarding the use of race-conscious admissions programs provided by the *Grutter* and *Gratz* decisions is that student body diversity is a compelling state interest for institutions of higher education.[104] Justice O'Connor, writing for the *Grutter* majority, struck down the notion that a remedial purpose is the only permissible justification for race-based governmental action, stating: "[W]e have never held that the only governmental use of race that can survive strict scrutiny is remedying past discrimination."[105] The majority instead accepted Justice Powell's position in *Bakke* that universities should be given the educational autonomy, based on their First Amendment freedoms, to make their own judgments, including the determination of goals that will help them to achieve their educational missions.[106] The Court further determined that the selection of a university's student body is a primary element in allowing a university to work towards its goal of diversity.[107] Relying on support and evidence provided by numerous amici curiae briefs, the Court concluded that the benefits of student body diversity are "substantial," and include: promotion of cross-racial understanding, breaking down of racial stereotypes, and enhancement of classroom discussions.[108] The Court also recognized that such benefits are not merely theoretical but practical and real, and help individuals to develop skills and qualifications essential to our government, military, and global workforce.[109]

Aside from simply holding that diversity is a compelling interest and recognizing its benefits, however, the Court appears to evade the task of truly defining educational diversity. Justice O'Connor acknowledged Justice Powell's characterization that "the diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element."[110] She also accepted his opinion that diversity is not "simple ethnic diversity, in which a specified percentage of the student body is guaranteed to be members

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[104] *Grutter*, 539 U.S. at 306.
[105] *Id.* at 328.
[106] *Id.* at 330.
[107] *Id.*
[108] *Id.*
[109] *Id.* at 330-33.
[110] *Id.* at 325 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978)).

of selected ethnic groups."[111] These broad definitions fail to specify what factors may and should be considered to determine what constitutes a diverse, "heterogeneous" student body for purposes of university admissions.[112] As one author points out, "defining 'diversity' is a slippery exercise," because the word is used so frequently, in a variety of contexts, and by many who "toss[] [it] around without a careful and rational analysis of its origins, meanings, and implications."[113] Without a clear definition of diversity, universities cannot be expected to ascertain what their diversity objective should actually be.

An in-depth discussion defining diversity, however, is not the intended focus of this paper. In light of the broad definition provided by Justice Powell and accepted by the *Grutter* majority, this author readily assents to the viewpoint that diversity encompasses a wide range of characteristics, including race, ethnicity, cultural background, socioeconomic status, geography, extracurricular activities, life experiences, and any other attributes that add to a person's individuality (or make them less distinctive) and shape their potential for contribution to a wide-ranging and beneficial educational environment.

B. The Constraints of Narrow Tailoring

Through its *Grutter* and *Gratz* opinions, the Court attempted to delineate how a higher education admissions program should be structured to fit the distinct issues raised by the use of race to achieve student body diversity.[114] The Court essentially set forth five basic guidelines for establishing a narrowly tailored race-conscious admissions program: (1) competitive review; (2) flexible, individualized consideration; (3) consideration of race-neutral alternatives; (4) no undue burden on non-minority applicants; and (5) limited in time.[115] The *Grutter* Court considered each of these five factors in reviewing the Law School's admissions program and found it to be constitutional.[116] In *Gratz*, however, the Court focused on the inflexibility and lack of

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[111] *Id.* at 324-25 (quoting *Bakke*, 438 U.S. at 315).

[112] *See id.* at 324.

[113] Lauriat, *supra* note 70, at 1173-74. In light of her views as to the complexity of defining diversity, Ms. Lauriat states that the Supreme Court should have been more hesitant in finding diversity a compelling government interest to override the constitutional guarantee of equal protection. *Id.*

[114] *See Grutter*, 539 U.S. at 333-34.

[115] REAFFIRMING DIVERSITY JOINT STATEMENT, *supra* note 6, at 7-8; *see also Grutter*, 539 U.S. at 334-37.

[116] REAFFIRMING DIVERSITY JOINT STATEMENT, *supra* note 6, at 8; *Grutter*, 539 U.S. at 337-39.

individualized consideration of the undergraduate admissions policy and found that it did not meet the narrow tailoring requirements.[117]

The guidelines established by the Court are in no way lucid or unambiguous, and the apparent disparity between the outcomes of *Grutter* and *Gratz* contributes to the lack of clarity. In his concurring and dissenting opinion in *Grutter*, Justice Scalia raised the legitimate concern that the majority's so-called guidelines serve more to obscure the affirmative action debate and "prolong the controversy and litigation"[118] than they do to resolve it.[119] Although Justice Scalia's trepidations in this particular regard are somewhat warranted, this confusion does not mean that we should altogether abandon the consideration of race in university admissions programs. Instead, we should closely examine the *Grutter* and *Gratz* opinions and their corresponding admissions systems, and address the ambiguities and issues that arise.

1. Was Michigan's undergraduate admissions program narrowly tailored?

In *Gratz*, the Supreme Court focused on the lack of flexibility and individualized consideration in finding that the undergraduate college's admissions program was not narrowly tailored to satisfy strict scrutiny. Similar to the Law School's admissions program, which the Court upheld as constitutional in *Grutter*, the undergraduate program considered a variety of factors in reviewing applicants for admission.[120] Unlike the Law School, however, the undergraduate program utilized a point system whereby applicants received varying quantities of points for each factor.[121] If an applicant obtained at least 100 of the maximum 150 points, the college offered him or her admission.[122]

The point system allowed the University to consider a wide range of factors that it believed would add to the diversity of its student body. Admissions counselors could allocate up to 110 points for academic factors, such as high

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[117] REAFFIRMING DIVERSITY JOINT STATEMENT, *supra* note 6, at 8; *see also* Gratz v. Bollinger, 539 U.S. 244, 271-73, 275 (2003).

[118] *Grutter*, 539 U.S. at 348 (Scalia, J., concurring in part and dissenting in part).

[119] *Id.* Justice Scalia asserted that the only constitutional holding in the *Grutter/Gratz* cases would be to forbid the use of racial preferences by state educational institutions. *Id.* at 347-48. He then intimated that "even a clear anticonstitutional holding that racial preferences are OK" would be a more favorable outcome because it would at least end the affirmative action debate. *Id.* at 348.

[120] *Gratz*, 539 U.S. at 253, 255.

[121] *Id.* at 255-56.

[122] *Id.* at 277 (O'Connor, J., concurring). The program's guidelines also set forth the following suggested courses of action for each of the descending ranges of points: 95-99—admit or postpone; 90-94—postpone or admit; 75-89—delay or postpone; 74 and below—delay or reject. *Id.*

school grades, standardized test scores, and curriculum strength.[123] Non-academic factors and the corresponding number of points included: 10 points for Michigan residency; 6 points for residence in an underrepresented Michigan county; and 4 points for legacy (alumni relationships).[124] Counselors could also award up to 3 points for an outstanding essay and up to 5 points for leadership, personal achievement, or public service.[125] In addition, an applicant could receive 20 points for *one* of the following: underrepresented race or ethnic minority; socioeconomic disadvantage; attendance at a predominantly minority or disadvantaged high school; athletic ability; or at the Provost's discretion.[126]

The *Gratz* Court found the distribution of 20 points to underrepresented minorities problematic, and held that the policy was not flexible enough and did not sufficiently allow for individualized consideration of applicants to satisfy the narrow tailoring requirements. The Court employed Justice Powell's analysis from *Bakke* and found that the automatic award of 20 points, which constituted one-fifth of the total points required for admission, had the "effect of making the factor of race . . . decisive for virtually every minimally qualified underrepresented minority applicant."[127] Given this effect, the Court reasoned that race in this case did not function merely as a "plus" for underrepresented minorities, but was a determinative factor in whether such individuals were granted admission.[128] To illustrate this point, Chief Justice Rehnquist proffered the example of an art protégé with talents rivaling Monet or Picasso who could only receive up to 5 points for his abilities under the admissions system, in comparison with an otherwise typical African American student who would be awarded 20 points just for being a member of an underrepresented minority group.[129]

In its analysis, however, the *Gratz* majority disregards the crucial fact that receiving 20 points for being an underrepresented minority precluded an applicant from being awarded 20 points for any of the remaining miscellaneous categories (socioeconomic disadvantage, attendance at a predominantly minority or disadvantaged high school, athletic ability, or at the Provost's discretion).[130] In other words, only *non*-minorities could receive 20 points in

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[123] *Id.* at 277; *see also* Susan Low Bloch, *Looking Ahead: The Future of Affirmative Action*, 52 AM. U.L. REV. 1507, 1514 n.38 (2003).

[124] *Gratz*, 539 U.S. at 277-78 (O'Connor, J., concurring); *see also* Bloch, *supra* note 123, at 1514 n.38.

[125] *Gratz*, 539 U.S. at 278 (O'Connor, J., concurring).

[126] *Id.* at 294-95 (Souter, J., dissenting)

[127] *Id.* at 272 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978)).

[128] *Id.* at 274.

[129] *Id.* at 273.

[130] *See supra* note 97 and accompanying text.

these categories.[131] This de facto result dramatically lessened the impact of the 20-point award for race, as it gave non-minorities a number of opportunities to attain the same 20 points that minorities received for ethnicity and correspondingly disallowed minorities from competing for points in those categories. Thus, Chief Justice Rehnquist's example of the art protégé is flawed, because it fails to consider that the applicant is in fact able to compete for the same 20 points that the African American applicant receives, and moreover, has four distinct chances to do so.

In addition to the remaining 20-point categories, the undergraduate college considered a number of other factors in evaluating diversity which also had the effect of favoring non-minorities.[132] For example, the University awarded 4 points for legacy, or having a relationship with someone who was an alumni of the school.[133] Although race-neutral on its face, the legacy preference

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[131] *See supra* note 97 and accompanying text. Although socioeconomic disadvantage or attending a predominantly disadvantaged or minority high school would under normal circumstances favor minorities, that is not so in this case; because minorities (as defined by the University) cannot receive an additional 20 points, the effect is that these factors favor non-minorities.

[132] *See Gratz*, 539 U.S. at 253 (listing alumni relationships, geography, high school quality and curriculum, high school grades, and standardized test scores as factors considered in the undergraduate college's admissions process). In his *Bakke* opinion, Justice Powell observed that the concepts of "majority" and "minority" are in actuality not two distinguishable classes, but merely terms used to reflect the arrangements and political judgments in place at a given time. *Bakke*, 438 U.S. at 295. As he pointed out, the white "majority" is itself "composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals." *Id.* This author therefore acknowledges that in discussing the preferential treatment that "whites" or "non-minorities" receive from a given admissions factor, oftentimes only a particular faction of "whites" may actually receive any benefit, and accordingly, various groups of whites within the larger majority may receive no benefit or may even themselves endure a discriminatory impact. As Justice Powell articulated, however, there is no principled basis for precisely distinguishing between these groups, and further, to draw such distinctions among each of them would result in a situation where "the only 'majority' left would be a new minority of white Anglo-Saxon Protestants." *Id.* at 295-96. Thus, for purposes of this paper, there will be no distinction drawn among the various groups which comprise the larger category of "whites" or "non-minorities." *See also infra* note 134.

[133] *Gratz*, 539 U.S. at 278 (O'Connor, J., concurring). The policy of giving legacy preferences is one that has a long history and is still widely used by universities across the United States. *See Preserve Universities' Right to Shape Student Community*, USA TODAY, Jan. 26, 2004, at 12A [hereinafter *Preserve Universities*]; William C. Kidder, Comment, *Situating Asian Pacific Americans in the Law School Affirmative Action Debate: Empirical Facts About Thernstrom's Rhetorical Facts*, 7 ASIAN L.J. 29, 59 (2000). Universities use legacy preferences to maintain support from and relationships with alumni, who are more likely to participate and make donations if their children are enrolled. *Preserve Universities*, at 12A. In recent months, Senate Democrats have proposed two bills—one which advocates the termination of university legacy programs, and another which would require universities to disclose the race and socio-economic status of legacy admittees. Todd Ackerman, *Legislators Slam A&M Over Legacy*

disproportionately benefits whites[134] because they by far comprise the largest percentage of college alumni.[135] For instance, in recent years, Texas A&M University has had more than 300 white legacy admits each year—almost the same as the total number of African Americans admitted in each of those years.[136] At Harvard University, more white students are admitted based on legacy than the total number of African American, Hispanic, and Native American admittees combined.[137] In all likelihood, the legacy preference will

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Admissions, THE HOUSTON CHRONICLE, Jan. 3, 2004, *available at* http://www.chron.com/cs/CDA/printstory.hts/metropolitan/2332840 (last visited Dec. 28, 2004) (copy on file with author); *see also* Pat Wingert, *Education: Legislating Legacies*, NEWSWEEK, Oct. 27, 2003, at 10. It is interesting to note that legacy policies were initially established for the purpose of excluding Jewish applicants and giving preference to white and wealthy individuals. Ann C. McGinley, *The Emerging Cronyism Defense and Affirmative Action: A Critical Perspective on the Distinction Between Colorblind and Race Conscious Decision Making Under Title VII*, 39 ARIZ. L. REV. 1003, 1041 n.237 (1997).

[134] Throughout this paper, the terms "whites" and "non-minorities" may appear to be used somewhat interchangeably. The terms are distinguishable, however, in that the term "whites" refers to persons having "origins in any of the original peoples of Europe, the Middle East, or North Africa," based on the definition provided by the U.S. Census Bureau. U.S. CENSUS BUREAU, U.S. DEPARTMENT OF COMMERCE, CENSUS 2000 SUMMARY FILE 1 TECHNICAL DOCUMENTATION § App. B (Sep. 2003), *available at* http://www.census.gov/prod/cen2000/doc/sf1.pdf. "Non-minorities," on the other hand, includes (for purposes of this paper) whites as well as any race other than the three recognized by the University of Michigan as underrepresented minorities (African American, Hispanic, and Native American), such as Asian Americans. Nonetheless, the actual distinction between the two terms as used in this paper is inconsequential to the crux of the discussion and analyses, especially because by numbers, whites comprise the majority of the "non-minority" category (for example, in Michigan, whites make up over 80 percent of the population, while the remaining non-minorities comprise less than 3 percent). *See* U.S. CENSUS BUREAU, U.S. DEPARTMENT OF COMMERCE, CENSUS 2000 SUMMARY FILE 1, PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS, CENSUS: 2000, GEOGRAPHIC AREA: MICHIGAN, *available at* http://factfinder.census.gov/servlet/QTTable?_bm=y&-qr_name=DEC_2000_SF1_U_DP1&-qr_name=DEC_2000_SF1_U_QTP&-geo_id=04000US26&-ds_name=DEC_2000_SF1_U&-_lang=en&-redoLog=false&-format=&-CONTEXT=qt (last visited Dec. 28, 2004) [hereinafter U.S. CENSUS 2000 MICHIGAN PROFILE].

[135] McGinley, *supra* note 133, at 1041 n.237; Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 537 (2002). This is primarily due to the fact that most college alumni attended universities at a time when there were few or no blacks enrolled. *Id. See also* THOMAS J. SUGRUE, THE COMPELLING NEED FOR DIVERSITY IN HIGHER EDUCATION: EXPERT REPORT OF THOMAS J. SUGRUE Table 10, *available at* http://www.umich.edu/~urel/admissions/research/expert/sugrutoc.html (last visited Dec. 28, 2004) [hereinafter SUGRUE EXPERT REPORT].

[136] Greg Winter, *Texas A&M Ban On 'Legacies' Fuels Debate on Admissions*, THE NEW YORK TIMES, Jan. 13, 2004, at A16. Texas A&M abolished its legacy preference in January 2004 after receiving extensive criticism for maintaining it while terminating its affirmative action program. *Id.*

[137] Law, *supra* note 8, at 624 n.93.

continue to favor whites for at least another generation, until the number of applications from children of affirmative action students increases substantially.[138]

Geographic preferences used by the University of Michigan also largely benefited whites. The University allocated 10 points to applicants who were residents of Michigan and an additional 6 points to those who were from underrepresented Michigan counties.[139] Michigan is a predominantly white state, with whites comprising over 80 percent of the total Michigan population, while African Americans, Hispanics, and Native Americans (the three groups designated "underrepresented minorities" by the University) comprise approximately 14, 3, and 1 percent, respectively.[140] The 10 points for residency thus effectively favored white applicants most of the time. Moreover, the vast majority of the State's eighty-three counties are virtually all white, while the population of the three minority groups is highly concentrated in Detroit and the other main metropolitan areas.[141] The additional 6 points for being from an underrepresented Michigan county therefore also primarily benefited whites. Hence, as a result of the two geographic preferences given by the University, applicants from the state's predominantly white Upper Peninsula (as well as a number of other counties where whites comprised the majority) automatically received 16 points.[142]

Other points awarded to applicants by the University of Michigan that primarily favored whites included 10 points to students who attended quality high schools and an additional 8 points to those who completed an especially demanding curriculum (i.e., Advanced Placement (AP) and honors courses).[143] Again, these factors appeared to be facially neutral. Minorities rarely attend the "best" schools (which are typically schools in white suburban districts), however, especially given the extreme segregation of schools in the United

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[138] Greenberg, *supra* note 135, at 537.

[139] Gratz v. Bollinger, 539 U.S. 244, 278 (2003) (O'Connor, J., concurring); Bloch, *supra* note 123, at 1514 n.38.

[140] U.S. CENSUS 2000 MICHIGAN PROFILE, *supra* note 134.

[141] SUGRUE EXPERT REPORT, *supra* note 135, at § VII n.11. Approximately 96 percent of Michigan's black population lives in the state's eleven census-defined metropolitan areas, with almost three-fourths of them in Detroit. *Id.* Similarly, approximately 85 percent of Hispanics live in the metropolitan areas, almost half of which are in Detroit, and almost two-thirds of the Native American population live in the metropolitan areas. *Id.* Of Michigan's 83 counties, the population of 72 counties have less than 10 percent blacks, and 59 of those have less than 2 percent; likewise, 68 of the counties have approximately 3 percent or less Hispanics. *Id.*

[142] *See Why Michigan's Former Admissions Systems Comply with Bakke and Are Not Quotas*, Feb. 21, 2003, *available at* http://www.umich.edu/~urel/admissions/archivedocs/comply.html (last visited Dec. 28, 2004).

[143] Cheryl I. Harris, *Constitutional Law Symposium: What the Supreme Court Did Not Hear In Grutter and Gratz*, 51 DRAKE L. REV. 697, 708 (2003); Wise, *supra* note 97.

States.[144] In addition, predominantly minority schools generally lack availability of AP and honors courses, while "better" schools (with mostly white enrollment) have greater offerings of such courses.[145] Under these circumstances, numerous minorities are precluded from even the opportunity to compete for these points, thereby giving whites a substantial advantage in these categories.[146]

Finally, the two factors that are generally accorded the most weight in college admissions, including at the University of Michigan—high school GPA and standardized test scores—also have a discriminatory effect against minorities and the socioeconomically disadvantaged.[147] On average, white students score over 200 points higher than black students on the Scholastic Assessment Test (SAT).[148] Other standardized tests, such as the Medical College Admission Test (MCAT) and the Law School Admission Test (LSAT), have similar scoring results.[149] Moreover, there is a striking correlation between test performance and socioeconomic class, such that children from families with higher incomes tend to have better test scores.[150]

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[144] Wise, *supra* note 97; *see also* SUGRUE EXPERT REPORT, *supra* note 135, at § IX. Michigan's schools are among the most segregated in the country. *Id.*

[145] Wise, *supra* note 97; Harris, *supra* note 143, at 708. In fact, there is currently a lawsuit in the State of California concerning the lack of availability of AP courses at predominantly minority high schools. *Id.*

[146] Wise, *supra* note 97; *see also* Harris, *supra* note 143, at 708.

[147] *See generally* Gratz v. Bollinger, 539 U.S. 244, 277 (2003) (O'Connor, J., concurring). This Comment will not delve into a comprehensive discussion on merit-based admissions standards, nor will it address the validity of the statistics proffered, as there are numerous articles with extensive discussions on the various aspects of this issue. It should be noted, however, that standardized test scores are generally not very good predictors of success in higher education or thereafter. Studies have shown that standardized scores correlate with first-year grades at a low level, typically predicting them at an approximately 16 to 20 percent variance; they are even weaker predictors of later academic performance and achievements. Harris, *supra* note 143, at 710; Wendy M. Williams, *Perspectives on Intelligence Testing, Affirmative Action, and Educational Policy*, 6 PSYCHOL. PUB. POL'Y & L. 5, 8 (2000). Consequently, heavy reliance on standardized test scores, even with the consideration of grades, "calls upon the test to do far more than it was designed to do." Linda F. Wightman, *Assessing the Value of Affirmative Action: The Role of Standardized Admissions Tests in the Debate About Merit, Academic Standards, and Affirmative Action*, 6 PSYCHOL. PUB. POL'Y & L. 90, 99 (2000).

[148] Jack Greenberg, *Symposium: On Grutter and Gratz: Examining "Diversity" in Education: Diversity, the University, and the World Outside*, 103 COLUM. L. REV. 1610, 1612-13 (2003).

[149] *Id.*; Jennifer C. Brooks, Comment, *The Demise of Affirmative Action and the Effect on Higher Education Admissions: A Chilling Effect or Much Ado About Nothing*, 48 DRAKE L. REV. 567, 581-82 (2000).

[150] Derrick Bell, *Symposium: On Grutter and Gratz: Examining "Diversity" in Education: Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1630 (2003). The link is not so striking when you consider that the higher the parents' income, the more test-preparation courses and other score-increasing coaching methods they can afford for their child. *Id.* at 1630-31.

Consequently, relying exclusively or even primarily on test scores and grades, as many universities do, narrowly constricts the evaluation of applicants and essentially "results in predictable and measurable discrimination."[151] Thus, as recognized by Justice Powell in *Bakke*: "To the extent that race and ethnic background [a]re considered only to . . . cur[e] established inaccuracies in predicting academic performance, it might be argued that there is no 'preference' at all."[152]

In discussing the preferences the above factors give to non-minorities and the corresponding discriminatory impact on minorities, this Comment does not attempt to argue that the use of these preferences is unconstitutional.[153] However, in light of the de facto impacts resulting from their use, the actual flexibility and allowance for individualized review permitted by the 20-point award for race increases significantly. Accordingly, the heavy advantage which the Court contends minorities receive through the award is greatly diminished and arguably nonexistent. The preferences also demonstrate that the competitiveness of review among applicants remains quite high and that there is no undue burden on non-minorities, because each individual has a multitude of opportunities to receive points and no single factor gives any applicant an automatic right or entitlement to admission.[154]

One legal scholar points out that "the consideration of race is only an unfair preference if the underlying system is fair and does not enact a set of preferences for particular groups."[155] Given the practical circumstances surrounding the University of Michigan's undergraduate admissions program, one may argue that the award of 20 points for race was not only fair, but was necessary to remedy the discrimination that would otherwise have occurred against minorities. The *Gratz* Court, however, applied its conventionally transparent approach to equal protection analysis and overlooked the significant advantages whites and other non-minorities received under the program, as well as the resulting detriment to minorities.[156] In light of the foregoing discussion, the University's award of 20 points to underrepresented minorities was narrowly tailored to further the interest of diversity.

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[151] Wightman, *supra* note 147, at 99.

[152] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306 n.43 (1978).

[153] Given the requirement of discriminatory intent, it is unlikely such a challenge would succeed anyway. *See infra* Part III.C.

[154] *See generally* Grutter v. Bollinger, 529 U.S. 206 (2003); Gratz v. Bollinger, 539 U.S. 244 (2003).

[155] Harris, *supra* note 143, at 710.

[156] *See infra* Part III.C.

2. Would a reduced award of points for race have been permissible?

The *Gratz* Court clearly found problematic the mechanical award of 20 points for race when 100 was needed for admission, primarily based on its view that such a sizeable "plus" made race a "decisive factor for virtually every minimally qualified underrepresented minority applicant."[157] The Chief Justice indicated the Court's difficulty with the 20-point award via his art protégé illustration, intimating the impropriety of a system under which only 5 points could be granted for "extraordinary artistic talent," but that bestowed 20 points for race.[158] In her concurrence, Justice O'Connor also highlighted her reservations regarding a 20 point award based solely on race, given that "other diversity contributions, such as leadership and service, personal achievement, and geographic diversity, are capped at much lower levels."[159]

Despite its disapproval of the 20 points, however, the Court did not articulate how many points would have been allowable for Michigan's admissions program to be narrowly tailored. Examples offered by both Chief Justice Rehnquist and Justice O'Connor compared race to factors for which a maximum of 5 points was allocable, thereby giving the impression that an award of 5 points for race may have been acceptable to the majority.[160] On the other hand, Justice O'Connor also mentioned geography in her comparison as one of the other factors "capped at much lower levels" than race.[161] This obscures the analysis because, as discussed in Part III.B.1, applicants from a number of Michigan's predominantly white counties received a total of 16 points based on their "geographic diversity," which is more akin to the 20 points awarded for race than the 5 points for the other factors mentioned. In light of these varying references, the Court does not indicate how a points-based admissions program should be structured to ensure that it remains within constitutional boundaries. Instead, the Court appears to broadly caution that the number of points given for race should be somewhat comparable to all other factors evaluated in determining diversity (which is still unclear given the differing point quantities each factor may be assigned).

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[157] *Gratz*, 539 U.S. at 274.

[158] *See supra* text accompanying note 129.

[159] *Gratz*, 539 U.S. at 279 (O'Connor, J., concurring).

[160] *See supra* text accompanying note 129. In her concurrence, Justice O'Connor provided her own illustration comparing two possible applicants, commenting that "[e]ven the most outstanding national high school leader could never receive more than five points for his or her accomplishments--a mere quarter of the points automatically assigned to an underrepresented minority solely based on the fact of his or her race." *Gratz*, 539 U.S. at 279 (O'Connor, J., concurring).

[161] *Id.*; *see also supra* text accompanying note 159.

Regardless of this deficiency in the Court's opinions, under *Bakke* and *Grutter*, the fundamental requisite for narrow tailoring is that a university meaningfully considers all factors that may contribute to diversity in its admissions decisions.[162] The University of Michigan considered a number of factors that it believed contributed to student body diversity such that race was "but a single though important element" in its admissions process.[163] In addition, the *Grutter* majority accepted the principle that all pertinent elements of diversity need not be accorded the same weight, as long as all applicants are placed on the same footing for consideration and are not insulated from comparison with all other candidates.[164] The *Gratz* model complied with this requirement because every applicant had the opportunity to compete for the 20 points—whether based on their race, socioeconomic status, high school, athletic ability, or at the Provost's discretion. Thus, no applicant was safeguarded from comparison with the rest of the candidate pool. The admissions program therefore conformed to the fundamental provisions of a constitutionally accepted program as set forth by Justice Powell in *Bakke* and accepted by the Court in *Grutter*.[165]

Moreover, universities should be entitled to elect how much weight to accord each diversity factor. In *Grutter*, the majority recognized the "tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."[166] The Court upheld the principle that educational autonomy is grounded in the First Amendment and that "[t]he freedom of a university to make its own judgments as to education includes the selection of its student body."[167] Accordingly, it should be the University's right to decide, within reasonable limits (which the *Gratz* program is within, as discussed earlier), that race, socioeconomic disadvantage, or any other factor has more potential for contribution to the diversity of its student body than artistic ability or leadership.[168] Perhaps the University receives an abundance of applications from those who have demonstrated leadership, community service, or artistic talents, while receiving only a few from

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[162] Grutter v. Bollinger, 539 U.S. 306, 337 (2003).

[163] *See id.* at 325.

[164] *Id.* at 334.

[165] *See Gratz*, 539 U.S. at 294 (Souter, J., dissenting).

[166] *Grutter*, 539 U.S. at 328.

[167] *Id.* (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978)). Granted, the Chief Justice, who wrote the majority opinion in *Gratz*, did not join in the *Grutter* majority opinion. Further, in his dissent, he stated his beliefs that the majority showed an "unprecedented display of deference" and that the Constitution does not give universities "such free rein in the use of race." *Id.* at 386-87 (Rehnquist, C.J., dissenting). The Chief Justice's beliefs do not in any way lessen the precedential value of the majority's ruling in *Grutter*, however.

[168] *See generally supra* notes 129, 160 and accompanying text.

minority or disadvantaged applicants, and therefore assigns points to create what it believes is the most beneficially diverse environment. Whatever the University's reasoning, provided it has a good faith basis for its point allocation, under *Grutter* it should not be reprimanded for its decisions.[169]

3. *Are point systems per se unconstitutional after* Gratz*?*

In addition to the uncertainty of whether a lower number of points awarded for race would have been allowable in *Gratz*, the Court also evaded the question of whether the use of an automatic point system is inherently unconstitutional. In holding that the University's admissions program was not narrowly tailored, the Court highlighted the fact that 20 points comprised one-fifth of the points needed to guarantee admission, intimating that a reduced award may have been permissible.[170] The majority also proclaimed its disapproval of the effect of the 20 point award in making race a decisive factor "for virtually every minimally qualified underrepresented minority applicant."[171]

At various points throughout the *Grutter* decision, however, the Court appeared to imply that any use of a system that mechanically distributes a predetermined number of points for race would be unconstitutional. For instance, it distinguished the Law School program from the undergraduate program on the basis that "the Law School awards no mechanical, predetermined diversity 'bonuses' based on race or ethnicity,"[172] thus focusing on the automatic nature of awarding a preset number of points. Additionally, in her *Gratz* concurrence, Justice O'Connor, while focusing on the imbalance of awarding 20 points for race compared with the other factors, also stated that "the selection index, by setting up automatic, predetermined point allocations for the soft variables, ensures that the diversity contributions of applicants cannot be individually assessed."[173] The lack of clarity as to the *Gratz* majority's actual holding is evident in that two members of the Court were apparently uncertain as to whether the majority was denouncing the point system in general or merely the high number of points awarded for race. In his dissent (joined by Justice Ginsburg), Justice Souter appeared unsure of how to characterize the majority's ruling, stating: "The[ir] objection goes to the use of points to quantify and compare characteristics, or to the number of points awarded due to race, but on either reading the objection is mistaken."[174]

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[169] *See generally Grutter*, 539 U.S. at 339.

[170] *Gratz*, 539 U.S. at 270.

[171] *Id.* at 272 (internal quotations omitted).

[172] *Grutter*, 539 U.S. at 337.

[173] *Gratz*, 539 U.S. at 279 (O'Connor, J., concurring).

[174] *Id.* at 295 (Souter, J., dissenting).

In trying to ascertain the boundaries established by the Court in its *Grutter* and *Gratz* decisions, a number of constitutional law scholars, in a joint statement, advised universities who employ numerical systems with automatic point assignments for race to undertake major review and revision of their policies.[175] Given the ambiguity of the *Gratz* holding, a discussion concerning the constitutionality of an admissions system that automatically awards predetermined points for various diversity factors including race seems inevitable.

The Court advised in *Gratz* that the undergraduate admissions program failed because its policy of automatically awarding points for race was too inflexible to allow for individualized consideration and selection of applicants.[176] The emphasis on flexibility and individualized consideration also resounded throughout the *Grutter* opinion, as the majority praised the Law School's "highly individualized, holistic review of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment."[177] Presumably, every university ideally aspires to employ such thorough, whole-file evaluation of each individual applicant in its admissions process, because such scrupulous review would likely increase their chances of assembling a strong, successful, and diverse student body. Unfortunately, however, universities must utilize procedures that are realistic and within the boundaries of actual constraints imposed on them, such as the limited resources of time and funding.

The *Gratz* majority recited the recognized principle that the potential for administrative challenges does not render an otherwise problematic system constitutional.[178] Michigan's admissions program, however, considered race alongside numerous other factors that it believed contributed to a diverse student body.[179] Although factors were accorded varying weights and race was conferred the highest number of points possible for a single factor, the process did not insulate minorities from review and competition with the rest of the applicant pool, because non-minorities could also compete for the same 20 points in various other categories.[180] Furthermore, giving race greater weight than some other factors does not render an admissions program uncon-

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[175] REAFFIRMING DIVERSITY JOINT STATEMENT, *supra* note 6, at 19-20. They also suggested that the automatic assignment of a "plus" for race may be constitutionally vulnerable even when used within a holistic, non-numerical system. *Id.*

[176] *Gratz*, 539 U.S. at 270-74.

[177] *Grutter*, 539 U.S. at 337 (stating that "[t]he importance of . . . individualized consideration in the context of a race-conscious admissions program is paramount").

[178] *Gratz*, 539 U.S. at 275.

[179] *See supra* Part III.B.1-2.

[180] *See supra* Part III.B.1.

stitutional.[181] The Michigan admissions program was therefore narrowly tailored to achieve the interest of diversity and thus, the administrative argument is not raised for the purpose of rendering an unconstitutional or otherwise problematic program constitutional.[182]

Attention must be drawn to the fact that although a comprehensive review of every applicant may be feasible for a graduate program such as the Law School, which receives approximately 3,500 applications each year for its 350 available seats, it may not only be taxing but may be utterly impracticable for a large, undergraduate institution such as Michigan's which receives roughly 25,000 applications for its freshman class of 5,000.[183] Since the Court's *Grutter* and *Gratz* decisions, the University of Michigan has implemented a new admissions process for its undergraduate program such that none of the academic or nonacademic factors it considers have a fixed weight, but are each "considered flexibly in the context of the student's entire file."[184] This new process calls for hiring five more full-time admissions counselors and sixteen part-time readers at a projected additional cost of $1.5 to $2 million in 2004.[185]

In light of such real-world considerations, it is patently unreasonable to altogether prohibit the use of points-based admissions systems. Publicly-funded state universities must operate within limited budgets. Given that reality, do we want our universities to expend additional resources on an admissions program that would permit extensive review of each applicant, but would conceivably result in a student body similarly diverse to one a points-based system would produce? Or would we prefer the resources be allocated to providing the finest possible educational institution, by attracting esteemed

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[181] *See Grutter*, 539 U.S. at 334.

[182] *See generally Gratz*, 539 U.S. at 275; *see also supra* Part III.B.1-2.

[183] *Grutter*, 539 U.S. at 312-13; Bloch, *supra* note 123, at 1515.

[184] Joel L. Selig, *The Michigan Affirmative Action Cases: Justice O'Connor, Bakke Redux, and the Mice That Roared But Did Not Prevail*, 76 TEMPLE L. REV. 579, 594 (2003) (citation omitted). In describing the new admissions process, University of Michigan officials stated that "academic factors . . . will continue to be the most important criteria," but "a range of non-academic factors . . . including personal interests and achievements, geography, alumni connections, race and ethnicity, family income, and family educational background" will also be taken into account. *Id.* In addition, the new application form requires applicants to answer two short questions and one longer essay, compared with just one essay required on the old application. Jodi S. Cohen, *Applications by Minorities Fall at U. of M; Court Rulings, Essays Seen as Factor*, CHICAGO TRIBUNE, Feb. 10, 2004, at 8, *available at* http://www.chicagotribune.com/archives (last visited Dec. 28, 2004) (copy on file with author).

[185] Selig, *supra* note 184, at 594 (citation omitted). During an interview on CNN, University of Michigan President Mary Sue Coleman stated: "[O]ur . . . policy . . . that the Court struck down, was a screening device, because we get so many applications. So what we may have to do is to have more admissions counselors, hire more people for the undergraduate admissions, do more intensive work . . . ." Bloch, *supra* note 123, at 1515 n.42.

faculty, offering a broad selection of courses, and maintaining up-to-date facilities and technology? Ideally, we would not have to make such a choice and every university across the United States would have ample resources to inexhaustibly fund each and every one of its programs. This unfortunately is not the case for most public universities. Indeed, government funding for higher education has progressively decreased in recent years.[186] Realistically speaking, implementation of a *Grutter*-type evaluation in undergraduate admissions programs would require an extensive overhaul of admissions policies and the hiring of additional admissions officers and staff, the considerable funding for which would logically have to be appropriated from other areas of the universities' budgets.[187]

Not only may it be unfeasible for undergraduate programs to employ a *Grutter*-type review of applications, but the procedures required for such a "holistic" evaluation may adversely impact minority enrollment, notwithstanding the continued use of race as a factor. After implementing its new admissions process,[188] the University of Michigan witnessed a significant decline in its minority application and admissions figures. As of February 2004, applications received from minorities were down 23 percent compared with the same time last year, and preliminary figures showed that the number of minorities admitted to the freshman class had decreased 30 percent.[189] Other universities that terminated their points systems in response to the *Grutter* and *Gratz* decisions also saw similar declines.[190] Ohio State University, who opted to supplement its application with four short essay questions, experienced a decrease in its minority applications and admissions of approximately 9 and 30 percent, respectively.[191] According to college admissions experts, decreases in overall applications are anticipated anytime a university utilizes a more complex application process, such as by increasing the number of essays or asking unique open-ended questions rather than requesting a more general personal

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[186] Guinier, *supra* note 75, at 129-130.

[187] *See, e.g., supra* notes 184-85 and accompanying text.

[188] *See supra* notes 184-85 and accompanying text.

[189] Cohen, *supra* note 184. Overall applications to the University of Michigan as of February 2004 were down about 18 percent from the previous year. *Id.* Some therefore argue that the decrease in minority applications and admissions is merely due to the overall decrease in applications as a backlash to the lawsuits against Michigan. *See id.*

[190] Ohio State University and the University of Massachusetts at Amherst scrapped their numerical systems after the decisions. *Id.*

[191] *Id.* (citing Mabel Freeman, Ohio State University, Assistant Vice President for Undergraduate Admissions). Ms. Freeman also noted that overall applications had decreased 12.5 percent. *Id.* The numbers were as of February 2004 and were compared to figures as of the same time last year. *Id.*

statement.[192] Furthermore, such additional requirements tend to particularly discourage students who are wavering about whether to attend college, which may explain why they have a greater impact on minority students.[193] In light of the practical effects discussed here, it is evident that although *Grutter* continues to permit the consideration of race in university admissions, the narrow tailoring restrictions of *Gratz* effectively operate to significantly reduce or even entirely eradicate any advantage afforded to minorities in the admissions process.[194]

Moreover, given the sizeable costs universities would have to incur to employ a *Grutter*-type review of applications, it is conceivable that some states and universities may altogether abandon the use of race in their admissions processes in favor of race-neutral alternatives that are less complicated and more economical to implement.[195] Considering, however, that these "race-neutral" alternatives are not really race-neutral at all, based on the considerable preferences whites receive under the traditional admissions process,[196] not using a race-conscious admissions program would likely result in a substantial decrease in minority enrollment.[197] In *Grutter*, the Sixth Circuit explicitly recognized that "race-neutral alternatives . . . were not enough to enroll a 'critical mass' of under-represented minority students."[198] One judge noted in a concurring opinion that "statistics have shown . . . that using factors other than race[,] such as socioeconomic status, failed to produce the highly qualified, ethnically diverse student body achieved when race was also factored into the admissions process."[199]

The detrimental effects of using race-neutral admissions approaches have been demonstrated by statistics from universities that have implemented such alternatives. For example, in 1996, California adopted Proposition 209, which prohibited all forms of racial and gender discrimination (including affirmative

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[192] *Id.* (citing Freeman, *supra* note 191 and David Hawkins, National Association for College Admission Counseling).

[193] *See id.* (citing Jim Conroy, New Trier Township High School, Winnetka, Ill., Chairman of the Post-High School Counseling Department).

[194] This is especially so considering the substantial "neutral" preferences afforded to whites in the admissions process. *See supra* Part III.B.1.

[195] The University of Michigan, for example, estimated that the implementation of their new "holistic review" admissions process would cost approximately $1.5 to $2 million in 2004. *See supra* notes 184-85 and accompanying text.

[196] *See supra* Part III.B.1.

[197] *See* Eckes, *supra* note 71, at 58.

[198] *Id.* at 60 (citing Grutter v. Bollinger, 288 F.3d 732, 750 (6th Cir. 2002), *aff'd*, Grutter v. Bollinger, 539 U.S. 306 (2003)).

[199] *Id.* (citing *Grutter*, 288 F.3d at 764 (Clay, J., concurring)).

action) in public employment and university admissions.[200] Subsequently, the 1998 statistics for the University of California (UC) system as a whole evidenced drops in freshman admissions from the prior year of 17.6 and 6.9 percent for Blacks and Hispanics, respectively.[201] Although the less competitive UC schools witnessed an increase in minority admissions, the more selective schools, such as UC Berkeley and UCLA, saw substantial declines.[202] UC Berkeley reported a decrease of 57 and 40 percent for Blacks and Hispanics, respectively, and UCLA reported 43 and 33 percent decreases.[203] Since then, California has implemented a "top 12.5% plan" under which all students ranked in the top 12.5 percent of their graduating class are guaranteed admission into the UC system.[204] Applicants are not guaranteed attendance at their UC school of choice, however, and the practical effect has been that underrepresented minorities are most often found at less selective campuses.[205] This result has been characterized as the "cascading" effect—more qualified minorities who with affirmative action would have been accepted at a more selective school are instead forced to attend a less selective school.[206] Lesser qualified minorities are consequently displaced into perhaps community colleges.[207] The end result, of course, is that some applicants (i.e., a number of minority students) are altogether pushed out of higher education.[208] Thus, minorities are still severely disadvantaged under this type of "race-neutral" approach.[209] It therefore appears that the narrow

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[200] *Id.* at 58. Proposition 209 was also known as the California Civil Rights Initiative and was passed by California voters in a 54 to 46 percent vote on November 5, 1996. *Id.* at 58 n.286. The initiative was unsuccessfully challenged under the California State Constitution in April 1997; the U.S. Supreme Court subsequently denied certiorari. *Id.* Interestingly (but not surprisingly), the only demographic group which predominately voted in favor of the initiative was white males—63 percent of whites and 61 percent of males voted in favor of Proposition 209. Brooks, *supra* note 149, at 575-76.

[201] Brooks, *supra* note 149, at 577.

[202] *Id.* at 577-78; *see also* Eckes, *supra* note 71, at 58.

[203] Brooks, *supra* note 149, at 577.

[204] OFFICE FOR CIVIL RIGHTS, U.S. DEPARTMENT OF EDUCATION, ACHIEVING DIVERSITY: RACE-NEUTRAL ALTERNATIVES IN AMERICAN EDUCATION 38 (2004), *available at* http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html [hereinafter ACHIEVING DIVERSITY REPORT]; *see also* Brooks, *supra* note 149, at 580.

[205] ACHIEVING DIVERSITY REPORT, *supra* note 204, at 38; Brooks, *supra* note 149, at 580.

[206] Harris, *supra* note 143, at 704.

[207] *Id.*

[208] *Id.* One metaphor used for "cascading" is that it is "tantamount to saying you can ride on the bus, but only if you stay in the back." *Id.*

[209] Texas and Florida have also implemented similar race-neutral alternatives in their public university admissions, guaranteeing admission to students within a top percentile of their graduating class. ACHIEVING DIVERSITY REPORT, *supra* note 204, at 40-41. Results of research on the impact of these states' plans on minority admissions vary, with some research indicating positive results for minorities and others suggesting adverse effects. *Compare, e.g., id.*,

tailoring restrictions imposed by *Gratz* operate in a practical sense to maintain the partiality towards whites and conversely to prolong the disadvantage to minorities in the university admissions process.

This Comment is not proposing that we grant universities unlimited deference and abandon guidelines for maintaining admissions programs within constitutional boundaries. An admissions program that awards predetermined points for diversity factors, including race, is not inherently unconstitutional, however.[210] In light of real world considerations, universities should be permitted to utilize such systems provided they are otherwise narrowly tailored to fit the interest of diversity.[211] Furthermore, point systems provide a feasible alternative for large undergraduate (or graduate) programs to perform a holistic review of each applicant and to consider the various factors they believe will contribute to the diversity of their student bodies. Such an approach allows universities to move away from admissions systems based purely on academic factors such as GPA and standardized test scores.[212]

C. Exploring the Court's "Lack of Vision"[213]

Although the Court's deliberate or inadvertent disregard of the numerous preferences received by whites in the admissions process and the effective injury these preferences have on minorities cannot be justified, perhaps it may be explained by the theories of white privilege and the corresponding

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Greenberg, *supra* note 148, at 1614-15, *and* Kent Fischer, *Study: Top Students Not Hurt by Admissions Law*, THE DALLAS MORNING NEWS, Jan. 20, 2004, at 3A. However, an in-depth discussion and analysis of these race-neutral alternatives and their results is beyond the scope of this Comment.

[210] *See supra* Part III.B.

[211] *See supra* Part III.B.3.

[212] *See supra* notes 147-52 and accompanying text. Opponents of affirmative action argue that such programs serve to legitimize the "poisoned" existing admissions process which places undue reliance on "merit-based" factors that effectively discriminate against minorities and the disadvantaged. Grutter v. Bollinger, 539 U.S. 306, 367-70 (2003) (Thomas, J., dissenting); *see also* Bell, *supra* note 150, at 1629-30. They contend that instead of continuing to use affirmative action programs to "correct" such discriminatory results, the existing selective admissions process should be discarded and universities should undertake to create an admissions system which truly gives consideration to the qualifications and abilities of each applicant. *Id.* While this author supports the implementation of such an ideal admissions system, until our Nation's universities actually execute such a conversion, we should not forego addressing the issues within the existing system. As one legal scholar points out: "To wait for [its] arrival, should it come, would consign many African-Americans to continued subordinate status for many years. In the meantime, affirmative action in some form will have to continue." Greenberg, *supra* note 135, at 555.

[213] *See supra* note 1 and accompanying text.

transparency phenomenon.[214] In the broadest sense, white privilege and transparency can be defined as "the pervasive, structural, and generally invisible assumption that white people define [the] norm,"[215] which results in "the tendency of whites not to think about whiteness, or about norms, behaviors, experiences, or perspectives that are white-specific."[216] Under this premise, all other races are instinctively judged based on how they compare to whites and white standards, thus giving whites a substantial advantage in every sense.[217]

This unconscious thought process is pervasive in our everyday lives.[218] Racism is a part of our history and our culture, and is embedded within each and every one of us such that we are all racists.[219] Of course, as our society has progressively rejected racism as immoral, overt racism (i.e., deliberate and identifiable acts of bigotry) has become much less of a concern than the more prevalent form of unconscious racism—actions rooted in prejudice so well-masked that even the actor himself may be unaware of its racist origins.[220] The white privilege and transparency perspectives are also indoctrinated in our legal system. After all, judges (the majority of whom are white) are not immune from racism, as they cannot "escape the psychological mechanisms that render us all, to some extent, unaware of our racist beliefs."[221] Racism and judicial bias are thus inherent, albeit unconsciously, in most judicial interpretation. This has resulted in the tendency of courts interpreting and applying anti-discrimination laws to "define racial justice in crabbed and inverted ways . . . thereby dissociating law (not completely, but significantly) from racial justice."[222] In other words, the law and our courts have effectively

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[214] *See* Law, *supra* note 8, at 604; Flagg, *supra* note 8, at 970-73.

[215] Law, *supra* note 8, at 604.

[216] Flagg, *supra* note 8, at 957.

[217] *See id.*

[218] *See* Lawrence, *supra* note 9, at 339-44; *see also* Law, *supra* note 8, at 605-16.

[219] Lawrence, *supra* note 9, at 322; *see also supra* Part II.A.

[220] Lawrence, *supra* note 9, at 335, 344; *see also* Harris, *supra* note 143, at 700. Some examples include: the taxi-cab driver who passes a well-dressed black couple waiting on the curb to instead pick up a white person half a block down; Law, *supra* note 8, at 605; the white father who sees nothing wrong with his young daughter's refusal to play with an Asian classmate because she doesn't have blue eyes (since eye color has no racial basis); Chris Iijima, *The Era of We-Construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections on the Critique of the Black/White Paradigm*, 29 COLUM. HUM. RTS. L. REV. 47, 48 (1997); or the black employee at a predominantly white company who receives outstanding performance evaluations, but is consistently denied promotion because of her white supervisor's assessment that she lacks "leadership potential." Barbara J. Flagg, *Enduring Principle: On Race, Process, and Constitutional Law*, 82 CAL. L. REV. 935, 971-72 (1994).

[221] Lawrence, *supra* note 9, at 380. In addition, most judges come from elite and affluent backgrounds, with over 20 percent of first-term appointees being millionaires. *Id.* at 380 n.296.

[222] Yamamoto, *supra* note 9, at 845-46.

viewed race and discrimination from a transparent perspective whereby whiteness and white ideals are the normative and defining positions.[223]

A definitive example of white transparency in legal doctrine is the requirement of discriminatory intent first established in *Washington v. Davis*.[224] This now well-established rule requires a plaintiff challenging a facially neutral law with racially disproportionate effects to demonstrate a discriminatory purpose in its enactment before strict scrutiny will apply.[225] The intent requirement emulates white privilege and transparency and reflects the "distinctively white manner" of thinking about discrimination.[226] It was constructed using white standards as the norm, and it ignores the resulting injury to minorities which occurs regardless of the decisionmakers' motives.[227] Furthermore, the intent requirement narrowly defines race discrimination as overt and deliberate and hence entirely disregards the predominant form of racism: unconscious racism.[228]

Through the doctrine of discriminatory intent and other equal protection jurisprudence, the Supreme Court has essentially "create[d] an imaginary world where discrimination does not exist unless it was consciously intended,"[229] thereby constricting our anti-discrimination laws and narrowly shaping our societal perspectives of race discrimination. Accordingly, rather than advancing racial justice and protecting the liberties of minorities, the Court (as well as lower courts) has carefully protected the interests of whites and reflected the values and preferences of the conservative majority.[230] The Court has consistently embraced the doctrine of constitutional "colorblindness"—the principle that race should *never* be considered—in interpreting and

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[223] *See* Iijima, *supra* note 220, at 48, 74 & 79-80.

[224] 426 U.S. 229 (1976).

[225] Lawrence, *supra* note 9, at 318. Professor Lawrence references and cites to abundant literature addressing the failings of the *Davis* intent requirement. *Id.* at 319 n.3. *See also* Flagg, *supra* note 8, at 961-62.

[226] Flagg, *supra* note 220, at 954; *see* Law, *supra* note 8, at 617-18.

[227] Lawrence, *supra* note 9, at 319.

[228] Flagg, *supra* note 220, at 967; Lawrence, *supra* note 9, at 322; *see also supra* text accompanying notes 218-23 for discussion regarding unconscious racism.

[229] Lawrence, *supra* note 9, at 324-25.

[230] Iijima, *supra* note 220, at 79; Yamamoto, *supra* note 9, at 847. Both Professors Iijima and Yamamoto cite several cases evidencing such results, including: Shaw v. Reno, 509 U.S. 630 (1993); Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996), *cert. denied*; Martin v. Wilks, 490 U.S. 755 (1989); Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989). Iijima, *supra* note 220, at 79-80; Yamamoto, *supra* note 9, at n.117. In addition, Professor Yamamoto notes an observation regarding the Rehnquist Court that it has simply "undertaken correctives to perceived political imbalances . . . [and] has responded to complaints that discrimination suits against whites and affirmative action for women and racial minorities have divided the American polity and have unfairly disadvantaged those in the majority." Yamamoto, *supra* note 9, at 847 n.124.

applying the Equal Protection Clause and other anti-discrimination laws.[231] The colorblindness principle is of course the rationale behind the discriminatory intent requirement and the rule compelling strict scrutiny review for government affirmative action.[232] Naturally, colorblindness is perceived by many whites (including a majority of the Court) as the neutral and therefore appropriate perspective.[233] By not taking race into consideration at all, they believe any risk of race discrimination is removed. The colorblindness rationale, however, is in actuality a form of white transparency, as it fails to contemplate the history of discrimination in our country, the integration of racism as a part of our culture, and the existence of both overt and unconscious discrimination in current society.[234]

In light of the Court's viewpoints regarding equal protection as discussed earlier, it is not surprising that the Court in *Gratz* failed to consider the sizeable advantages that whites and other non-minorities received through a number of the "non-racial" preferences utilized by the University of Michigan in its admissions process. Because factors such as legacy, geography, or merit[235] are facially neutral and there is no apparent intent on the part of the University to favor whites by using them, the use of such factors does not constitute racial discrimination under *Davis*. Hence, such factors need not be considered in evaluating whether the University's use of race is narrowly tailored. The Court entirely overlooks the disparate impact these "neutral" preferences have by putting minorities at a severe disadvantage in the admissions process where even an award of 20 points may not be adequate to offset the adverse effects.[236]

The Court's analysis and outcome in *Gratz* is of course consistent with its transparent doctrinal analysis and colorblind perspective. The Court ignored the practical effects inherent within the traditional admissions process of benefiting whites and disfavoring minorities, and accordingly preserved the interests and values of the conservative, white majority.[237] In highlighting that fact, this Comment is not attempting to place blame or culpability on the Court

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[231] Flagg, *supra* note 220, at 960; Yamamoto, *supra* note 9, at 851.

[232] Flagg, *supra* note 220, at 960. It should be noted that the colorblind principle was indoctrinated almost half a century ago, but as of yet has been unsuccessful in achieving racial justice in our society. Flagg, *supra* note 8, at 1013-14.

[233] Flagg, *supra* note 220, at 960-61.

[234] Wallace, *supra* note 22, at 704-05 ("This idea of a color blind society attempt[s] to negate more than two centuries of anti-black sentiment, racial hatred, and the subordination of African Americans without recognizing that those atrocities occurred."). The colorblind perspective also overlooks the fact that the U.S. Constitution is in reality a race-conscious document. *Id.* at 699; *see also supra* Part II.A.

[235] *See supra* Part III.B.1 for discussion.

[236] *See supra* text accompanying notes 152-56.

[237] *See supra* note 230 and accompanying text.

or the University of Michigan for disregarding these racially disparate results. As pointed out by one legal scholar, "[b]laming is not an effective, empirically well-founded, or prudent way of addressing the complete range of contemporary manifestations of race discrimination."[238]

When objectionable conditions exist, however, there must be some assumption of responsibility for rectifying the situation.[239] In the case of racial injustice, our Supreme Court certainly has the responsibility to ensure that the laws governing racial equality are applied in a manner such that racial justice is the actual end result. If the existing legal doctrines governing equal protection review and analysis[240] have been unsuccessful in achieving this objective, then the Court should go beyond them to address race-related issues from a perspective that accounts for both conscious and unconscious discrimination.[241] In other words, perhaps the time has come for the Court to modify its Equal Protection analysis to recognize the fact that there is often no discernible distinction between discriminatory intent and discriminatory impact, because "[f]requently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor."[242] Thus, in situations where racially disproportionate conditions exist as a result of facially neutral factors, these disparate effects should at a minimum be considered in determining the impact of race-conscious considerations which were implemented to counterbalance such effects.[243]

IV. CONCLUSION

Following the Supreme Court's issuance of the *Grutter* and *Gratz* decisions, proponents of affirmative action exhaled a collective sigh of relief, pleased

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[238] Flagg, *supra* note 8, at 988. Furthermore, blaming individuals for unconsciously maintained attitudes held by the majority of people is inapt and pointless. *Id.* at 989.

[239] *See generally id.* at 990-91. One may take responsibility for correcting a situation without accepting blame for or even any causal connection with it. *Id.* A simple example is that a person may take responsibility for cleaning the kitchen, but by doing so, is not admitting to any role in creating the mess. *Id.*

[240] Examples of such equal protection doctrines include the discriminatory intent requirement and the use of strict scrutiny review for affirmative action. *See* Flagg, *supra* note 220, at 960-61, 966-68; *see also supra* text accompanying notes 224-34.

[241] Iijima, *supra* note 220, at 87; *see also* Flagg, *supra* note 220, at 966-68.

[242] *See* Flagg, *supra* note 8, at 963 (quoting Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring)). Alternatively put, an actor should be "presumed to have intended the natural consequences of his deeds" and accordingly held accountable for his actions. *Id.* (internal quotations omitted).

[243] *See id.* at 991-1005 (proposing the reformist "disparate impact rule"); Lawrence, *supra* note 9, at 355-58 (proposing the "cultural meaning test," which addresses unconscious racism and disproportionate impact).

with the Court's ruling that educational diversity is a compelling government interest that justifies the consideration of race in university admissions. The decisions appeared to answer questions which had been lingering for more than a quarter of a century, and the Court's guidance setting forth seemingly lucid requirements to ensure narrow tailoring of race-conscious admissions programs appeared constructive and functional at first glance. In actuality, however, the decisions are deficient in a number of ways. The Court failed to define educational diversity and to provide distinct guidelines for narrowly tailoring race-based admissions programs. It also overlooked the real-world facts and circumstances surrounding the university admissions process, such as the substantial benefits whites traditionally receive and the resulting detriment to minorities. In doing so, the Court adhered to its traditionally transparent doctrinal approach.

Perhaps this oversight by the Court may serve as an indication of the deficiencies inherent in our equal protection laws and analysis. In recognizing this, a modified approach which contemplates all of the real-world circumstances and conditions related to race and racial injustice should be considered. By continuously shaping and improving our legal doctrines, we may hopefully one day achieve a fairer and more workable system, and ultimately, true racial justice and equality.

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Your Body, Your Choice: How Mandatory Advance Health-Care Directives Are Necessary to Protect Your Fundamental Right to Accept or Refuse Medical Treatment

I. INTRODUCTION

In 1990, Terri Schiavo, a Florida resident, suffered brain damage when her heart failed and cut off oxygen to her brain.[1] Although she survived the heart attack, she was left in a "persistent vegetative state."[2] The Florida District Court of Appeal found that her recovery was almost impossible: "Unless an act of God, a true miracle, were to recreate her brain, [Terri] will always remain in an unconscious, reflexive state, totally dependent upon others to feed her and care for her most private needs."[3] Feeding and hydrating tubes kept her alive.[4] Caretakers changed her diapers daily.[5]

For many years, Terri's spouse and parents have been battling over whether she should be kept alive through such artificial means.[6] On one side, her spouse, Michael, claims that Terri would not have wanted to be kept alive artificially.[7] On the other side, Terri's parents believe Terri has a chance of improving and do not want to let her go.[8] Both sides suspect the opposing party of assessing Terri's wishes based upon their own selfish motivations.[9]

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[1] *In re* Guardianship of Schiavo, 780 So. 2d 176, 177 (Fla. Dist. Ct. App. 2001) [hereinafter Schiavo I].

[2] A "persistent vegetative state" is generally "a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive function." *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 266 (1990).

[3] *Shiavo I*, 780 So. 2d at 177.

[4] *Id.*

[5] *Id.*

[6] *Id.* at 178.

[7] *Id.*

[8] *Id.*

[9] *Id.* In the early 1990s, Michael, as Terri's guardian, filed a medical malpractice lawsuit, which resulted in a sizable award of money for Terri. *Id.* The fund remains sufficient to care for Terri for many years. *Id.* If she were to die, Michael would inherit the money under the laws of intestacy. *Id.* If Michael divorced Terri in order to have a more normal family life, the fund remaining at the end of Terri's life would presumably go to her parents. *Id.*

On February 11, 2000, a Florida guardianship court held by clear and convincing evidence that "[Terri] Schiavo would then elect to cease life-prolonging procedures if she were competent to make her own decision." *In re* Guardianship of Schiavo, 792 So. 2d 551, 554 (Fla. Dist. Ct. App. 2001) [hereinafter Schiavo II]. In so holding, the court authorized Michael to discontinue the administration of feeding and hydrating tubes. *Id.* at 555. Terri's parents filed several more motions and appeals, however, thus delaying Michael from obtaining a court

The world may never know what Terri really wanted.[10]

A. The Problem

Terri's situation exemplifies a serious problem: her fundamental right to accept or refuse medical treatment[11] may have been violated[12] because there

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order to remove Terri's feeding and hydrating tubes for a few years. *See id.*; *see also In re* Guardianship of Schiavo, 800 So. 2d 640 (Fla. Dist. Ct. App. 2001) [hereinafter Schiavo III]; *In re* Guardianship of Schiavo, 851 So. 2d 182 (Fla. Dist. Ct. App. 2003), *review denied*, 855 So. 2d 621 (Fla. 2003) [hereinafter Schiavo IV].

After Michael finally obtained a court order to remove the tubes, the Florida legislature passed a new law on October 21, 2003, specifically drafted for Terri, giving Florida governor, Jeb Bush, the authority to order the reinsertion of Terri's feeding tube. *See Brain-damaged Florida woman receiving fluids* (Oct. 22, 2003), *at* http://www.cnn.com/2003/LAW/10/21/coma.woman/index.html (last visited Dec. 21, 2004). Michael filed a lawsuit challenging the constitutionality of Terri's Law, and on September 23, 2004, the Florida Supreme Court held that Terri's Law was "unconstitutional both on its face and as applied." *See* Bush v. Schiavo, No. SC04-925, 2004 Fla. LEXIS 1539, at *3 (Fla. Sept. 23, 2004). On October 4, 2004, Governor Bush filed a motion for rehearing, specifically asking for "clarification of [the court's] recent ruling." *See Governor Bush seeks Schiavo rehearing* (Oct. 4, 2004), *at* http://www.cnn.com/2004/LAW/10/04/schiavo/index.html (last visited Dec. 21, 2004).

[10] The world may never know what Robert Wendland in California wanted either. *See* Conservatorship of Wendland, 28 P.3d 151 (Cal. 2001). An automobile accident left him conscious but severely disabled and dependent on artificial nutrition and hydration. *Id.* at 154. Despite evidence that he expressly told his wife, brother, and daughter on separate occasions that he would never want artificial life support, the California Supreme Court denied his wife's petition to remove the medical treatment. *Id.* at 157, 175. The court explained that Robert's wife failed to prove by clear and convincing evidence that Robert wished to refuse such treatment. *Id.*

[11] Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 281 (1990) ("[T]he Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment."). The *Cruzan* Court held that this fundamental right to refuse unwanted medical treatment is a personal one, and that states could constitutionally require clear and convincing evidence of a person's pre-incapacitation wish to refuse medical treatment before complying with such a wish. *Id.* at 281-82. Although the court did not resolve the issue whether a surrogate could exercise this personal right for an incapacitated patient, *id.* at 287 n.12, Justice O'Connor, in her concurrence, strongly suggested that a surrogate could exercise this right and that the Constitution may require states to comply with the surrogate's decision to protect the incapacitated patient's fundamental right. *Id.* at 289-92 (O'Connor, J., concurring); *see also* Washington v. Glucksberg, 521 U.S. 702 (1997) (holding that the Due Process Clause protects the traditional right to refuse unwanted medical treatment).

[12] The author assumes that Terri, prior to her incapacitation, actually expressed that she would prefer to forego life-sustaining treatment. Thus, the author uses the term "violated." In contrast, if Terri expressed that she would always want to be kept alive, the term "violated" would be inappropriate because her wish was honored. If Terri did not express any pre-incapacitation wishes regarding life-sustaining treatment, then the term "violated" would be inappropriate because there can be no violation of her choice if she never made one. Rather, the phrases "her right never matured," "she lost the opportunity to exercise her right," or something to that effect would better describe the status of Terri's right to accept or refuse medical treatment.

was insufficient proof of her pre-incapacitation[13] wishes. Sadly, the cause of the problem—insufficient proof of her pre-incapacitation wishes—could have been avoided through the simple execution of an advance health care directive ("advance directive").[14] Advance directives are legally recognized statements that enable people to give instructions about future medical care or to appoint another person to make health care decisions if they are unable to make those decisions themselves.[15] Because an advance directive is merely an instruction regarding health care or an appointment of an agent to make health care decisions, an advance directive can easily address any condition a patient could be in, such as a coma, persistent vegetative state, or minimally conscious state. The individual just needs to state something along the lines of, "if I am ever in a coma, persistent vegetative state, or minimally conscious state, I want the physician to [fill in with individual's instruction]." If Terri had executed an advance directive before becoming incapacitated, then her choice would have been known and protected.

Unfortunately, Terri's problem is not unique. Approximately two million people die annually in the United States.[16] No more than fifty percent of those who die have advance directives.[17] Of the approximate one million people who die annually without an advance directive, a significant number are presumably given end-of-life medical treatment that conflicts with their pre-incapacitation wishes.[18] If such pre-incapacitation wishes were actually expressed by the patient, then such treatment would be a violation of the patient's fundamental right to accept or refuse medical treatment.[19]

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[13] "The concept of 'incompetency' is generally considered to be a legal status imposed by courts." James H. Pietsch, *Legal Issues Concerning . . . Medical Treatment Decisions (Part I)*, 1995-DEC HAW. B.J. 28, at *1 (1995). "The concept of capacity (and incapacity) is more related to specific activities and the determination of decisional capacity is considered to be within the domain of the medical profession." *Id.*

[14] *See Cruzan*, 497 U.S. at 291-92 (O'Connor, J., concurring) (suggesting that advance directives are valuable safeguards in protecting a person's fundamental right to accept or refuse medical treatment).

[15] Charles P. Sabatino, *Health Care Advance Directives*, 16-SUM. FAM. ADVOC. 61, 62 (1993) (defining the different types of advance directives).

[16] 139 CONG. REC. E882-01 (1993) (statement of Rep. Dooley) [hereinafter Dooley Hearing].

[17] *See* Edward J. Larson & Thomas A. Eaton, *The Limits of Advance Directives: A History and Assessment of the Patient Self-Determination Act*, 32 WAKE FOREST L. REV. 249, 277 (1997).

[18] Dooley Hearing, *supra* note 16 ("Given the choice, most Americans would not want their lives hopelessly—and expensively—prolonged by machines.").

[19] *See Cruzan*, 497 U.S. at 281 (holding that a person has a constitutional right to refuse unwanted medical treatment).

This Comment is *not* pro-death. Its purpose is *not* to convince people to choose to die when terminally ill, comatose, or in a persistent vegetative state. Withdrawing Terri's artificial

On another important level, this problem has also inflated the nation's already-ballooning health-care spending.[20] Of the tens of thousands of people who may be receiving artificial life support[21] against their wishes,[22] the majority are likely receiving government funds to help pay for the treatment because the federal government pays for most end-of-life treatment through Medicare.[23] One study estimates that a person could easily spend at least $40,000 in medical expenses during the last year of life.[24] Multiplying that figure by the number of people who die annually without advance directives[25] would show that millions of taxpayer dollars are spent needlessly on possibly unwanted life-sustaining treatment.[26]

However, not everyone receiving end-of-life care is eligible for government benefits.[27] In all likelihood, health-insurance companies are also spending

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tube feeding if she wanted it would be as unjust as forcing her to have it if she did not want it.

[20] *See Health Access and Affordability: Testimony Before the Subcomm. of Labor, HHS, Education of the S. Comm. on Approp.*, 108th Cong. (2003) (statement of Mr. Donald Hoover, Professor of Statistics at Rutgers University, Member of the Rutgers Institute for Health, Health Care Policy and Aging Research) [hereinafter *Health Access and Affordability*], *available at* 2003 WL 56335221.

Critics may discourage over-emphasizing economic concerns. They may perceive such concerns to be superficial or petty. In reality, however, the economy is very important. Modern society functions on the production, distribution, and consumption of goods and services. If health-care costs get so high that the average person cannot afford it, then there will be many sick, dying people in our nation. Sickness and death are never superficial or petty concerns.

[21] *See* James P. Kelly, *Rehabilitation of the Severely Closed Head Injured Patient*, 1 ANN.2001 ATLA-CLE 1331, at *1 (2001). Approximately 70,000 to 90,000 people with traumatic brain injury live with severe disabilities. *Id.* With such severe disabilities, such people presumably would require life-sustaining treatment, i.e., feeding tubes, to live. Likewise, because eighty percent of two million people die annually in hospitals, many of these people presumably receive end-of-life care through these hospitals before dying. *See supra* note 16 and accompanying text.

[22] *See* Dooley Hearing, *supra* note 16 ("Given the choice, most Americans would not want their lives hopelessly—and expensively—prolonged by machines.").

[23] *Health Access and Affordability, supra* note 20 (discussing the federal government's role in paying for the costly end-of-life treatment for most people).

[24] *Id.*

[25] *See* Larson & Eaton, *supra* note 17, at 277 (estimating that no more than fifty percent of the two million people who die annually in the United States have advance directives).

[26] From 1966 to 2002, the number of people receiving Medicare benefits increased 212 percent from 19,108,822 to 40,488,878. *See Medicare Enrollment: National Trends 1966-2002*, Centers for Medicare & Medicaid Services (last modified Oct. 16, 2003), *available at* http://cms.hhs.gov/statistics/enrollment/natltrends/hi_smi.asp (last visited Dec. 21, 2004). Because the cost of Medicare has grown with the increase of Medicare recipients, the government must use the taxpayers' dollars efficiently so that those who really need and *want* medical treatment receive it.

[27] *See In re* Guardianship of Schiavo, 780 So. 2d 176, 177-78 (Fla. Dist. Ct. App. 2001) (discussing the facts and circumstances of Terri Schiavo, who was not eligible for government

millions on end-of-life care. These insurance companies will undoubtedly transfer the cost of such care to their policyholders by increasing the premiums on their benefits. Considering that many incapacitated people, such as Terri, receive life-sustaining treatment for many years,[28] the economic impact of the lack of advance directives is staggering.[29] Ultimately, whether it is through increases in taxes or health-insurance premiums, health-care costs will continue to rise until the average person cannot afford health care anymore.[30]

If more people do not start using advance directives, the economic impact of life-prolonging treatment will only worsen.[31] Medical technology will only improve in the future,[32] and the idea of keeping someone "alive" indefinitely

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benefits through Medicare or Medicaid). There are probably many people like Terri who are too young to be eligible for Medicare benefits. Thus, their end-of-life care must be paid by other means, such as personal savings, health insurance, and other third parties.

[28] For example, Terri has been receiving life-sustaining treatment for fourteen years. *Id.* at 177.

[29] *See supra* note 24 and accompanying text (discussing the high cost of end-of-life treatment). If most people wish to forego life-sustaining treatment but do not express such wishes through an advance directive, then one can reasonably assume that a substantial portion of such people will be kept alive against their will for at least a short period of time. The aggregate amount of money spent on end-of-life care for such individuals is extremely high, even if each individual is kept alive only for a short period of time, partly because of the overwhelming number of people who receive end-of-life care.

[30] *See supra* notes 20-29 and accompanying text (discussing how the average individual, either through increasing taxes or health-insurance premiums, will end up being required to pay for other people's costly end-of-life treatment).

[31] *See Health Access and Affordability*, *supra* note 20 ("[O]ur nation spends substantial amounts on medical care for persons in their last year of life; this will increase as our population ages."). Some researchers estimate the potential cost savings from greater use of advance directives to be more than $100 billion per year. *See* Larson & Eaton, *supra* note 17, at 282 (citing Peter A. Singer & Frederick H. Lowy, *Rationing, Patient Preferences, and Cost of Care at the End of Life*, 152 ARCHIVES INTERNAL MED. 478, 479 (1992)). Researchers have also found that patients with advance directives were hospitalized for shorter periods of time, were less likely to be admitted into the intensive care unit, and incurred substantially lower hospital bills compared to patients without advance directives. *Id.* at 282-83 (citing Christopher v. Chambers et al., *Relationship of Advance Directives to Hospital Charges in a Medicare Population*, 154 ARCHIVES INTERNAL MED. 541, 546 (1994)).

[32] *See* S. Elizabeth Wilborn Malloy, *Beyond Misguided Paternalism: Resuscitating the Right to Refuse Medical Treatment*, 33 WAKE FOREST L. REV. 1035, 1036 (1998). Modern biomedical technologies such as respirators, cardiac pacemakers, kidney dialysis units, and feeding tubes have greatly increased medicine's capacity to prolong human life. *Id.*; *see also HHS Study Finds Life Expectancy in the U.S. Rose to 77.2 Years in 2001*, U.S. Dep't of Health & Human Serv. (last modified Mar. 14, 2003), *available at* http://www.hhs.gov/news/press/2003pres/20030314a.html (last visited Dec. 21, 2004); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 301 (1990) (Brennan, J., dissenting) ("Medical technology has effectively created a twilight zone of suspended animation where death commences while life, in some form, continues."). Because the majority of the population "would not want their lives hopelessly—and expensively—prolonged by machines," *see* Dooley Hearing, *supra* note 16, the idea of keeping some-

might no longer be ridiculous. Terri's tragedy illustrates this dilemma. Prior to the 1970s, people did not face the painful decision of whether to prolong one's life via artificial nutrition and hydration because such technology did not exist.[33] Medical advances are important to society. Like other instruments of power, however, they must be exercised with responsibility and care. Otherwise, this nation's health-care costs will become unaffordable to the average American.[34]

B. The Solution

The government has recognized the vital role that advance directives can play in protecting a person's right to determine his end-of-life care and decreasing health-care spending in this nation. To encourage the use of advance directives, the federal government has enacted legislation that requires hospitals to disburse information to patients upon admittance regarding advance directives.[35] Several states have also adopted statutes that lower the execution requirements of advance directives.[36] These laws, however, had limited success, if any, in increasing the use of advance directives in the nation's population.[37] Unlike these laws that simply encourage or facilitate the use of advance directives, new legislation that mandates the execution of advance directives by a certain age would significantly increase the use of advance directives. Such an increase in the use of advance directives would help solve the problem illustrated by Terri's tragedy because it would provide the necessary evidence of a person's wishes.

Part II.A of this Comment provides a survey of the historical background that led to the creation of advance directives. It closes with an analysis of the relevant statutes, namely, the Patient Self-Determination Act and the Uniform

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one alive indefinitely through the use of machines probably is unappealing to the average individual.

[33] "Ninety percent of the medicine being practiced today [, including tube feeding,] did not exist in 1950." *See* Malloy, *supra* note 32, at 1091 n.2 (citation omitted).

[34] *See supra* notes 20-29 and accompanying text (discussing how the average individual, either through increasing taxes or health-insurance premiums, will end up being required to pay for other people's costly end-of-life treatment).

[35] *See* Patient Self-Determination Act, 42 U.S.C.A. §§ 1395cc, 1396a (1990).

[36] *See, e.g.*, HAW. REV. STAT. § 327E-3 (1999); N.M. STAT. ANN. § 24-7A-2 (2004); MISS. CODE ANN. § 41-41-205 (2004).

[37] *See* Larson & Eaton, *supra* note 17, at 276-77 (relying on studies calculating advance-directive use before and after the Patient Self-Determination Act). Because the Patient Self-Determination Act and the Uniform Health-Care Decisions Act were enacted about the same time, the author infers that the studies used to analyze whether the Patient Self-Determination Act increased the use of advance directives can also be used to analyze whether the Uniform Health-Care Decisions Act increased the use of advance directives.

Health-Care Decisions Act, and discusses their successes and failures. Part II.B addresses the main non-constitutional arguments against mandatory advance directives. It ends with examples of the proposed legislation. Part III analyzes the proposed legislation under constitutional scrutiny. Specifically, it explains how the legislation could survive a possible conflict with the constitutional rights of freedom of thought and privacy. Part IV concludes that mandatory advance directives are constitutional and necessary to protect a person's right to accept or refuse medical treatment.

II. BACKGROUND

As discussed earlier, an advance directive is a statement recognized under state law regarding the provision of health care when the individual is incapacitated.[38] Advance directives usually come in two forms: (1) an individual instruction, also known as a living will[39] and (2) a power of attorney for health care.[40] An individual instruction is a "written statement of one's wishes regarding the use of specified medical treatments."[41] People can limit their individual instructions to take effect only if a specified condition arises, such as when they are in a persistent vegetative state, a permanent coma, or have a terminal illness.[42] A power of attorney for health care allows an individual to appoint someone to make decisions about medical care if that individual is no longer able.[43] The preferred approach is to combine the individual instruction and the power of attorney into one document.[44]

A. The Creation of Advance Directives

All fifty states have statutes that recognize the use of advance directives.[45] The authority of advance directives extends from the constitutional right to

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[38] *See* Sabatino, *supra* note 15, at 62.

[39] The term "living will" is confusing. David M. English & Alan Meisel, *Uniform Health-Care Decisions Act Gives New Guidance*, 21 EST. PLAN. 355, 359 (1994). Thus, "individual instruction" is preferred. *Id.*

[40] Sabatino, *supra* note 15, at 62; *see also* Thaddeus A. Hoffmeister, *The Growing Importance of Advance Medical Directives*, 177 MIL. L. REV. 110, 117-18 (2003) (noting that advance directives that combine an individual instruction and a power of attorney for health care are becoming the standard format for most advance directives).

[41] Sabatino, *supra* note 15, at 62.

[42] *See id.*

[43] *Id.*

[44] *Id.*; *see also* Hoffmeister, *supra* note 40, at 117-18.

[45] *See* English & Meisel, *supra* note 39, at 355. Many states have different requirements for a valid advance directive. *Id.*

refuse unwanted medical treatment.[46] Courts developed this right to refuse unwanted medical treatment through a series of cases[47] that began with the seminal case of *In re Quinlan*.[48]

1. In re Quinlan

In *Quinlan*, 21-year-old Karen Quinlan ceased breathing for at least two fifteen-minute periods.[49] The lack of oxygen left her in a persistent vegetative state, and a respirator kept her alive.[50] Months later, after it was clear that Quinlan would never improve, Quinlan's father requested that she be disconnected from the respirator.[51] Her doctors refused, fearing that doing so would not conform to standard medical practices.[52] Quinlan's father petitioned the New Jersey courts to disconnect Quinlan's respirator.[53] In granting the father's petition, the New Jersey Supreme Court held that Quinlan had a right of privacy to choose to forego a "vegetative existence" and die by natural causes.[54] The court also held that her father could assert this right because it was the "only practical way to prevent destruction of [her] right."[55] Before *Quinlan*, no state recognized a patient's right to limit life-sustaining medical treatment.[56] After *Quinlan*, however, states began enacting statutes that recognized such rights.[57]

2. Cruzan v. Director, Missouri Department of Health

Although very influential, *Quinlan* lacked constitutional authority outside of Missouri because it was only a state court decision. It was not until four-

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[46] *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 281 (1990); Washington v. Glucksberg, 521 U.S. 702, 724 (1997).

[47] *Cruzan*, 497 U.S. at 269-92 (explaining the source of the right to refuse unwanted medical treatment).

[48] 355 A.2d 647 (N.J. 1976).

[49] *Id.* at 653-54.

[50] *Id.* at 654-55.

[51] *Id.* at 651.

[52] *Id.* at 655.

[53] *Id.* at 651.

[54] *Id.* at 663-64; *but see* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 279 n.7 (1990) (noting that although many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy, the Supreme Court believes that the right is more properly provided by the Fourteenth Amendment's liberty interest).

[55] *Quinlan*, 355 A.2d at 664.

[56] Stephen M. Parke, *Death and Dying in Army Hospitals: The Past and Future Roles of Advance Medical Directives*, 1994-AUG ARMY LAW. 3, 3 (1994).

[57] *See id.* at 4.

teen years later in *Cruzan v. Director, Missouri Department of Health*[58] that the U.S. Supreme Court recognized a fundamental right to refuse life-sustaining medical treatment.[59] In *Cruzan*, the U.S. Supreme Court addressed the narrow issue of whether Missouri could constitutionally require clear and convincing evidence of an incompetent patient's wishes concerning the withdrawal of life-sustaining treatment before complying with such a request.[60]

An auto accident severely injured Nancy Cruzan, leaving her in a persistent vegetative state and dependent on feeding tubes.[61] After about five years, when it became apparent that Cruzan would never regain her brain function, her parents requested that her feeding tube be withdrawn.[62] The physicians refused to comply without court approval.[63] Cruzan's parents sought and received authorization from the state trial court for termination of the life support.[64] A divided Missouri Supreme Court, however, reversed the decision, holding that no one can withdraw an incompetent's life-sustaining medical treatment without the incompetent's advance directive[65] or clear and convincing evidence of the incompetent's wish to refuse such treatment.[66]

The U.S. Supreme Court held that because of the legitimate state interest at stake—the unqualified interest of the preservation of life—and the overwhelming finality of the decision, Missouri could constitutionally apply a clear and convincing evidence test to the petition to withdraw life support.[67] In doing so, however, the Court also strongly suggested that the Constitution protects the traditional right to refuse unwanted medical treatment.[68] The Court began by recognizing that at common law, "even the touching of one person by another without consent and without legal justification was a battery."[69] The Court added that "no right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[70]

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[58] 497 U.S. 261 (1990).

[59] *Id.* at 281.

[60] *Id.* at 280.

[61] *Id.* at 266.

[62] *Id.* at 267.

[63] *Id.* at 268.

[64] *Id.*

[65] The Missouri Supreme Court expressly held that an advance directive provided the necessary clear and convincing evidence of a patient's wishes. *Id.* at 268-69.

[66] *Id.*

[67] *Id.* at 281-82.

[68] *Id.* at 279.

[69] *Id.* at 269.

[70] *Id.* (citation omitted).

This right to bodily integrity provides the foundation of the doctrine of informed consent for medical treatment.[71] The informed-consent doctrine is "firmly entrenched" in American tort law.[72] The logical corollary of this doctrine is that the patient has the right to deny consent, or, in other words, to refuse medical treatment.[73] After recognizing that the common law doctrine of informed consent encompasses the right of a competent individual to refuse medical treatment, the Court strongly suggested that the Constitution also protected such a right: "[i]t cannot be disputed that the Due Process Clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment."[74]

The Court did not decide the issue of whether a state is required to defer to a surrogate's decision if sufficient evidence established that the patient wanted that individual to make such decisions.[75] In her concurrence, however, Justice O'Connor held that the Constitution might require states to comply with a surrogate or agent's decision to protect the patient's liberty interest in refusing medical treatment.[76] She explained that the recognition and enforcement of an agent's decision would be a valuable safeguard of the patient's right to direct his medical care.[77]

3. Washington v. Glucksberg

Washington v. Glucksberg[78] bolstered *Cruzan* by affirming that the Constitution protects a right to refuse medical treatment. In *Glucksberg*, the Court held that the State of Washington's prohibition against "causing or aiding" a suicide was constitutional.[79] Plaintiffs argued that cases like *Cruzan* support an interest in self-sovereignty, which includes a right to commit suicide or to assist in suicide.[80] The Court disagreed, however, distinguishing the fundamental right to refuse medical treatment and the plaintiffs' asserted right to suicide.[81] The Court held that the right to refuse medical treatment is "entirely consistent with this Nation's history and constitutional traditions,"[82] whereas

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[71] *Id.* The common law doctrine of informed consent requires a physician to obtain the patient's consent before proceeding with medical treatment. *Id.*

[72] *Id.*

[73] *Id.* at 270.

[74] *Id.* at 281.

[75] *Id.* at 287 n.12.

[76] *Id.* at 289 (O'Connor, J., concurring).

[77] *Id.* at 290-92.

[78] 521 U.S. 702 (1997).

[79] *Id.*

[80] *Id.* at 724.

[81] *Id.* at 724-26.

[82] *Id.* at 725.

the right to commit or assist in suicide has never enjoyed similar legal protection.[83]

4. Patient Self-Determination Act

Legislatures joined the judiciary in recognizing the right to refuse medical treatment and the valuable role advance directives can play in protecting that right.[84] As stated earlier, *Quinlan* sparked many state legislatures to enact advance directive statutes.[85] Likewise, *Cruzan* triggered federal legislation on advance directives.[86]

Touted as the "Miranda warning" for the terminally ill,[87] the Patient Self-Determination Act ("PSDA") was the first significant federal legislation concerning the use of advance directives to control health-care treatment and decisions.[88] The PSDA requires all Medicare and Medicaid organizations such as hospitals, nursing facilities, and hospices to:

> (1) provide written information to patients at the time of admission or initial provision of services concerning
>
> a. the patient's right to accept or refuse life-sustaining medical treatment and right to formulate advance directives, and
>
> b. the organization's written policies respecting the implementation of such rights;
>
> (2) document in the patient's medical records whether they have executed advance directives;
>
> (3) not condition the provision of health care or otherwise discriminate against an individual based on whether that individual has executed an advance directive;
>
> (4) ensure compliance with requirements of state law respecting advance directives at facilities of the organization; and
>
> (5) provide education for staff and the community on issues concerning advance directives.[89]

The PSDA also requires each state to provide a written description of state law regarding advance directives.[90] Health-care providers must distribute this

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[83] *Id.* at 725-26.

[84] *See* Parke, *supra* note 56, at 4; *see also* Patient Self-Determination Act ("PSDA"), 42 U.S.C.A. §§ 1395cc, 1396a (2004); Uniform Health-Care Decisions Act ("UHCDA"), HAW. REV. STAT. § 327E-3 (2004).

[85] Parke, *supra* note 56, at 4.

[86] Larson & Eaton, *supra* note 17, at 255 (noting that efforts to pass the PSDA received a major boost from the *Cruzan* ruling, which emphasized the importance of advance directives).

[87] *Id.* at 251.

[88] Parke, *supra* note 56, at 6.

[89] 42 U.S.C.A. § 1395cc; *see also id.* § 1396a.

[90] Larson & Eaton, *supra* note 17, at 268 (citing scattered sections in 42 U.S.C.).

description to patients upon admission.[91] The expressed purpose[92] of the PSDA was to educate individuals about their rights regarding medical treatment and to help them exercise those rights if they so desired.[93] Proponents of the law believed that if given information, more people would execute advance directives and thereby avoid the problems and litigation over the initiation or continuation of unwanted life-sustaining medical treatment.[94]

The PSDA had limited success in achieving these goals.[95] Although the states substantially complied with the PSDA by providing succinct and clear descriptions of the law, the manner in which this information was distributed significantly reduced its effectiveness.[96] Hospitals usually distributed the information perfunctorily with little verbal explanation or routine follow-up.[97] Furthermore, they did not check for comprehension.[98] The absence of active physician participation in the education process may also have limited the effectiveness of the educational component of the PSDA.[99]

Moreover, the PSDA did not significantly increase the number of advance directives executed.[100] Before the enactment of the PSDA, approximately fifteen to twenty percent of the population executed advance directives.[101] After the enactment of the PSDA, many researchers estimated only a slight increase, if any, in the execution of advance directives.[102] Additionally, a recent government report stated that only thirty-three to fifty percent of those who know about advance directives actually execute one.[103] Thus, even if the entire adult population were aware of advance directives, it is unlikely that more than fifty percent would actually use one.[104]

5. *Uniform Health-Care Decisions Act*

In August 1993, the Uniform Law Commissioners promulgated the next significant statute concerning the use of advance directives, the Uniform

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[91] 42 U.S.C.A. § 1395cc; *see also id.* § 1396a.

[92] Sen. John C. Danforth (R-Missouri), who introduced the bill, mainly wanted an increase in the use of advance directives, which would thereby decrease the nation's health-care spending. Larson & Eaton, *supra* note 17, at 258-61.

[93] *Id.* at 256-62.

[94] *Id.* at 257-58.

[95] *Id.* at 250.

[96] *Id.* at 268-75.

[97] *Id.* at 269.

[98] *Id.*

[99] *Id.* at 272.

[100] *Id.* at 277.

[101] *Id.* at 276.

[102] *Id.* at 277.

[103] *Id.*

[104] *Id.*

Health-Care Decisions Act ("UHCDA").[105] The UHCDA aimed to: (1) recognize the right of a competent individual to decide all aspects of his health care in all circumstances, including the right to refuse life-sustaining medical treatment; (2) replace existing legislation on advance directives with a single statute; (3) simplify and facilitate the execution of advance directives; (4) ensure that decisions regarding an individual's health care be governed by the individual's own desires; (5) ensure compliance by health-care providers; and (6) provide a procedure for the resolution of disputes.[106]

To simplify and facilitate the execution of advance directives, the UHCDA keeps execution requirements to a minimum.[107] Two assumptions drive this: (1) the elaborate execution requirements found in many existing statutes make advance directives more difficult to execute and unnecessarily inhibit their use, thereby defeating the intent of advance-directive legislation and (2) such requirements do little, if anything, to prevent fraud or enhance reliability.[108] Under the UHCDA, an individual instruction may be either oral or written.[109] A power of attorney for health care must be in writing and signed by the principal, but it does not need to be witnessed or acknowledged.[110]

Although the UHCDA encourages and facilitates the use of advance directives, it also recognizes that many people fail to plan for their futures.[111] Consequently, the UHCDA provides two back-up provisions.[112] One section specifies when individuals other than a patient's agent or guardian may act as a "surrogate"[113] and make health-care decisions for the patient.[114] The other section addresses health-care decision-making by guardians.[115]

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[105] English & Meisel, *supra* note 39, at 357.

[106] Unif. Health-Care Decisions Act, 9 U.L.A. 144 (1999) (providing prefatory note on the UHCDA).

[107] English & Meisel, *supra* note 39, at 359-60.

[108] *Id.*

[109] *Id.* at 360.

[110] *Id.*; *but see* HAW. REV. STAT. § 327E-3(b) (2004) ("The power shall be in writing, contain the date of its execution, be signed by the principal, and be *witnessed* by one of the following methods . . . .") (emphasis added).

[111] English & Meisel, *supra* note 39, at 358.

[112] *Id.*

[113] "Surrogate" refers to an individual who, although not appointed by the patient or the court, acts as the medical decision maker for the incapacitated patient. *Id.* at 361; *see also* Unif. Health-Care Decisions Act § 1, 9 U.L.A. 149 (1999) (defining "surrogate"); HAW. REV. STAT. § 327E-2 (2004) (same). "Agent" refers to a surrogate appointed by the patient. English & Meisel, *supra* note 39, at 361; *see also* 9 U.L.A. 148 (defining "agent"); HAW. REV. STAT. § 327E-2 (same). "Guardian" refers to a judicially appointed surrogate. English & Meisel, *supra* note 39, at 361; *see also* 9 U.L.A. 148 (defining "guardian"); HAW. REV. STAT. § 327E-2 (same).

[114] English & Meisel, *supra* note 39, at 358.

[115] *Id.*

The UHCDA was drafted in response to the need for more comprehensive and consistent legislation regarding advance directives among the states.[116] Because state legislation on advance directives were often developed sporadically, many states had fragmented, incomplete, and frequently inconsistent sets of rules.[117] Thus, many statutes inappropriately inhibited, rather than facilitated, the use of advance directives.[118] Given the increasing mobility of society, where advance directives executed in one state must frequently be implemented in another, the laws needed more uniformity.[119]

Unfortunately, as of late 2004, only six states—Hawai'i, Delaware, Maine, Mississippi, California, and New Mexico—have adopted the UHCDA.[120] Furthermore, although the UHCDA may have improved the states' facilitation of advance directives, it still fails to take into account two common reasons why people do not execute one: laziness and procrastination.[121] Deep profound reasons, such as religion, are not the only obstacles against executing an advance directive.[122] Many people fail to execute an advance directive simply because they "don't feel like it," or feel that "it can wait until later."[123] This partly explains why legislation that only encourages the use of advance directives, such as the PSDA and UHCDA, still fail to get more people to use advance directives. No matter how much the government educates, encourages, and facilitates the use of advance directives, a significant portion of the population will still fail to execute an advance directive.[124] Therefore, in addition to educating, encouraging, and facilitating the use of advance direc-

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[116] *Id.* at 356-57.

[117] *Id.* at 356.

[118] *Id.* (explaining that the execution requirements for advance directives often go well beyond what is required for the execution of a will).

[119] *Id.* The need for "portable" advance directives was especially apparent among military personnel who have transient lifestyles. *See* Hoffmeister, *supra* note 40, at 122. Congress responded to this issue by enacting 10 U.S.C. § 1044c, which essentially created federal recognition of military advance directives. *Id.* at 122-24.

[120] Unif. Health-Care Decisions Act References & Annotations, 9 U.L.A. 8 (Supp. 2004) (providing table of jurisdictions wherein the UHCDA has been adopted).

[121] *See* Charles P. Sabatino, *The New Uniform Health-Care Decisions Act: Paving a Health Care Decisions Superhighway?*, 53 MD. L. REV. 1238, 1243 (1994). The UHCDA's policy to affirm the legitimacy and value of direct communication between doctor and patient may dissipate the incentive to create a formal directive. *Id.* For example, patients might think: "[w]hy bother, if I can just tell my physician [later]?". *Id.*

[122] *See id.*

[123] *See id.*

[124] *See* Larson & Eaton, *supra* note 17, at 277 (discussing the PSDA's limited success in increasing the number of people who execute an advance directive); *see also supra* notes 121-23 and accompanying text (discussing how laziness and procrastination limit the PSDA and UHCDA).

tives, the government must enact legislation that mandates the use of advance directives.

B. Mandatory Advance Directives: The Necessary Next Step

Despite the general consensus that an advance directive is a valuable tool in ensuring the protection of an individual's fundamental right, Congress and state legislatures have hesitated from mandating the use of advance directives.[125] In fact, both the PSDA and UHCDA expressly forbid health-care providers from conditioning medical treatment on the execution of an advance directive.[126] One concern that PSDA opponents expressed, and which will undoubtedly resurface in the face of legislation mandating the use of advance directives, was the fear that indigents would be pressured into choosing to discontinue life-sustaining treatment, or, in other words, pressured to die.[127] Although a valid concern, it can be addressed with minimal effort on behalf of whoever helps the indigent execute the advance directive.

An advance directive protects a person's *choice* regarding his health care.[128] It *does not* encourage a person to die. If an indigent is sufficiently informed of his right to choose, then he would not feel pressured to discontinue treatment. Rather, the indigent would know that, if he wishes, he could choose to accept life-prolonging treatment for as long as possible.

Sufficiently informing an indigent of his right to choose is not an arduous task. Whoever helps the indigent execute an advance directive—whether it is a physician, nurse, hospital administrative staff, Medicaid representative, Legal Aid staff, or pro bono attorney—need only spend a few minutes emphasizing the fact that he has a right to choose. Thus, the fear of pressuring indigents into choosing to discontinue treatment is not substantial. If courts and lawmakers really believe that "no right is held more sacred . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others," [129] then advance directives must be made mandatory. Current laws that forbid such a mandate, such as the PSDA and UHCDA, must be changed to allow it.

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[125] *See* Larson & Eaton, *supra* note 17, at 256 (noting that the only legislator who actively opposed the PSDA feared that indigents might be forced to sign advance directives as a means to discontinue treatment).

[126] 42 U.S.C.A. § 1395cc(f)(1)(C) (2004); *see id.* § 1396a(w)(1)(C) (2004); HAW. REV. STAT. § 327E-7(h) (2004).

[127] *See* Larson & Eaton, *supra* note 17, at 256.

[128] *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 289-92 (1990) (O'Connor, J., concurring) (suggesting that advance directives are valuable safeguards in protecting a person's fundamental right to *accept or refuse* medical treatment).

[129] *Id.* at 269.

To effectively mandate the use of advance directives, the government should condition the provision of valuable benefits or privileges—such as Medicare and Medicaid benefits, health insurance, and driver's licenses—on the execution of an advance directive. Such legislation would not be facially unconstitutional because it would only restrict *benefits* and *privileges*, not fundamental rights.[130] Moreover, conditioning such benefits and privileges is rationally related to the objectives of (1) protecting an individual's right to refuse or accept medical treatment and (2) saving billions of dollars in health-care costs.[131] For example, the first bill could provide:

> (a) Recipients of Medicare and Medicaid benefits must execute an advance directive to qualify for receipt of such benefits.
>
> (b) The execution of advance directives need only meet the execution requirements provided by the Uniform Health-Care Decisions Act.[132]
>
> (c) A copy of the advance directive must be provided to the appropriate Medicare and Medicaid office upon application for benefits. Individuals who were receiving benefits prior to the passing of this bill will have six months to provide a copy of their advance directive.
>
> (d) Failure to comply with this section will result in denial of benefits.[133]

To ensure the use of advance directives among people who would otherwise not qualify for Medicare or Medicaid benefits, the government could also make health insurance companies condition their provision of insurance on the execution of an advance directive. For example, the next bill could provide:

> (a) Every health-insurance provider must require each of its policyholders to execute an advance directive upon reaching the age of thirty.[134] The execution

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[130] *See* Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (defining fundamental rights under the Due Process Clause as those that are "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty"). Medical treatment itself is not guaranteed by the Constitution. If it were, then the government would be required to provide free health insurance or health care to everyone.

[131] Although they are not "deeply rooted in this Nation's history and tradition" nor "implicit in the concept of ordered liberty," these benefits and privileges have become very valuable in today's society. People want to have Medicare/Medicaid benefits and health insurance because, for the average individual, health care is almost impossible to afford without them. *See Health Access and Affordability*, *supra* note 20. Similarly, many people have grown so dependent on driving as a means of transportation that conditioning their ability to legally drive will be an effective way to meet the said objectives.

[132] Under the UHCDA, an individual instruction may be either oral or written. Unif. Health-Care Decisions Act § 2, 9 U.L.A. 151 (1999). A power of attorney for health care must be in writing and signed by the principal. *Id.*

[133] Author's Proposed Legislation Conditioning the Provision of Medicare and Medicaid (2004).

[134] Admittedly, thirty years old is a somewhat arbitrary age. Presumably, however, most thirty-year olds have formed an educated opinion as to their health care and, therefore, should be able to express their health-care preferences through an advance directive.

of advance directives need only meet the execution requirements provided by the Uniform Health-Care Decisions Act.[135] A copy of either the written advance directive or the physician's recordation of an oral advance directive must be provided to the provider no later than six months after the policyholder reaches thirty. Policyholders should be encouraged to regularly update their advance directives.

(b) If a policyholder fails to execute an advance directive within six months after reaching the age of thirty, the provider must cancel the policyholder's policy. The policyholder will forfeit any payment already made to the provider for such policy. In the case where the policyholder (i) is an employee in a state that mandates health-insurance coverage, and (ii) receives health insurance through his employment, the provider shall not cancel the policy. Instead, the provider shall charge the employee and employer an amount equal to the fine discussed in subsection (c).

(c) A provider's failure to comply with this section will subject it to a fine of no less than $5,000. An outstanding fine will be treated like a federal tax lien on the provider's assets.[136]

To reach the people who are uninsured, the government could condition a privilege that many in today's society enjoy and depend on—driving. For example:

(a) General rule. Upon reaching the age of thirty[137] or thereafter, anyone who wishes to apply for a driver's license or renew a driver's license must execute an advance directive. The execution of advance directives need only meet the execution requirements provided by the Uniform Health-Care Decisions Act.

(b) Consequences of noncompliance. Failure to comply with subsection (a) will result in a denial of the issuance of the driver's license.[138]

Lastly, to ensure advance-directive use among those people who are not affected by the foregoing proposed legislation, the government could require all health-care providers to withhold non-emergency room medical treatment[139] until the patient executes an advance directive. For example:

(a) All health-care providers that receive Medicare or Medicaid funds must notify their patients that the provision of "non-emergency room" ("non-ER") health care will be conditioned on whether the patient has executed an advance directive. Upon receiving notice of such condition from their health-care provider, patients will have a six-month grace period during which they must

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[135] *See supra* note 132 (discussing the execution requirements under the UHCDA).

[136] Author's Proposed Legislation Conditioning the Provision of Health Insurance (2004).

[137] *See supra* note 134.

[138] Author's Proposed Legislation Conditioning the Provision of Driver's Licenses (2004).

[139] The author uses the term "non-emergency room" health care to refer to all medical treatment that is not provided through the health-care provider's emergency room, such as medical treatment received at a physician's office, clinic, or health center.

execute an advance directive. Health-care providers may provide non-ER health care during this grace period. After the grace period lapses, health-care providers must not provide non-ER health care to patients that have failed to execute an advance directive.

(b) "Non-emergency room" health care refers to all treatment that is not provided through the health care provider's emergency room.[140]

This law is not burdensome on either the health-care provider or the patient. Normally, a patient is already required to read and sign a few papers upon checking in at the hospital. If the patient does not have an advance directive, he could easily execute one upon checking in by filling out another form.[141]

These bills could include an opt-out provision to accommodate the minority of individuals who, for deeply religious or cultural reasons, refuse to execute an advance directive.[142] Admittedly, an opt-out provision would technically render advance directives non-mandatory and, therefore, may decrease the population's use of advance directives by several percent. Getting ninety-five percent of the population to use advance directives, however, would still be better than the current rate of use among the population, which is likely around twenty percent.[143]

III. ANALYSIS

The foregoing section explained why mandatory advance directives are the "only practical way to prevent destruction"[144] of a person's fundamental right

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[140] Author's Proposed Legislation Conditioning the Provision of Non-Emergency Room Health Care (2004).

[141] Studies show that distributing information on advance directives to patients at hospitals does not cause undue anxiety or distress. *See* Larson & Eaton, *supra* note 17, at 274. Rather, patients overwhelmingly favor receiving materials on advance directives. *Id.* Distributing forms for executing an advance directive should be no different.

[142] *See id.* (noting that many Asian and Hispanic-Americans believe that medical decisions, including end-of-life treatment, should be made by the family rather than the individual patient) (citation omitted); *but see* U.S. v. Lee, 455 U.S. 252 (1982) (rejecting an Amish employer's claim that he should be allowed to opt out of participating in the social security program because the social security tax violated his First Amendment right of freedom of religion).

An opt-out provision for religious reasons is a reasonable accommodation. At the same time, it is susceptible to abuse by strategic converts who profess to be of that faith only to get a desirable advantage. Thus, the government must be cautious of who it allows to opt-out. Otherwise, some people might convert to avoid compliance, thereby defeating the purpose of the statute. Defining the standards or guidelines the government should use in applying such an opt-out provision is beyond the scope of this paper.

[143] *See* Larson & Eaton, *supra* note 17, at 276 (noting that many researchers estimate that only about twenty percent of the population use advance directives) (citation omitted).

[144] *In re* Quinlan, 355 A.2d 647, 664 (N.J. 1976) (holding that honoring Quinlan's father's decision to discontinue Quinlan's life-sustaining treatment was the "only practical way to prevent destruction of [Quinlan's] right").

to refuse or accept medical treatment.[145] Moreover, the section also explained how advance directives can save Americans billions of dollars needlessly spent on unwanted medical treatment.[146] The following sections address the issue of the constitutionality of mandatory advance directives. Specifically, the sections explain why mandatory advance directives do not violate, but rather promote, the constitutional rights of freedom of thought and privacy.

A. The Right of Freedom of Thought

The U.S. Supreme Court has held that the First Amendment's right of freedom of thought prohibits the government from compelling people to say certain things.[147] In *West Virginia State Board of Education v. Barnette*,[148] the Supreme Court held that the West Virginia Board of Education could not constitutionally compel teachers and students to salute the American flag and pledge. In January 1942, the West Virginia Board of Education adopted a resolution requiring the salute and pledge pursuant to a West Virginia statute directing all schools to instruct students in history, civics, and in the Constitution.[149] The statute's purpose was to "teach[], foster[] and perpetuat[e] the ideals, principles and spirit of Americanism."[150] Students who were Jehovah's Witnesses refused to conform because of religious beliefs.[151] The schools considered the students insubordinate and expelled them.[152] The statute prohibited their readmission until the students complied with the flag salute and pledge.[153] The state also prosecuted the parents for their children's delinquency.[154]

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[145] *See supra* Part II.B (discussing why advance directives should be mandated); *see also* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 290-92 (1990) (O'Connor, J., concurring) (suggesting that advance directives are valuable safeguards of the patient's right to direct her medical care).

[146] *See* Larson & Eaton, *supra* note 17, at 282 (noting that the greater use of advance directives could save 100 billion dollars per year) (citation omitted).

[147] *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that the state could not constitutionally coerce students and teachers to salute the American flag and pledge); *see also* Wooley v. Maynard, 430 U.S. 705 (1977) (holding that the state could not constitutionally coerce an individual to participate in the dissemination of an ideological message by displaying it on his private property); United States v. United Foods, Inc., 533 U.S. 405 (2001) (holding that the Constitution prevented the government from compelling individuals to pay subsidies for speech to which they object).

[148] 319 U.S. 624.

[149] *Id.* at 625-26.

[150] *Id.* at 625.

[151] *Id.* at 629.

[152] *Id.* at 629-30.

[153] *Id.* at 629.

[154] *Id.* at 630.

The Supreme Court held that "national unity" or "patriotism" could not infringe upon the students' right of freedom of thought.[155] It explained that "the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[156] The Court declared that the First Amendment's right of freedom of thought and religion guarantees both the right to speak freely and the right to refrain from speaking at all, except when essential operations of government may require it for the preservation of an orderly society—as in the case of compulsion to give evidence in court.[157] Thus, absent a compelling governmental interest, the government cannot coerce an individual to affirm a belief.[158]

The Supreme Court took a similar view of the First Amendment in *Wooley v. Maynard*.[159] In *Wooley*, the Court held that New Hampshire could not constitutionally enforce criminal sanctions against persons who cover the state motto, "Live Free or Die," on their vehicle license plates because of their religious beliefs.[160] Citing *Barnette* for the proposition that the First Amendment protects the right to speak freely and the right to refrain from speaking at all, the Court declared: "[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee the concomitant right to decline to foster such concepts."[161] The Court, as in *Barnette*, acknowledged it faced a state measure that forced an individual to disseminate an ideological point of view that the individual disagreed with.[162] Likewise, as in *Barnette*, the *Wooley* Court held that the state invaded the "sphere of intellect and spirit"[163] that the First Amendment was intended to protect from government control.[164]

After identifying the plaintiffs' First Amendment rights implicated by the state action, the Court in both *Barnette* and *Wooley* proceeded to determine whether the state's countervailing interest was sufficiently compelling to justify the compulsory acts.[165] In *Barnette*, the Court held that the state's interest in fostering patriotism could not reach beyond constitutional limitations by compelling speech that conflicted with the individual's religious

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[155] *Id.* at 641-42.

[156] *Id.* at 642.

[157] *Id.* at 645 (Murphy, J., concurring).

[158] *See id.*

[159] 430 U.S. 705 (1977).

[160] *Id.* at 717.

[161] *Id.* at 714 (citing *Barnette*, 319 U.S. at 637).

[162] *Id.* at 715.

[163] *Id.* (quoting *Barnette*, 319 U.S. at 642).

[164] *Id.*

[165] *See Barnette*, 319 U.S. at 636-42; *Wooley*, 430 U.S. at 716.

belief.[166] Similarly, in *Wooley*, the Court held that the state's interest in disseminating an ideology, no matter how acceptable to some, cannot outweigh an individual's First Amendment right to avoid becoming the courier for such a message.[167]

On its face, both *Barnette* and *Wooley* may appear to support a finding that mandatory advance directives are unconstitutional. As the following sections explain, however, there are at least two reasons why they do not. First, *Barnette* and *Wooley* protect the right to refrain from speech that is *contrary* to one's belief; they do not prohibit speech that expresses one's belief. Second, even if *Barnette* and *Wooley* protect the right to refrain from any speech, including speech consistent with one's beliefs, they also provide that such a right is not absolute and can be overcome by a sufficiently compelling state interest.

1. Distinguishing Barnette *and* Wooley *speech from advance directives*

Unlike the speech compelled in *Barnette* or *Wooley*, mandatory advance directives would merely compel the individual to express *his* own thoughts, beliefs, or wishes concerning his health care.[168] The government would not be forcing an individual to adopt or affirm a belief that is contrary to his own beliefs.[169] Conversely, the *Barnette* plaintiffs claimed that by compelling the flag salute and pledge, the West Virginia Board of Education was unconstitutionally forcing them to "bow down" or "serve" a "graven image," which is directly forbidden by their religion.[170] The *Barnette* Court recognized the injustice of compelling an affirmation of a belief that directly clashes with one's deeply held faith: "[o]fficial compulsion to affirm what is *contrary* to one's religious beliefs is the antithesis of freedom of worship."[171]

Likewise, the *Wooley* plaintiffs claimed that New Hampshire was unconstitutionally forcing them to disseminate a motto that was "repugnant to their moral and religious beliefs."[172] The *Wooley* Court held that "[t]he First Amendment protects the right of individuals to hold a point of view *different*

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[166] *Barnette*, 319 U.S. at 641-42. "To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds." *Id.* at 641.

[167] *Wooley*, 430 U.S. at 716-17.

[168] *See* Sabatino, *supra* note 15, at 62 (defining advance directives as statements regarding one's health-care preferences).

[169] *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 289-92 (1990) (O'Connor, J., concurring) (noting that a patient's advance directive is generally an expression of his or her intent).

[170] *Barnette*, 319 U.S. at 629.

[171] *Id.* at 646 (Murphy, J., concurring) (emphasis added).

[172] *Wooley*, 430 U.S. at 706-07.

from the majority and to refuse to foster, in the way New Hampshire commands, *an idea they find morally objectionable.*"[173] Thus, the speech at issue here—the execution of advance directives—is different from the speech objected to in *Barnette* and *Wooley*. Here, the speech merely consists of a statement of one's own wishes concerning health care, not a statement repugnant to one's moral and religious beliefs. Therefore, *Barnette* and *Wooley* do not bar mandatory advance directives.

2. The right to refrain from speech is not absolute

An individual's religion may possibly prohibit him from making any end-of-life health-care decisions.[174] If this is true, then the mere execution of an advance directive may conflict with a deeply held religious belief. Even if *Barnette* and *Wooley* stand for the proposition that the right to refrain from speech includes any speech, regardless of content, such a right must nevertheless yield to the government's compelling interest in requiring advance directives.[175]

The Supreme Court expressly held that the identification of any First Amendment interests implicated by a state action is only the first step.[176] The second step is to determine whether the state's countervailing interest is sufficiently compelling to justify the coercion of speech.[177] Even the *Barnette* Court recognized that the First Amendment's right to refrain from speech is not absolute:

> No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do. The First Amendment does not go so far. Religious faiths, honestly held, do not free individuals from responsibility to conduct themselves obediently to laws which are either imperatively necessary to protect society as a whole from grave and pressingly imminent dangers . . . .[178]

Thus, the First Amendment protects the rights to speak freely or to refrain from speaking at all, "except in so far as essential operations of government

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[173] *Id.* at 715 (emphases added).

[174] *See supra* note 142 and accompanying text (explaining that some religions or cultures may discourage people from executing advance directives).

[175] *See Barnette*, 319 U.S. at 633-42; *Wooley*, 430 U.S. at 716. "No well-ordered society can leave to the individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do." *Barnette*, 319 U.S. at 643.

[176] *See supra* note 165 and accompanying text (discussing the Supreme Court's constitutional analysis in *Barnette* and *Wooley*).

[177] *See supra* note 165 and accompanying text (discussing the Supreme Court's constitutional analysis in *Barnette* and *Wooley*).

[178] *Barnette*, 319 U.S. at 643-44.

may require it for the preservation of an orderly society,-- [sic] as in the case of compulsion to give evidence in court."[179] *Jacobson v. Massachusetts*[180] demonstrates this well.

In *Jacobson*, the Supreme Court held that the government could constitutionally require people to be vaccinated for smallpox to protect the general public.[181] On February 27, 1902, the board of health for the city of Cambridge, Massachusetts, adopted a regulation that required all Cambridge residents to be vaccinated for smallpox.[182] The vaccination was free.[183] The regulation was the board's response to the increasing prevalence of smallpox in the city.[184] When the defendant refused to be vaccinated, he was convicted and fined pursuant to a state statute that gave the board of health the power to require and enforce the vaccinations of residents.[185]

The Court held that the liberty secured by the Constitution does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint.[186] Rather, there are manifold restraints and burdens to which every person is necessarily subject for the common good, health, and prosperity of the state.[187] Therefore, "[e]ven liberty itself, the greatest of all rights, is not [an] unrestricted license to act according to one's own will."[188] Rather, liberty is "only freedom from restraint under conditions essential to the equal enjoyment of the same right by others."[189] In other words, the Court explained that under the Constitution, "liberty" is actually "liberty regulated by law."[190] Under this "liberty," the *Jacobson* court recognized that the mandatory vaccination was necessary to protect the health, safety, and rights of the general public.[191]

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[179] *Id.* at 645 (Murphy, J., concurring).

[180] 197 U.S. 11 (1905).

[181] *Id.* at 26-27.

[182] *Id.* at 12-13.

[183] *Id.* at 13.

[184] *Id.* at 12.

[185] *Id.* at 13.

[186] *Id.* at 26.

[187] *Id.*

[188] *Id.* at 26-27 (quoting Crowley v. Christensen, 137 U.S. 86, 89 (1890)) (quotations omitted).

[189] *Id.* at 27 (quoting *Crowley*, 137 U.S. at 89) (quotations omitted).

[190] *Id.* The Court added:

> But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.

Id. at 29.

[191] *Id.* at 26-27.

Vaccination is not the only form of constitutional government compulsion. The government frequently requires people to do things they may not want to do. For example, the government requires people to pay taxes, register for the military draft, reach a certain age before drinking alcohol, and obey speed limits. The government not only compels individuals to do certain things for the protection of the general public, but also requires individuals to do things for their own good, such as wear seat belts and contribute to social security.

Mandatory advance directives would be another example of a constitutional government compulsion. The government has a compelling interest in protecting its citizens' "sacred" right to accept or refuse medical treatment.[192] Terri Schiavo's tragedy illustrates how vulnerable that right is without an advance directive.[193] No one should be forced to live in a severely diminished and possibly painful capacity against his or her will.[194] The opposite view is equally true: no one should be forced against his or her will to give up the one thing that can never be regained—one's life.[195]

Moreover, the government also has a compelling interest in keeping health-care spending down by preventing the provision of costly, unwanted medical treatment.[196] If Medicare funds are wasted on unwanted, and thus unnecessary, medical treatment, then the public suffers because that money could have been allocated to medical treatment that patients desperately needed and *wanted.* Moreover, as health-insurance companies continue to spend more on costly, unwanted medical treatment, the price of premiums will continue to rise until the average American will no longer be able to afford any health care.[197]

The government therefore has sufficiently compelling interests to justify mandatory advance directives. As illustrated in the proposed bills in Part II.B, the government would narrowly tailor its action by not burdening a funda-

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[192] Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 269 (1990) ("[N]o right is held more sacred, or is more carefully guarded, by common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."). An advance directive is a valuable safeguard of a patient's right to direct medical care. *Id.* at 290-92 (O'Connor, J., concurring); *see also In re* Quinlan, 355 A.2d 647, 664 (N.J. 1976) (holding that advance directives are the "only practical way to prevent destruction" of an individual's right to refuse or accept medical treatment).

[193] *See supra* notes 1-10 and accompanying text (describing the facts and circumstances of Terri Schiavo's life).

[194] *Cruzan*, 497 U.S. at 281 (holding that a person has the fundamental right to refuse or accept medical treatment).

[195] *Id.*

[196] *See Health Access and Affordability, supra* note 20 (describing how the government pays for most of the costly end-of-life treatment for patients).

[197] *See id.*

mental right and accommodate a potential religious and cultural minority with an opt-out provision.[198] A mandate to use advance directives would not be unreasonably burdensome to anyone involved. Individuals would only be required to meet the execution requirements set out in the UHCDA, which are very minimal.[199] The record keeper, whether it is a health-insurance company or the government, would merely have to keep a record of the individual's advance directive. Although this administrative task would incur some costs, these costs would be only a fraction of the costs that would otherwise be spent on unwanted end-of-life care. Therefore, even if there is a First Amendment right to refrain from any speech, such a right must yield to the government's compelling interests and narrowly tailored action.

B. The Right of Privacy

Like the rights found in the First Amendment, the constitutional right of privacy does not bar the government from mandating the disclosure of one's health-care preferences through an advance directive. The right of privacy has at least three forms.[200] The first is the right to have one's private affairs be free from unreasonable governmental surveillance and intrusion.[201] The second is the right to be free from government interference while making certain kinds of important decisions.[202] The third is the right to avoid public disclosure of personal matters.[203] Mandatory advance directives would implicate only the third form of privacy.[204]

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[198] *See supra* notes 133-40 and accompanying text (providing examples of proposed bills that would mandate the use of advance directives).

[199] *See supra* notes 107-10 and accompanying text (describing the UHCDA).

[200] *See* Whalen v. Roe, 429 U.S. 589, 599-600 (1977).

[201] *Id.*

[202] *Id.*

[203] *Id.*

[204] The Fourth Amendment directly protects the right to have one's private affairs be free from unreasonable government surveillance and intrusion. *Id.* Specifically, the Fourth Amendment protects the legitimate expectations of privacy. Minnesota v. Olson, 495 U.S. 91, 95 (1990) (citing Rakas v. Illinois, 439 U.S. 128, 143 (1978)). To be protected, legitimate expectations of privacy must have its source outside of the Fourth Amendment, either by reference to the concept of real or personal property law or to understandings that are recognized and permitted by society. United States v. Vicknair, 610 F.2d 372, 379 (5th Cir. 1980) (citing *Rakas*, 439 U.S. at 143 n.12).

Here, there is no legitimate expectation of privacy. An advance directive is simply an expression of one's health-care preferences. *See* Sabatino, *supra* note 15, at 62 (defining advance directive). In the medical context, such expressions are common and necessary because physicians cannot provide any treatment without the patient's consent. *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 269 (1990) (explaining the doctrine of informed consent). Even if there is a legitimate expectation of privacy, any search conducted by virtue of an advance directive would be reasonable in light of the government's compelling interests discussed above.

1. Avoiding public disclosures of personal matters

The Supreme Court has suggested the protection of the right to avoid public disclosure of personal matters in cases like *Whalen v. Roe*[205] and *Griswold v. Connecticut*.[206] Because the execution of an advance directive is merely an expression of one's preference regarding health care,[207] it is analogous to a simple disclosure of personal information. Thus, on its face, the privacy right to avoid public disclosure of personal matters appears to apply. People nevertheless are constitutionally compelled to make disclosures everyday. For example, whenever people apply for a job, license, or service, they usually have to disclose some personal information such as their name, address, telephone number, social security number, or credit card information. Such disclosures are necessary to help maintain an orderly society.[208]

The disclosure of one's preference in health care through an advance directive is no different. In *Whalen*, the Court recognized that the government could constitutionally compel such necessary disclosures. At the time of the complaint in *Whalen*, New York had a statute that required a copy of all prescriptions for certain type of drugs be sent to the state department of health for record-keeping and tracking purposes.[209] This legislation was New York's response to the problem of legitimate drugs being diverted into unlawful

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See Overstreet v. Lexington-Fayette Urban County Gov't, 305 F.3d 566, 577 (6th Cir. 2002) (holding that the government did not violate the Fourth Amendment because the search, which was conducted through a disclosure form, was reasonable). Therefore, mandating the use of advance directives would comply with the strictures of the Fourth Amendment.

The Supreme Court has also held that the Due Process Clause protects the privacy right to be free from government interference while making certain kinds of important decisions. *See* Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997). The Court explained that due process not only guarantees fair process but also substantively protects "liberty." *Id.* Thus, in addition to the specific freedoms protected by the Bill of Rights, the "liberty" protected by the Due Process Clause includes the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, to abortion, and to refuse unwanted medical treatment. *Id.* at 720. An advance directive is merely a statement expressing one's health-care preferences. *See* Sabatino, *supra* note 15, at 62 (defining advance directive). Mandating its use would not unreasonably burden an individual's ability to exercise his privacy rights. Therefore, the second form of the privacy right is not implicated either.

[205] 429 U.S. at 599-600.

[206] 381 U.S. 479, 483 (1965) ("[T]he First Amendment has a penumbra where privacy is protected from government intrusion.").

[207] *See* Sabatino, *supra* note 15 (defining advance directive).

[208] *See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 629, 643-44 (1943) (holding that a "well-ordered society" cannot give individuals an absolute right to make final decisions, unassailable by the State, as to everything they will or will not do).

[209] *Whalen*, 429 U.S. at 591-93.

channels.[210] The Court noted that the department of health took appropriate measures to ensure the protection of private information from public disclosure.[211]

In holding that the New York statute did not violate the plaintiffs' constitutional right to privacy, the Court reasoned that "disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies are often an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient."[212] Thus, "[r]equiring such disclosures to representatives of the State having responsibility for the health of the community, does not automatically amount to an impermissible invasion of privacy."[213] The Court declared that "although the Constitution affords protection against certain kinds of government intrusions into personal and private matters, there is no 'general constitutional right to privacy.'"[214] Nearly every governmental action interferes with personal privacy to some degree.[215] The important issue is whether that interference violates the Constitution.[216] The *Whalen* Court held that it did not.[217]

Likewise, in *Overstreet v. Lexington-Fayette Urban County Government*,[218] the Sixth Circuit found the government interference constitutional.[219] In *Overstreet*, a county employee brought an action against the county, challenging the constitutionality of a county policy mandating public disclosure of real estate holdings by certain employees and their family members.[220] The purposes of the county's mandatory disclosure policy were to promote public confidence in the integrity of the local government and to avoid the perception of a conflict between government employees' private interests and their public duties.[221] The *Overstreet* court explained that the constitutional right of privacy was restricted to protecting those rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty."[222] The plaintiff's

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[210] *Id.* at 591.

[211] *Id.* at 607 (Brennan, J., concurring) ("In this case, as the Court's opinion makes clear, the State's carefully designed program includes numerous safeguards intended to forestall the danger of indiscriminate disclosure.").

[212] *Id.* at 602.

[213] *Id.*

[214] *Id.* at 607-08 (Stewart, J., concurring) (quoting Katz v. United States, 389 U.S. 347, 350-51 (1967)).

[215] *Id.* at 608 (citing *Katz*, 389 U.S. at 350 n.5).

[216] *Id.*

[217] *Id.* at 602-04.

[218] 305 F.3d 566 (6th Cir. 2002).

[219] *Id.* at 574-76.

[220] *Id.* at 569-71.

[221] *Id.* at 569.

[222] *Id.* at 574.

privacy interest in his real estate holdings was far from being "fundamental."[223] The *Overstreet* court held that even if the plaintiff had a fundamental interest at stake, his interest would probably be outweighed by the public interest in the disclosure of his personal information.[224]

Here, as in *Whalen* and *Overstreet*, the government's compelling interests justify the compulsion of disclosure.[225] The government has a compelling interest in protecting its citizens' "sacred" right to accept or refuse medical treatment.[226] Moreover, the government also has a compelling interest in keeping health care affordable by avoiding costly, unwanted medical treatment.[227] Second, although there might be a legitimate interest in keeping one's health-care preferences private, this interest is not fundamental.[228] Third, the patient's advance directive would be protected from public disclosure in a similar way the patient's other medical information is protected.[229]

Lastly, as in *Whalen*, the disclosure of one's health care decisions is an "essential part of modern medical practice."[230] The common law doctrine of informed consent requires a physician to obtain the patient's consent before providing treatment.[231] In other words, the patient must tell his physician what type of treatment he wants or does not want before any such treatment is

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[223] *Id.* at 575.

[224] *Id.*

[225] *See supra* notes 192-97 and accompanying text (discussing the government's compelling interests in protecting an individual's constitutional right to accept or refuse medical treatment, and keeping the cost of health-care affordable by the average individual).

[226] Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 269 (1990). An advance directive is a valuable safeguard of the patient's right to direct medical care. *See id.* at 290-92 (O'Connor, J., concurring); *see also In re* Quinlan, 355 A.2d 647, 664 (N.J. 1976) (holding that advance directives are the "only practical way to prevent destruction" of an individual's right to refuse or accept medical treatment).

[227] *See Health Access and Affordability*, *supra* note 20.

[228] *See Overstreet*, 305 F.3d at 575 (noting that the privacy interest in one's personal finances and real estate holdings is far from being fundamental).

[229] The Standards for Privacy of Individually Identifiable Health Information, a set of regulations promulgated by the Secretary of Health and Human Services pursuant to the Health Insurance Portability & Accountability Act of 1996 ("HIPAA"), protects patients' privacy by regulating the ways in which certain medical information may be used by certain entities. *See* Kevin B. Davis, *Privacy Rights in Personal Information: HIPAA and the Privacy Gap Between Fundamental Privacy Rights and Medical Information*, 19 J. MARSHALL J. COMPUTER & INFO. L. 535, 536-37 (2001). Thus, when a copy of the advance directive is included in the patient's medical files, HIPAA protects this confidential information from disclosure. *Id.*; *see also* Whalen v. Roe, 429 U.S. 589, 607 (1977) (noting that the state department of health took appropriate measures to protect the private information from public disclosure).

[230] *See Whalen*, 429 U.S. at 602; *see also Cruzan*, 497 U.S. at 269 (discussing the doctrine of informed consent).

[231] *Cruzan*, 497 U.S. at 269.

given.[232] This instruction regarding treatment preferences is essentially what an advance directive is.[233] In fact, mandating the use of advance directives is a logical extension to the doctrine of informed consent—both are intended to ensure that a person's fundamental right to refuse or accept medical treatment is protected.[234] Therefore, considering that the doctrine of informed consent is "firmly entrenched" in American jurisprudence,[235] the Constitution does not bar the government from requiring the disclosure of one's health-care preferences through an advance directive.

2. Hawai'i's constitutional right of privacy

Unlike the United States Constitution, which does not contain an express provision guaranteeing the right of privacy, the Hawai'i State Constitution explicitly establishes this right.[236] Because of this specific provision establishing the right of privacy, the Hawai'i Supreme Court noted that it is "free to give broader privacy protection than that given by the federal constitution."[237] In other words, because of this possible broader privacy protection to individuals, the right of privacy under the Hawai'i Constitution could provide the basis not found in the United States Constitution to withhold disclosure of one's health-care preferences.

The Hawai'i Supreme Court also held, however, that the "privacy right found in [the Hawai'i State Constitution] is similar to the federal right and that no 'purpose to lend talismanic effect' to abstract phrases such as 'intimate decision' or 'personal autonomy' can 'be inferred from [it], any more than . . . from the federal decisions."[238] No Hawai'i case law holds or suggests that Hawai'i courts would analyze this issue differently than the Supreme Court did or find the government interests discussed above not compelling. Therefore, because of the similar analyses under both constitutions and the compelling government interests involved, the Hawai'i State Constitution most likely will not bar the government from mandating the use of advance directives.

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[232] *Id.*

[233] *See* Sabatino, *supra* note 15, at 62 (defining advance directives).

[234] *See Cruzan*, 497 U.S. at 269 (explaining how informed consent and advance directives protect a person's bodily integrity).

[235] *See id.*

[236] HAW. CONST. art. I, § 6.

[237] State v. Mallan, 86 Hawai'i 440, 448, 950 P.2d 178, 186 (1998) (citation omitted).

[238] Baehr v. Lewin, 74 Haw. 530, 555-56, 852 P.2d 44, 57 (1993) (citing State v. Mueller, 66 Haw. 616, 630, 671 P.2d 1351, 1360 (1983) (alteration in original)).

IV. CONCLUSION

Everyone has a fundamental right to accept or refuse medical treatment.[239] Unfortunately, millions of people lose this "sacred" right because they become incapacitated without providing sufficient proof of their pre-incapacitation wishes regarding end-of-life medical treatment.[240] The courts and legislatures agree that the use of advance directives would protect this fundamental right.[241] Unfortunately, current legislation has failed to significantly increase the use of advance directives in the population.[242] One of the reasons why more people do not use advance directives is because people are either lazy or like to procrastinate.[243] Therefore, no matter how much the government encourages the use of advance directives, most of the population will not use them unless the government requires it.

Mandating the use of advance directives may implicate the constitutional rights to refrain from speaking[244] and privacy.[245] Even if these rights are implicated, however, the government has a compelling interest in protecting its citizens' "sacred" right to accept or refuse medical treatment.[246] Terri Schiavo's tragedy illustrates how vulnerable this right is without further protection. The events that caused Terri's persistent vegetative state were unfortunate, but the events that followed, namely, the long, bitter feud between her parents and husband, were even more disheartening because the problems could have been avoided with the execution of an advance directive. No one should have to go through what Terri has gone through.

In addition to protecting its citizens' "sacred" right to accept or refuse medical treatment, the government has a compelling interest to keep health-care spending down by preventing the provision of costly, unwanted medical treatment.[247] The cost of health care is escalating out of control. If nothing is done soon, the average individual will not be able to afford essential health services such as getting vaccination shots or other necessary medical attention

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[239] *Cruzan*, 497 U.S. at 281.

[240] *See* Larson & Eaton, *supra* note 17, at 277 (estimating that no more than fifty percent of the two million people who die annually in the United States have an advance directive).

[241] *See, e.g.*, *Cruzan*, 497 U.S. at 289-92 (O'Connor, J., concurring) (suggesting that advance directives are valuable safeguards in protecting a person's fundamental right to accept or refuse medical treatment).

[242] *See* Larson & Eaton, *supra* note 17, at 277.

[243] *See supra* note 121 and accompanying text (explaining that merely encouraging the use of advance directives is insufficient because non-compelling reasons such as laziness or procrastination can deter a person from executing an advance directive).

[244] *See supra* Part III.A.

[245] *See supra* Part III.B.

[246] *Cruzan*, 497 U.S. at 269.

[247] *See Health Access and Affordability*, *supra* note 20.

for his child. These compelling interests justify the government's possible implication of the constitutional rights to refrain from speaking and privacy.[248] Therefore, the government can and should mandate the use of advance directives.

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[248] *See supra* Part III.

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Holding Hawai'i Nursing Facilities Accountable for the Inadequate Pain Management of Elderly Residents[1]

I. INTRODUCTION

Lester Tomlinson was diagnosed with an extremely painful and incurable form of lung cancer.[2] To ensure that his last days would be free from pain and met with dignity, he executed an advance directive requesting that pain medication be administered, even if it hastened his death.[3] Despite these instructions, Tomlinson spent the last twenty days of his life in "unremitting agony."[4]

On January 18, 2001, Tomlinson entered Mt. Diablo Hospital complaining of shortness of breath and chest pain.[5] An initial assessment indicated continuous pain in his back, shoulder, and lungs.[6] At times the pain reached an intensity of level 10, which on a scale of 1 to 10 meant the worst pain imaginable.[7] Hospital protocol required pain assessment at least every four hours, and the facility's pain standard goal was level 3 or less.[8] Nonetheless, Tomlinson continuously reported pain ranging from levels 3 to 9.[9] Records also indicated that Tomlinson lost his glasses in the emergency room and had hearing difficulties, which severely impaired his ability to understand and communicate.[10] Throughout the six days Tomlinson remained hospitalized, nurses failed to notify the hospital physician about his continuous pain spikes.[11] When Tomlinson was moved to a skilled nursing facility, the

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[1] A prior version of this Comment appears on-line in the Univ. of Haw. Public Health Law & Policy Journal. *See* Shawna Oyabu, Article, *Inadequate Pain Management: A New Tort for Hawai'i?*, 1 PUB. HEALTH L. & POL'Y J. 1 (last updated Oct. 18, 2004), *at* http://www.hawaii.edu/phlo/phlpj/v1/pdf_files/v1-01-Oyabu.pdf (on file with author).

[2] Pls.' Mediation Br., Tomlinson v. Bayberry Care Ctr., No. C 02-00120 (Cal. Super. Ct. Contra Costa County 2003), *available at* http://www.compassionindying.org/tomlinson/tomlinson_brief.pdf (last visited Aug. 20, 2004) (on file with Compassion in Dying Federation) (copy on file with author).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *See id.*

[10] *Id.*

[11] *Id.*

physician's transfer order contained no pain medication, despite the fact that he had required the pain medication Vicodin daily.[12]

An initial assessment of Tomlinson upon admittance into Bayberry Care Center showed pain at levels 6 to 7.[13] It also noted that medication effectively relieved the pain.[14] In this type of situation, facility procedure required use of a Pain Flow Sheet, which provided for treatment, evaluation, and assessment of the pain, and for continuing care to ensure the patient's comfort.[15] No sheet was initiated, however, and he suffered from uncontrolled pain for three days.[16] Tomlinson finally received Vicodin on his fourth day at Bayberry, but only after his daughter, Ginger, called the assigned physician to report that he was in pain, had no medication, and had become increasingly confused.[17] No follow-up assessment was made to determine the effectiveness of the medication.[18] When Vicodin failed to relieve Tomlinson's pain, nurses' reports indicated that he was "yelling all night" and "screaming in pain."[19] According to Ginger, she once found her father "moaning and crying . . . and asking to die."[20] She even bought earplugs for her father's roommate, after he was unable to sleep for four consecutive nights due to the moaning and crying.[21]

After researching other available pain medications, Ginger requested a prescription for a fentanyl patch.[22] Again, Dr. Whitney prescribed the requested

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[12] *Id.* Vicodin (manufactured by Abbot Laboratories) is a prescription drug containing hydrocodone bitartrate (opioid analgesic) and acetaminophen (non-opiate), used to treat moderate to moderately severe pain. PHYSICIANS' DESK REFERENCE 525 (Thomson PDR, 58th ed. 2004).

[13] Pls.' Mediation Br., *Tomlinson* (No. C 02-00120).

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* Upon transfer to the nursing facility, Tomlinson was assigned a new physician, Dr. Eugene Whitney. *Id.* Dr. Whitney's practice involved making regularly scheduled rounds to various nursing homes, to see patients whose primary physicians would not treat them while in the homes. *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.* Drugs classified as "opioids" are commonly used to treat moderate to severe pain, including cancer pain and chronic noncancer pain. NAT'L PHARM. COUNCIL, INC., PAIN: CURRENT UNDERSTANDING OF ASSESSMENT, MANAGEMENT, AND TREATMENTS 38 (Dec. 2001) (citation omitted). Opioids are used when pain does not respond to "nonopioids" such as acetaminophen or nonsteroidal anti-inflammatory drugs. *Id.* at 33-38 (citations omitted). Opioids can also be combined with nonopioid analgesics, allowing for use of lower dose. *Id.* at 38. Fentanyl, also sold under the trade name Duragesic (manufactured by Janssen Pharmaceutica), is a strong opioid analgesic used to treat chronic pain that cannot be effectively relieved by lesser means such as acetaminophen-opioid combinations. PHYSICIANS' DESK REFERENCE, *supra* note 12, at 1751.

medication, but did not conduct a follow-up assessment.[23] When the patch proved ineffective, Tomlinson's wife, Rosa, requested a prescription for a low dose of morphine sulfate to be administered around-the-clock.[24] As was the pattern now, the medication was prescribed but no follow-up assessment was made.[25] During the course of Tomlinson's stay, Dr. Whitney examined the patient on only one occasion, sixteen days after admittance.[26]

On the twentieth day, Ginger sent a fax to Dr. Whitney informing him that her father had been in pain throughout his stay at the center, and asking whether he should be hospitalized.[27] Ginger never received a response.[28] Lester Tomlinson died later that day.[29]

Although Lester Tomlinson's experience took place in a California nursing home, inadequate treatment of chronic pain[30] is a recognized problem nationwide.[31] Studies show that those most at risk of inadequate treatment are frail elderly nursing home residents—individuals aged 65 or over.[32] A major factor contributing to this risk is the inability of nursing home residents to personally assert the right to adequate pain relief, stemming largely from the absence of a clear standard of care for pain management. As a result, health care providers have not been held accountable for their actions. A legal theory emerging from California has now established a standard of care for pain management, however, making the prevailing practice of undertreatment unacceptable.[33] This Comment posits that under the newly established theory,

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[23] Pls.' Mediation Br., *Tomlinson* (No. C 02-00120).

[24] *Id.* Because responses to specific opioids and dosages will differ among individuals, various opioids should be tried until pain is effectively relieved. NAT'L PHARM. COUNCIL, INC., *supra* note 22, at 38 (citation omitted). Morphine sulfate is a potent opioid analgesic, used to treat moderate to severe pain. PHYSICIAN'S DESK REFERENCE, *supra* note 12, at 2841. Respiratory depression is a chief danger of using morphine, and it is recommended for use only when deemed essential. *Id.*

[25] *See* Pls.' Mediation Br., *Tomlinson* (No. C 02-00120).

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] NAT'L PHARM. COUNCIL, INC., *supra* note 22, at 11. Chronic pain is defined as "pain that extends beyond the period of healing, with levels of identified pathology that often are low and insufficient to explain the presence and/or extent of the pain." *Id.* (citation omitted).

[31] *See* Ben A. Rich, *A Prescription for the Pain: The Emerging Standard of Care for Pain Management*, 26 WM. MITCHELL L. REV. 1, 2-8 (2000).

[32] ARTHRITIS FOUND., PAIN IN AMERICA: HIGHLIGHTS FROM A GALLUP SURVEY, *at* http://www.arthritis.org/conditions/speakingofpain/factsheet.asp (last visited Aug. 20, 2004) (highlighting results from a Gallup survey conducted by The Gallup Organization from May 21 to June 9, 1999, sponsored by Merck & Co., Inc.); *see* Barry R. Furrow, *Pain Management and Provider Liability: No More Excuses*, 29 J.L. MED. & ETHICS 28, 42 (2001).

[33] *See* discussion *infra* Part III.

existing Hawai'i State laws are sufficient to provide nursing home residents with effective remedies to assert their right to adequate pain treatment and to hold providers liable.

Part II of this Comment gives an overview of the problem of inadequate pain management in the institutional setting, and explains the significance of this problem for the State of Hawai'i. It briefly examines the state's progress in the area of pain management and discusses the difficulties residents traditionally faced in attaining judicial assistance in asserting the right to adequate pain relief. Part III then examines a theory developing in California that provides patients with a cause of action for inadequate treatment of pain under the state's "elder abuse statute." It also discusses the implications of the new theory, and its effect on medical malpractice law. Part IV explores various ways in which the new theory can be utilized under existing Hawai'i State laws. Finally, Part V offers recommendations for non-judicial actions based on the new theory that should be taken to further protect Hawai'i's nursing home residents.

II. THE PREVALENCE OF PAIN IN THE INSTITUTIONAL SETTING

Although up to 95 percent of serious pain can effectively be relieved, nearly half of all Americans continue to suffer unnecessarily in the last days of their lives.[34] While attempts to raise awareness regarding undertreated pain began in the early 1970s,[35] serious steps towards improvement have only begun in the last fifteen years.[36] Reasons for the enduring reluctance by health care providers to address the problem include: 1) lack of proper pain management training; 2) fear of drug seeking, addiction, and hastened death; and 3) fear of litigation or disciplinary actions for overprescription of controlled narcotics.[37]

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[34] LAST ACTS, MEANS TO A BETTER END: A REPORT ON DYING IN AMERICA TODAY 34 (Nov. 2002), *available at* http://www.rwjf.org/news/special/meansReport.pdf (last visited Aug. 22, 2004). Last Acts is a national coalition committed to improving end-of-life care. *Id.* at 2.

[35] *See* Rich, *supra* note 31, at 8 (citation omitted).

[36] *See* Robyn S. Shapiro, *Health Care Providers' Liability Exposure for Inappropriate Pain Management*, 24 J.L. MED. & ETHICS 360, 361 (1996) (discussing Estate of Henry James v. Hillhaven Corp., No. 89 CVS 64 (N.C. Super. Ct. Nov. 20, 1990)). In this case, a North Carolina court found the defendant nursing home liable for improper administration of pain medication. The jury awarded the estate of a cancer patient $15 million in damages. This was the first time a negligence case was based on the inadequate treatment of pain. *Id.* (citation omitted).

[37] Reasons for the reluctance by health care providers to aggressively treat pain have already been discussed in many articles, and is thus, not the topic of this Comment. For an in-depth discussion regarding barriers to effective pain treatment, *see* Rich, *supra* note 31, at 39-55.

Although pain affects individuals of all ages, 55 percent of those aged 65 or over report daily pain.[38] Of particular concern is the undertreatment of pain of elderly nursing home residents, most of whom suffer from chronic illness.[39] According to researchers of the first national study of pain in nursing homes conducted in 1999, there is "woefully inadequate pain management among a frail, old and vulnerable population of Americans."[40] They found that approximately 40 to 50 percent of nursing home residents nationwide experienced moderate daily pain or excruciating pain on any given day,[41] with 41.2 percent reporting the same level of pain 60 to 180 days later.[42]

A. Undertreatment of Pain: A Significant Concern for Hawai'i

Inadequate pain treatment presents a special concern for Hawai'i, which is "third in the nation in terms of growth rate of seniors as a proportion of the population."[43] From 1970 to 2000, Hawai'i's total population grew by 57 percent.[44] In comparison, the population of those aged 60 or over grew by 207 percent, those aged 75 or over by 415 percent, and those aged 85 or over by 482 percent.[45] In 2000, 17 percent of the state's population was aged 60 or over (207,100 individuals), while 1.4 percent was aged 85 years or over (17,564 individuals).[46] It is estimated that between 2000 and 2020, the

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[38] ARTHRITIS FOUND., *supra* note 32.

[39] JOAN TENO ET AL., CTR. FOR GERONTOLOGY & HEALTH CARE RESEARCH AT THE BROWN UNIV. MEDICAL SCHOOL, THE PREVALENCE AND TREATMENT OF PAIN IN US NURSING HOMES 6-9 (2001), *available at* http://www.chcr.brown.edu/COMMSTATE/PAINMONOGRAPHWEBVERSION.PDF (last visited Aug. 22, 2004); *see also* Furrow, *supra* note 32, at 42.

[40] Scott J. Turner, *Researchers find pain widespread and severe in nursing homes*, 25 GEORGE STREET J., Apr. 27, 2001, *available at* http://www.brown.edu/Administration/George_Street_Journal/vol25/25GSJ25e.html (last visited Aug. 22, 2004) (quoting Vince Mor, director of the Dep't of Community Health and co-author of the study) (discussing the findings of a study conducted by the Brown Medical School).

[41] Andre Picard, *Many Seniors Get 'Woefully Inadequate' Pain Treatment, Study Says*, PUB. HEALTH REPORTER, Apr. 25, 2001, *available at* http://vachss.com/help_text/styles/archive-print.php (last visited Aug. 22, 2004) (discussing finding of the Brown University study).

[42] Turner, *supra* note 40.

[43] EXECUTIVE OFFICE ON AGING, 2011 WORKFORCE BRIEFING BOOK 4 (1998), *available at* http://www.durp.hawaii.edu/eoa/docs/BriefingBook.pdf (last visited Aug. 22, 2004) (summarizing findings and recommendations of The Hawai'i Summit: 2011 Project, formed in response to concerns regarding Hawai'i's aging population).

[44] EXECUTIVE OFFICE ON AGING, HAWAII ST. PLAN ON AGING (2004-2007) SUMMARY 4, *available at* http://www4.hawaii.gov/eoa/pdf/4_year_plan/state_plan_0407.pdf (last visited Mar. 8, 2005) [hereinafter PLAN].

[45] *Id.*

[46] EXECUTIVE OFFICE ON AGING, PROFILE OF HAWAII'S OLDER ADULTS 1 (May 2003), *available at* http://www2.state.hi.us/eoa/information/stats/profile2003.pdf (last visited Aug. 22, 2004) [hereinafter PROFILE].

number of individuals 60 or over will grow by 73 percent, and the number of individuals 85 or over by 116 percent.[47] Hawai'i's life expectancy of 79 years remains the highest in the nation.[48] The leading cause of death for Hawai'i residents 60 or over is chronic illness, including heart disease, cancer, stroke, and chronic lower respiratory disease.[49]

In 2002, there were approximately 2,483 residents in Hawai'i nursing home facilities,[50] 2,423 of which were age 65 or over.[51] Hawai'i nursing home residents have consistently ranked as the most dependent in the nation,[52] with 41 percent of those 65 or over having a disability requiring assistance in one or more activities of daily living,[53] and over half of these individuals having at least two disabilities.[54] Fifty-one percent of Hawai'i nursing home residents were diagnosed with some form of dementia, compared to the national average of 43.6 percent.[55]

According to the 1999 study, 33.3 percent of all Hawai'i nursing home residents experienced persistent severe pain on any given day.[56] Of residents suffering from cancer, 42.9 percent reported persistent severe pain.[57] Most disturbing, however, was the finding that 64 percent of terminally ill residents

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[47] PLAN, *supra* note 44, at 5.

[48] PROFILE, *supra* note 46, at 2. The national average age is 75. *Id.*

[49] *Id.* at 7.

[50] CHARLENE HARRINGTON, ET AL., NURSING FACILITIES, STAFFING, RESIDENTS AND FACILITY DEFICIENCIES, 1996 THROUGH 2002, 15 (Aug. 2003).

[51] State Health Facts Online, *Hawaii: Total Nursing Facility Resident as a Percent of the State 65+ Population, 2002*, provided by The Henry J. Kaiser Family Foundation, *at* http://www.statehealthfacts.kff.org (last visited Apr. 2, 2004).

[52] HARRINGTON, *supra* note 50, at 34. From 2000 through 2002, Hawai'i nursing home residents have ranked highest in the nation for acuity. *Id.* at 35. The acuity index is based on characteristics such as being bedfast, needing assistance with ambulation or eating, having an indwelling catheter, incontinence, pressures ulcers, bowl or bladder retraining, or requiring special skin care. *Id.* at 34.

[53] This is defined as having one or more of the following disabilities: sensory, physical, mental, self-care, go-outside-the-home-alone. PROFILE, *supra* note 46, at 6.

[54] *Id.*

[55] *See* HARRINGTON, *supra* note 50, at 43.

[56] CTR. FOR GERONTOLOGY & HEALTH CARE RESEARCH AT THE BROWN UNIV. MEDICAL SCHOOL, FACTS ON DYING: POLICY RELEVANT DATA ON CARE AT THE END OF LIFE, HAWAII STATE PROFILE, *at* http://www.chcr.brown.edu/dying/hiprofile.htm (site last edited May 20, 2004) (last visited Aug. 22, 2004) [hereinafter HAWAI'I STATE PROFILE]. Persistent severe pain is defined as pain reported by a resident upon initial assessment, which worsened or remained severe 60 to 180 days later. CTR. FOR GERONTOLOGY & HEALTH CARE RESEARCH AT THE BROWN UNIV. MEDICAL SCHOOL, FACTS ON DYING: POLICY RELEVANT DATA ON CARE AT THE END OF LIFE, ABOUT THIS RESEARCH, *at* http://www.chcr.brown.edu/dying/ABOUTTHISRESEARCH.HTM (site last edited May 18, 2004) (last visited Aug. 22, 2004).

[57] HAWAI'I STATE PROFILE, *supra* note 56.

experienced persistent severe pain.[58] Clearly, effective pain management for the terminally ill is overdue.

B. Hawai'i's Progress in the Area of Pain Management

At first glance, Hawai'i appears to be ignoring the issue of adequate pain management. A 2002 national report pointed out that up until the end of 2001, only six states—Alaska, Connecticut, Delaware, Illinois, Indiana, and Hawai'i—had no official pain policy.[59] In a national progress report on policies relating to pain management in effect as of March 2003, Hawai'i earned a grade of D+, up from a D earned in 2000.[60] Between 1995 and 2003, Hawai'i consistently ranked among the bottom fifteen states in the nation for lowest annual rate of serious disciplinary actions by state medical boards.[61]

On July 9, 2004, however, the Hawai'i State Legislature enacted a Pain Patient's Bill of Rights.[62] The Act not only recognizes the right of patients suffering from severe acute or chronic pain to receive aggressive pain treatment (including the justified use of opiates), but also allows physicians to prescribe opiates when it is deemed medically necessary.[63] Thus, as of July 1, 2004, Hawai'i residents have a statutory right to request aggressive pain treatment.[64]

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[58] *Id.*

[59] PAIN & POLICY STUDIES GROUP, UNIV. OF WIS. COMPREHENSIVE CANCER CTR., 2001 ANNUAL REVIEW OF STATE PAIN POLICIES: A QUESTION OF BALANCE 2 (Feb. 2002), *available at* http://www.medsch.wisc.edu/ painpolicy/publicat/01annrev/contents.htm (last visited Aug. 22, 2004) [hereinafter 2001 ANNUAL REVIEW].

[60] PAIN & POLICY STUDIES GROUP, UNIV. OF WIS. COMPREHENSIVE CANCER CTR., ACHIEVING BALANCE IN STATE PAIN POLICY: A PROGRESS REPORT CARD 13 (Sept. 2003), *available at* http://www.medsch.wisc.edu/painpolicy/2003_balance/prc2003.pdf (last visited Aug. 22, 2004). The positive change resulted from: modification of Hawai'i's three-day restrictive prescription validity period for certain controlled substances, elimination of a multi-copy prescription form requirement, and adoption of an Electronic Data Transfer system. *Id.* at 16.

[61] SIDNEY M. WOLFE & PETER LURIE, PUBLIC CITIZEN'S HEALTH RESEARCH GROUP, RANKING OF STATE MEDICAL BOARDS' SERIOUS DISCIPLINARY ACTIONS IN 2003, HEALTH RESEARCH GROUP PUB. NO. 1696, (Apr. 14, 2004), *at* http://www.citizen.org/publications/print_release.cfm?ID=7308 (last visited Aug. 22, 2004). Publication based on data from the Federation of State Medical Boards. *See* FED'N OF STATE MEDICAL BOARDS OF THE U.S., INC., SUMMARY OF 2003 BOARD ACTIONS (Apr. 5, 2004), *available at* http://www.fsmb.org/PDFFiles/2004.pdf (last visited Aug. 22, 2004)

[62] *See* Act of July 9, 2004, ch. 189, 23rd Leg., Reg. Sess. (Haw. 2004).

[63] *Id.* In addition, the law authorizes the Hawai'i board of medical examiners to establish pain management guidelines. *Id.*

[64] *Id.*; *but see* Rich, *supra* note 31, at 47-48 (stating that despite the fact that an increasing number of states have statutorily addressed the issue of pain management, the impact of these statutes on actual physician practice has been very limited).

Several other significant achievements in the area of pain management merit recognition. In 1999, Hawai'i's Tripler Army Medical Center became the first Army medical facility in the nation to score 100 percent for compliance with quality standards set by the Joint Commission on Accreditation of Healthcare Organizations.[65] In 2001, the efforts of Kokua Mau, a partnership of public and private organizations advocating improvement of end-of-life care (overseen by the Executive Office on Aging), were nationally recognized by Harvard University's Innovations in American Government Program.[66] Kokua Mau placed in the top 100 in the competition in 2002 as well.[67] Most recently in 2004, the St. Francis Medical Center Institute of Cancer was re-accredited as a Community Hospital Comprehensive Program.[68] After an annual examination conducted by the Commission on Cancer of the American College of Surgeons, the program received the highest possible rating.[69]

Clearly, progress in the area of pain management is being made. Where efforts by community members and the Legislature are unable to effectuate timely, necessary improvements, however, tort litigation can be a powerful vehicle for change.[70] Until recently, however, this avenue was not available to victims of inadequate pain treatment.

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[65] *Tripler is Rated Perfect in Accreditation Survey*, HONOLULU STAR-BULLETIN, Jan. 18, 1999, *available at* http://starbulletin.com/1999/01/18/news/briefs.htm (last visited Aug. 22, 2004). The Joint Commission on Accreditation of Healthcare Organizations ("JCAHO") is an independent, not-for-profit organization, dedicated to improving the safety and quality of care provided to the public in health care organizations. JCAHO evaluates and accredits over 16,000 health care organizations and programs nationwide. It is the predominant standards-setting and accrediting body in the United States. *See* JOINT COMM'N ON ACCREDITATION OF HEALTHCARE ORGANIZATIONS, FACTS ABOUT THE JOINT COMMISSION ON ACCREDITATION OF HEALTHCARE ORGANIZATIONS, *at* http://www.jcaho.org/about+us/index.htm (last visited May 2, 2004).

[66] Press Release, Ash Inst. for Democratic Governance & Innovation, Kennedy School of Government, Harvard Univ., Hawai'i's Kokua Mau Program is a Finalist in Prestigious American Government Award (Aug. 29, 2001), *at* http://www.ashinstitute.harvard.edu/Ash/pr_2001f_kokua.htm (last visited Aug. 20, 2004) (copy on file with author).

[67] EXECUTIVE OFFICE ON AGING, 2003 ANN. REP. 14 (Oct. 2003), *available at* http://www2.state.hi.us/eoa/pdf/2003_Annual_Report.pdf (last visited Aug. 20, 2004) [hereinafter 2003 ANNUAL REPORT].

[68] *St. Francis Re-accredited*, HONOLULU ADVERTISER, Mar. 29, 2004, at B3.

[69] *Id.*

[70] *See* Furrow, *supra* note 32, at 28 (stating that "[t]ort liability is a powerful external threat, and it can work in tandem with other constructive pressures in the environment to improve management of patient pain").

C. Difficulties Faced by Residents in Judicially Asserting the Right to Adequate Pain Relief

A terminally ill patient has a constitutionally protected right to receive adequate pain treatment.[71] Failure to provide adequate treatment thus constitutes professional negligence.[72] Due to the difficulty in defining what actions constitute adequate treatment, however, medical malpractice suits for the undertreatment of pain have been rare.[73]

In medical malpractice suits, the legal standard of care by which to measure a physician's conduct has traditionally been established through usual and customary practices of the profession.[74] To prove that conduct meets the standard, an expert usually testifies that the defendant's actions conform to the actual pattern of practice in the community.[75] Courts have generally given medical testimony conclusive weight, irrespective of the effectiveness of the practice.[76]

This judicial deference proves problematic, however, where inadequate treatment is the usual and customary practice.[77] With inadequate care constituting the generally accepted standard, proving negligence becomes extremely difficult.[78] But based on a new theory established in California, health care providers will consequently no longer be able to escape liability.

III. LEGAL ANALYSIS OF A NEW THEORY ESTABLISHING A STANDARD OF CARE FOR PAIN MANAGEMENT

In a recent line of California cases, claims for pain and suffering due to inadequate pain management have been successfully brought under the state's "elder abuse statute."[79] A state court's finding that failure to adequately treat the pain of an elderly patient constitutes abuse has led to revolutionary

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[71] *See* Vacco v. Quill, 521 U.S. 793, 808 (1997). The Court declared that a State may permit palliative care, which has the unintended effect of hastening death. *Id.* (citation omitted).

[72] *See* Furrow, *supra* note 32, at 29.

[73] *See* Kathryn L. Tucker, *Pain Management: Advising and Advocating for Good Care; Seeking Redress and Accountability for Inadequate Care*, 15 NAELA QUARTERLY 17, 18 (Fall 2002).

[74] *See* Shapiro, *supra* note 36, at 360.

[75] *See* Furrow, *supra* note 32, at 31.

[76] *Id.* (citation omitted).

[77] *See id.*

[78] *See id.* at 31-32.

[79] *See Bergman Case Continues to Spark Discussion and Influence Physicians and Medical Boards*, TOPICS IN PAIN MANAGEMENT, July 2003 [hereinafter TOPICS]; *see* CAL. WELF. & INST. CODE 15600 (West 2000).

changes in both the medical and legal communities.[80] As a result of these cases, a standard of care for pain management has been established, and the ambiguity surrounding pain medication prescription effectively removed.[81] Clinical practice guidelines and standards[82] now offer authoritative, legally enforceable statements on adequate pain management, and are presumptive evidence of due care.[83] Consequently, health care providers can no longer escape liability by offering evidence of inadequate treatment as the "usual or customary" practice in the community.

A. Bergman v. Chin—*The Seminal Case*

In 2001, a California jury found that a physician's failure to adequately manage the pain of a terminally ill patient was a form of elder abuse in *Bergman v. Chin*.[84] Although it was not the first case to base a claim on poor pain management,[85] it was the first time undertreatment was framed as the cause of action under an "elder abuse statute" in a civil trial.[86] The jury

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[80] TOPICS, *supra* note 79 (discussing Bergman v. Chin, No. H205732-1 (Cal. Super. Ct. June 13, 2001)).

[81] *See* Jahna Berry, *A Painful Trend? Malpractice Bar Divided on Impact of Elder Abuse Case*, RECORDER (San. Fran.), July 13, 2001, *available at* 7/13/2001 RECORDER-SF 1 (West).

[82] Clinical practice guidelines are "systematically developed statements to assist practitioner and patient decisions about appropriate health care for specific clinical circumstances." Furrow, *supra* note 32, at 32. They offer health care providers instructions for proper treatment of specific illnesses or conditions, based on policy and standards developed by the medical community. *Id.* Practice standards provide clear definitions of what actions constitute appropriate care in specific clinical circumstances. NAT'L PHARM. COUNCIL, INC., *supra* note 22, at 77. The guidelines and standards are developed by national specialty societies such as the Agency for Healthcare Research and Quality, the Joint Commission on Accreditation of Healthcare Organizations, the American Pain Society, and the American Academy of Family Physicians; as well as by the Government and individual facilities. Furrow, *supra* note 32, at 32; NAT'L PHARM. COUNCIL, INC., *supra* note 22, at 75.

[83] Furrow, *supra* note 32, at 32.

[84] *See* 46 TRIALS DIG. 4TH (Trial Dig. Publ'g) 2, (Cal. Alameda County Super. Ct. June 13, 2001), *available at* 2001 WL 1517376, at **1-2.

[85] *See* Shapiro, *supra* note 36, at 361 (discussing Estate of Henry James v. Hillhaven Corp., No. 89CVS64 (N.C. Super. Ct. Jan. 15, 1991)). In *Estate of Henry James*, a North Carolina jury awarded the estate of a prostate cancer patient $15 million. *Id.* Although the hospital physician prescribed morphine to alleviate James' pain, a nurse at the defendant nursing home independently assessed the patient as "addicted to morphine." *Id.* Staff at the facility then withheld the morphine, and substituted it with less effective pain medication or placebos. Faison v. Hillhaven Corp., No. 89CVS64 (N.C. Hertford Super. Ct. Nov. 1991) (LPR Jury), 1991 WL 453508. The nursing home was found guilty of failing to adequately treat the patient's cancer pains. *Id.*

[86] *Bergman*, 46 TRIALS DIG. 4TH at 2, 2001 WL 1517376, at *2; Tom Troy, *New Type of Suit: Pain Treatment, Calif. Verdict Against Doctor is Based on Law Against Abuse of the Elderly*, 23 NAT'L. L.J. A5, A5 (July 5, 2001).

awarded the plaintiffs, survivors of an 85-year-old lung cancer patient, $1.5 million for unnecessary pain and suffering caused by the inadequate treatment of pain.[87]

On February 16, 1998, William Bergman was admitted into Eden Medical Center where he was diagnosed with multiple spinal compression fractures and a strong possibility of lung cancer.[88] Although the emergency room physician initially prescribed morphine,[89] Dr. Wing Chin, the attending physician at the hospital and co-defendant in the case, changed the prescription to Demerol, with instructions to administer the pain medication "PRN" (as needed).[90] During the five days Bergman remained hospitalized, records indicated that on numerous occasions he complained of severe pain ranging from levels 7 to 10, with 10 being the worst pain imaginable.[91] Yet, no other type of medication was prescribed.[92] At the time of discharge, Bergman reported level 10 pain.[93] Despite the fact that he was known to have difficulty swallowing, Bergman was prescribed an oral form of Vicodin.[94] Only after the plaintiff requested stronger medication for her father did Dr. Chin prescribe a shot of Demerol and a fentanyl patch.[95]

Two days after discharge, a hospice nurse found Bergman in "out of control" pain.[96] After attempting to contact Dr. Chin for one and a half hours, the nurse was told that the patient was no longer under his care.[97] Bergman's regular physician then re-prescribed liquid morphine and two additional patches, which effectively relieved the pain.[98] Bergman died the next day.[99]

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[87] *Bergman*, 46 TRIALS DIG. 4TH at 2, 2001 WL 1517376, at *1.

[88] *Id.*

[89] Berry, *supra* note 81.

[90] *Id.*; *Bergman*, 46 TRIALS DIG. 4TH at 2, 2001 WL 1517376, at *1. Demerol (Sanofi-Synthelabo Inc.) is an opioid analgesic similar to morphine, used to treat moderate to severe pain. PHYSICIAN'S DESK REFERENCE, *supra* note 12, at 3014-15.

[91] *Bergman*, 46 TRIALS DIG. 4TH at 2, 2001 WL 1517376, at *1.

[92] *Id.*

[93] Bergman v. Super. Ct. of Alameda County, No. A091386, 3 (Cal. Ct. App. 1st Oct. 19, 2000).

[94] *Bergman*, 46 TRIALS DIG. 4TH at 2, 2001 WL 1517376, at *1.

[95] *Id.*

[96] *Id.*

[97] Tucker, *supra* note 73, at 19.

[98] *Bergman*, 46 TRIALS DIG. 4TH at 2, 2001 WL 1517376, at *1.

[99] *Id.*

1. Bringing a claim under California's Elder Abuse and Dependent Adult Civil Protection Act

Because California's malpractice law only provided an injured party with a cause of action for pain and suffering, the plaintiffs in *Bergman* asserted a claim under the state's Elder Abuse and Dependent Adult Civil Protection Act.[100] Not only did the "elder abuse statute" allow pain and suffering claims to survive the death of the injured, but also provided for recovery of attorneys' fees and permitted heightened remedies.[101] The plaintiffs based their claim on the fact that the defendant's failure to establish an adequate pain management plan was reckless,[102] resulted in severe injury (excruciating pain), and was therefore a violation of the state's "elder abuse statute."[103] This meant, however, that the plaintiffs needed to meet a higher burden of proof. While California's malpractice laws required proof of negligence by a preponderance of the evidence, the "elder abuse statute" required proof that conduct rose to the level of "recklessness" through clear and convincing evidence.[104] Thus, the plaintiffs needed to show that the defendant acted with "deliberate disregard of the high probability that an injury [would] occur," and that the conduct constituted a "conscious choice of a course of action . . . with knowledge of the serious danger to others involved in it."[105]

2. Proving reckless negligence and establishing a standard of care

Under traditional medical malpractice schemes, the plaintiffs did not have a recognized cause of action. Defense experts testified that Dr. Chin's conduct fell within the standard of care, and asserted, "what [he] did, 95 percent of doctors would do."[106] Under a claim of reckless neglect, however, state pain policies and guidelines were allowed as evidence to establish notice of the defendant's duty to provide attentive and aggressive pain treatment.[107] Among other things, the plaintiffs introduced California's Intractable Pain Treatment laws;[108] Pain Guidelines adopted by the state's medical board; a

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[100] Troy, *supra* note 86, at A5; *see* CAL. WELF. & INST. CODE § 15600, *et seq.* (West 2001).

[101] Berry, *supra* note 81; *see* CAL. WELF. & INST. CODE § 15657 (West 2001).

[102] Bergman v. Super. Ct. of Alameda County, No. A091386, 3 (Cal. Ct. App. 1st Oct. 19, 2000).

[103] *Elder Abuse: Undertreating Pain Can Amount to Elder Abuse*, PAIN & CENTRAL NERVOUS SYSTEM WEEK 22, 22-23 (Feb. 14, 2000).

[104] Berry, *supra* note 81; *see* CAL. WELF. & INST. CODE § 15657.

[105] *Bergman*, No. A091386, at 3 (citation omitted in original) (quoting Delaney v. Baker, 971 P.2d 986, 991 (Cal. 1999)).

[106] *See* Berry, *supra* note 81.

[107] Tucker, *supra* note 73, at 19.

[108] *See* CAL. BUS. & PROF. CODE § 2241.5 (West 2003).

policy statement made by the board encouraging aggressive pain care; clinical practice guidelines issued by the Agency for Health Care Policy and Research ("AHCPR") that were mailed to all California physicians in 1994; California's Pain Patient's Bill of Rights;[109] and numerous medical literature addressing the issue.[110]

To prove that Dr. Chin's conduct rose to the level of recklessness, the plaintiffs' expert described how specific actions by the defendant grossly departed from the standard of care laid out by the AHCPR guidelines.[111] Among various key departures, the expert pointed out: while the guidelines recommended around-the-clock pain medication for intractable pain, with additional medication for breakthrough pain, Dr. Chin prescribed 25-milligrams of Demerol (one quarter the manufacturer's recommended dose) on an "as needed" basis;[112] and despite reports of level 10 pain at the time of discharge, Dr. Chin merely prescribed an oral form of Vicodin (the medication Bergman had been taking prior to hospitalization) knowing that the patient had difficulties swallowing.[113] A shot of Demerol and an additional fentanyl patch were later prescribed, but only after the patient's daughter demanded it.[114] According to the expert, "the care and treatment provided . . . was consistently below the standard of care and demonstrated an indifference and deliberate disregard for Mr. Bergman's continued and severe pain and suffering."[115]

The jury ultimately found that the numerous policies, guidelines, and medical literature, effectively put Dr. Chin "on notice of his duty to treat pain attentively and aggressively."[116] In light of this, his failure to treat Bergman's pain aggressively constituted recklessness rather than plain negligence.[117] Although the $1.5 million award for pain and suffering was later reduced to $250,000 under California's Medical Injury Compensation Reform Act,[118] Dr. Chin was also ordered to pay attorneys' fees, which the court enhanced by a

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[109] CAL. HEALTH & SAFETY CODE §§ 124960-124961 (West 2004).

[110] Tucker, *supra* note 73, at 19.

[111] *Id.*

[112] Troy, *supra* note 86, at A5; Bergman v. Super. Ct. of Alameda County, No. A091386, 3 (Cal. Ct. App. 1st Oct. 19, 2000).

[113] *Bergman*, No. A091386, at 3.

[114] Troy, *supra* note 86, at A5.

[115] *Bergman*, No. A091386, at 3 (quoting testimony from Fordyce Declaration, Plaintiff's expert witness).

[116] Tucker, *supra* note 73, at 19.

[117] *Id.*

[118] TOPICS, *supra* note 79; *see* CAL. CIV. CODE § 3333.2 (West 1997) (limiting the amount of damages for noneconomic loss in suits based on professional negligence against a health care provider to two hundred fifty thousand dollars).

multiplier available in cases significant to the public interest resulting in a total of 150 percent of actual fees.[119]

B. Tomlinson v. Bayberry Care Center—*A Shift in Perspective*

Following the *Bergman* verdict, defense attorneys in California attempted to calm stunned medical and malpractice communities by stating, "If you had the same fact pattern, and ran it by a different jury, you would have a different result."[120] They further declared, "This is not . . . 'the new tort'."[121] Two years later, California's second pain case was successfully brought under the state's "elder abuse statute."[122]

Lester Tomlinson, 85, suffered from mesothelioma, an incurable form of lung cancer.[123] Similar to the facts in *Bergman*, Tomlinson was admitted into a hospital; records indicated that he experienced pain "all the time," which at times reached level 10; and pain relief was only sporadically provided.[124] After being transferred to a nursing home, Tomlinson frequently reported pain.[125] The facility never provided around-the-clock pain control, however, and the physician only prescribed pain medication after family members requested medications that they independently researched.[126] Follow-up assessments were never made.[127] Despite the fact that Tomlinson had an Advance Directive expressly stating his wishes to aggressively treat his pain, the days prior to his death were characterized as "twenty days of unremitting agony."[128]

After reading about the *Bergman* case, Ginger Tomlinson filed a lawsuit, which became known as *Tomlinson v. Bayberry Care Center*,[129] claiming, among other things, that improper pain management of her terminally ill father's pain constituted reckless neglect under California's Elder Abuse and

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[119] Tucker, *supra* note 73, at 20.

[120] Berry, *supra* note 81 (quoting David Lucchese, Malpractice attorney, of Walnut Creek's Anderson, Galloway & Lucchese).

[121] *Id.* (quoting Ralph Lombardi, Defense Attorney in Oakland).

[122] *See generally* TOPICS, *supra* note 79.

[123] Pls.' Mediation Br., Tomlinson v. Bayberry Care Ctr., No. C 02-00120 (Cal. Super. Ct. Contra Costa County 2003), *available at* http://www.compassionindying.org/tomlinson/tomlinson_brief.pdf (last visited Aug. 20, 2004) (on file with Compassion in Dying Federation) (copy on file with author).

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *See generally id.*

[128] *Id.*

[129] *Id.*

Dependent Adult Civil Protection Act.[130] The hospital, the attending physician at the hospital, the nursing care facility, and the physician at the facility, all settled for undisclosed amounts and agreed to participate in continuing education classes.[131]

While the settlements by all of the defendants were caused in part by the *Bergman* verdict, the overriding cause was a shift in perspective in the medical and health care communities.[132] An affirmative duty to provide adequate pain management now appears to be firmly established.[133] Illustrative of this shift are the disciplinary actions taken by the California Medical Board, and the pursuance of fraud charges by the Centers for Medicare and Medicaid Services ("CMS"). In *Bergman*, the California Medical Board refused to pursue disciplinary action despite finding inadequate care on the part of the defendant.[134] In *Tomlinson*, however, not only did the board file an accusation with the state attorney general, but it also issued a public reprimand of Dr. Eugene B. Whitney.[135] Of equal significance, CMS launched an investigation and is currently considering pursuing federal fraud charges.[136] The premises of the charges would be that adequate pain management is the standard of care, and billing for treatment that falls short of the standard constitutes fraud.[137]

As a result of this shift in perspective, nursing home residents (or their estates) nation-wide are now afforded effective remedies for asserting the right to adequate pain treatment. With inadequate management recognized as substandard care, a cause of action may now exist under a state's "elder abuse statute," where the quality-of-care given falls below acceptable standards. In addition, or in the alternative, a cause of action may also exist under medical malpractice statutes, where substandard care constitutes professional negligence.

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[130] COMPASSION IN DYING FED'N, TOMLISON CASE SUMMARY, *at* http://www.compassionindying.org/tomlinson/casesummary.php (last visited Jan. 27, 2004); *see* CAL. WELF. & INST. CODE § 15600 *et seq.* (West 2001).

[131] *See* TOPICS, *supra* note 79; *see California Doctor, Nursing Home Settle Suit on Pain Care*, ANDREWS HEALTH LITIG. REP. 9, 9 (Aug. 2003).

[132] *See* TOPICS, *supra* note 79.

[133] *Id.*

[134] *Id.*

[135] *Id.*; *see* In re Eugene B. Whitney, M.D., Medical Board of Cal., Case No. 12-2002-133376 (Dec. 15, 2003).

[136] Thomson American Health Consultants, *This is not a phantom pain: Liability risk grows for poor pain management*, 25 HEALTHCARE RISK MANAGEMENT 49, 51 (May 2003), *available at* http://www.compassionindying.org/tomlinson/health_risk.pdf (last visited Aug. 22, 2004).

[137] *Id.*

IV. APPLYING THE NEW THEORY TO EXISTING HAWAI'I STATE LAWS

Under the theory that inadequate pain relief constitutes both elder abuse and professional negligence, existing Hawai'i State laws sufficiently provide for the established standard of care. On the basis that inadequate management constitutes abuse, nursing home residents are now able to utilize various elderly services to initiate immediate intervention and/or protective proceedings.[138] Additionally, the state attorney general can pursue civil or criminal charges for abuse of a dependent adult.[139] Although residents (or their estates) are not provided with private causes of action for abuse, they are provided with various causes of action under Hawai'i medical malpractice laws, under the theory that inadequate management constitutes professional negligence.[140] Thus, a variety of state laws now offer elderly nursing home residents and their estates effective tools and remedies to assert the right to adequate pain treatment.[141]

Abuse or neglect of a dependent elderly nursing home resident can be addressed in various ways: formally or informally, administratively, judicially, or privately between a resident and a facility. This Comment focuses on the types of proceedings made available to a resident or an estate under the new theory. There are three main types of proceedings: 1) protective proceedings; 2) civil causes of action; and 3) criminal prosecution.[142] Each type serves a different purpose. As a result, more than one type of proceeding may apply in a particular situation.[143] This Comment discusses the first two types in depth, and only briefly touches upon the third.

A. Protective Proceedings

When an individual suffers from inadequate pain relief, immediate intervention is paramount. Protective proceedings are an appropriate alternative, and include investigation of reports of alleged abuse, findings, and issuance of protective orders.[144] Under the theory that inadequate pain treatment constitutes elder abuse, nursing home residents are now afforded recourse through

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[138] *See* discussion *infra* Part IV.A.

[139] *See* discussion *infra* Part IV.B.

[140] *See* discussion *infra* Part IV.C.

[141] Throughout this section the author uses the term "resident" to refer to a nursing home resident, a designated legal representative, a court appointed guardian, a legal surrogate, or a resident's estate.

[142] *Nursing Home Abuse & Injuries – Overview, at* http://injury.FindLaw.com/nursing-home-abuse/nursing-home-abuse-basics-overview.html (last visited Aug. 22, 2004).

[143] *Id.*

[144] *See Statutory Protection of Older Persons, at* http://injury.FindLaw.com/nursing-home-abuse/articles/2008.html (last visited Aug. 22, 2004).

Hawai'i's statewide elderly service delivery network. Resources available to facilitate immediate intervention include: Dependent Adult Protective Services; the Long-Term Care Ombudsman Program; the Department of Commerce and Consumer Affairs; the Medicaid Investigations Division of the Office of the Attorney General of the State of Hawai'i; and the state's Uniform Health-care Decisions Act.

1. Dependent Adult Protective Services

Although Hawai'i does not have an "elder abuse statute," there are other laws and resources in place to protect elderly nursing home residents. The most cogent law is Hawai'i's Dependent Adult Protective Services Act.[145] The purpose of this law is to protect adults who are at a high risk of abuse, neglect, and financial exploitation, due to their dependency on others.[146] To benefit from this law, an individual must be at least 18 years old, have a mental or physical impairment, and be "dependent upon another person, a care organization, or a care facility for personal health, safety, or welfare," on account of the impairment.[147]

The statute defines "abuse" as "actual or imminent physical injury, psychological abuse or neglect, sexual abuse, financial exploitation, *negligent treatment*, or maltreatment."[148] Applicable situations include those when "[a]ny dependent adult is not provided in a timely manner with *adequate* . . . physical care, *medical care*, or supervision,"[149] or when "[t]here has been a failure to exercise that degree of care toward a dependent adult which a reasonable person with the responsibility of a caregiver would exercise, including, but not limited to, failure to . . . [p]rovide necessary health care, access to health care, or prescribed medication."[150] For conduct to qualify as abuse under the statute, however, two criteria must be met: 1) the abuse has occurred, and 2) further abuse is imminent unless protective action is taken.[151]

Intervention may be initiated by a complaint to the Department of Human Services' Adult Intake.[152] The complaint may be made by a victim, family

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[145] HAW. REV. STAT. §§ 346-(221-253) (1993).

[146] *See id.* § 346-221.

[147] *See id.* § 346-222; *see id.* § 577-1 (1993) (establishing that the period of minority under State law ceases at age eighteen).

[148] HAW. REV. STAT. § 346-222 (emphasis added).

[149] *See id.* § 346-222(3) (emphases added).

[150] *See id.* § 346-222(5).

[151] *See id.* § 346-223; *see id.* § 346-222 (stating that "[i]mminent abuse" exists where there is reasonable cause to believe that abuse will occur or recur within the next ninety days).

[152] HAW. REV. STAT. § 346-224; Telephone Interview with David Tanaka, Supervisor, Adult Protective Services (Feb. 28, 2004) [hereinafter Tanaka Interview].

member, facility staff member, or any interested party.[153] If the "abuse" criteria are met, the report is sent to Adult Protective Services ("APS") for investigation.[154] APS must have the consent of the victim, or a representative of the victim, however, before they can initiate investigation or protective action.[155] If there is probable cause[156] to believe that the dependent adult lacks the capacity to make such decisions and has no designated representative, a court may issue a protective order[157] and appoint a guardian ad litem to represent the victim's interests.[158] Even after an investigation has begun, APS may, at any time, intervene to protect the victim. If the agency finds probable cause that a dependent adult is in danger of imminent abuse, it may undertake informal resolution with the facility, seek an order for immediate protection, seek a temporary restraining order, or file a petition with a court seeking any protective or remedial actions authorized by law.[159] Under the statute, "abuse" is demonstrated by a preponderance of the evidence.[160] If the court determines that abuse occurred, a protective order will be issued.[161] In addition, "[t]he court may . . . order the appropriate parties to pay or reimburse reasonable costs and fees of the guardian ad litem and counsel appointed for the dependent adult."[162]

Thus, in cases where a dependent adult remains in severe pain despite requests for pain medication, a resident or family member can petition a court for help. They can petition a court to order the facility to immediately administer the medication, or to transfer the patient to a willing facility,

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[153] HAW. REV. STAT. § 346-224.

[154] *See id.* § 346-227 (1993).

[155] *See id.* § 346-230 (1993).

[156] *See id.* § 346-231(b) (1993). The statute provides that a finding of probable cause may be based in whole or in part upon hearsay evidence when direct testimony is unavailable. *See id.*

[157] *See id.* § 346-231 (1993).

[158] *See id.* § 346-234 (1993).

[159] *See id.* § 346-228 (1993). Where injury is imminent, an order for immediate protection may be obtained orally or in writing by the department, without notice to the defendant and without a hearing. *See id.* § 346-231(a),(e). If an order is issued orally, it must be reduced to writing within twenty-four hours, and the department must file a petition with the court within twenty-four hours. *See id.* § 346-231(e). A hearing to show cause why an order should be continued will take place within seventy-two hours of the issuance of a written order. *See id.* § 346-232(a). If cause is shown, the court is required to schedule an adjudicatory hearing "as soon as it is practical." *See id.* § 346-232(c) (1993).

[160] HAW. REV. STAT. § 346-240(b) (1993).

[161] *See id.* § 346-241 (1993). The statute provides that if the defendant fails to comply with the protective order, "[t]he court may apply contempt of court provisions and all other provisions available under the law." *See id.* § 346-246 (1993).

[162] HAW. REV. STAT. § 346-234.

pending an adjudicatory hearing. Initiation of protective proceedings does not preclude the use of any other criminal, civil, or administrative remedies.[163]

2. Mandated reporting

Adult Protective Services may also receive complaints through mandated reporters. Under the Dependent Adult Protective Services Act, certain "persons who, in the performance of their professional or official duties, know or have reason to believe that a dependent adult has been abused and is threatened with imminent abuse," are required to promptly file an oral report with the Department of Human Services.[164] These mandated reporters include licensed or registered professionals of healing arts, physicians, nurses, pharmacists, employees or officers of any public or private agency or institution providing medical services, law enforcement, and employees or officers of any adult residential care home or similar institution.[165] This means that reporting abuse can be as straightforward as calling the police.

A person mandated to make a report who knowingly fails to do so, or who willfully prevents another from reporting the abuse, will be guilty of a petty misdemeanor.[166] Thus, if a staff member is aware of inadequate treatment and does not report it, that individual can also be held liable. On the other hand, immunity is granted to anyone making a report in good faith, who might otherwise have incurred liability.[167]

3. Long-term Care Ombudsman Program

The Long-term Care Ombudsman Program ("Program") is another valuable resource available to residents in public or private nursing homes.[168] As part of the statewide elderly services network, the Program's main purposes are to facilitate assessment and prevention of elder abuse in long-term care facilities,[169] and to advocate improvement of the quality of care received.[170] In cases of institutional mistreatment, defined by the statute as "acts which may adversely affect the health, safety, welfare, and rights of residents,"

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[163] HAW. REV. STAT. § 346-223 (1993).

[164] HAW. REV. STAT. § 346-224.

[165] *See id.*

[166] *See id.* § 346-224(e) (1993).

[167] *See id.* § 346-250 (1993).

[168] *See* 42 U.S.C.A. § 3027(a)(12) (2000) (establishing State Long Term Care Ombudsman Programs under the Older Americans Act of 1965, as amended).

[169] *See* HAW. REV. STAT. § 349-12 (1993).

[170] *See id.*

complaints can be made to a state ombudsman (investigator).[171] Those entitled to assistance under the Program include all elderly residents of long-term care facilities, intermediate care facilities, nursing homes, or similar adult care facilities.[172] A report of mistreatment can be filed by a victim, or by any other person on behalf of the victim.[173] Complaints can be made to an area agency on aging by phone, in writing, or in person,[174] or to an ombudsman during unannounced visits to the nursing home.[175] Complaints can also be made to certified Long-term Care Ombudsman volunteers, during their regular meetings with residents.[176] In addition, the volunteers are available to advise interested parties about issues such as resident rights and informal and formal remedies, and can refer a resident to appropriate services and agencies.[177]

All complaints received are immediately investigated.[178] With the written consent of the victim or victim's representative, the ombudsman can access all patient records and files.[179] All reports are kept confidential.[180] Where an individual lacks sufficient capacity, a court may order disclosure.[181] In the event abuse or neglect is found, the ombudsman will inform the victim of their possible options.[182] Again, consent is required before the findings can be forwarded to appropriate agencies (including law enforcement) capable of taking corrective action.[183] Any act of retaliation by a facility or its employees is a

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[171] *See id.* § 349-12(b)(2).

[172] *See id.* § 349-12(a).

[173] *See id.* § 349-12(b)(2).

[174] *See* 42 U.S.C.A. § 3025(a)(1) (2000) (requiring establishment of a state agency responsible for the planning, policy development, administration, coordination, priority setting, and evaluation of all state activities related to older individuals); *see* HAW. REV. STAT. § 349-7 (1993) (recognizing the executive office on aging as the sole state agency responsible for programs relating to senior citizens in Hawai'i); *see also* HAW. REV. STAT. § 349-9 (1993) (establishing county offices on aging pursuant to the Older Americans Act of 1965, as amended).

[175] *See* HAW. REV. STAT. § 321-15.6(a) (Supp. 2003) providing:

> The department [of health] shall conduct unannounced visits, other than the inspection for relicensing, to every licensed adult residential care home and expanded adult residential care home on an annual basis and at such intervals as determined by the department to ensure the health, safety, and welfare of each resident.

Id.

[176] *See* 2003 ANNUAL REPORT, *supra* note 67, at 6-7.

[177] *See id.*

[178] *See* HAW. REV. STAT. § 349-12(b)(2).

[179] *See id.* § 349-12(b)(7) (1993).

[180] *See id.* § 349-12(b)(7)-(8) (1993).

[181] *See id.* § 349-12(b)(8)(B) (1993).

[182] *See id.* § 349-12(b)(2).

[183] *See id.* § 349-12(b)(8).

misdemeanor.[184] Each act of retaliation is considered a separate incident, and each day that an act continues constitutes a separate offense.[185]

A significant benefit provided by the program is the continued advocacy for quality care. In situations where the abuse does not meet the criteria set out under the Dependent Adult Protective Services Act (i.e., evidence is insufficient to show abuse has occurred and is imminent), or where residents or their agents refuse for whatever reason to pursue legal or administrative action, program volunteers attempt to continue weekly visits with the resident.[186] Where inadequate pain management persists, the volunteer will continue to advise a resident or family member about alternative ways for obtaining relief. This includes consulting facility staff about current pain standards, filing a complaint with the Joint Commission ("JCAHO") or the Department of Commerce and Consumer Affairs, or arranging for the resident to be transferred to another facility.[187] The ombudsman, however, does not have the authority to assist residents in private tort litigation.[188]

4. Department of Commerce and Consumer Affairs

Alternatively, a resident can initiate intervention by filing a complaint with the State Department of Commerce and Consumer Affairs ("Department").[189] All nursing facilities in Hawai'i must be licensed by the Department.[190] If a facility fails to "substantially . . . conform to the required [licensing] standards," the license will be revoked or suspended.[191] Currently, all facilities are required to have a written policy prohibiting the mistreatment, neglect, or abuse of a resident.[192] If a violation of the licensing standards is found upon investigation, appropriate action will be taken, including injunctive relief.[193] Any person found in violation of the standards will also be fined "not more than $500 for a first offense," and "not more than $1000, or imprisonment not more than one year, or both."[194] Furthermore, remedies or penalties are cumu-

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[184] *See id.* § 349-14(b) (1993).

[185] *See id.*

[186] Telephone Interview with John McDermott, Hawai'i State Long-Term Care Ombudsman, Executive Office on Aging (Feb. 29, 2004).

[187] *Id.*

[188] *Id.*

[189] *See* HAW. REV. STAT. § 457B-6(5) (Supp. 2003).

[190] HAW. REV. STAT. § 457B-3 (Supp. 2003).

[191] *See id.* § 457B-6(3) (Supp. 2003).

[192] *See* 11 HAW. ADMIN. R. § 11-94-15(c)(5) (1985).

[193] *See id.*; *see* HAW. REV. STAT. § 457B-10 (Supp. 2003) (authorizing the Department to apply for an injunction in any court of competent jurisdiction, to enjoin any person whose license has been suspended or revoked, from further practicing nursing home administration).

[194] *See* HAW. REV. STAT. § 457B-12 (1993).

lative to those available under other state laws, unless otherwise provided.[195] As a result, the Department can order a facility to adequately manage the pain of a resident or face severe consequences.

5. Medicaid Investigations Division

Yet another way a victim can initiate intervention is by making a report with the Medicaid Investigations Division of the Department of the Attorney General of the State of Hawai'i ("Division").[196] Under Hawai'i law, the Division has the power to investigate alleged abuses occurring in any state nursing facility.[197] When findings of abuse, neglect, or exploitation of a dependent adult are made, the Division has the authority to criminally prosecute the nursing facility involved.[198] Claims pursued by the Division, however, must show that conduct rises to the level of criminal intent. This is an extremely high standard that is rarely met in dependent adult abuse cases.[199] As mandated reporters under the Dependent Adult Protective Services Act, however, Medicaid investigators are required to forward the report to the Department of Human Services even when conduct does not reach criminal levels.[200]

6. Advance health care directives

Residents with advance health care directives are afforded yet another option.[201] Under the Hawai'i Uniform Health-care Decisions Act (modified),[202] a health care provider must follow an individual's health care directive; a reasonable interpretation of the directive by a guardian, agent or surrogate; or a health-care decision made by a guardian, agent or surrogate.[203] If the provider is aware of a patient's wishes but refuses to comply, a family member or interested person can petition a court to direct a health care

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[195] *See id.* § 457B-13 (1993).

[196] *See id.* § 28-91 (1993).

[197] *See id.*

[198] *See id.*

[199] 199 Mike Gordon, *Elder Abuse Bills Take Spotlight*, HONOLULU ADVERTISER, Feb. 27, 2003, at Hawaii: B. Between 1999 and February 2003, the Attorney General for the state of Hawaii prosecuted only four cases of abuse and neglect, with only one case rising to the level of a felony. *Id.*

[200] HAW. REV. STAT. § 346-224 (1993).

[201] *See id.* § 327E-2 (Supp. 2003) (defining an "advance health-care directive" as "an individual instruction or a power of attorney for health care").

[202] *See id.* § 327E (Supp. 2003).

[203] HAW. REV. STAT. § 327E-7 (Supp. 2003); *see infra* note 206 (defining "legal surrogate" and "guardian").

instruction, or to transfer the patient to a facility that will comply.[204] Thus, if a patient has a directive instructing that pain relief be given despite any secondary effects such as a hastened death, any person can petition a court to order the administration of pain medication in accordance with the directive.[205] If there are family members who oppose the decision to medicate, however, this vehicle may not provide an immediate remedy. Relief may also be delayed where the decision to administer pain medication is not contained in a written directive, but is made by a guardian, agent, or surrogate.[206]

B. Civil Cause of Action Based on Abuse of a Dependent Elder

The second type of proceeding made available by the new theory is a civil cause of action. Under current Hawai'i law, however, only the attorney general has a statutory cause of action for "dependent elder abuse" occurring in a long-term care facility.[207]

1. The Elder Justice Act

Until recently, the attorney general could only bring criminal charges against health care facilities in cases of abuse or neglect.[208] This has proved problematic when dealing with dependent elderly nursing home residents. One of the primary problems in litigation involving elderly residents is proving causation.[209] A majority of the residents are in the homes due to mental or physical incapacities, thus communication presents a significant problem. Many residents are unable to explain what happened to them, recall specific times and events, or identify the person who inflicted the injury.[210] There are also problems such as multiple illnesses and natural physical frailties (i.e. thin skin that bruises easily or broken bones caused by ordinary touching).[211] Due to these obstacles, criminal intent is rarely proven and

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[204] HAW. REV. STAT. § 327E-14 (Supp. 2003).

[205] *See id.*

[206] *See id.* Under State law, a patient's agent, guardian, surrogate, or a health-care provider, may petition a court to enjoin or direct a health-care decision. A "legal surrogate" is an agent designated in a power of attorney for health care, or surrogate designated or selected in accordance with chapter 327E. *See id.* § 671-3(e) (Supp. 2003). A "guardian" is a judicially appointed guardian having authority to make a health-care decision for an individual." *See id.* § 327E-2. Because court involvement is required, intervention may not be as immediate.

[207] HAW. REV. STAT. § 28-94(a) (Supp. 2003).

[208] *See* discussion *supra* Part IV.A.5.

[209] *See* Furrow, *supra* note 32, at 42; Tanaka Interview, *supra* note 152.

[210] *See* Furrow, *supra* note 32, at 42; Tanaka Interview, *supra* note 152.

[211] *See* Furrow, *supra* note 32, at 42; Tanaka Interview, *supra* note 152.

conviction rates remain low.[212] Under a recently enacted law, however, the attorney general now has the option to pursue civil action in cases of institutional abuse of dependent elders.

The Elder Justice Act, which took effect in 2003, authorizes the attorney general to pursue a civil action against *any caregiver* found guilty of abusing a dependent elder,[213] on behalf of the state.[214] The action can be for the purposes of prevention, restraint, or remedy.[215] The statute defines neglect as "the *reckless* disregard for the health, safety or welfare of a dependent elder . . . that results in *injury*."[216] To illustrate the range of actions that constitute neglect, the statute reads: "'Neglect' includes, but is not limited to . . . [f]ailure to provide or arrange for necessary . . . health care; except when such failure is in accordance with the dependent elder's [health care] directive."[217] If a dependent elder lacks sufficient capacity to communicate a responsible decision, abuse occurs when the individual is "exposed to a situation or condition which poses an imminent risk of death or risk of serious physical harm."[218]

In the event that abuse or negligence is found, a mandatory civil penalty will be ordered in an amount "not less than $500 nor more than $1,000 for each day that the abuse occurred . . . [plus] costs of investigation."[219] The law provides limited protection, however, and to qualify, a resident must be sixty-two years of age or older, have a mental or physical impairment, and be dependent upon another for personal health, safety, or welfare due to the impairment.[220] Those who can be held liable as caregivers include "any person who has undertaken the care, custody, or physical control of, or who has a legal or contractual duty to care for the health, safety, and welfare of a dependent elder, including . . . owners, operators, employees, or staff of . . . [l]ong-term care facilities."[221] A significant benefit of claims brought by the attorney general is a statutory exemption excluding state actions from a statute of limitation.[222]

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[212] *See* Furrow, *supra* note 32, at 42.

[213] HAW. REV. STAT. § 28-94(a) (Supp. 2003). The statute defines abuse as "actual or imminent physical injury, psychological abuse or neglect, sexual abuse, financial exploitation, negligent treatment, or maltreatment." *See id.* at § 28-94(b) (1993).

[214] *See id.* § 28-94(b).

[215] *See id.*

[216] *See id.* (emphases added).

[217] *See id.* § 28-94(b).

[218] *See id.* § 28-94(b)(5).

[219] *See id.* § 28-94(a) (Supp. 2003). However, the statute does not specify a maximum amount. *See id.*

[220] *See id.* § 28-94(b).

[221] *See id.*

[222] *See id.* § 657-1.5 (1993).

2. Bringing a claim under the Act

Assuming both resident and caregiver fall within the purview of the statute,[223] the basis for a claim brought under the Elder Justice Act would be that the defendant's failure to provide necessary and adequate pain treatment showed reckless disregard for the health, safety, and welfare of the resident, resulted in injury (unrelieved pain), and therefore constituted neglect of a dependent elder.[224] The first step would be to establish the duty of adequate and aggressive pain treatment owed to the patient, and the defendant's notice of this duty. Under the new theory, a plaintiff could introduce the recently enacted "Pain Patient's Bill of Rights,"[225] as well as the Joint Commission on Accreditation of Healthcare Organization's ("JCAHO") pain assessment and management standards.[226] Although accreditation by the Joint Commission is not required, all hospitals and a small number of nursing homes in Hawai'i are voluntarily accredited.[227] Therefore, the JCAHO pain assessment and management standards in place at all hospitals and accredited nursing facilities become, in effect, the standard of care in the community. As seen in *Tomlinson*, courts are generally willing to extend the duty of adequate pain management to nursing facilities.[228]

The next step would be to establish the standard of care by which to measure the defendant's conduct. The general rule followed by Hawai'i

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[223] *See id.* § 28-94(a).

[224] *See id.* § 28-94.

[225] *See* Act of July 9, 2004, Ch. 189, 23rd Leg., Reg. Sess. (Haw. 2004); *see* discussion *supra* Part II.C.

[226] NAT'L PHARM. COUNCIL, INC., *supra* note 22, at 3. The inclusion of pain assessment and management standards began in the 2000-2001 JCAHO accreditation manual. *Id.* The standards clearly articulate what constitutes appropriate treatment. *Id.* at 77. They mandate, among other things, that accredited facilities should: recognize a patient's right to adequate pain management; provide training for staff members on an ongoing basis; educate patients and family members about their rights upon admission; perform proper assessment and reassessment; record results of assessments in a way that facilitates regular reassessment and follow-up; and address patient needs for symptom management in the discharge planning process. *See* ST. FRANCIS MEDICAL CTR. & ST. FRANCIS MEDICAL CTR.—WEST, JCAHO POCKET GUIDE 2003, at 11 [hereinafter JCAHO POCKET GUIDE 2003]; *see also* NAT'L PHARM. COUNCIL, INC., *supra* note 22, at 77-78.The standards also mandate use of "pain as the 5th vital sign." *See* Furrow, *supra* note 32, at 43. This means that in addition to the routine monitoring and recording of a patient's blood pressure, pulse, respiration and temperature, health care providers are now required to routinely monitor pain. *See* JCAHO POCKET GUIDE 2003, at 11. Routine inquiry involves the recording of pain location, intensity, duration, quantity, and quality. *See id.*

[227] *See* JCAHO website for a listing of JCAHO accredited hospitals and nursing facilities in Hawai'i, *at* http://www.jcaho.org (last modified Oct. 4, 2004) (last visited Aug. 22, 2004).

[228] *See generally* TOPICS, *supra* note 79.

courts is that "the question of negligence must be decided by reference to relevant medical standards of care, which [the] plaintiff carries the burden of proving through expert medical testimony."[229] Under the new theory, clinical practice guidelines and standards would be allowed as evidence to establish the standard of care owed to the resident. A plaintiff would need to retain an expert to explain the Joint Commission pain management standards and its relevancy to the defendant, and to testify how the provider's conduct deviated from those standards.

Lastly, a plaintiff would need to prove that an injury occurred, and that the injury or damage was caused by the *reckless* negligence of the defendant.[230] The burden would be on the plaintiff to prove this by clear and convincing evidence.[231] "Clear and convincing" means that the evidence must "produce in the mind of the trier of fact a firm belief or conviction as to the allegations sought to be established, and requires the existence of a fact be highly probable." [232] To reach the level of "recklessness," a plaintiff must show that the defendant "has intentionally done an act of an unreasonable character in disregard of a risk known to or so obvious that he [or she] must be taken to have been aware of it, and so great as to make it highly probable that harm would follow."[233] In both the *Bergman* and *Tomlinson* cases, the plaintiffs used medical records indicating various levels of pain to show that an injury had occurred, and that the defendants were aware of the injuries.[234] A plaintiff would thus retain an expert to testify that the victim's pain could have been effectively relieved or controlled by pain medication. The plaintiff could then introduce medical records to show that the defendant was aware of the risk of injury to the patient, but due to an intentional disregard for the patient's health, safety, and welfare, failed to treat the pain adequately, which resulted in the patient suffering unnecessarily.

In *Bergman*, the plaintiff introduced clinical practice guidelines and state pain policies as evidence of the environment in which the defendant practiced, and to show that he was on notice of his duty to treat pain aggressively.[235]

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[229] Craft v. Peebles, 78 Hawai'i 287, 298, 893 P.2d 138, 149 (1995) (involving a medical malpractice action where the plaintiff brought claims against her physician for professional negligence after the rupture of her silicone breast implants).

[230] *See* HAW. REV. STAT. § 28-94(b) (Supp. 2003).

[231] Iddings v. Mee-Lee, 82 Hawai'i 1, 14, 919 P.2d 263, 276 (1996) (holding that the clear and convincing standard of proof must be applied to all civil claims alleging willful and wanton misconduct).

[232] *Id.* at 13, 919 P.2d at 275 (citations omitted).

[233] *Id.* at 11, 919 P.2d at 273 (quoting Thompson v. Bohlken, 312 N.W.2d 501, 504-05 (Iowa 1981) (citation omitted)).

[234] Thomson American Health Consultants, *supra* note 136, at 49.

[235] Tucker, *supra* note 73, at 19. "Plaintiffs were able to convince the jury that the physician had been reckless because the physician was shown to be practicing in an environment where

Based on this theory, the absence of comprehensive state pain policies,[236] the reluctance by Hawai'i's Medical Board to adopt pain guidelines, and the lack of serious disciplinary action in cases of professional negligence[237] all present potential problems. A plaintiff can, however, introduce evidence such as: the massive number of articles addressing adequate pain management published in medical and health journals;[238] the *Bergman* case and its progeny; the Joint Commission standards; and the abundance of clinical practice guidelines offered over the Internet, among other things.[239]

If a civil judgment is entered against the defendant, the plaintiff would have to prove damages. This involves establishing when the neglect began, as well as the amount spent in litigating the case.[240] If conduct is found to rise to the level of recklessness, there is a high probability that other claims will be filed and fines assessed against the institution. As illustrated by the *Tomlinson* case, significant changes have taken place. The Centers for Medicare and Medicaid Services now classify inadequate treatment as substandard care and a basis for fraud; state boards have begun to take disciplinary action;[241] and state departments in charge of licensing will have to take disciplinary action for substandard care. Moreover, victimized residents or their estates may now institute private medical malpractice suits seeking punitive damages among other things.[242] Clearly, nursing homes can no longer afford to ignore residents' pain.

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he had been barraged with information about his duty and responsibility to treat pain aggressively and attentively." *Id.*

[236] *See* 2001 ANNUAL REVIEW, *supra* note 59, at 2.

[237] *See* WOLFE & LURIE, *supra* note 61.

[238] Pls.' Mediation Br., Tomlinson v. Bayberry Care Ctr., No. C 02-00120 (Cal. Super. Ct. Contra Costa County 2003), *available at* http://www.compassionindying.org/tomlinson/tomlinson_brief.pdf (last visited Aug. 20, 2004) (on file with Compassion in Dying Federation) (copy on file with author).

[239] *See, e.g.*, The National Guideline Clearinghouse, *at* http://www.guideline.gov.

[240] HAW. REV. STAT. § 28-94(a) (Supp. 2003) provides in relevant part:

> Any caregiver against whom a civil judgment is entered on a complaint alleging that the caregiver committed abuse against a dependent elder, shall be subject to a civil penalty of not less than $500 nor more than $1,000 for *each day* that the *abuse occurred*, and the *costs of investigation*.

Id. (emphases added).

[241] *See, e.g.*, Thomson American Health Consultants, *supra* note 136, at 51; *see In re* Eugene B. Whitney, M.D., Medical Board of Cal., Case No. 12-2002-133376 (Dec. 15, 2003). In a decision effective January 14, 2004, the California Licensing Board became only the second board to discipline a physician for the undertreatment of pain. *See id.*

[242] *See* discussion *infra* Part IV.C.

C. Civil Causes of Action Under Hawai'i's Medical Malpractice Laws

After an individual is protected from further harm, or in situations where an estate desires compensation for past abuses, civil remedies provide another alternative. Although nursing home residents are not provided a private cause of action for dependent elder abuse, state law does allow for the survival of an action arising out of neglect.[243] Therefore, under the theory that inadequate pain management constitutes professional negligence, a resident or an estate is provided several causes of action under traditional medical tort laws.[244] Such claims can be pursued in addition to judicial, administrative, or protective actions taken by the attorney general, Department of Health, Department of Consumer Affairs, Medicaid Investigations Divisions, or Adult Protective Services.

A "medical tort" is defined as "professional negligence, the rendering of professional service without informed consent, or an error or omission in professional practice, by a health care provider, which proximately causes death, injury, or other damage to a patient."[245] All individuals regardless of age or dependency status can assert a medical tort claim.[246] A plaintiff is required to take all steps necessary in a typical medical tort case, however, including filing a claim with the medical claim conciliation panel before instituting a lawsuit.[247] Claims are subject to a two-year statute of limitation,[248] and damages awarded for pain and suffering subject to the $375,000 cap for tort claims.[249]

1. *Professional negligence*

In medical tort claims based on professional negligence, the burden is on the plaintiff to show the "duty owed by the defendant to the plaintiff, a breach of that duty, and a causal relationship between the breach and the injury

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[243] HAW. REV. STAT. § 663-7 (1993) provides in part: "A cause of action arising out of . . . neglect . . . shall not be extinguished by reason of the death of the injured person. The cause of action shall survive in favor of the legal representative of the person and any damages recovered shall form part of the estate of the deceased." *See id.*

[244] Throughout this section, the author uses the term "resident" to refer to a nursing home resident or their estate, as well as a resident's legal surrogate or guardian.

[245] HAW. REV. STAT. § 671-1(2) (1993).

[246] *See id.* § 663-1 (1993).

[247] *See id.* § 671-12(a) (1993) (requiring any person, or representative of the person, to file a claim with the medical claim conciliation panel before a claim for medical tort can be commenced).

[248] *See id.* § 657-7.3 (1993).

[249] *See id.* § 663-8.7 (1993).

suffered."[250] Thus, a plaintiff bringing a cause of action under traditional medical tort laws would proceed the same way as with a claim brought under the Elder Justice Act.[251] Several significant differences exist, however. The lower standard of negligence, rather than reckless neglect, applies, which must be proven by a preponderance of the evidence. This means that a plaintiff would only need to prove "whether 'the existence of [a] contested fact is more probable than its nonexistence.'"[252] To establish the standard of care by which to measure the defendant's conduct, expert medical testimony is again generally necessary.[253] Expert testimony is also needed to prove how the defendant's conduct deviated from the standard.[254]

2. Negligent failure to obtain informed consent

A plaintiff may also be able to assert a medical tort claim based on the provider's negligent failure to obtain informed consent.[255] Under state law, a health care provider is required to obtain the informed consent of a patient before administering medical care.[256] Among the requirements for informed consent is that the patient be made aware of the condition being treated and of possible alternative forms of treatment.[257] Because aggressive treatment is now a recognized alternative, the basis for a claim would be that the option of aggressive treatment was never provided, and therefore professional service was rendered without informed consent. If a plaintiff could show that demands for aggressive treatment were made and not met, or that medical records indicated continuing pain and medication that could have provided effective relief was not offered, a failure to obtain informed consent will be found.

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[250] *See* Bernard v. Char, 79 Hawai'i 378, 377, 903 P.2d 676, 682 (Haw. App. 1995) (citation omitted).

[251] *See* discussion *infra* Part IV.B.1.

[252] Masaki v. Gen. Motors Corp., 71 Haw. 1, 14, 780 P.2d 566, 574 (1989) (stating that "[i]n most civil proceedings . . . the plaintiff must show by a 'preponderance of the evidence' that his or her claim is valid. . . . [T]he preponderance standard directs the factfinder to decide 'whether the existence of contested fact is more probable than its nonexistence.'" (quoting E. CLEARY, MCCORMICK ON EVIDENCE § 339, at 957 (3d ed. 1984))).

[253] Craft v. Peebles, 78 Hawai'i 287, 298, 893 P.2d 138, 149 (1995) (expressly stating that "the question of negligence must be decided by reference to relevant medical standards of care for which the plaintiff carries the burden of proving through expert medical testimony" (quoting Nishi v. Hartwell, 52 Haw. 188, 195, 473 P.2d 116, 121 (1970) (citations omitted))).

[254] *See Bernard*, 79 Hawai'i at 377, 903 P.2d at 682.

[255] *See* HAW. REV. STAT. § 671-3 (Supp. 2003).

[256] *See id.*

[257] *See id.* § 671-3(b)(4).

3. Failure to comply with health care instructions

Where a resident lacks sufficient capacity[258] to make health care decisions, the defendant's conduct may rise to the level of recklessness, or even criminal intent, if an advance health care directive[259] exists but is not complied with.[260] Under Hawai'i's Uniform Health-Care Decisions Act (modified),[261] a health care institution must comply with a health care instruction made by a patient, designated agent, judicially appointed guardian, or legal surrogate.[262] The institution may decline to comply under certain situations,[263] but must inform the decision-maker of the refusal and of a provider willing to comply.[264] Additionally, the provider must assist the resident in a transfer if one is so desired, and provide continuing care until the transfer is completed.[265] If a plaintiff can prove that the institution knew about an advance directive but failed to comply, this could be used to prove reckless negligence and failure to obtain informed consent. Hawai'i courts have consistently imposed an affirmative duty on health care providers to protect patient autonomy through informed consent.[266] Thus, by consciously choosing not to comply with a directive, the provider is recklessly disregarding patient autonomy and violating the duty of informed consent. A failure to comply would then be grounds for pain and suffering damages, and depending on the mental state of the defendant, could also be grounds for punitive damages.[267] Moreover, if a

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[258] *See id.* § 327E-2 (Supp. 2003) (defining "[c]apacity" as "an individual's ability to understand the significant benefits, risks, and alternatives to proposed health care and to make and communicate a health-care decision").

[259] *See id.* (defining an "[a]dvance health-care directive" as "an individual instruction or a power of attorney for health care").

[260] *See id.* § 327E (Supp. 2003). The statute provides in relevant part:

> (a) An adult or emancipated minor may give an individual instruction. The instruction may be oral or written. The instruction may be limited to take effect only if a specified condition arises.
>
> (b) An adult or emancipated minor may execute a power of attorney for health care, which may authorize the agent to make any health-care decision the principal could have made while having capacity.

See id.

[261] *See id.* § 327E-3 (Supp. 2003).

[262] *See id.* § 372E-7 (Supp. 2003).

[263] *See id.*

[264] *See id.* § 327E-7(g)(3).

[265] *See id.* § 327E-7.

[266] *See* Keomaka v. Zakaib, 8 Haw. App. 518, 523-24, 811 P.2d 478, 482-83 (1991), *cert. denied*, 72 Haw. 618, 841 P.2d 1075 (1991).

[267] *See* Masaki v. Gen. Motors Corp., 71 Haw. 1, 6, 780 P.2d 566, 570 (1989). The court held that "[i]n determining whether an award of punitive damages is appropriate, the inquiry focuses primarily upon the defendant's mental state, and to a lesser degree, the nature of his conduct." *Id.* (citation omitted).

violation of the law is found, statutory damages including actual damages and reasonable attorney fees will be awarded to the resident or estate.[268]

Based on Hawai'i's higher than average rate of elderly residents with advance directives, this presents a potentially significant liability issue for the state's health care providers.[269] In 2000, 48.5 percent of all residents in nursing homes in Hawai'i had formal advance directives; 55.4 percent of terminally ill residents had formal advance directives; and 40.7 percent of residents with severe cognitive impairment had formal advance directives.[270]

4. Damages

Proving damages presents another common problem in suits involving dependent elders. Recognizable damages are usually minimal due to limited lifespan, existence of one or more disabilities, and no loss of wages.[271] Consequently, not many attorneys are willing to take these cases. Damages in these types of suits, therefore, should mainly focus on pain and suffering,[272] mental anguish, and loss of quality of life.[273] A plaintiff should consider:

> 1) Necessary and reasonable medical expenses; 2) Actual past expenses for physician, hospital, nursing and laboratory fees, medications, prosthetic devices, etc.; 3) Anticipated future expenses; 4) Harm from conditions caused by prolonged immobilization; 5) Pain and suffering from physical injuries; 6) Pain and suffering reasonably likely to occur in the future; 7) "Phantom pain" and other subjective pain that may not be readily apparent to others; 8) Mental anguish; 9) Harm from loss of sleep; [and] 10) Past and future impairment of the ability to enjoy life.[274]

Damages may also be recoverable by surviving spouses and children, including damages for loss of companionship, mental anguish and grief, and funeral and burial expenses.[275]

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[268] HAW. REV. STAT. § 327E-10 (Supp. 2003).

[269] *See* HAWAI'I STATE PROFILE, *supra* note 56.

[270] *Id.* The corresponding national averages are as follows: 36.1 percent of all residents; 45 percent for terminally ill residents; and 36.9 percent for residents with severe cognitive impairment. *Id.*

[271] Furrow, *supra* note 32, at 42.

[272] HAW. REV. STAT. § 663-8.5(b) (1993). "Pain and suffering is one type of noneconomic damage and means the actual physical pain and suffering that is the proximate result of a physical injury sustained by a person." *See id.*

[273] *See Nursing Home Injuries: Special Proof Considerations*, *at* http://injury.findlaw.com/nursing-home-abuse/nursing-home-abuse-basics/nursing-home-abuse-basics-proof.html (last visited Aug. 22, 2004) (discussing information a plaintiff should attempt to provide in proving damages in claims against nursing homes).

[274] *Id.*

[275] *Id.*

Hawai'i law permits survival of claims after a person's death with regard to punitive damages.[276] Thus, in some situations, punitive damages may also be appropriate.[277] Hawai'i courts have consistently held that "[w]here clear and convincing evidence exists, one circumstance . . . that warrants an award of punitive damages is when 'there has been some wilful misconduct or that entire want of care which would raise a presumption of a conscious indifference to consequences.'"[278] Consequently, if a plaintiff can prove that a provider's conduct rises to the level of recklessness under the new theory, punitive damages may be available. In situations where health care providers have inadequately managed the pain of terminally ill patients, juries generally appear willing to award punitive damages.[279]

D. Other Possible Causes of Actions Under the New Theory

With inadequate pain treatment now recognized as substandard care, a plethora of additional claims are available to encourage victims and attorneys to pursue action. Possible claims include breach of contract,[280] fraud,[281] intentional or negligent infliction of emotional distress, unfair business practices,[282] and violations of consumer protection.[283]

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[276] Jenkins v. Whittaker Corp., 551 F. Supp. 110 (D. Haw. 1982), *cert. denied*, 479 U.S. 918 (1986) (holding that "because the decedent would have had an action for punitive damages had he survived, . . . his estate representative [was] entitled to recover for punitive damages under HAW. REV. STAT. § 663-7").

[277] Masaki v. Gen. Motors Corp., 71 Haw. 1, 6, 780 P.2d 566, 570 (1989) (holding that "[p]unitive or exemplary damages are generally defined as those damages assessed in addition to compensatory damages for the purpose of punishing the defendant for aggravated or outrageous misconduct and to deter the defendant and others from similar conduct in the future" (quoting D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 3.9, at 204 (1973))).

[278] Ditto v. McCurdy, 86 Hawai'i 84, 91, 947 P.2d 952, 959, (1997), *appeal after remand*, 98 Hawai'i 123 (2002) (quoting *Masaki*, 71 Haw. at 11, 780 P.2d at 572 (citation omitted)).

[279] *See supra* note 85 (discussing jury award of $15 million, including $7.5 in punitive damages, against nursing home for inadequate pain treatment); *see also* TOPICS, *supra* note 79 (discussing the *Bergman* case where the jury voted eight to four to award punitive damages—one vote short of California's requirement of a nine to three vote for awarding punitive damages).

[280] *See Nursing Home Abuse & Injuries—Overview*, *supra* note 142 (explaining that a claim for breach of contract exists if a provider's conduct violates a promise made in the facility's admissions contract regarding adequate care of the resident).

[281] *See supra* Part III.B. (discussing possible fraud charges against Dr. Eugene Whitney by the Centers for Medicare and Medicaid Services).

[282] *See* Berry, *supra* note 81. According to Robert Slattery, attorney for the defendant in the *Bergman* case, the claim lacked legal basis because unfair business practice applies to contract disputes rather than malpractice disputes. *Id.*; *but see supra* note 280.

[283] *See* Deanne Morgan, *From the Front Lines: Pain Treatment Failures*, NURSING HOME LAW & LITIGATION REPORT (Feb. 2004), *available at* http://www.compassionindying.org/

V. RECOMMENDATIONS FOR ACTIONS TO FURTHER PROTECT HAWAI'I'S RESIDENTS

Although a standard of care for pain management now exists, actual practice in the community will reflect this standard only if providers are aware of it. Therefore, education becomes the next priority. This means educating health care providers about what constitutes proper care, as well as educating residents about their right to receive adequate treatment. Furthermore, with inadequate treatment now constituting elder abuse, individuals involved in the elderly services network must be made aware of the established standard of care.

A. Educating Health Care Providers

To further improve the management of pain, use of "pain as the 5th vital sign" should be added to the Department of Commerce and Consumer Affairs' licensing requirements. A major factor contributing to the inadequate treatment of pain in the institutional setting is poorly trained staff.[284] For that reason, it is imperative that each facility implement administrative procedures facilitating proper pain management. Of equal importance is the implementation of effective performance measurement processes and methods.[285]

One method for ensuring frequent pain assessment and proper continuing care is utilization of "pain as the 5th vital sign."[286] This method requires pain to be measured and recorded with each evaluation of the patient's temperature, pulse, respiration, and blood pressure.[287] Using these regular assessments as starting points, the staff would then follow the facility's established pain management strategies. Because all Hawai'i hospitals are required to use this method pursuant to the Joint Commission pain assessment standards,[288] adoption of the method as a uniform practice in facilities would provide accurate and useful data for comparative studies of facilities statewide.

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tomlinson/index.php#9 (last visited Aug. 22, 2004) (on file with Compassion in Dying Federation) (copy on file with author). The claims listed here are theoretically possible under the new theory. Further analysis is beyond the scope of this Comment.

[284] *See* Rich, *supra* note 31, at 14-15.

[285] Furrow, *supra* note 32, at 31.

[286] "Pain as the 5th Vital Sign" is an initiative by the American Pain Society. The purpose of the initiative is to offer health care organizations a pain management improvement strategy, focusing on need to assess pain regularly. NAT'L PHARM. COUNCIL, INC., *supra* note 22, at 77.

[287] *Id.*

[288] *See supra* note 226.

Another suggestion is the adoption of an "intractable pain statute." To encourage adequate pain management, states such as California have enacted these statutes to assure physicians that no litigation or disciplinary action will be taken for justifiable, aggressive treatment of intractable pain.[289] The Hawai'i State Legislature should therefore adopt an "intractable pain statute" to expedite improvement in the area of pain management.

Because facility staff are required to report the abuse of a dependent adult under state law,[290] it is important for all staff members to recognize that inadequate pain management now constitutes abuse. For this reason, "inadequate pain management" should be added to the definition of "abuse" under the Dependent Adult Protective Services Act,[291] as well as to the definition of "neglect" contained in the Elder Justice Act.[292] Furthermore, all facilities in Hawai'i should be required to include inadequate and untimely pain relief as an enumerated action constituting mistreatment in individual facility policies.[293]

B. Educating the Public

Now that residents are able to utilize services dealing with elder abuse to obtain immediate pain relief, another recommendation is the utilization of these services to educate residents and family members about the right to adequate pain relief, as well as about options available when that right is violated. This means that individuals involved in these services must also be made aware of the established standard of care. Volunteers and employees in the network must receive training regarding a resident's right to aggressive treatment, conduct that constitutes adequate treatment, and options available to a resident or family member when adequate treatment is not being provided. They must also learn how to recognize situations where an elderly resident is being neglected. Therefore, signs and symptoms relating to unrelieved pain should be added to training materials, brochures, pamphlets, and guides provided to volunteers and employees, as well as to material distributed to the public.[294]

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[289] *See, e.g.*, CAL. BUS. & PROF. CODE § 2241.5 (West 1994).

[290] HAW. REV. STAT. § 346-224 (1993).

[291] *See id.* § 346-222 (1993).

[292] *See id.* § 28-94(b) (Supp. 2003).

[293] *See* 11 HAW. ADMIN. R. § 11-94-15(c)(5) (1985).

[294] *See, e.g.*, EXECUTIVE OFFICE ON AGING & DEP'T OF HUMAN SERVICES, GUIDELINES FOR MANDATED REPORTERS DEPENDENT ADULT ABUSE AND NEGLECT (Feb. 2003).

C. Amending the Elder Justice Act to Provide Private Causes of Action

To further protect the rights of Hawai'i's residents, the Elder Justice Act should be amended to provide victims and estates with private causes of action for the abuse of a dependent elder, as well as treble damages.[295] By limiting residents to claims asserted solely under traditional medical malpractice law, victims are not being compensated for their injuries. Medical malpractice suits are extremely expensive and time consuming, and most terminally ill residents will not live long enough to see a case to the end. What is more, many residents and families who lack the financial resources to institute malpractice claims will remain unprotected.[296] Due to factors such as limited lifespan, physical or mental impairment, and terminal illness, a lack of enhanced penalties means that damages awarded to residents or estates will generally remain low.[297] Only where the most egregious facts exist will the attention of attorneys be drawn.[298] The possibility of enhanced damages would provide a greatly needed incentive for attorneys to represent elderly residents. To safeguard institutions against a landslide of frivolous claims, however, the Act should also include a provision that makes litigation costs payable by the plaintiff where claims are found to be frivolous.[299]

VI. CONCLUSION

As the result of a theory emerging from a line of California elder abuse cases, a standard of care for pain management has been established, ambiguities surrounding pain medication prescription removed, and an affirmative duty to aggressively treat pain recognized. Applying this theory

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[295] An earlier draft of the Elder Justice Act provided private causes of action for residents and their estates, treble damages, and an exemption of damages awarded under the section from the $375,000 cap. S.B. No. 78, 2003 Leg., 22nd Sess. (Haw. 2003). Due to concerns over the provisions' impact on health care providers' general liability insurance, however, the provisions were omitted from the final version. 2003 Haw. House J. 817, 859-61 (daily ed. Apr. 8, 2003).

[296] Telephone Interview with Thomas Grande, Partner, Davis Levin Livingston Grande (Apr. 26, 2004) [hereinafter Grande Interview].

[297] *See* Kevin B. Dreher, Book Note, *Enforcement of Standards of Care in the Long-Term Care Industry: How Far Have We Come and Where Do We Go from Here?*, 10 ELDER L.J. 119, 143-144 (2002).

[298] Grande Interview, *supra* note 296; *see* Lindy Washburn, *Elderly find their malpractice cases aren't worth lawyers' time*, N. N.J. Rec., Oct. 6, 2002, at A-1 (stating that as a result of the low potential for damages in cases involving the elderly, victims or survivors seldom file malpractice suits due to inability to find representation).

[299] Ellen J. Scott, *Punitive Damages in Lawsuits Against Nursing Homes*, 23 J. LEGAL MED. 115, 128 (Mar. 2002). "To provide a disincentive for frivolous lawsuits, such statutes should include a provision awarding defense attorney's fees if it could be established that the plaintiff acted in bad faith in bringing the case." *Id.*

to existing Hawai'i state laws, residents are provided with sufficient remedies to assert their right to adequate pain management. Because inadequate relief now constitutes elder abuse, Hawai'i's dependent elderly residents and their families are provided with an entire network of protective services to exhaust. In addition, the state attorney general has a cause of action for the undertreatment of a dependent elder's pain, and can pursue either civil or criminal charges against a facility. Where state law fails to afford residents or estates a private cause of action to hold providers liable for dependent elder abuse, state medical malpractice laws fill the gap by providing a cause of action for professional negligence. Thus, while more can be done, Hawai'i's existing laws are sufficient to provide for the established standard of care.

Because substandard pain management has prevailed as the practice in the community for so long, changes have been slow. As demonstrated by the events unfolding in California, when pain guidelines and state policies have only a limited effect, external pressures such as the threat of litigation are sometimes necessary to effectuate timely improvements.[300] Although it took a $15 million jury award to finally get the attention of California health care providers, hopefully the mere threat of litigation will provide enough incentive for providers nationwide to react. While Hawai'i residents await this reaction, however, they can rest assured that alternatives now exist to protect them when violations occur.

Shawna E. Oyabu[301]

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[300] Furrow, *supra* note 32, at 30 (stating that "[t]he threat of malpractice litigation may offset [the powerful forces influencing practioners' to improperly manage pain] . . . making anxious providers either overestimate the risk of suit or at least adjust their practice to a new assessment of the risk of the suit").

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Trailblaze or Retreat? Political Gerrymandering After *Vieth v. Jubelirer*

If the record of this case does not establish unconstitutional political gerrymandering, no such claim exists. This Court should not then waste its valuable judicial resources entertaining illusory claims that, in reality, can never be established.[1]

I. INTRODUCTION

Under the Census Clause,[2] states are required to reapportion their congressional districts every ten years in accordance with the decennial national census.[3] Population figures from the 2000 census allotted Pennsylvania nineteen Representatives in Congress, a decrease of two from 1990.[4] Pennsylvania's two state Houses held Republican majorities at that time, and its Governor was also a Republican.[5] At the urging of prominent national Republican Party members, the Pennsylvania General Assembly enacted an electoral districting plan designed to penalize Democratic voters.[6] Packing, cracking, and pairing[7] formerly Democratic districts into disadvantageous new regions, the misshapen map created a Republican advantage in thirteen districts, even if the party lost the popular vote.[8] Registered Democrats filed

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[1] Erfer v. Commonwealth, 794 A.2d 325, 343 (Penn. 2002) (Zappala, C.J., dissenting) (emphasis added).

[2] U.S. CONST. art. I, § 2, cl. 3. (reading in significant part, "The actual Enumeration shall be made . . . within every . . . Term of ten Years, in such Manner as they shall by Law direct").

[3] Decennial reapportionment is not an explicit constitutional requirement, but less frequent reapportionment will raise a presumption of unconstitutionality. Reynolds v. Sims, 377 U.S. 533, 583-84 (1964).

[4] Vieth v. Jubelirer, 541 U.S. 267, 272 (2004).

[5] *Id.*

[6] *Id.*

[7] "Packing," "cracking," and "pairing" are electoral districting terms: "'Packing' refers to the practice of filling a district with a supermajority of a given group or party." *Id.* at 287 n.7. "'Cracking' involves the splitting of a group or party among several districts to deny that group or party a majority in any of those districts." *Id.* "Pairing" is the practice of pushing two incumbents from the same political party into a single district, forcing them to compete against one another. Brief for Appellants at 7, Vieth v. Jubelirer, 541 U.S. 267 (2004) (No. 02-1580). "Pairing" is a particularly damaging form of what Samuel Issacharoff and Pamela Karlan dub "shacking," or engineering districts by removing candidates' residences to new districts. Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 552-53(2004).

[8] Brief for Appellants at 14, *Vieth* (No. 02-1580).

In the results of the 2004 congressional election, Republicans won twelve of nineteen seats, and lost the presidential electoral race by the slim margin of just under 127,500 votes. *See* http://www.cnn.com/ELECTION/2004/pages/results/states/PA/ (last visited Nov. 13, 2004).

a complaint alleging that the legislation constituted a political gerrymander in violation of Article I of the U.S. Constitution and the Fourteenth Amendment's Equal Protection Clause.[9] The District Court for the Middle District of Pennsylvania held that the plan was not an illegal gerrymander because plaintiffs had failed to demonstrate discriminatory effect.[10] Plaintiffs appealed to the U.S. Supreme Court, who noted probable jurisdiction.[11] In *Vieth v. Jubelirer*,[12] Justice Scalia, writing for the plurality, ruled that political gerrymandering claims are non-justiciable for lack of judicially discoverable and manageable standards.[13]

Vieth overrules the intent-effect standard set by the Supreme Court in *Davis v. Bandemer*.[14] Although five of the nine justices believed that political gerrymandering claims should remain justiciable,[15] they did not agree on a standard by which to assess such claims. As a result, *Vieth* contains three dissents and one concurrence, each contending that political gerrymandering claims are justiciable, but setting forth different standards for assessing those claims. The purpose of this casenote is to examine the justices' diverse opinions in *Vieth* and to envision a rational map by which to adjudicate gerrymandering.

Part II of this Note outlines a brief legal history of political gerrymandering, and of racial gerrymandering, which is jurisprudentially distinct from, yet instructive in examination of, the former. Part III details an anatomy of *Vieth*. Part IV is composed of three subsections. Subsection A posits that the plurality's conception of gerrymandering jurisprudence lacks conceptual clarity, maintains a false distinction between racial and political gerrymandering, and is unproductively doctrinaire. Subsection B outlines three critiques of the Court's voting rights jurisprudence, through which this Note seeks to demonstrate *Vieth's* inadequate examination of the broader doctrinal inconsistencies in the Court's treatment of political gerrymandering. First, subsection B discusses Samuel Issacharoff's call for the Court to hold partisan apportionment presumptively unconstitutional. Next, the subsection summarizes Richard Hasen's defense of "unmanageable" standards, and finally, the subsection recounts Michael McConnell's proposal to replace the

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[9] Vieth v. Pennsylvania, 188 F. Supp. 2d 532, 536-37 (M.D. Pa. 2002) (three-judge court).

[10] *See* Vieth v. Pennsylvania, 241 F. Supp. 2d 478, 484 (M.D. Pa. 2003).

[11] Vieth v. Jubelirer, 539 U.S. 957 (2003), *prob. juris. noted.*

[12] 541 U.S. 267 [hereinafter *Vieth*].

[13] *See generally id.*

[14] 478 U.S. 109 (1986) (holding that partisan gerrymandering claims are justiciable under an intent-effect test). The *Bandemer* analysis is discussed *infra* Part II.A.

[15] Justices Kennedy, Stevens, Souter, Ginsburg, and Breyer wrote or joined in separate opinions which did not support the plurality's contention that political gerrymandering claims are henceforth non-justiciable. *See Vieth*, 541 U.S. 267.

Equal Protection analysis of political gerrymandering claims with one based on the Republican Form of Government Clause.[16] Subsection C looks at the extent to which each theory would require that the Supreme Court revisit a fundamental tenet of its voting rights jurisprudence and examines *Jackson v. Perry*,[17] the Supreme Court's first post-*Vieth* political gerrymandering case. This Note concludes that partisan redistricting should be held presumptively unconstitutional. More importantly, it suggests that in order to draft a conceptually rational and coherent voting rights paradigm, the Supreme Court should reach further into the core values underpinning American democracy in its voting rights determinations.

II. BACKGROUND

Political gerrymandering and racial gerrymandering are jurisprudentially distinct. Racial gerrymandering is subject to strict scrutiny because it involves classifying voters according to race.[18] On the other hand, the mere justiciability of political gerrymandering is currently under question.[19] The following subsections trace the non-parallel development of racial and political gerrymandering, in order to provide a background for the analysis of these essentially indistinct forms of district-manipulation.

A. Reapportionment, the Political Question, and Voter Parity

The history of "political question" justiciability begins in 1946 with *Colegrove v. Green*.[20] The petitioners in *Colegrove* complained that the Illinois legislature had not reapportioned its congressional legislative districts in forty years, thus ignoring significant and increasing discrepancies in voter parity due to differential population growth.[21] Petitioners requested that the Supreme Court invalidate provisions of the Illinois statute governing

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[16] U.S. CONST. art. IV, § 4.

[17] ___ U.S. ___, 125 S. Ct. 351 (2004), *vacating* Session v. Perry, 298 F. Supp. 2d 451 (E.D. Tex. 2004) (three-judge court).

[18] *See* discussion *infra* Part II.B; Shaw v. Reno, 509 U.S. 630, 631 (1993) ("[S]tate legislation that . . . distinguishes among citizens on account of race . . . must be narrowly tailored to further a compelling governmental interest." (citing Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 277-78 (1986))).

[19] *See generally Vieth*, 541 U.S. 267 (holding political gerrymandering claims nonjusticiable).

[20] 328 U.S. 549 (1946). For a history of the origins and development of the political question doctrine, *see* Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 246-63 (2002).

[21] *See Colegrove*, 328 U.S. at 550.

congressional districting as violations of the right to vote under Article I of the U.S. Constitution and the equal protection of the laws under the Fourteenth Amendment.[22] The Court determined that the issue was a "political question" properly addressed by State legislatures or by Congress, and was therefore non-justiciable.[23] According to the majority, "[c]ourts ought not to enter this political thicket."[24]

Sixteen years later, the Court decided differently in *Baker v. Carr*.[25] The petitioners in *Baker* brought forth virtually the same claim as the complainants in *Colegrove*. The State of Tennessee had failed to reapportion its congressional districts for 60 years, and as a result, the districting map had become tainted with "rotten boroughs."[26] The Court in *Baker* ruled that the substance of the complaint was justiciable, explaining, "the mere fact that the suit seeks protection of a political right does not mean it presents a political question."[27] The Court then clarified the distinction between justiciable and non-justiciable political issues:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[28]

Although the central issue in *Baker* was political, it did not constitute a non-justiciable political question according to the Court's new test.[29] The Court did not, however, consider remedies for the plaintiffs' apportionment claim, remanding the case for further proceedings.[30]

The Supreme Court articulated its stance regarding the *remedy* for disproportionate districting two years later, in *Wesberry v. Sanders*.[31] Voters

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[22] *Id.* at 568.

[23] *See id.* at 556.

[24] *Id.*

[25] 369 U.S. 186, 208-09 (1962).

[26] *See id.* at 303-07 (Frankfurter, J., dissenting) (tracing history of English "rotten boroughs" as analogy to American gerrymandering).

[27] *Id.* at 209.

[28] *Id.* at 217.

[29] *Id.* at 226.

[30] *Id.* at 237.

[31] 376 U.S. 1 (1964).

in Georgia's Fifth Congressional District, which was populated with more than twice as many constituents as its surrounding districts, brought the action.[32] Justice Black, writing for the majority, held that the districting scheme was an unconstitutional dilution of the right to vote.[33] "'[B]y the People of the several States,'"[34] he explained, "means that as nearly as practicable one man's vote in a congressional election is to be worth as much as another's."[35] The Framers had intended for population to be the basis of congressional elections; it was "a principle tenaciously fought for and established at the Constitutional Convention."[36]

The one-person, one-vote rule set out in *Wesberry* rapidly became a fundamental tenet of the American conception of representative democracy.[37] In 1983, the Court zealously applied the rule in *Karcher v. Daggett*,[38] requiring near-perfect mathematical parity for congressional apportionment.[39] The Court concluded that the deviations between the districts at issue in *Karcher* were "not the result of a good-faith effort to achieve population equality."[40] Although they do not necessarily specifically address political gerrymandering, these cases—*Colegrove*, *Baker*, *Wesberry*, and *Karcher*—provide the backdrop for the Court's analysis of political gerrymandering claims, since the functional issue in political gerrymandering cases was one of vote-dilution.

The Court specifically addressed the justiciability of political gerrymandering in *Bandemer*.[41] Plaintiffs brought action against the State of Indiana claiming that the State's congressional apportionment plan unconstitutionally

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[32] *Id.* at 2.

[33] *Id.* at 7.

[34] *Id.* (citing U.S. CONST. art. I, § 2).

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

[36] *Id.* at 8.

[37] *See* Reynolds v. Sims, 377 U.S. 533 (1964) (adopting one-person, one-vote rule for State legislative elections); Avery v. Midland County, 390 U.S. 474 (1968) (adopting one-person, one-vote rule for county elections). *See also* Nathaniel Persily, Thad Kousser & Patrick Egan, *The Complicated Impact of One Person, One Vote on Political Competition and Representation*, 80 N.C.L. REV. 1299, 1301 (2002) ("Within just a few years, almost every legislative institution in America reorganized itself to comply with the [one-person, one-vote] decisions."); Erin Daly, *Idealists, Pragmatists, and Textualists: Judging Electoral Districts in America, Canada, and Australia*, 21 B.C. INT'L & COMP. L. REV. 261, 264 (1998) ("[T]he rule's success has led to the conviction . . . that the one person, one vote rule is the only legitimate way to achieve true democracy.").

[38] 462 U.S. 725 (1983).

[39] The Court struck down New Jersey's congressional reapportionment scheme, for which maximum deviation was 0.6984% on the mean. *Id.* at 728.

[40] *Id.* at 727.

[41] Davis v. Bandemer, 478 U.S. 109 (1986).

diluted the vote of its resident Democrats.[42] The Court determined that gerrymandering cases were justiciable under the Equal Protection Clause.[43] Justice White wrote for the plurality,[44] setting forth an intent-effect test for adjudicating such claims: "[P]laintiffs were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group."[45] However, the *Bandemer* standard provided little guidance for lower courts and frustrated legal scholars.[46] *Bandemer's* intent prong was straightforward. As the Court stated, "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended."[47] It was the effect prong that confounded claimants, judges, and observers.[48] An unconstitutionally discriminatory effect under *Bandemer* could be found only where "the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[49] This meant that challenging a districting scheme required a showing that the petitioners were effectively "shut out" of the electoral process altogether—a claim that was nearly impossible to prove.[50] What is more, the Court failed to explain what it meant by "consistently degrade." In a system where reapportionment is carried out every ten years, the Court required that unconstitutional discrimination must be evidenced by the "continued

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[42] *Id.* at 113.

[43] *Id.* at 143.

[44] A majority of the Court found the issue to be justiciable; however, Justice Powell wrote a concurring opinion on the proper standards for adjudication. *Id.* at 161-85 (Powell, J., concurring).

[45] *Id.* at 127.

[46] *See, e.g.*, Vieth v. Pennsylvania, 188 F. Supp. 2d 532, 544 (M.D. Pa. 2002) (three-judge court) ("[T]he recondite standard enunciated in *Bandemer* offers little concrete guidance."); Samuel Issacharoff, *Judging Politics: The Elusive Quest for Judicial Review of Political Fairness*, 71 TEX. L. REV. 1643, 1646 (1993) ("[T]he Court's standards are fundamentally unworkable and incorporate such ambiguous and unclear commands as to be unfit for any manageable form of judicial application."); *see generally* Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1365-67 (1987).

[47] *Bandemer*, 478 U.S. at 129.

[48] *See, e.g.*, Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, "Fair Representation" and an Exegesis into the Judicial Role*, 78 NOTRE DAME L. REV. 527, 562 (2003) ("The effects prong has proven to be far more cryptic [than the intent prong].").

[49] *Bandemer*, 478 U.S. at 132.

[50] *See, e.g.*, Badham v. Eu, 694 F. Supp. 664, 670 (N.D. Cal. 1988) (finding no discriminatory effect under *Bandemer*, because Republican plaintiffs did not show a complete "shut out" from the political process—plaintiffs made no allegations of interference with registration, organizing, voting, fund-raising, or campaigning, nor of any impediment to participation in public debate).

frustration" of the will of the voters:[51] disproportionate results in a single election would not be enough.[52] In *Bandemer* itself, the plurality recognized that its standard was "of necessity a difficult inquiry."[53] The Court denied the petitioners' claim in part because there was no evidence that the latest reapportionment would "consign the Democrats to a minority status . . . throughout the 1980's or that the Democrats would have no hope of doing any better in the reapportionment that would occur after the 1990 census."[54]

From the outset, the plurality opinion in *Bandemer* had skeptics. Justice O'Connor speculated in her concurrence that the standard "w[ould] over time either prove unmanageable and arbitrary or else evolve towards some loose form of proportionality."[55] What actually happened was the former: Lower courts fumbled with the standard, failing to find a single gerrymandering claim that satisfied the test.[56]

The Court finally revisited the issue in *Vieth*, after "[e]ighteen years of judicial effort with virtually nothing to show for it."[57] Before turning to *Vieth*, however, it is necessary to return to the post-*Colegrove* setting of general non-justiciability for electoral districting claims, in order to trace the non-parallel development of gerrymandering cases involving race. Racial gerrymandering was, and continues to be, treated as distinct from other types of gerrymandering.

B. The Non-Parallel Development of Racial Gerrymandering

In 1960, the Supreme Court removed racial gerrymandering claims from the realm of non-justiciability. In *Gomillion v. Lightfoot*,[58] the Court heard a challenge to the validity of a local Alabama act that redrew the boundary of the City of Tuskagee such that all but four or five of the city's black voters were excluded from its limits, without removing a single white voter.[59] Black petitioners who lived within Tuskagee's formerly-square boundary brought action against Tuskagee's Mayor, claiming that the new 28-sided boundary deprived blacks of their right to vote in municipal elections.[60] The district court granted the Defendant's motion to dismiss for failure to state a claim

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[51] *Bandemer*, 478 U.S. at 133.

[52] *Id.* at 135.

[53] *Id.* at 143.

[54] *Id.* at 135-36.

[55] *Id.* at 155 (O'Connor, J., concurring).

[56] Vieth v. Jubelirer, 541 U.S. 279-80 (2004) ("[I]n *all* of the cases we are aware of involving that most common form of political gerrymandering, relief was denied.").

[57] *Id.* at 281.

[58] 364 U.S. 339 (1960).

[59] *Id.* at 341.

[60] *Id.* at 340-41.

upon which relief could be granted,[61] stating that, "[t]his Court has . . . no power to change any boundaries of municipal corporations fixed by a duly convened and elected legislative body, acting for the people in the State of Alabama."[62] On appeal, the Supreme Court reversed, ruling that *Colegrove* did not control.[63] In *Colegrove*, the appellants had complained of vote dilution under Article I, whereas in *Gomillion*, the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment right to vote[64] were at issue.[65] *Gomillion* established the proposition that when redistricting is so bizarre on its face that there is no conceivable explanation for the change other than racial classification, intent is inferred and the legislation is subject to strict scrutiny.[66] Thus, where race is the sole factor in excluding citizens from the opportunity to vote, the controversy is "lifted" from the "so-called 'political' arena and into the conventional sphere of constitutional litigation."[67] However, race was not prohibited from *all* consideration in the drawing of boundaries. And more importantly, a finding of unconstitutionality still required discerning an actual harm against an individual's voter franchise.

Thirty-three years later, in *Shaw v. Reno*,[68] the actual harm was harder to identify. At issue were two irregularly-shaped congressional districts in North Carolina, designed to create majority-black districts.[69] The first district under question was compared to a "bug splattered on a windshield."[70] The second, 160 miles long and in parts no wider than the interstate corridor, inspired one state legislator to remark, "[i]f you drove down the interstate with both car doors open, you'd kill most of the people in the district."[71] The petitioners, white voters from adjoining districts, complained that the new districting plan was an unconstitutional racial gerrymander.[72] The Supreme Court agreed, holding that classifying voters according to race and drawing boundaries on that basis, without regard to traditional districting principles such as contiguity and compactness, subjects the districting legislation to strict scrutiny,

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[61] *Id.* at 340.

[62] *Id.* at 340-41.

[63] *See id.* at 347.

[64] U.S. CONST. amend. XV, § 1. ("The right of citizens of the United States to vote shall not be abridged by the United States or by any State on account of race, color, or previous condition of servitude.").

[65] *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960).

[66] *See id.* at 341-42.

[67] *Id.* at 346-47.

[68] 509 U.S. 630 (1993).

[69] *Id.* at 635.

[70] *Id.* (citing WALL ST. J., Feb. 4, 1992, at A14).

[71] *Id.* at 636 (citing WASH. POST, Apr. 20, 1993, at A4).

[72] *Id.* 633-34.

regardless of the motivations underlying the classification.[73] Because the issue in *Shaw* was whether the plaintiffs had stated a claim upon which relief could be granted, the Court did not make any further determination on what state interest might be compelling enough to justify racial classifications.

The Court elaborated on the question three years later, in *Miller v. Johnson*.[74] Relying on *Shaw*, the plaintiffs in *Miller* alleged that Georgia's state congressional districting plan violated the Equal Protection Clause because the map could not be rationally construed as anything other than an attempt to segregate voters according to race.[75] Georgia's black majority districts in *Miller* were not quite as grossly contorted as North Carolina's in *Shaw*,[76] but the Court determined that the plaintiffs were "neither confined in their proof to evidence regarding the district's geometry and makeup nor required to make a threshold showing of bizarreness."[77] Plaintiffs could now show a violation of equal protection by proving that race was the predominant factor motivating the legislature to draw the line in a particular way.[78] The plaintiff "must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations."[79] In other words, taking race into account is permissible, as long as traditional districting principles other than race are more heavily weighted than race.[80] With respect to Georgia's apportionment scheme, the lines were unconstitutional.

Thus, for racial gerrymandering cases, plaintiffs could make a viable unconstitutionality claim under the *Shaw* and *Miller* predominant-factor analysis. Meanwhile, a finding of unconstitutionality in political cases under *Bandemer* was theoretically achievable, and practically unattainable. But this discrepancy was not ameliorated when the Court revisited the issue in *Vieth*.

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[73] *See id.* at 657-58.

[74] 515 U.S. 900 (1995).

[75] *Id.* at 903.

[76] *Compare id.* at 928 (appendix "A" Map of Georgia Congressional Districts; and appendix "B" Population Density Map of 11th Congressional District of Georgia), *with* Shaw v. Reno, 509 U.S. 630, 659 (1993) (appendix North Carolina Congressional Plan).

[77] *Miller*, 515 U.S. at 915.

[78] *Id.* at 916.

[79] *Id.*

[80] In the subsequent litigation spawned by *Shaw*—Shaw v. Hunt, 517 U.S. 899 (1996), Hunt v. Cromartie, 526 U.S. 541 (1999), and Easley v. Cromartie, 532 U.S. 234 (2001)—this rule was further modified. Where racial classifications correspond with political affiliations, and politics, rather than race, is the driving force behind the redistricting, the plan may remain constitutional. *See Easley*, 532 U.S. at 258; *cf. generally* John Hart Ely, *Confounded by Cromartie: Are Racial Stereotypes Now Acceptable Across the Board or Only When Used in Support of Partisan Gerrymanders?*, 56 U. MIAMI L. REV. 489 (2002).

III. ANATOMY OF *VIETH*

In *Vieth*, the Supreme Court overruled the *Bandemer* intent-effect standard.[81] Justice Scalia, joined by Justices Thomas and O'Connor and Chief Justice Rehnquist, further declared that political gerrymandering is nonjusticiable,[82] while racial gerrymandering claims remain determinable according to *Shaw* and *Miller*.[83] But of the nine justices, five were reticent to shut the door completely on the justiciability of political gerrymandering.[84] What follows is a dissection of *Vieth*, beginning with its case history, and detailing each of the five opinions set forth in the controversial case.

A. A Brief History of Vieth

The 2000 decennial national census tabulated Pennsylvania's resident population at 12,281,054.[85] Changes in national population trends resulted in a decrease in the number of Congressional seats allotted to Pennsylvania.[86] The state's General Assembly, which was responsible for the redistricting of the Congressional districts, enacted a new map to accommodate the changes ("Act I") in early 2002.[87] Although the two major parties held virtually equal support among Pennsylvania's population,[88] the new districting plan placed Republican candidates in a strong position to win thirteen of the nineteen seats.[89]

In *Vieth v. Pennsylvania*,[90] plaintiffs, registered Democrats, challenged the map as an unconstitutional gerrymander in violation of Article I, Section 2, of the U.S. Constitution and as a violation of the one-person, one-vote principle

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[81] *See generally* Vieth v. Jubelirer, 541 U.S. 267 (2004).

[82] *Id.* at 281 ("[W]e must conclude that political gerrymandering claims are nonjusticiable . . . .").

[83] *See id.* at 284-88 (discussing the inapplicability of existing racial gerrymandering standards to political cases); *see also infra* notes 114-16 and accompanying text.

[84] *See infra* Part III.C-F.

[85] Vieth v. Pennsylvania, 188 F. Supp. 2d 532, 535 (M.D. Pa. 2002) (three-judge court) [hereinafter *Vieth I*].

[86] *Id.* at 534.

[87] *Id.* at 535.

[88] In early 2002, of voters registered as either Democrat or Republican, 53.6% were registered Democrats; 46.4% were registered Republicans. The November 2000 congressional election, which was held under the 1992 apportionment plan, saw Democrats win 50.6% of total votes, and Republicans take 49.4% of the votes. *Id.* at 536. *See also supra* note 8.

[89] *Vieth I*, 188 F. Supp at 536; *see also supra* note 8; J. Clark Kelso, *Vieth v. Jubelirer: Judicial Review of Political Gerrymanders*, 3 ELECTION L.J. 47, 48 (2004).

[90] 188 F. Supp. 2d 532.

guaranteed by the Equal Protection Clause of the Fourteenth Amendment.[91] The district court in *Vieth I* found the gerrymandering claim deficient on the *Bandemer* effects prong: "[T]here are no allegations that anyone has ever prevented, or will ever prevent, Plaintiffs from: registering to vote; organizing with other like-minded voters; raising funds on behalf of candidates; voting; campaigning; or speaking out on matters of public concern."[92]

The district court held that the plaintiffs had stated a valid claim, however, on their Article I one-person, one-vote complaint.[93] At an evidentiary hearing three months later,[94] the same court determined that Pennsylvania, without adequate justification, had failed to make a good-faith effort at achieving voter parity, in violation of *Karcher*.[95] The court ordered the Pennsylvania General Assembly to remap the state within three weeks.[96]

Pennsylvania's Governor signed a new plan into law on April 18, 2002.[97] Again, plaintiffs alleged that the plan violated the one-person, one-vote rule and constituted an illegal gerrymander.[98] This time, the district court found that the plan passed muster on both complaints.[99] The plaintiffs appealed, and the U.S. Supreme Court noted probable jurisdiction.[100]

B. The Plurality Opinion: Political Gerrymandering Claims are Non-justiciable Because No Judicially Discernable and Manageable Standards Exist

Writing for the plurality, Justice Scalia rejected *Bandemer*, echoing the concerns voiced by Justice O'Connor in her *Bandemer* concurrence:[101] "Eighteen years of essentially pointless litigation have persuaded us that *Bandemer* is incapable of principled application. We would therefore overrule that case, and decline to adjudicate these political gerrymandering claims."[102] Applying the *Baker* justiciability test, Justice Scalia determined that political

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[91] *Id.* at 537-38. Interestingly, Plaintiffs also claimed that Act I violated their First Amendment right to be free of governmental classification according to political association, *id.* at 538, a claim the court dismissed, but which would be revived by Justice Kennedy in his concurring opinion in the Supreme Court *Vieth* decision.

[92] *Id.* at 547.

[93] *Id.* at 549.

[94] Vieth v. Pennsylvania, 195 F. Supp. 2d 672 (M.D. Pa. 2002) (three-judge court).

[95] *See id.* at 678.

[96] *Id.* at 679.

[97] Vieth v. Pennsylvania, 241 F. Supp. 2d 478, 480 (M.D. Pa. 2003).

[98] *Id.* at 478.

[99] *Id.* at 485.

[100] Vieth v. Jubelirer, 539 U.S. 957 (2003), *prob. juris. noted.*

[101] *See supra* note 55 and accompanying text.

[102] Vieth v. Jubelirer, 541 U.S. 267, 306 (2004).

gerrymandering claims are non-justiciable because there are no judicially discernible and manageable standards for adjudication of such claims.[103]

Justice Scalia prefaced his discussion with an assessment of the judiciary's limitations. Judicial action must be based on standards. While legislatures may be "inconsistent, illogical, and ad hoc[,] law pronounced by the courts must be principled, rational, and based on reasoned distinctions."[104] Acknowledging the general legal consensus that *Bandemer* provided no guidance,[105] he then turned to the appellants' proposed revision of the standard.[106] Appellants' brief advocated retaining the two-pronged *Bandemer* analysis, while honing its content such that their claim could be recognized:

> To demonstrate unconstitutional partisan gerrymandering, plaintiffs must make two showings. *First*, plaintiffs must show that the mapmakers acted with a predominant intent to achieve partisan advantage. That can be shown by direct evidence or by circumstantial evidence that other neutral and legitimate redistricting criteria were subordinated to the goal of achieving partisan advantage. *Second*, sufficient partisan effects are established if (1) the plaintiffs show that the districts systematically "pack" and "crack" the rival party's voters, and (2) the court's examination of the "totality of the circumstances" confirms that the map can thwart the plaintiffs' ability to translate a majority of votes into a majority of seats.[107]

According to Justice Scalia, the appellants' proposed predominant-intent test was more difficult, but more indeterminate,[108] than *Bandemer's* straightforward intent requirement.[109] Noting that the appellants had borrowed the predominant intent standard from the *Shaw* line of racial gerrymandering cases, Justice Scalia nonetheless determined the standard to be unmanageable in the political gerrymandering context.[110] The plaintiffs in *Miller* and *Shaw* were voters in the districts they challenged.[111] Here, the appellants were challenging Pennsylvania's entire map, "[s]ince 'it would be quixotic to

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[103] *Id.* at 281. Some scholars have also noted that the plurality's opinion "began with an intriguing feint in the direction of treating gerrymandering claims as nonjusticiable because of 'a textually demonstrable constitutional commitment of the issue to a coordinate political department.'" Issacharoff & Karlan, *supra* note 7, at 559.

[104] *Vieth*, 541 U.S. at 278.

[105] *See id.* at 279-83.

[106] *Id.* at 284.

[107] Brief for Appellants at 19-20, *Vieth* (No. 02-1580) (emphases added) (citations omitted).

[108] *Vieth v. Jubelirer*, 541 U.S. at 267, 284 (2004).

[109] *See supra* note 47 and accompanying text.

[110] *Vieth*, 541 U.S. at 284-85.

[111] *See* Miller v. Johnson, 515 U.S. 900, 909 (1995) ("As residents of the challenged Eleventh District, all appellees had standing."); Shaw v. Reno, 509 U.S. 630, 636-37 (1993) (indicating that appellants lived within a single county alleged to have been split to accommodate an impermissible racial gerrymander).

attempt to bar state legislatures from considering politics as they redraw district lines.'"[112] For Justice Scalia, this proposed intent standard was too vague:

> Does it mean, for instance, that partisan intent must outweigh all other goals—contiguity, compactness, preservation of neighborhoods, etc.—*statewide*? And how is the statewide "outweighing" to be determined? If three-fifths of the map's districts forgo the pursuit of partisan ends in favor of strictly observing political-subdivision lines, and only two-fifths ignore those lines to disadvantage the plaintiffs, is the observance of political subdivisions the "predominant" goal between those two?[113]

Furthermore, even if the challenge was limited to a single district, Justice Scalia argued that the Constitution *contemplates* districting by political bodies, as evidenced by Article I, Section 4.[114] On the other hand, the racial segregation of voters is "rare" and constitutionally suspect, "quite different from determining whether it is so substantially affected by the excess of an ordinary and lawful motive as to invalidate it."[115] Justice Scalia conceded that the standard is somewhat unmanageable even in racial gerrymandering claims, but permitted "modest" unmanageability where a constitutional command is clear, as in the Fourteenth Amendment's obligation to refrain from racial discrimination.[116] Where the constitutional obligation is "not to apply *too much* partisanship,"[117] however, judicial enforcement is "both dubious and severely unmanageable."[118]

Likewise, the appellants' proposed effects test was inadequate. Justice Scalia found it impossible to determine the effect of an attempt at political gerrymandering, because unlike race, political affiliation is not an immutable characteristic, but may shift with each electoral race.[119] Therefore, he reasoned, it is impossible to fashion *any* standard assessing effect.[120]

Although Justice Scalia rejected the notion that standards exist to adduce effect, he nonetheless specifically assessed and rejected appellants' proposed standard.[121] The appellants alleged that the map systematically packed and

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[112] *Vieth*, 541 U.S. at 285 (citing Brief for Appellants at 3, *Vieth* (No. 02-1580)).

[113] *Id.* at 285.

[114] *Id.* Article I, Section 4 reads in significant part, "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ." U.S. CONST. art. I, § 4.

[115] *Vieth v. Jubelirer*, 541 U.S. 267, 286 (2004).

[116] *Id.*

[117] *Id.*

[118] *Id.* at 286-87.

[119] *Id.* at 287.

[120] *Id. See infra* notes 190-92 and accompanying text.

[121] *Vieth*, 541 U.S. at 288-90.

cracked voters, "thwart[ing] the plaintiffs' ability to translate a majority of votes into a majority of seats."[122] But that allegation, responded Justice Scalia, is not one for which the Constitution provides relief: There is no constitutional right to proportional representation, for the equal protection of the law applies to persons, not groups.[123] Moreover, there is no benchmark establishing "majority" status, because political affiliation is but one factor contributing to a person's choice of vote.[124] One-person, one-vote cases such as *Reynolds v. Sims*[125] are distinguishable because voter parity is an easily administrable standard, "whereas requiring judges to decide whether a districting system will produce a statewide majority for a majority party casts them forth upon a sea of imponderables, and asks them to make determinations that not even election experts can agree upon."[126]

Finally, the plurality opinion addressed the standard proposed by Justice Powell in his *Bandemer* dissent, which Justice Scalia described as a totality-of-the-circumstances analysis.[127] Justice Powell had suggested that courts determine the fairness of a particular gerrymander by looking to all contributing evidence, without a requirement that one factor be dispositive.[128] But for the plurality in *Vieth*, fairness was not a judicially manageable standard.

> Fairness is compatible with noncontiguous districts, it is compatible with districts that straddle political subdivisions, and it is compatible with a party's not winning the number of seats that mirrors the proportion of its vote. Some criterion more solid and more demonstrably met than that seems to us necessary. . . .[129]

C. *Justice Kennedy's Concurrence: The Court Should Not Foreclose the Possibility that Discoverable and Manageable Standards will Emerge*

While Justice Kennedy agreed with the plurality in that requiring Pennsylvania to correct its entire electoral map would be too substantial an intrusion into politics,[130] he was disinclined to foreclose all possibility of relief for political gerrymandering claims. In contrast with the plurality, Justice Kennedy believed that "the arguments are not so compelling that they require

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[122] *Id.* at 286-87 (citing Brief for Appellants at 20, *Vieth* (No. 02-1580)).

[123] *Id.* at 288.

[124] *Id. See also* Daniel H. Lowenstein & Jonathan Steinberg, *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory?*, 33 UCLA L. REV. 1 (1985).

[125] 377 U.S. 533 (1964).

[126] *Vieth v. Jubelirer*, 541 U.S. 267, 290 (2004).

[127] *Id.* at 290-91.

[128] *See* Davis v. Bandemer, 478 U.S. 109, 173 (1986) (Powell, J., dissenting).

[129] *Vieth*, 541 U.S. at 291.

[130] *Id.* at 306 (Kennedy, J., concurring).

us now to bar all future claims of injury from a partisan gerrymander."[131] Justice Kennedy wished to err on the side of caution, to keep the door open to the possibility that manageable standards will emerge in the future, especially in light of the fact that voting rights are *important* rights.[132] Although *Bandemer* failed on a single formulation, its failure is not proof that no standard exists.[133] In addition, given that new technologies have amplified the ability to gerrymander, the same technologies might one day provide reliable methods to guide the Court.[134]

Justice Kennedy also recognized that the First Amendment might provide a better source of law for future political gerrymandering claims.[135] When voters are disfavored on the basis of their political views, First Amendment concerns could arise if redistricting burdens a group's representational rights.[136] Justice Kennedy believed the plurality's contention that if a First Amendment claim was sustained, it "would render unlawful *all* consideration of political affiliation in districting,"[137] to be fallacious.[138] In contrast with *Shaw*, the issue is not whether citizens were classified in the first instance.[139] Rather, the question should be whether a State has used political classifications to impose a burden on a group's representational rights.[140] This inquiry would allow a "pragmatic or functional assessment that accords some latitude to the States."[141]

In his conclusion, Justice Kennedy observed that the plurality conceded, "an *excessive* injection of politics [in districting] is *un*lawful."[142] Thus the plurality recognized that a constitutional violation via political gerrymandering *might* exist. Justice Kennedy thought this to be "all the more reason to admit the possibility of later suits."[143]

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[131] *Id.* at 309.
[132] *See id.* at 311.
[133] *See id.* at 311-12.
[134] *Id.* at 312-13.
[135] *Id.* at 314.
[136] *Id.*
[137] *Id.* at 294.
[138] *Id.* at 314-15 ("The plurality . . . misrepresents the First Amendment analysis.").
[139] *Id.* at 315.
[140] *Id.*
[141] *Id.*
[142] *Id.* at 316 (quoting *id.* at 293) (alteration in original).
[143] *Id.*

D. Justice Stevens' Dissent: Apply the Shaw Standard to Political Gerrymandering Claims

Justice Stevens' dissent advocated applying the *Miller* predominant-intent approach to political gerrymandering.[144] He believed that "when partisanship is the legislature's sole motivation—when any pretense of neutrality is forsaken unabashedly and all traditional districting criteria are subverted for partisan advantage—the governing body cannot be said to have acted impartially."[145] Yet "[t]he concept of equal justice under law *requires* the State to govern impartially."[146] Justice Stevens agreed that the Court should not presently attempt to fashion new standards for abusive districting, but pointed out that existing principles could be applied to *Vieth*.[147] For example, he argued, it is an established principle that a district's peculiar shape may be indicative of an "illicit purpose" in districting.[148] Bearing in mind the *Shaw* and *Miller* precedents, Justice Stevens thought "the question of justiciability in cases such as this—where plaintiffs argue that a single motivation resulted in a districting scheme with discriminatory effects—to be well-settled."[149]

According to Justice Stevens, the plurality was incorrect in its conclusion that politics is "an ordinary and lawful motive"[150] unlike the "rare and constitutionally suspect" racial motivation.[151] Rather, "[w]e have squarely rejected the notion that 'a purpose to discriminate on the basis of politics' is never subject to strict scrutiny."[152] The First Amendment protects the freedom of political belief and association, and when the government burdens those fundamental rights, its decisions *are* subject to strict scrutiny.[153]

Justice Stevens believed that in the districting process, "racial, religious, ethnic, and economic gerrymanders are all species of political gerrymanders."[154] Thus the dispositive issues in each have parallel analyses. The question is simply "whether a single non-neutral criterion controlled the districting process to such an extent that the Constitution was offended."[155] The plurality

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[144] *See id.* at 334-35 (Stevens, J., dissenting) (reciting the *Shaw* and *Miller* determinations and concluding that the same standard should apply in political gerrymandering context).

[145] *Id.* at 318.

[146] *Id.* at 317 (emphasis added).

[147] *Id.* at 318.

[148] *Id.* at 321.

[149] *Id.* at 323.

[150] *Id.* at 324 (quoting *id.* at 286).

[151] *Id.*

[152] *Id.* (quoting *id.* at 294).

[153] *Id.*

[154] *Id.* at 326 (quoting Mobile v. Bolden, 446 U.S. 55, 88 (1980)).

[155] *Id.*

failed to generate a convincing rationale for distinguishing partisan from racial gerrymandering in terms of justiciability.[156]

Justice Stevens believed that political gerrymandering can cause the same representational, or "expressive," harm that was discerned in *Shaw*.[157] In racial gerrymandering cases, when voters are sorted with the sole and obvious purpose of creating a district based on the supposed common interests of a racial group, the harm is that the winner of an election will perceive his representational obligations to be limited to the racial group, and not to the entire constituency.[158] Justice Stevens felt that in political gerrymandering cases, the risk of representational harm is at least as strong as in racial cases.[159] Political gerrymandering could create the troubling scenario in which "the will of the cartographers rather than the will of the people will govern."[160]

Recognizing that electoral boundaries cannot be drawn without some reference to partisan voting patterns, Justice Stevens accepted that political motives are permissible in redistricting.[161] But just as *Shaw* and *Miller* established that race could not be the predominant motivating factor in line-drawing, partisanship should likewise not eclipse all other districting criteria.[162] The plurality's decision was flawed because it would make an invidious political gerrymander permissible, while a racial gerrymander intended to benefit a minority would remain impermissible.

> [T]he view that the plurality implicitly embraces . . . that a gerrymander contrived for the sole purpose of disadvantaging a political minority is less objectionable that one seeking to benefit a racial minority—is doubly flawed. It disregards the obvious distinction between and invidious and a benign purpose, and it mistakenly assumes that race cannot provide a legitimate basis for making political judgments.[163]

Consequently, according to Justice Stevens, the *Shaw* line should apply here. The analysis should be whether partisan considerations were the overwhelming motivation behind the new plan: "[I]f the only possible explanation for a district's bizarre shape is a naked desire to increase partisan strength, then no rational basis exists to save the district from an equal protection challenge."[164] Finally, should a constitutional violation be found, Justice

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[156] *Id.* at 326-27.
[157] *See id.* at 331.
[158] *See id.* at 330-31.
[159] *Id.* at 331.
[160] *Id.*
[161] *Id.* at 332.
[162] *Id.* at 336.
[163] *Id.* at 338.
[164] *Id.* at 339.

Stevens suggested imposing a remedy based on one of many statutes that state legislatures have enacted to prevent political gerrymandering.[165]

E. Justice Souter's Dissent: The "Fresh Start" Approach

In contrast to Justice Stevens' approach, which envisioned an expansion of existing standards under *Shaw*, Justice Souter, joined by Justice Ginsburg, advocated starting the analysis from scratch.[166] Because the Supreme Court "created the problem no one else has been able to solve, it is up to us to make a fresh start."[167] Justice Souter proposed a five-element test to establish a plaintiff's prima facie case against a single district,[168] which, once met, would require the State to present an affirmative justification of its districting.[169] As to a state-wide claim, Justice Souter recognized that it might not make sense for a court to consider each district in isolation of a larger plan, but refrained from creating a framework for adjudication of a plan in its entirety until gaining greater experience with individual district claims.[170]

F. Justice Breyer's Dissent: Prevention of Unjustified Use of Political Factors to Entrench a Minority in Power

In contrast to the other dissenters in *Vieth*, Justice Breyer focused on examining the principles and goals underlying American democracy.[171] First, he acknowledged that the U.S. system relies on single-member districts and first-past-the-post elections.[172] Justice Breyer did not take that fact for granted, but examined it as a policy choice adopted to "make[ ] it easier for voters to identify which party is responsible for government decisionmaking[,]

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[165] *Id.* at 340-41. *See, e.g.*, HAW. REV. STAT. § 25-2 (1993) (example of a statute enacted to prevent abusive districting).

[166] *Vieth v. Jubelirer*, 541 U.S. 267, 345 (2004) (Souter, J., dissenting).

[167] *Id.*

[168] Justice Souter's five elements were: (1) The resident plaintiff must identify himself as a member of a cohesive political group; (2) the plaintiff must show that his district paid little or no heed to contiguity, compactness, respect for other political subdivisions, and conformity with geographic features; (3) the plaintiff must show specifically how the deviations from traditional districting principles fail to match the population distribution of his group; (4) the plaintiff must present a hypothetical district that would cure the offending deviation while improving conformity to traditional districting principles; and (5) the plaintiff must show that the district was intentionally manipulated in order to disadvantage his group. *Id.* at 347-50.

[169] *Id.* at 351.

[170] *Id.* at 353.

[171] *See id.* at 356-59 (Breyer, J., dissenting).

[172] *See id.* at 357-59 (discussing the utility of single-member districts and first-past-the-post ballots, and their ubiquity as the norm in American elections).

. . . while simultaneously providing greater legislative stability."[173] Political considerations are both important and proper in drawing single-member districts, because "politicians, unlike nonpartisan observers, normally understand how 'the location and shape of districts' determine 'the political complexion of the area.'"[174]

Moreover, there is an inherent politicism to "traditional" districting practices: Single-member districting favors certain interests over others. For example, "because . . . Democrats have often been concentrated in cities while Republicans have often been concentrated in suburbs and sometimes rural areas, geographically drawn boundaries have tended to 'pack' the former."[175] For Justice Breyer, this was evidence that boundary-drawing should not be "politics free," but can also "represent an uneasy truce, sanctioned by tradition, among different parties seeking political advantage."[176]

Even so, Justice Breyer found a serious abuse in the "*unjustified* use of political factors to entrench a minority in power."[177] When a minority retains power "purely [as] the result of partisan manipulation and not other factors[,]" democratic values are compromised.[178] He elucidated his view by offering a series of hypotheticals[179] illustrating what *might* be unconstitutional. While the plurality criticized his unjustified-use standard as vague,[180] Justice Breyer emphasized his bottom line: "[Courts] should be able to separate the unjustified abuse of partisan boundary-drawing considerations to achieve that end from their more ordinary and justified use."[181]

IV. ANALYSIS

In a preview article, one observer speculated that "[the *Vieth* Court] may splinter badly, leaving us with at best another plurality opinion and,

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[173] *Id.*

[174] *Id.* at 358 (quoting Gaffney v. Cummings, 412 U.S. 735, 753 (1973)).

[175] *Id.* at 359 (quoting *id.* at 290 (citing Davis v. Bandemer, 478 U.S. 109, 159 (1986) (O'Connor, J., concurring))) (alterations in original). *See generally* Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L. J. 179 (2003) (finding that the combination of a Republican distributional bias and an increase in incumbent-protecting gerrymandering in Florida, Ohio, Pennsylvania, and Michigan, generated a distorted House of Representatives in 2002).

[176] *Vieth v. Jubelirer*, 541 U.S. 267, 360 (2004) (Breyer, J., dissenting).

[177] *Id.* at 360.

[178] *Id.* at 360-61.

[179] *See id.* at 365-67 (describing several districting scenarios which a court might find unconstitutional).

[180] *Id.* at 299-300 (plurality opinion) ("Despite his promise to do so, [Justice Breyer] never tells us what he is testing for, beyond the unhelpful 'unjustified entrenchment' . . . we neither know precisely what [he] is testing for, nor precisely what fails the test.").

[181] *Id.* at 365 (Breyer, J., dissenting).

conceivably, more confusion."[182] The forecast's accuracy begs the question: Why does this Court consciously lead the nation into further uncertainty when it was presented with an opportunity to clarify a matter that had been frustrating courts for eighteen years?

The following discussion is divided into three parts in an attempt to answer this question. The first describes how the idealistic plurality opinion in *Vieth* lacks conceptual clarity and creates a false distinction between racial and political gerrymandering. The second outlines three critiques of the Court's voting rights jurisprudence: (1) the Court should hold partisan apportionment presumptively unconstitutional; (2) the Court should embrace "unmanageable" standards; and (3) the Court should abandon Equal Protection analysis of political gerrymandering in favor of an analysis based on the Republican Form of Government Clause. Finally, the third section discusses how these analyses demonstrate some of the broader failings in the Court's voting rights jurisprudence, and how the *Vieth* opinions skirt the doctrinal inconsistencies in the Court's treatment of political gerrymandering. This Note concludes that the simplest and most pragmatic solution available to the Court is to hold partisan redistricting presumptively unconstitutional.

A. Lack of Conceptual Clarity: The Racial vs. Political Gerrymandering Paradox

That *Bandemer's* intent-effect standard for partisan gerrymandering claims was a failure is a near-universal consensus.[183] But the result in *Vieth* only serves to further obfuscate the issue because the plurality's non-justiciability determination is incompatible with the Court's treatment of racial gerrymandering claims. According to the plurality's reasoning, a state legislature

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[182] Kelso, *supra* note 89, at 48.

[183] *See, e.g.*, Bernard Grofman, *An Expert Witness Perspective on Continuing and Emerging Voting Rights Controversies: From One Person, One Vote to Partisan Gerrymandering*, 21 STETSON L. REV. 783, 816 (1992) (citations omitted) ("[A]s far as I am aware I am one of only two people who believe that *Bandemer* makes sense. Moreover, the other person, Daniel Lowenstein, has a diametrically opposed view as to *what* the plurality opinion means."); Issacharoff, *supra* note 46, at 1671 ("[T]he *Bandemer* decision was decidedly unpropitious."); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 114 (2000) ("[T]he Supreme Court has announced [in Davis v. Bandemer] a constitutional 'standard' so toothless that it might as well have held partisan gerrymandering nonjusticiable."); Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 799 (2004) ("The Court's inability to craft a workable evidentiary standard in Bandemer has left the prohibition against partisan gerrymandering essentially unenforceable." (citation omitted)); Edward Still, *The Hunting of the Gerrymander*, 38 UCLA L. REV. 1019, 1020 (1991) (book review) ("[*Bandemer*] has confounded legislators, practitioners, and academics alike.").

may redistrict with the exclusive intent to disadvantage one party, without any requirement beyond contiguity and perfect mathematical parity.[184] Meanwhile, efforts to separate voters by race in order to provide minorities with greater representation are subject to strict scrutiny under *Shaw*.

Although Justice Scalia laboriously attempted to distinguish between racial and political gerrymandering, he failed to convincingly discern a significant difference between the two. Justice Scalia insisted that "we do not say that race-conscious decisionmaking is always unlawful."[185] Yet, he also stated that "setting out to segregate voters by race is unlawful and hence rare, and setting out to segregate the two by political affiliation is (so long as one doesn't go too far) lawful and hence ordinary."[186] This distinction seems to be a semantic proxy for logic. What purpose is there in lawfully and race-consciously drawing boundaries if not to "segregate" by avoiding the cracking of a community? "Segregation" of voters, whether by race or by political affiliation, is *always* lawful, so long as one doesn't go too far.

As Justice Stevens noted, "the plurality does not argue that the judicially manageable standards that have been used to adjudicate racial gerrymandering claims would not be equally manageable in political gerrymandering cases."[187] The plurality's proposition, that since race-based districting is "rare and constitutionally suspect,"[188] it is distinguishable in terms of justiciability, is flawed. Rather, "[t]he standards . . . are discernible and judicially manageable regardless of the number of cases . . . or the level of scrutiny at which the analysis occurs."[189]

Much of the plurality's conviction lies in its belief that the harmful effect of partisan gerrymandering cannot be measured.[190] Once lines are drawn and candidates are elected, it is difficult, if not impossible, to prove that a representative won or lost her seat through illegal gerrymandering, instead of through sheer (un)popularity. Or, as Justice Scalia wrote, "[w]e dare say (and hope) that the political party which puts forward an utterly incompetent candidate will lose even in its registration stronghold."[191] As a result, Justice Scalia concluded, "[t]hese facts make it impossible to assess the effects of partisan gerrymandering, to fashion a standard for evaluating a violation, and finally to craft a remedy."[192] Herein lies a lack of conceptual clarity: The

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[184] *See supra* Part II.A.

[185] *Vieth v. Jubelirer*, 541 U.S. 267, 293 (2004).

[186] *Id.*

[187] *Id.* at 234 (Stevens, J., dissenting).

[188] *Id.* at 286 (plurality opinion).

[189] *Id.* at 325 (Stevens, J., dissenting).

[190] *See id.* at 287.

[191] *Id.*

[192] *Id.*

Shaw and *Miller* cases *recognized* "representational" harms. Why not for political gerrymanders?

In *Miller*, Justice Kennedy noted, "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not 'as simply components of a racial, religious, sexual or national class.'"[193] But if this is so, the Court confounded that principle in *Miller* and *Shaw* when it overlooked the lack of individual harm, and embraced the notion that blacks as a *group* suffered an "expressive" harm.[194] The Court explained that "[c]lassifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.'"[195]

As is clear in *Shaw*, even when minority voters are classified exclusively by race, the "segregation" might not create a cognizable individual harm.[196] Instead, racial classification "injures voters in other ways. It reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole."[197] As discussed previously, Justice Stevens explained that political gerrymanders are just as, if not more, harmful to representative democracy than racial gerrymanders.[198] It is also worth noting that *no* racial stereotype was alleged to have been reinforced in *Shaw* and *Miller*, except perhaps that blacks are more likely to vote for Democrats than Republicans—hardly a dangerous enough "stereotype" to be worthy of constitutional review.

Furthermore, in terms of electoral apportionment, voters are not individuals as much as they are members of groups.[199] Apportionment is an exercise in demographics, and in fashioning a map, the value of a citizen's vote is statistical, rather than personal. In that sense, voting rights are very much

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[193] Miller v. Johnson, 515 U.S. 900, 911 (1995) (quoting Metro Broadcasting, Inc. v. FCC, 487 U.S. 547, 602 (1990) (O'Connor, J., dissenting) (quoting Arizona Governing Comm. For Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073, 1083 (1983))).

[194] Because the apportionment plans in *Shaw* and *Miller* did not dilute white voting strength, there was no individualized harm to the white complainants. *See* Shaw v. Reno, 509 U.S. 630, 638-39 (1993); *Miller*, 515 U.S. at 909 (White appellees had standing under Equal Protection Clause, as interpreted in *Shaw*); *see also supra* notes 157-58 and accompanying text; Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483 (1993).

[195] *Shaw*, 509 U.S. at 643 (quoting Hirabayashi v. United States, 320 U.S. 81, 100 (1943)).

[196] *Id.* at 649-50 ("Classifying citizens by race . . . threatens special harms that are not present in our vote-dilution cases.").

[197] *Id.* at 650.

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

[199] For an in-depth examination of groups and the nature of vote dilution, *see* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001).

collective rights, and unless a person is denied the opportunity to exercise his individual delegation of sovereign power, the right remains collective.

Justice Scalia advocated that the Court retreat from the political thicket. In doing so, he espoused a paradoxical stance. In racial cases, the Court brashly and obtrusively limits legislative efforts to redistrict, yet in political cases it would completely remove its participation. On the one hand, he proclaimed that when questions are the domain of the political branches, "the law is that the judicial department has no business entertaining the claim of unlawfulness."[200] On the other, "[t]he [*Shaw*] cases did exactly what Justice Scalia says the Court should not do: they needlessly fettered the state governments by imposing color-blinders upon them."[201] With the *Shaw* "color blinders" obstructing their view, Justice Scalia's attempted retreat will not lead the Court from further disarray, as potential claimants reframe their political complaints into justiciable race-based allegations.

The Court's pitiless treatment of political gerrymandering claims has forced litigants to "squeeze all claims of improper manipulation of redistricting into the suffocating category of race."[202] Post-*Shaw*, districting schemes that were motivated by partisan considerations were recast as race-based for the purposes of judicial complaint:

> The racial gerrymandering cases from the 1990s were, without exception to the best of my knowledge, the product of intense partisan struggles in which contorted minority districts were created either by Democrats seeking to preserve Democratic incumbent districts, or by Republicans seeking to pack likely

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[200] Vieth v. Jubelirer, 541 U.S. 267, 277 (2004).

[201] Daly, *supra* note 37, at 379. Ironically, in jurisdictions where courts are considered less formalistic than the current U.S. Supreme Court, voting rights determinations show greater deference to legislatures:

> In voting rights cases, the pragmatic Canadian courts (as well as the textualist Australian Court) were more deferential to state governments than the American Supreme Court; both the Canadian and the Australian courts explicitly recognized the interests of separation of powers, federalism, and judicial restraint, none of which was acknowledged in the Shaw cases.

Id. at 377. *See also* Dixon v. Attorney Gen. of British Columbia, [1989] 35 B.C.L.R.2d 273.

> In determining the [level of voter parity], deference must be accorded to the legislature. It is in a better position than the courts to determine whether deviation is required. However, in making that determination, the legislature must act in accordance with such legal principles as may be found to be inherent in the Charter guarantee of the right to vote.

Id.

[202] Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 630-31 (2002). For further discussion of the link between partisan gerrymandering and race-based dilution claims, *see* Note, *The Implications of Coalitional and Influence Districts for Vote Dilution Litigation*, 117 HARV. L. REV. 2598, 2610-19 (2004).

> Democratic voters into some districts and thereby tilt the balance of power in other districts.[203]

In the absence of justiciable political gerrymandering standards,[204] *Shaw* is troubling because it proposes that electoral opportunities in terms of favorable districting are available to all factions *except* racial groups.[205] As a result, lower courts have "sanctified the divergent legislative needs of rice farmers and soybean farmers—all the while condemning the racial considerations that unconstitutionally infected the process."[206] The plurality in *Vieth* ramparts *Shaw*'s bizarre result presumably because those justices idealistically believe that one *should not* be able to predict a person's vote by his race.

Some legal thinkers would charge that American jurisprudence is beleaguered by superfluous idealism: "[T]he Court appears more concerned with how things should be than with how things are, and virtually no attention is paid to the process of getting from how things are to how they should be, nor to the Court's role in implementing (or impeding) that transition."[207] Indeed, the Court seems overly attached to doctrinaire platitudes in most of its apportionment decisions. The Court demands mathematical perfection in one-person, one-vote cases, even though the Constitution creates no such requirement. And it requires a simplistic, color-blind approach to *Shaw* and *Miller* racial apportionment questions, without offering a persuasive analysis of the harm we are avoiding.[208] This dogmatic attitude is exemplified by Justice

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[203] Issacharoff, *supra* note 202, at 643.

[204] Either under the unworkable *Bandemer* standard, discussed *supra*, or under *Vieth*'s lack of any majority standard.

[205] Issacharoff, *supra* note 202, at 636.

[206] *Id.* (citing Hays v. Louisiana, 862 F. Supp. 119, 127 (W.D. La. 1994)).

[207] Daly, *supra* note 37, at 333.

[208] Erin Daly identifies some of the unanswered questions raised in the *Shaw* cases:

> Rather than analyze the potential benefits of the accepted rule or the detriments of the rejected rule, the Court in the Shaw cases merely adopts a maxim that has some simple intuitive appeal—"the State may not . . . separate its citizens into different voting districts on the basis of their race"—without pausing to consider the application of such a rule in the present setting. Did the states in fact separate citizens into different voting districts on the basis of race? If so, did it cause any harm or did it produce benefits? If it caused harm, to whom? Was it constitutionally cognizable harm? Why? What should the cure be for such harm? The Court seems uninterested in answering these and similar factual questions.

Id. at 333-34 (quoting Miller v. Johnson, 515 U.S. 900, 911 (1995)).

See also Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L. J. 2505 (1997). Pildes discusses the mismatch between the predominant-motive test and expressive harms. "[T]he 'predominant motive' test fails to identify when the expressive harms with which Shaw is concerned actually occur; the test stems from an individual rights model that is unsuited to addressing the kind of injuries Shaw recognizes; and the test cannot be administered intelligibly." *Id.* at 2546-47.

Scalia's plurality opinion in *Vieth*. Justice Scalia demanded perfectly neutral criteria for finding impermissible political gerrymandering, rejecting totality-of-the-circumstances analyses because "fairness" is not a judicially manageable standard.[209] But Justice Scalia's approach stymies the development of *actual* standards. In adjudicating racial gerrymandering claims, "[w]hat is important to the Court is whether the plans may distance us from our ideal, not whether they actually do."[210]

B. So Many Standards: The Hunt for Solutions

Concededly, the search for judicially manageable and discernable standards for political gerrymandering is elusive. In *Vieth*, Justice Scalia assessed and rejected seven possible standards,[211] and academe is profuse with further proposals.[212] There is no lack of workable standards. The Court's inability to select an acceptable standard stems from its reluctance to revisit past decisions, which are beset with elemental errors and a misguided overemphasis on the "manageability" of gerrymandering standards. The following section discusses three alternative solutions that would require the Court to rethink its voting rights jurisprudence: (1) holding partisan districting presumptively unconstitutional, thereby handing the process to non-partisan electoral commissions; (2) embracing "*unmanageable*" standards; and (3) reframing the gerrymandering injury as a harm against Republicanism.

1. Partisan districting as presumptively unconstitutional

In lieu of evaluating the political gerrymandering harm in terms of its effect on legislative composition, Professor Samuel Issacharoff suggests that courts should "examine the impact on the political equivalent of consumer welfare."[213] Issacharoff takes a market approach to the issue, analogizing the

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[209] Vieth v. Jubelirer, 541 U.S. 267, 291 (2004).

[210] Daly, *supra* note 37, at 340.

[211] Justice Scalia rejected the standards offered by (1) the *Vieth* plaintiffs; (2) *Bandemer*'s plurality; (3) Justice Powell's dissent in *Bandemer*; (4) Justice Kennedy's *Vieth* concurrence (for further analysis of Justice Kennedy's standard, *see* Richard L. Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims after Vieth* (forthcoming 2004), Loyola-LA Legal Studies Research Paper No. 04-12, *available at* http://ssrn.com/abstract=561243); (5) Justice Souter's *Vieth* dissent; (6) Justice Stevens' *Vieth* dissent; and (7) Justice Breyer's *Vieth* dissent.

[212] *See infra* Part IV.B.1-3; *see also, e.g.*, Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77 (1985) (examining districting criteria and their respective policy goals).

[213] Issacharoff, *supra* note 202, at 622.

conduct of the two main parties to anti-trust lockups.[214] Political gerrymandering is not harmful merely as an individual rights issue, but also as an injury against the competitive electoral process.[215] Competition is fundamental to "the ability of voters to ensure the responsiveness of elected officials to the voters' interests through the after-the-fact capacity to vote those officials out of office."[216] According to Issacharoff, it is not enough to limit parties' ability to lock each other out; they must also be prevented from forming bipartisan redistricting commissions.[217] He likens bipartisan redistricting to market cartelization: when two dominant, competing firms agree to segregate their markets for their mutual advantage,[218] "such a pact would be a first-order violation of the antitrust laws."[219] Hence in apportionment, "there should be greater constitutional concern and, correspondingly, greater warrant for judicial intervention when political parties have joined together to squeeze the competitive juices out of the process."[220] The Court should, then, disallow partisan actors from controlling the electoral map, and transfer the process to non-partisan boundary commissions.[221]

One criticism of Issacharoff's partisan lockup approach is that nonpartisan boundary commissions are difficult to create and comprise part of the "myth of nonpartisan oversight of politics."[222] Because it is difficult to create an "authentically nonpartisan and politically disinterested"[223] commission, Professor Nathaniel Persily contends that Issacharoff's rule would "merely become[] one more amorphous cause of action to strike down a districting plan."[224] Even if it were possible to find a politically neutral actor for the purposes of line-drawing, argues Persily, it might not be *desirable* because the "insiders" are often in the best position not only to measure community concerns, but also to maintain "service relationships between representatives

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[214] *See id.* at 618; Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).

[215] Issacharoff, *supra* note 202, at 600 ("[T]he harm is the insult to the competitiveness of the process resulting from the ability of insiders to lessen competitive pressures.").

[216] *Id.* at 615.

[217] *See id.* at 599-601.

[218] Issacharoff uses Coke and Pepsi as obvious examples. *See id.* at 599.

[219] *Id.*

[220] *Id.* at 600.

[221] *Id.* at 647-48 ("A strategy of reinforcing political competition by taking the process of redistricting out of the hands of partisan officials offers the prospect of realizing our constitutional values.").

[222] Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 650 (2002).

[223] *Id.* at 674.

[224] *Id.* at 676. However, Persily concedes that "[i]f a prophylactic rule could curtail judicial involvement in redistricting, that single benefit might outweigh the costs." *Id.* at 652.

and constituents that fit into larger public policy programs."[225] The problem with this argument is that it sounds suspiciously like a fancy way of saying that it is better for representatives to choose their constituents than for constituents to unwisely elect the "wrong" candidate. As for the question of how to form a truly non-partisan commission, the answer is, of course, that it is unnecessary to guarantee penultimate neutrality. The value in such a scheme lies in its favorability over the current model, not in its normative perfection.[226]

2. The Court should embrace "unmanageable" standards

Professor Richard Hasen traces the failings of current voting rights jurisprudence to the outcome in *Baker*, and posits that its holding, that a lack of judicially discoverable and manageable standards creates a nonjusticiable political question, was in err:

> [T]he Baker Court . . . failed to appreciate the benefits of judicial unmanageability or murky standards for dealing with election cases under the Equal Protection Clause of the Fourteenth Amendment. Precisely because these cases require the Supreme Court to make at least implicit normative judgments about the meaning of democracy or the structure of representative government, the danger of manageable standards is that they will ossify the new rules and enshrine the current Court majority's political theory.[227]

Hasen argues that because manageable standards can be costly, particularly when the political theory adopted is controversial, the Court should allow itself "wiggle room" for future modification.[228]

For Hasen, the one-person, one-vote rule elucidated in *Reynolds* and *Wesberry* is a case in point. Although popular[229] and elegantly manageable, the rule has found many critics,[230] primarily because its appeal "soon made it

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[225] *Id.* at 679.

[226] Critics of Issacharoff's approach might be intrigued by the more innovative course currently underway in British Columbia, where 160 randomly selected citizens have assembled for eleven months to examine and recommend changes to that province's electoral process. The Assembly's recommendations, which thus far include the replacement of first-past-the-post with a preferential ballot, will be presented to the public by plebiscite, and if passed, shall go into effect in 2009. *See* Citizens' Assembly on Electoral Reform, *at* http://www.citizensassembly.bc.ca (last visited Nov. 15, 2004).

[227] Richard L. Hasen, *The Benefits of "Judicially Unmanageable" Standards in Election Cases Under the Equal Protection Clause*, 80 N.C. L. REV. 1469, 1471-72 (2002).

[228] *Id.* at 1472-73.

[229] *See supra* note 37 and accompanying text.

[230] *See, e.g.*, McConnell, *supra* note 183, at 103 ("[A]s a matter of text and history, [one-person, one-vote] is almost certainly incorrect, and judicial enforcement of it has produced unintended results that are perverse from many different points of view."); Cox, *supra* note 183,

the sole arbiter of political fairness."[231] Other traditional districting criteria, such as compactness, pre-existing political boundaries, natural geographic boundaries, history, and communities of interest were overpowered by the equipopulisity requirement, and this in turn disturbed states' ability to apportion according to each state's unique characteristics.[232] Moreover, as a

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at 757-59 (maintaining that scholars are pessimistic about the capacity of procedural redistricting regulations, such as the one-person, one-vote rule, to curb partisan gerrymandering); *but see* Persily, Kousser & Egan, *supra* note 37 (concluding that while one-person, one-vote is partially to blame for a decline in electoral competition, it has either increased or has had no affect on party competition at the state legislative level).

Critics have also attacked the extension of the rule to local governments. *See* Bruce E. Cain, *Election Law as a Field: A Political Scientist's Perspective*, 32 LOY. L.A. L. REV. 1105 (1999) (discussing the thwarted attempt in San Francisco Bay area to establish regional government giving surrounding suburbs and cities parity with larger urban neighborhoods).

[231] Issacharoff, *supra* note 46, at 1651.

[232] *See* Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713, 744-65 (1964) (Stewart, J., dissenting) (rejecting pure voter parity as the overriding districting requirement).

> The fact is, of course, that population factors must often to some degree be subordinated in devising a legislative apportionment plan which is to achieve the important goal of ensuring a fair, effective, and balanced representation of the regional, social, and economic interests within a State . . . . What constitutes a rational plan reasonably designed to achieve this objective will vary from State to State, since each State is unique in terms of topography, geography, demography, history, heterogeneity and concentration of population, variety of social and economic interests, and in the operation and interrelation of its political institutions. But so long as a State's apportionment plan reasonably achieves, in light of the State's own characteristics, effective and balanced representation of all substantial interests, without sacrificing the principle of effective majority rule, that plan cannot be considered irrational.

Id. at 751.

As late as *Wesberry*, even Justice Brennan, who joined in the majority decision, expressed discomfort with the rule: "On the remedy, I think that we would be wise only to reverse and let the district court fashion the remedy without giving any hints as to what it should do. There must be substantial equality. This one is way out of line." Hasen, *supra* note 227, at 1479 (citing The Supreme Court in Conference (1940-1985), at 852 (Del Dickson ed., 2001) (quoting Justice Brennan)). It is also noteworthy that courts in other common-law jurisdictions have rejected the American conception of voter parity.

> [T]hat equality of numbers within electoral divisions is an essential concomitant of a democratic system, so that in any constitution framed upon democratic principles it must have been intended to guarantee that electorates would, so far as practicable contain an equal number of people or of electors, is simply incorrect—it begs the question and ignores history.

McKinlay's Case (1975) 135 C.L.R. 1, 45 (Austrl.).

> It is clear that the American jurisprudence, at least at the congressional level, requires virtually absolute equality of voting power. However, it would be simplistic and wrong to infer, without more, that the Canadian concept of democracy dictates the same result.

Dixon v. British Columbia, [1989] 35 B.C.L.R.2d 273, *17.

deterrent to political gerrymandering, the rule, as demonstrated at its extreme in *Karcher*, has been a "stunning doctrinal failure."[233]

One-person, one-vote, "the most judicially manageable of standards,"[234] was prematurely enshrined in the Court's theory of politics.[235] Hasen would have preferred to see "initial baby steps in different directions by lower-level decisionmakers who did not have to speak definitively for the nation."[236] Although a different *Reynolds* outcome—one that would have allowed for some judicial "wiggle room"—might have resulted in inconsistent lower court decisions, Hasen argues that a little initial uncertainty is positive, "in situations like the apportionment cases where highly disputed normative principles are involved."[237] The Court should not entirely shun unmanageable standards; instead, Hasen contends, "unmanageable judicial standards have much to commend them in certain circumstances."[238]

3. Gerrymandering under the Republican Form of Government Clause

Like Richard Hasen, Professor Michael McConnell attacks the one-person, one-vote standard, and suggests that "the Court adopted a legal theory for addressing [malapportionment] that was wrong in principle and mischievous in its consequences."[239] McConnell contends that instead of the Equal Protection Clause, the Court should have adjudicated districting schemes according to the Republican Form of Government Clause,[240] which is "a structural or institutional guarantee, emphasizing the right of 'the People'—the majority—to ultimate political authority."[241] According to McConnell, framing voting rights as an equal protection issue is logically and practically problematic, and has caused the Court to "[commit] itself to the norm of equipopulous districts, without proper consideration of whether that is the proper standard."[242] McConnell argues that "the Equal Protection Clause was not originally understood by its framers to encompass voting rights,"[243] nor is it possible to

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[233] Issacharoff, *supra* note 46, at 1655. Issacharoff characterized the Court's handling of Karcher v. Daggett, 462 U.S. 725 (1983), as "unfortunate." *Id.* at 1655-56 (noting that the Census Bureau's estimated margin of error surpassed the deviations at issue in *Karcher*).

[234] Hasen, *supra* note 227, at 1478.

[235] *See id.* at 1471-72.

[236] *Id.* at 1486.

[237] *Id.* at 1488.

[238] *Id.* at 1503.

[239] McConnell, *supra* note 183, at 104.

[240] U.S. CONST. art. IV, § 4. (stating in significant part, "The United States shall guarantee to every State in this Union a Republican Form of Government").

[241] McConnell, *supra* note 183, at 107.

[242] *Id.*

[243] *Id.* at 110.

achieve pure voter parity, due to census error, mobility, birth and mortality rates.[244] Furthermore, congressional seats are apportioned in whole numbers to states, so that *between* states, there can be a very large deviation.[245]

Viewing gerrymandering in the context of Republicanism would help to solve the political-racial gerrymandering paradox previously discussed.[246] From a Republicanism perspective, racial gerrymandering would be doctrinally acceptable, "if done for the purposes of bringing minority voting strength closer to what it would be under a system of proportional representation."[247] Yet political gerrymandering would be "in obvious tension with the values of Republicanism."[248] McConnell concedes that the Court is "too firmly entrenched in its [*Baker v. Carr*] thinking"[249] to reconsider election theory fundamentals. Nonetheless, he contends that to replace the Equal Protection Clause with the Republican Form of Government Clause would provide a "practical and judicially manageable means of curbing gerrymandering abuses of all kinds, and it would put an end to the embarrassingly standardless line of cases that began with [*Shaw v. Reno*]."[250]

*C. Post-*Vieth*, Ongoing Uncertainty*

The Supreme Court's voting rights jurisprudence appears "simply ad hoc—different views of the point of politics emerge almost at random as the Court confronts questions that range from patronage to redistricting to restructurings of the political process through voter initiatives."[251] To avoid the perception that its decisions are purely extemporized, the Court must eventually confront the broader questions that critics have been weighing for years, and set its voting rights jurisprudence on a doctrinally rational and cohesive path. In *Vieth*, not only did the plurality endorse a conceptually nonsensical approach to gerrymandering, but as the proposals outlined above illustrate, the dissenting opinions were incomplete.[252] The Court failed to

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[244] *Id.*

[245] McConnell points out that "[t]he smallest district in the country [in 2000] . . . (Wyoming) had 453,588 voters, and the largest district (Montana) had 799,065 voters—a disparity over 700 times as large as that held unconstitutional in Karcher." *Id.* at 112 (citing United States Department of Commerce, Statistical Abstract of the United States 28 (119th ed. 1999)).

[246] *See supra* Part IV.A.

[247] McConnell, *supra* note 183, at 116.

[248] *Id.*

[249] *Id.*

[250] *Id.*

[251] Issacharoff & Pildes, *supra* note 214, at 646.

[252] With the possible exception of Justice Breyer's dissent, in which he discusses at some length the underlying goals of democracy in the U.S. *See supra* Part III.F.

examine the broader doctrinal inconsistencies in its treatment of voting rights that will continue to plague voting rights determinations.

In October of 2004, the Supreme Court heard its first redistricting case since *Vieth*. In *Jackson v. Perry*,[253] the Court vacated and remanded a Texas plan "with as partisan a redistricting as we have seen."[254] *Jackson* involved an unprecedented mid-decade reapportionment carried out with the express and sole purpose of maximizing Republican returns to Congress.[255] Observers were surprised by the Supreme Court's order, having expected summary dismissal of the case.[256] Instead, the Court vacated and remanded in light of *Vieth*.[257] While Texas's Attorney General described the decision as a "routine procedural step,"[258] others attached more weight to the order's significance. Samuel Issacharoff, for example, believes that the order is a follow-up of Justice Kennedy's "open invitation" to re-frame the plaintiffs' arguments as First Amendment injuries.[259] Rick Hasen maintains that Justice Kennedy's First Amendment argument cannot be satisfied,[260] but sees *Vieth* as a

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[253] ___ U.S. ___, 125 S. Ct. 351 (2004), *vacating* Session v. Perry, 298 F. Supp. 2d 451 (E.D. Tex. 2004) (three-judge court).

[254] Hasen, *supra* note 207, at 35; *see also Session*, 298 F. Supp. 2d 451, *vacated sub nom Jackson*, ___ U.S. ___, 125 S. Ct. 351.

The Texas redistricting process at issue was sensational: Democratic state representatives fled to neighboring states to block the map by denying quorum; Republicans responded by deploying state troopers to apprehend them. *Rethinking Texas's Redistricting*, N.Y. TIMES, Oct. 22, 2004, at A22, *available at* http://www.nytimes.com/2004/10/22/opinion/22fri2.html (last visited Oct. 26, 2004). And shortly before the *Jackson* remand, Congressional House Majority Leader Tom DeLay was reproached by the House Ethics Committee for enlisting the aid of Federal Aviation Administration officials in locating the missing Democrats. *See* Letter from Joel Hefley, Chairman, U.S. House of Representatives Ethics Committee, to Tom DeLay, U.S. House of Representatives Majority Leader (Oct. 6, 2004) (on file with author), *available at* http://www.house.gov/ethics/DeLay_letter.htm (last visited Oct. 22, 2004).

[255] Brief for Appellants at 5, *Jackson* (No. 03-1391) ("The State of Texas has conceded that partisanship was the sole motivation behind [the map] . . . , and even the State's own expert witness testified that [it] . . . targets at least seven Democratic Representatives for defeat while protecting all fifteen Republican incumbents.").

[256] *See* Linda Greenhouse, *Justices Revive Texas Districting Challenge*, Oct. 19, 2004, at A13, *available at* http://www.nytimes.com/2004/10/19/politics/19scotus.html (last visited Oct. 26, 2004).

[257] *Jackson*, ___ U.S. at ___, 125 S. Ct. at 351.

[258] Mary Alice Robbins, *Parties Dispute What Court Meant in Order for Redistricting Review*, 20 TEXAS LAWYER 1, Oct. 25, 2004 (quoting Texas Attorney General Greg Abbott's comments at a news conference held after the Supreme Court ruling).

[259] *Id.*

[260] *See* Hasen, *supra* note 211, at 4-5 ("[N]either history nor the First Amendment is likely to provide Justice Kennedy with an acceptable way to separate permissible from impermissible use of voters' party affiliations in redistricting.").

"placeholder decision"[261] that represents both the Court's uncertainty with regard to standards and its desire to reconsider the issue in the future.[262] Nathaniel Persily concurs, interpreting the Supreme Court's message to be, "We don't know how to resolve these issues. District Court, give us some ideas how to resolve this case."[263] In effect, the *Jackson* decision asks the district courts to fulfill the momentous task of prioritizing the nation's democratic values—an exercise for which even the Supreme Court begrudges review.

The three proposals outlined above each require that the Court fundamentally re-think its past decisions, and may therefore be difficult to pragmatically endorse. To abandon Equal Protection analysis for Republicanism would overturn forty years of apportionment decisions, very seriously throwing into question the Court's capability to intervene in politics, and compromising stare decisis. Hasen's alternative, to discard the "judicially discernable and manageable" requirement of the *Baker* justiciability test, is less severe, but still requires the Court to admit to a grave error in its political question theory. Of the three alternatives presented, to determine that partisan districting is presumptively unconstitutional would be both undisruptive and manageable, and is therefore the most practical solution presented. Nonetheless, it would still require the Court to embrace doctrinal pragmatism and abandon its idealistic quest for purely neutral standards—something that Justice Scalia, at least thus far, has refused to do.

V. CONCLUSION

Instead of articulating a new standard, the plurality in *Vieth* would hold political gerrymandering claims to be non-justiciable.[264] In doing so, the

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[261] Kimberly Reeves, *The Redistricting Rematch*, AUSTIN CHRONICLE, Oct. 22, 2004, *available at* http://www.austinchronicle.com/issues/dispatch/2004-10-22/pols_naked2.html (last visited Oct. 29, 2004).

[262] *Id.*; *see also* Hasen, *supra* note 211. Interestingly, although Hasen critiques Justice Kennedy's standard (the *de facto* replacement for the *Bandemer* test) as impossible to meet, *see supra* notes 260-61 and accompanying text, he nonetheless applauds the decision in *Vieth*. Richard L. Hasen, *Supreme Court Got it Right in Pa. Redistricting Case*, ROLL CALL, May 3, 2004, *available at* http://www.rollcall.com/pub/49_117/guest/5381-1.html (last visited Nov. 13, 2004). Hasen commends Justice Kennedy's concurrence for its utility as a "backstop to preserve the possibility that courts will step in only in the most egregious cases of partisan manipulation." *Id.* According to Hasen, the Court should not step in until a social consensus emerges "as to the line between permissible and impermissible political behavior," and until then, it "should keep its nose out of each state's political decisions." *Id.* Hasen appears to be seeking a bright-line rule based on a social consensus; the general consensus that egregious political gerrymandering should not be tolerated apparently does not satisfy his requirements.

[263] Reeves, *supra* note 261.

[264] *See supra* note 82 and accompanying text.

plurality adopted the nonsensical position that classifying voters primarily by race is impermissible, yet classifying voters primarily by political affiliation is wholly barred from adjudication. If an expressive harm exists for racial gerrymandering, there is a corresponding, and greater, expressive harm in the political gerrymandering context.[265] The concurring and dissenting opinions in *Vieth* present several possible standards for determining when political gerrymandering has gone too far,[266] yet none squarely faces the doctrinal inconsistencies the Court has created in 40 years of voting rights determinations. In particular, the Court has never questioned its one-person, one-vote rule, but instead zealously embraces it, despite the chorus of critique that has arisen regarding the rule's democratic utility.[267] And the Court continues to view voting rights cases within an individual rights framework, rather than to understand apportionment as an aggregate rights issue. As long as the Court fundamentally misperceives the nature of voting harms, and steadfastly adheres to its former blunders, it should not be surprising that the Court cannot discover standards for political gerrymandering.

Legal scholars and lower courts uniformly abhorred the *Bandemer* ruling.[268] But its *de facto* replacement—whatever standard might satisfy Justice Kennedy—is likely to be no less elusive than *Bandemer*'s impossible intent-effect test.[269] The Court missed an opportunity to clarify its voting rights jurisprudence, and to provide some guidance for the lower courts. The Court should have heeded Samuel Issacharoff's suggestion and held partisan districting to be presumptively unconstitutional. Doing so would simplify the debate substantially, and deliver the United States from the polarizing, inefficient litigation of *Vieth* and *Jackson*. Issacharoff's approach is nondisruptive, manageable, and preserves for the states the task of legislating their own districting commissions in accordance with their individual state requirements and democratic ideals.

Erika Lewis[270]

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[265] *See supra* notes 159-60 and accompanying text.

[266] *See supra* Part III.C-F.

[267] *See supra* notes 230, 232.

[268] *See supra* note 183 and accompanying text.

[269] *See supra* note 260 and accompanying text.

[270] J.D. Candidate 2006, William S. Richardson School of Law, University of Hawai'i at Manoa. Apologies to Richard Hasen, Nathaniel Persily, Michael McConnell, Samuel Issacharoff, Pamela Karlan, and Erin Daly. Thanks to Staci Uwaine, Aimee Lum, and Sieu Che.

Wiping Out the Ban on Surfboards at Point Panic

I. INTRODUCTION

Rivalries are not uncommon among wave riders because only a finite number of surfable waves roll through a given surf spot on a given day. Consequently, surfers have developed numerous ways to group and identify themselves. There are short boarders, long boarders, body boarders, body surfers, wind surfers, kite boarders, locals, non-locals, soul surfers, pro surfers, old timers, groms, rippers, barneys, dawn patrollers, pau hana crews, and weekend warriors. The list goes on. These groups generally coexist peacefully because of their common love of the ocean; but as any wave rider will attest, disagreements inevitably occur.

At the surf spot known as Point Panic,[1] a peculiar sequence of events unfolds on nearly a daily basis. The scene resembles a playground rivalry. Board surfers arrive at the crack of dawn to catch a few precious waves before anyone else shows up. Soon thereafter, body surfers arrive and one of them eventually calls the police. Unfortunately for surfers, the teacher monitoring this playground is statutorily obliged to take the body surfers' side. When Department of Land and Natural Resources ("DLNR") agents arrive, the surfers unlucky enough to be around are rounded up, issued citations, and have their boards confiscated.

This Article establishes that the ordinance making board surfing illegal at Point Panic is invalid because it is arbitrary and capricious, and that even if deemed a valid exercise of the state's police power, the ordinance is unenforceable against native Hawaiians because their customary rights are protected by Hawai'i's Constitution. Part II of this Article provides background information on the history of surfing, the surf spot at Point Panic, and the ordinance prohibiting surfing there. Part III discusses the legal grounds on which the ordinance can be challenged by surfers who unexpectedly find themselves charged with violating the law. Part IV briefly articulates a less restrictive alternative to the conflict at Point Panic. Finally, Part V summarizes this Article, concluding that as applied, the Point Panic ordinance violates both the public trust doctrine and the Hawai'i Constitution.

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[1] *See infra* Part II.B.

II. BACKGROUND

Surfing has long been a part of the Hawaiian culture. In addition to surfing's cultural contributions to Hawaiian society, the sport has yielded substantial economic benefits in recent years. Although Point Panic is one of Hawai'i's finest surf spots, an ordinance prohibits board surfing there, thus squandering a valuable societal resource.

A. History of Surfing in Hawai'i

Although its exact origins are difficult to pinpoint, surfing was an ancient practice in various island groups of Polynesia.[2] Historic evidence suggests that surfing existed in Hawai'i over one thousand years ago.[3] While surfing was a tremendously popular pastime in ancient Hawai'i,[4] it was more than a mere sport. The practice was also entwined with vital aspects of Hawaiian culture, such as religion and politics.[5]

Hawaiian surfing was highly advanced by the time the first Europeans arrived in the Sandwich Isles.[6] Ancient Hawaiians rode waves by standing on wooden surf boards, by riding prone on paipo boards,[7] or simply by body surfing. The full-sized surfboard, however, with its capacity for handling greater speed, larger waves, and a variety of maneuvers, was the most popular and dramatic means of riding.[8] Ancient Hawaiians also named popular board

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[2] BEN FINNEY & JAMES D. HOUSTON, SURFING: A HISTORY OF THE ANCIENT HAWAIIAN SPORT 23 (1996).

[3] *Id.* at 21 (stating that a cautious estimate would date Hawaiian surfing back at least a thousand years).

[4] *Id.* at 27 (discussing excerpt from WILLIAM ELLIS, 3 POLYNESIAN RESEARCHES (1831)) (explaining that when surf conditions were favorable, "daily tasks such as farming, fishing and tapa-making were left undone while an entire community—men, women and children—enjoyed themselves in the rising surf and rushing white water").

[5] Surfing entwined itself with vital elements of Hawaiian culture through its connection with the ancient religion of the islands. Although surfing was not specifically a religious observance, it was, like other aspects of Hawaiian life, integrally involved with the gods and spirits of the day. There were religious rites related to surfboard construction, sports gods, surf chants, and the annual Makahiki festival in which surfing played a major role. Although all members of society enjoyed surfing, certain breaks and boards were clearly reserved for the ruling class. *Id.* at 42-53.

[6] The term "Sandwich Isles" refers to the Hawaiian Islands.

[7] A "paipo board" is a wooden handboard or bodyboard historically ridden prone by Hawaiians and other Pacific islanders. *See* Surfline.com-Surfology, Surfing Glossary *at* http://surfline.com/surfology/gloss_definitions.cfm (last visited Nov. 14, 2004).

[8] FINNEY & HOUSTON, *supra* note 2, at 16.

surfing spots all around the islands including breaks within the Point Panic vicinity.[9]

The first Western account of surfing was written by a crew member of Captain James Cook's voyages to Hawai'i in 1778 who marveled at the natives' skill in the water.[10] As Western influence spread throughout the Hawaiian Kingdom, the native religion, including religious rites associated with surfing, began to disappear. The diminishment of the cultural aspects of surfing contributed to the sport's demise.[11] As one pair of authors put it, "[s]urfing's decline was part of the wider disaster visited upon the Hawaiian people."[12] The missionaries' view of surfing as an immoral activity further eroded the sport's once sacred status.[13] After one hundred years of Western

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[9] Among Oahu's ancient South Shore surf spots were Ai Wohi, Ka Lehua Wehe, Ka Pua, Ka Puni, and Mai Hiwa in Waikiki, and Ula Kua, Ke Kai O Mamala, and Awa Lua in Honolulu. *Id.* at 30.

[10] For a description of ancient Hawaiian surfing by a member of Captain Cook's crew, *see* Journal of Lieutenant James King, COOK'S VOYAGES, 1778 *reprinted in* FINNEY & HOUSTON, *supra* note 2, at 97.

> But a diversion the most common is upon the Water, where there is a very great Sea, & surf breaking on the Shore. The Men sometimes 20 or 30 go without the Swell of the Surf, & lay themselves flat upon an oval piece of plank about their Size & breadth, they keep their legs close on top of it, & their Arms are us'd [sic] to guide the plank, they wait the time of the greatest Swell that sets on Shore, & altogether push forward with their Arms to keep on its top, it sends them in with a most astonishing Velocity, & the great art is to guide the plank so as always to keep it in a proper direction on the top of the Swell, & as it alters its direct. If the Swell drives him close to the rocks before he is overtaken by its break, he is much prais'd [sic]. On first seeing this very dangerous diversion I did not conceive it possible but that some of them must be dashed to mummy against the sharp rocks, but just before they reach the shore, if they are very near, they quit their plank, & dive under till the Surf is broke, when the piece of plank is sent many yards by the force of the Surf from the beach. The greatest number are generally overtaken by the break of the swell, the force of which they avoid, diving & swimming under the water out of its impulse. By such like exercises, these men may be said to be almost amphibious. The Women could swim off to the Ship, & continue half a day in the Water, & afterwards return. The above diversion is only intended as an amusement, not a tryal [sic] of Skill, & in a gentle swell that sets on must I conceive be very pleasant, at least they seem to feel a great pleasure in the motion which this Exercise gives.

Id. (footnote omitted).

[11] *Id.* at 53. "For surfing, the abolition of the traditional religion signaled the end of its sacred aspects. With surf chants, board construction rites, sports gods, and other sacred elements removed, the once ornate sport of surfing was stripped of much of its cultural plumage." *Id.*

[12] *Id.* at 51.

[13] *See id.* at 54-56 (describing the missionaries' view of surfing).

> Of course, surfing itself did not displease all the missionaries, but they were unanimously united in their opposition to the related activities such as betting, the "immorality" of surfing together in "scanty costume," sexual freedom among men and women surfers, and whatever religious practices might have remained after the collapse of the old religion.

Id.

influence in Hawai'i, surfing was on the verge of extinction.[14] Throughout the twentieth century, surfing regained much of its prestige in the islands. During the early 1900s, surfing's popularity in Waikiki grew among both native Hawaiians and Westerners. Duke Kahanamoku[15] and others became household names around the globe as the Waikiki Beach Boys[16] served as Hawai'i's international ambassadors to the sport. In the 1960s, surfing became a mainstream infatuation as Gidget, the Beach Boys band, and world surfing champion and future Hawaiian gubernatorial candidate, Fred Hemmings, all rode surfing's wave of popularity.

Today, the sport of surfing has recovered much of its once regal appeal and is viewed as a respectable international sport.[17] Recent interest in "extreme" sports has given rise to a $250 billion per year industry,[18] within which surfing generates $5 billion annually.[19] In 2000, an estimated 1.8 million surfers in the United States purchased approximately 400,000 surfboards.[20] Surfing contests generate $35 to $50 million dollars for Hawai'i's economy annually, and the sport contributes significantly to Hawai'i's tourism industry.[21]

The fact that some Hawaiians have hung up their body boards to explore traditional methods of wave riding such as paipo boarding is evidence that

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[14] *See id.* at 59 (stating that by 1900, "the sport might be said to have returned to its infancy: boards were short, riding techniques were simple, the whole pastime was unelaborate and practiced by only a few. Soon after the turn of the century, however, the first signs of revival appeared").

[15] Duke Kahanamoku was a legendary surfer from Hawai'i, also famous for winning an Olympic gold medal in swimming. *See* Malcolm Gault-Williams, Legendary Surfers: A Definitive History of Surfing's Culture and Heroes, *at* http://www.legendarysurfers.com/surf/legends/ls06.shtml (last visited Nov. 14, 2004).

[16] The Waikiki Beach Boys were known for their surfing skills, their friendly "aloha" spirit, and their practice of teaching tourists to surf in Waikiki. *Id.*

[17] *See* Will Hoover, *Surf Pros Attract $7 Million to North Shore Each Year*, HONOLULU ADVERTISER, Feb. 16, 2003, at Main-A (statement of economic consultant Mike Markrich: "[Since 1988], surfing has gone from being a marginal sport on the fringes of respectability to an international phenomenon and the focal point of a multibillion-dollar resort surf wear industry . . . ."), *available at* http://honoluluadvertiser.com/article/2003/Feb/16/ln/ln01a.html.

[18] *See* Matt Kranz, *Sponsors Get Gnarly Idea: Surf Sells, Dude*, USA TODAY, Aug. 6, 2001, *available at* http://usatoday.com/money/advertising/2001-08-03-surf.htm (last visited Nov. 14, 2004).

[19] *See* Kristen Sawada, *Former Local Athletes Turn Love of Sport into Business*, PACIFIC BUSINESS NEWS, Dec. 20, 2002 (statement of Triple Crown of Surfing promoter Randy Rarick), *available at* http://www.bizjournals.com/pacific/stories/2002/12/23/focus2.html (last visited Nov. 14, 2004).

[20] *See* Krantz, *supra* note 18.

[21] *See* Sawada, *supra* note 19.

Hawaiians are once again proud of their surfing heritage.[22] Indeed, surfing in Hawai'i is helping Hawaiians rediscover their cultural roots.

B. The Surf Spot at Point Panic

The Point Panic surf spot is one of four world class surf breaks on the South Shore of Oahu.[23] It is designated as a spot for experienced surfers only, due likely to the rugged topography of the shoreline and strong currents.[24] Although waves at Point Panic break to both the left and right, the spot owes its world class designation to its perfect right hander.[25]

The surf break is located on the western side of the channel through which boats ingress and egress the Kewalo Basin Boat Harbor on the South Shore of Oahu. A fine dining restaurant overlooks the surf spot. Additionally, there are numerous commercial establishments catering to locals and tourists just inland of the harbor.

The waves at Point Panic break just a few yards in front of a turbulent rocky jetty, making them easy to view. Because there are no beaches in the surf spot's immediate vicinity, non-surfing beachgoers generally do not enter the water at Point Panic. When the surf is above advisory levels, strong currents moving through the surf break make it difficult for swimmers, even those wearing swim fins, to remain stationary in the water. As a result, there is a dramatic decrease in the number of body surfers who enter the water at Point Panic during high surf. Correspondingly, during high surf an increasing number of board surfers ride Point Panic's waves illegally.[26]

As ocean swells come ashore at Point Panic, the steeply sloped ocean bottom running along the edge of the Kewalo Basin boat channel creates a

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[22] *See* Dayton Morinaga, *Wave-Riders are Trying to Revive Hawaiian Tradition with Homemade, Wooden Paipos*, HONOLULU ADVERTISER, June 29, 2000, at D6, *available at* http://the.honoluluadvertiser.com/2000/Jun/29/recreation.html (last visited Nov. 14, 2004).

[23] The other world class surf spots are "Queen's" and "Threes" in Waikiki, and "Bowls" in front of the Ala Wai Boat Harbor. *See* Wannasurf.com Inc., Point Panics- North America, USA, Hawaii, Oahu, *at* http://www.wannasurf.com/spot/North_America/USA_Hawaii/Oahu/point_panics/index.html (last visited Nov. 14, 2004).

[24] *See id.*

[25] "Right hand waves" break towards the right from the vantage of a surfer riding the wave. From a beach viewpoint, they break toward the left as the onlooker is facing the ocean. *See* Surfline.com-Surfology, Surfing Glossary, *at* http://surfline.com/surfology/gloss_definitions.cfm (last visited Nov. 13, 2004).

[26] *See* Mike Gordon, *Today is Just Swell for Wave Riders*, HONOLULU ADVERTISER, July 16, 2004, at B1 (featuring graphic by Jeff Widener and caption, *SURF'S UP ON THE SOUTH SHORE*; "A body boarder carves up a wave off point panic this morning"), *available at* http://honoluluadvertiser.com/article/2004/Jul/16/br/br04p.html (last visited Nov. 14, 2004).

right hand wave featuring machine-like barrels[27] which roll along the reef before coming to an end in the channel. Point Panic's coveted barrels make the spot ideal for all types of wave riders on most days. The waves at Point Panic can be surfed year round, although the largest and best surf comes during the summer months.

C. The Ordinance Banning Surfboards

Section 13-254-14(a) of the Hawai'i Administrative Rules[28] ("Point Panic ordinance") prohibits a person from riding a surfboard at Point Panic. It states, "No person shall operate a surfboard in the restricted area of the Point Panic ocean waters."[29] Violators of the ordinance may be punished by up to thirty days in jail and fined up to $1,000.[30] In addition to fines and jail time,

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[27] The term "barrel" refers to the space inside a breaking wave between the lip and face. A surfer may be completely hidden from view during a barrel ride, especially from shore. It is one of the most difficult, best and most enjoyable acts in surfing, but often very difficult to complete due to changing variations in each wave. Surfline, *supra* note 25.

[28] HAW. ADMIN. R. § 13-254-14(a) (1994).

[29] *See id.*; *see also id.* § 13-250-5 (1994) (defining relevant terms used in the DLNR ordinance).

"Operate" means to navigate or otherwise use a vessel, surfboard, or paddle board (paipo board). "Surfboard" means any type of board that exceeds four feet in length and is used for the sport of surf riding. *See id.*; *see also id.* § 13-254-13 (1994) (defining the restricted surfing area at Point Panic).

"Point Panic ocean waters" means the portion of Kewalo ocean waters confined by the boundaries shown on Exhibit "J", June 1, 1981, located at the end of this chapter, which boundaries are described as follows:(1) Beginning at a point where the mean high water mark intersects a seaward prolongation of the west boundary of Ahui Street; (2) In a Diamond Head direction along the mean high water mark to the point where the mean high water mark intersects the west boundary of the Kewalo Basin seawall; (3) To a point one hundred yards seaward on a prolongation of the Kewalo Basin seawall; (4) In an ewa direction on a straight line at right angles to the seaward prolongation of the Kewalo Basin seawall to a point where the line intersects a seaward prolongation of the west boundary of Ahui Street; and (5) Along a straight line in a shoreward direction to, and ending at the point of beginning.

See id.

[30] *See id.* § 13-252-7 (1994) (providing that "[a]ny person who is guilty of violating these rules shall be punished as provided in section 200-25, Hawai[']i Revised Statutes"). Section 200-25 of the Hawai'i Revised Statutes states that:

Any person violating this part, or any rule adopted pursuant to this part, shall be fined not less than $50 and not more than $1,000 or sentenced to a term of imprisonment of not more than thirty days, or both, for each violation; provided that in addition to, or as a condition to the suspension of, the fines and penalties, the court may deprive the offender of the privilege of operating any vessel, including but not limited to any thrill craft or vessel engaged in parasailing or water sledding, in the waters of the State for a period of not more than thirty days.

HAW. REV. STAT. § 200-25 (1997).

the surfboards belonging to offenders of the ordinance may be confiscated.[31]

The DLNR has enacted similar ordinances in the waters of Makapu'u Beach, Kailua Bay, and Brennecke Beach.[32] Unlike Point Panic, these spots front sandy beaches suitable for swimming and wading in addition to body surfing. Furthermore, because the waves at these spots are beach breaks which break closer to, and sometimes onto the shore, they are less suited for traditional board surfing than the surf spot at Point Panic.

The DLNR created the ordinances in the name of "further[ing] the public interest and welfare and to promote safety within the geographical limits of certain portions of Hawai'i's ocean waters, navigable streams and beaches."[33] Before the State granted jurisdiction over Kewalo Basin to the DLNR, Point Panic was regulated by the State Departments of Transportation and Public Safety.[34] Specifically, the relevant functions assumed by the DLNR pertain to "[m]anaging and administering the ocean-based recreation and coastal areas programs of the State."[35] The powers of the DLNR chairperson are limited by section 200-4 of the Hawai'i Revised Statutes, which states in relevant part:

> The chairperson may adopt rules necessary . . . .
>
> . . . .
>
> (4) For the conduct of the public using small boat harbors, launching ramps, and other boating facilities owned or controlled by the State [and]
>
> (5) To regulate and control recreational and commercial use of small boat harbors, launching ramps, and other boating facilities owned or controlled by the State and the ocean waters and navigable streams of the State . . . .[36]

The Point Panic ordinance's unpopularity among the board surfers is not surprising. Admittedly, board surfers who failed to express their concerns at hearings held on the matter are partially to blame for the adoption of the ordinance. Many board surfers nevertheless feel that the DLNR enacted the ordinance solely for the purpose of conveying a benefit on body surfers by banning board surfers, with whom body surfers compete for waves. A recent statement by a DLNR field supervisor at Point Panic is consistent with this

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[31] *See* HAW. ADMIN. R. § 13-252-9 (1994). "As incident to a lawful arrest, the arresting authority may take legal custody of any personal property which is the subject of or related to any violation of these rules. The property may be released only upon approval by the court which has jurisdiction of the case." *See id.*

[32] *See id.* §§ 13-254-4, -7, -11 (1994).

[33] *See id.* § 13-250-1 (1994).

[34] *See* HAW. REV. STAT. § 200-2 (2003).

[35] *See id.* § 200-3 (2003).

[36] *See id.* § 200-4 (2003).

view.[37] Proponents of the ordinance argue that the law is necessary to prevent injuries caused by in-the-water collisions between body surfers and surfboards.[38] In response to the many disputes arising as a result of the Point Panic ordinance, the news media has run numerous stories and editorials regarding the fines and confiscations imposed on board surfers caught at Point Panic.[39] Unfortunately, instead of standing up for their rights, most surfers charged with violating the Point Panic ordinance have simply paid fines in hopes of recovering their confiscated surfboards. Board surfers might be complacent, but several legal theories support the right to surf at Point Panic.

III. LEGAL THEORIES FOR CHALLENGING THE ORDINANCE

Administrative regulations may be struck down when they are arbitrary or capricious, violate constitutional provisions, or exceed statutory authority.[40] While there is a great deal of case law regarding the protection of surf spots from development,[41] there are relatively few cases in which ordinances enacted for the purpose of public safety have been challenged by aggrieved surfers. In the cases attacking such ordinances, public trust and equal protection arguments are the predominant legal theories.[42] A few cases have

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[37] *See* Leila Fujimori, *Agents Pull Illegal Surfers From Point Panic Waves*, HONOLULU STAR-BULLETIN, May 13, 2004, *available at* http://starbulletin.com/2004/05/13/news/story9.html ("Michael Lapilio, DLNR crime reduction unit field supervisor, said the law is designed to provide body surfers an area for themselves.").

[38] *See id.* (stating that "[i]f [board surfing and body surfing are] mixed together, someone's going to get hurt").

[39] *See, e.g.*, Michael Uyehara, Editorial, *Punishment; Surfboard Confiscation Doesn't Match Crime*, HONOLULU ADVERTISER, May 18, 2004, at A7 (stating that, "[w]e don't confiscate the cars of speeders or drunken drivers. Companies that owe hundreds of thousands of dollars in state taxes are often given deals where they pay pennies on the dollar. What's up with that? Let's make the punishment more appropriate for the 'crime'.").

[40] *See* HAW. REV. STAT. § 91-14(g) (2003) (providing for judicial review of state agency actions).

> Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are: (1) In violation of constitutional or statutory provisions; or (2) In excess of the statutory authority or jurisdiction of the agency; or (3) Made upon unlawful procedure; or (4) Affected by other error of law; or (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or (6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

See id.

[41] *See* Wendy Oram & Clay Valverde, *Legal Protection of Surf Breaks: Putting the Brakes on Destruction of Surf*, 13 STAN. ENVTL. L.J. 401, 420 (1994).

[42] *See* discussion *infra* Part III.B.

unsuccessfully raised more creative arguments based on the First Amendment and due process.[43] This part first touches on the creative arguments which have failed. Next, it discusses the public trust and equal protection arguments in detail. Finally, it advances a new, Hawai'i-specific argument based on native Hawaiian rights.

A. Creative But Unsuccessful Approaches

In an attempt to preserve the right to maintain access to their surf spots, surfers have raised a number of creative legal claims. As the following discussion reveals, all claims are not created equal. In *MacDonald v. Newsome*,[44] a surfer challenging an ordinance banning surfboards in a particular area unsuccessfully raised First Amendment and due process arguments.[45]

The first challenge by the plaintiff in *MacDonald* alleged that the ordinance infringed on the plaintiff's right to freedom of expression.[46] The court pointed out that "[a] series of recent decisions indicate that activities such as snow skiing, camping, the erection of a tent city, and nudity on a public beach are not types of 'speech' which fall within the protection of the First Amendment."[47] The court next distinguished the plaintiff's situation from a case in which the First Amendment protected an individual prosecuted for sleeping in a park because it was part of an all night protest.[48] The court noted that the plaintiff's complaint "[did] not allege that as [he] rides waves along the coast he protects or endeavors to make a public declaration or statement"[49] and that "surfing is more of an 'avocation or sport'"[50] than an exercise of freedom of expression.[51] Given the holding in *MacDonald*, a First Amendment argument for board surfing at Point Panic is weak at best.

The plaintiff in *MacDonald* also argued that the ordinance violated his right to procedural due process.[52] The court held that absent a "failure of [the administrative body] to comply with statutory prerequisites concerning notice of its meetings and adoption of ordinances,"[53] MacDonald's claim had to fail because surfers do not have a property or liberty interest in their right to surf

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[43] *See infra* Part III.A.

[44] 437 F. Supp. 796 (E.D.N.C. 1977).

[45] *See id.* at 797-98

[46] *Id.*

[47] *Id.* at 798 (citations omitted).

[48] *See id.* (citing United States v. Abney, 534 F.2d 984 (D.C. Cir. 1976)).

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.* at 799.

along the coastal waters.[54] Fortunately for surfers, there are more viable legal theories on which to challenge the Point Panic ordinance.

B. The Public Trust Doctrine and Equal Protection

Ordinances such as Hawai'i Administrative Rule section 13-254-15 are most commonly challenged under the public trust doctrine. According to this doctrine, states hold navigable waterways in trust for public use.[55] The U.S. Supreme Court emphasized the public's interest in the nation's navigable waters in *Illinois Central Railroad Company v. State of Illinois*,[56] when it held that "[t]he state can no more abdicate its trust over property in which the whole people are interested, like navigable waters . . . than it can abdicate its police powers in the administration of government and the preservation of the peace."[57] In other words, a state's ability to regulate navigable waters cannot go beyond the extent of its police powers.

State powers are not only *limited* by the public trust doctrine; the doctrine also creates certain affirmative duties for state governments. The Supreme Court of California succinctly articulated those duties in *National Audubon Society v. Superior Court of Alpine County*,[58] explaining that:

> [T]he public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.[59]

The aforementioned restrictions on the disposition of public trust assets discussed by the California Supreme Court serve as evidence of the trust's great importance.

1. Public trust challenges to recreational activities

Public trust challenges to ordinances banning recreational activities on navigable waters have yielded mixed results in other jurisdictions. Courts have recognized that public trust rights encompass recreational activities.[60]

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[54] *Id.*

[55] *See In re* Paradise Holdings, Inc., 619 F. Supp. 21 (D. Haw. 1984) *aff'd*, 795 F.2d 756 (9th Cir. 1986) (holding that Point Panic is a navigable waterway).

[56] 146 U.S. 387 (1892).

[57] *Id.* at 453.

[58] 658 P.2d 709 (Cal. 1983).

[59] *Id.* at 724.

[60] *See* Weden v. San Juan County, 958 P.2d 273, 283-84 (Wash. 1998) ("We have previously acknowledged that the *jus publicum* interest encompasses the rights of fishing, boating,

Challenges to laws restricting such activities typically allege that the ordinances involved are improper exercises of a state's police powers or that they violate equal protection by discriminating against a certain class of recreational users. The exercise of police powers through an ordinance is valid as long it promotes "health, safety . . . or welfare,"[61] and "bear[s] some reasonable relationship to accomplishing the purpose underlying the statute."[62] Statutes regulating the public trust may be struck down, however, if they are "*clearly unreasonable, arbitrary, or capricious.*"[63]

Similarly, with respect to equal protection arguments, "[parties] assailing a classification as violative of the state and federal constitutions generally [have] the burden of showing, with convicing [sic] clarity that the classification does not rest upon some ground of difference having a fair and substantial relation to the object of the legislation."[64] As the public trust and equal protection arguments are somewhat parallel, the cases raising them are now discussed together.

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swimming, water skiing, *and other related recreational purposes* generally regarded as corollary to the right of navigation and the use of public waters.") (quotations and citations omitted); *see also* Van Ness v. Borough of Deal, 393 A.2d 571, 573 (N.J. 1978) ("Of course, the municipality, in the exercise of its police power and in the interest of the public health and safety, would have the right to adopt reasonable regulations as to the use and enjoyment of the beach area.").

[61] *Weden*, 958 P.2d at 284.

[62] *Id.* (citation omitted).

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

[64] Nelson v. Miwa, 56 Haw. 601, 605, 546 P.2d 1005, 1008-09 (1976) (discussing equal protection analysis).

> We must ascertain, therefore, whether appellee has shown with requisite clarity that there is no rational basis for the University's requirements for faculty members who are between the ages of sixty-five and seventy and who otherwise meet bona fide occupational qualifications when no similar requirements are imposed upon younger professors.

Id. at 605-06 (footnotes and page numbers omitted). *See also* Morey v. Doud, 354 U.S. 457, 463-64 (1957) (discussing equal protection in the discrimination context).

> The rules for testing a discrimination [claim] have been summarized as follows: 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not make [sic] with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

Id. (internal citations omitted). *See also* Takahashi v. Fish and Game Comm'n., 334 U.S. 410, 420-21 (1948) (holding that prohibiting a lawfully admitted alien from obtaining a fishing license in the interest of preserving state fishing resources violated the equal protection clause).

In *Carter v. Town of Palm Beach*,[65] a Florida court held an ordinance banning surfing within the coastal limits of an entire town unconstitutional, stating that the municipality, "may regulate and control surfing and skimming in areas subject to its jurisdiction and may prohibit these activities at certain places along the beach. However, the complete prohibition of this sport from *all* the beach area is arbitrary and unreasonable."[66] *Carter* revealed that ordinances banning surfing can be overly oppressive.[67] Significantly, the Palm Beach ordinance applied to an area fronting a beach. A New York court reached a different result in *People v. McGuire*,[68] holding that "the section of the Municipal Code of the City of Long Beach, under which the defendants were prosecuted, is constitutional and a proper exercise of the police power by the city."[69] *McGuire* also involved the ban of surfing in front of a beach area.[70]

Weden v. San Juan County[71] also addressed the ban of certain recreational activities from public trust areas.[72] In *Weden*, the Washington Supreme Court upheld an ordinance banning the use of Personal Water Craft ("PWC") on a lake, noting that "[a]lthough the Ordinance prohibits a particular form of recreation, the waters are open to access by the *entire* public, including owners of PWC who utilize some other method of recreation."[73] *Weden* is distinguishable from the Point Panic case because the record in *Weden* was "replete with evidence of 'displeased citizens,'"[74] presented expert testimony regarding the harm such vessels cause to the marine environment,[75] and because of the dangers posed by PWC's to swimmers.

2. *The public trust doctrine in Hawai'i*

The Hawai'i Supreme Court recently discussed the public trust doctrine in *In re Wai'ola O Moloka'i, Inc.* ("*Wai'ola*").[76] *Wai'ola* involved a dispute over the allocation of underground fresh water resources, which are part of the public trust in Hawai'i.[77] While the facts in *Wai'ola* differ from the facts

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[65] 237 So. 2d 130 (Fla. 1970).
[66] *Id.* at 131-32 (emphasis added).
[67] *See id.*
[68] 63 Misc. 2d 639 (N.Y. City Ct. 1970).
[69] *Id.* at 642.
[70] *See id.*
[71] 958 P.2d 273 (Wash. 1998).
[72] *Id.*
[73] *Id.* at 283-84.
[74] *Id.* at 285
[75] *Id.* at 286.
[76] 103 Hawai'i 401, 83 P.3d 664 (2004).
[77] *See id.*

surrounding the Point Panic ordinance, much of the dicta in *Wai'ola* provides insight into the Hawai'i Supreme Court's view of the public trust. For example, the court noted that "article XI, sections 1 and 7 of the Hawai'i Constitution, adopted 'the public trust doctrine as a fundamental principle of constitutional law in Hawai'i.'"[78] As such, the court explained that "[i]n Hawai'i, the water resources trust also encompasses a *duty to promote the reasonable and beneficial use of water resources* in order to *maximize their social and economic benefits* to the people of this state."[79] Significantly, the court emphasized that the public's rights to the trust cannot be permanently allocated away; that the state is empowered to "*revisit* prior diversions and allocations, even those made with due consideration of the effect on the public trust,"[80] and that the state's duty to protect the public trust "precludes any grant or assertion of vested rights to use water to the detriment of a public trust purpose."[81] The court further explained that "the object is not maximum consumptive use, but rather the most *equitable, reasonable, and beneficial allocation* of state water resources."[82] In addition, "any balancing between public and private purposes [must] begin with a presumption in favor of public use, access, and enjoyment."[83] Finally, the court pointed out that "the state may compromise public rights in the resource pursuant only to a decision made with a level of openness, diligence, and foresight commensurate with the high priority these rights command under the laws of our state."[84]

Taken as a whole, *Wai'ola* demonstrates the Hawai'i Supreme Court's commitment to preserving the public trust assets, access to which are fundamental rights in Hawai'i. The court emphasized that even where rights are justifiably infringed upon, the state should revisit the reasoning behind the infringement

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[78] *See id.* at 430, 83 P.3d at 693 (quoting *In re* Water Use Permit Applications, 94 Hawai'i 97, 130-32, 9 P.3d 409, 443-45 (2000)); *see also* HAW. CONST. art. XI, § 1, which states that:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect [Hawai'i's] natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.

See id.

[79] *Wai'ola*, 103 Hawai'i at 430, 83 P.3d at 693 (emphases added) (internal citations and quotations omitted).

[80] *Id.* (emphasis added) (internal citations and quotations omitted).

[81] *Id.* (internal citations and quotations omitted).

[82] *Id.* (emphasis added) (internal citations and quotations omitted).

[83] *Id.* at 432, 83 P.3d at 695 (quoting *Water Use*, 94 Hawai'i at 142, 9 P.3d at 454) (internal quotations omitted) (emphasis added).

[84] *Id.* at 430, 83 P.3d at 693 (quoting *Water Use*, 94 Hawai'i at 143, 9 P.3d at 455) (internal quotations omitted).

in order to further the public interest.[85] The Point Panic ordinance is a perfect example of an infringement in need of revisitation.

3. Application of the doctrine at Point Panic

In light of the importance that the Hawai'i Supreme Court places on the public trust, several facts surrounding the ordinance banning surfboards at Point Panic indicate that the law is an invalid exercise of the DLNR's powers. First, the statute fails to promote health, safety, or welfare. Like other forms of wave riding, body surfing is accompanied by inherent dangers. For example, at Sandy Beach, a body surfing beach on Oahu, lifeguards respond to neck injuries once every thirty three days, on average, and to serious cervical spine injuries requiring hospitalization about twice a year.[86] Additionally, because body surfers are not equipped with buoyant surfboards, they can easily swim beneath errant surfboards as they approach. Therefore, body surfers are no more endangered by surfboards than board surfers are at other spots. Furthermore, it is unclear how body surfers are less likely to collide with other body surfers than board surfers are. Board surfers create very little, if any, incremental danger to body surfers at Point Panic.

Another problem with DLNR's argument that the ordinance promotes safety is that strong currents and boat traffic in the Point Panic area make it dangerous for swimmers to be in the water without buoyant devices. Surfers, body boarders, and paipo boarders have a speed advantage when fighting strong currents because their boards reduce the amount of friction between their bodies and the water. Additionally, board surfers are more visible to the numerous ocean-going vessels that pass through the Kewalo Basin channel than body surfers are. In 1984, a body surfer was killed instantly at Point Panic after being sucked into the propeller of a reversing vessel that did not see him.[87] The accident might have been avoided had the victim been on a surfboard or body board because he might have been seen or might have been able to paddle more quickly to safety. In light of this tragic occurrence, it is surprising that the DLNR concluded that a ban on surfboards at Point Panic would promote safety.

Significantly, the Point Panic ordinance is the only ordinance cited in this article banning surfboards from waters not fronting a sandy beach area.[88] Where beach areas are involved, similar ordinances are less objectionable.

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[85] *See id.*

[86] *See* Helen Altonn, *Weather Service Re-vamps Surf Height Reports*, HONOLULU STAR BULLETIN, Mar. 31, 2001, *available at* http://starbulletin.com/2001/03/31/news/story10.html.

[87] *See In re* Paradise Holdings, Inc., 619 F. Supp. 21, 21-22 (D. Haw. 1984), *aff'd*, 795 F.2d 756 (9th Cir. 1986).

[88] *See supra* Parts II.C, III.A-B.

Casual beachgoers such as tourists and children are not prepared for the dangers associated with runaway surfboards. The same can hardly be argued for experienced body surfers who are willing to climb down a rocky jetty, jump off of it into very rough surf adjacent to a highly trafficked boat channel, fight strong currents, and then scale the same jetty when exiting the water.

The DLNR's ordinance fails to promote safety and is therefore beyond the scope of the agency's powers. The only way that the Point Panic ordinance conceivably promotes safety is by making the surf spot less crowded for body surfers at the expense of board surfers. Such a distinction violates equal protection because there is no "ground of difference having a fair and substantial relation to the object of the legislation."[89]

Another public trust ideal—efficient allocation of public trust resources—also militates in favor of lifting the ban on surfboards at Point Panic. The Hawai'i Supreme Court recognizes the presumption in favor of public use of trust resources[90] and the goal of "maximiz[ing] their social and economic benefits to the people of [Hawai'i]."[91] Although mathematical data on the subject is scant, it does not take a lot of experience around the South Shore's world class surf spots to conclude that board surfing is tremendously more popular than body surfing. For example, when the surf is up at Queen's, Three's, or Bowls,[92] it is not uncommon for more than fifty people to be surfing a single break. Despite Point Panic's status as a world class surf spot, crowds there come nowhere close to the numbers seen at the South Shore's other world class reefs.[93] This is purely a result of the ban on surfboards there. Disproportionately small crowds at Point Panic indicate that the ordinance results in a misallocation of the state's social water resources. The

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[89] Gleason v. Carlson, 92 F. Supp. 280, 285 (D. Kan. 1948). *See, e.g.*, Capano v. Borough of Stone Harbor, 530 F. Supp. 1254, 1270 (D.N.J. 1982). *Capano* held that a city ordinance allowing nuns, but not members of the general public to swim in a certain area was invalid because the nuns:

> [F]ailed to introduce any persuasive evidence as to why the nuns are not as susceptible to the unsafe conditions as members of the general public. The facts that fewer nuns use the beach than members of the public would were there a public beach and that nuns do not swim for very long periods of time do not overcome the existence of unsafe conditions.

Id.

[90] *See Wai'ola*, 103 Hawai'i at 429, 83 P.3d at 692 (citing *In re* Water Use Permit Applications, 94 Hawai'i 97, 130-32, 9 P.3d 409, 443-45 (2000)).

[91] *Id.* at 430, 83 P.3d at 693 (quoting *Water Use*, 94 Hawai'i at 138-39, 9 P.3d at 450-51) (internal quotations omitted).

[92] *See* Wannasurf, *supra* note 23.

[93] *See, e.g.*, Fujimori, *supra* note 37. "'Look now, there's nobody out there,' said surfer Derek Lamoya, 42, who got his first surfing ticket and had his yellow surfboard confiscated. 'Who gets to ride the waves?'" *Id.*

misallocation is particularly evident when the surf is too big for most body surfers to fight the current in the Point Panic waters.

In addition to misallocating social resources, the Point Panic ordinance fails to maximize the economic benefits of the public trust. While the exact amount of economic benefit derived from the use of a coastal resource for surfing is difficult to quantify,[94] the surfing has undeniably positive effects on local economies. Surfing reefs inject money into local economies by attracting tourists, attracting surf contests, attracting surf-related businesses, and creating up market image and marketing opportunities.[95] Crowded surfing areas such as Oahu's South Shore experience the positive effects associated with the addition of new surf spots in greater magnitudes.[96] The economic mechanisms following injections of money into local economies are described as follows:

> Following an injection of money into an economy, the money becomes re-spent . . . repeatedly in a series of *indirect* effects. With an expansion of the economy, comes an increase in wealth and a consequent increase in consumption expenditure. This is called *induced* effects. This multiplier increases when the leakage from the economy is low, so will be higher if there is good infrastructure and facilities close to the reef. This is especially true of facilities such as restaurants with a good view over the reefs with floodlighting of surfing in the evenings.[97]

There is a tremendous amount of infrastructure close to the reef at Point Panic. A restaurant even overlooks the surf spot. Lifting the ban on surfboards there would yield positive economic effects due to net increases in spending by surfers and tourists alike. Board surfing attracts more spectators than body surfing because observers can more easily see the movements of board surfers. The much larger turnouts at board surfing contests compared to body surfing contests support this fact. That the news media frequently features board surfers illegally surfing Point Panic during large swells serves as further evidence of board surfing's relative popularity.[98] Because the South Shore's other world class surf spots break over a hundred yards off shore, the

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[94] *See, e.g.*, Oram & Valverde, *supra* note 41, at 417-19 (discussing the various approaches for valuing a surf break, which include market valuation, contingent valuation, travel cost valuation, and democratic valuation).

[95] *See* David Weight, *Economics of Surf Reefs*, PROCEEDINGS OF THE 3RD INTERNATIONAL SURFING REEF SYMPOSIUM, RAGLAN, NEW ZEALAND, 351, 354 (2003).

[96] *Id.* at 355 (stating that "latent demand . . . is very important because it means that the provision of extra capacity will be exploited, not merely by existing surfers surfing more often, but by newcomers and tourists").

[97] *Id.* at 357.

[98] *See supra* note 26.

legalization of board surfing at Point Panic would create a tourist attraction for spectators wishing to view the sport from just a few yards away.[99]

Another economic problem with the Point Panic ordinance is that it is expensive to enforce. The costly use of DLNR equipment and personnel to police surf spots is a waste of tax dollars.[100] Additionally, the prosecution of surfers gives rise to unnecessary litigation costs for courts and surfers alike.[101] Considering the social and economic benefits derived from surfing in Hawai'i, the Point Panic ordinance misallocates the state's public trust resources while putting an unnecessary burden on courts and law enforcement officers.

Because the Point Panic ordinance is unable to promote public safety and misallocates social and economic public trust resources, it is clear that the law banning surfboards at Point Panic is arbitrary and capricious. Accordingly, the ordinance violates the public trust doctrine and equal protection by conveying a public trust benefit on body surfers at the expense of other wave riders without a rational basis for doing so. The ordinance should therefore be struck down.

C. Traditional Native Hawaiian Rights

Even if the Point Panic ordinance were valid from a public trust standpoint, it would be unenforceable against native Hawaiians. The Hawai'i Supreme Court has clarified the native Hawaiian rights guaranteed by the Hawai'i Constitution in a recent line of cases. This section reviews those cases along with the applicable laws, then discusses how they apply to the Point Panic ordinance.

1. The evolution of customary native Hawaiian rights

The Hawai'i Constitution explicitly provides for the protection of customary native Hawaiian rights:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.[102]

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[99] *See supra* note 26.

[100] *See, e.g.*, Fujimori, *supra* note 37. DLNR agents "used a rubber jet boat to herd the surfers out. Surfers said there was an officer on a kayak on the [western] side of the bodysurfing zone, and as surfers climbed out of the water, they were cited." *Id.*

[101] *See id.* (stating that accused violators must appear in court).

[102] HAW. CONST. art. XII, § 7.

The Hawai'i Revised Statutes echo that spirit by establishing native Hawaiian usages as part of the common law of the State of Hawai'i, stating that:

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawai'i in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.[103]

Interestingly, the Hawai'i Revised Statutes indicate that traditional gathering rights in Hawai'i are not even extinguished by private property ownership, as evidenced by the following exerpt:

> Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.[104]

Although the native Hawaiian rights line of cases dates further back, it is sufficient to begin this analysis with *Kalipi v. Hawaiian Trust Co.*[105] *Kalipi* involved a native Hawaiian plaintiff seeking to establish his right to enter a private defendant's undeveloped land for the purpose of gathering certain traditionally used agricultural products.[106] The court held that such gathering rights existed, but that they did not apply to the plaintiff because he did not reside in the defendant's ahupua'a.[107] Despite the adverse ruling, *Kalipi's* dicta greatly reinforced native Hawaiian rights.

The *Kalipi* court recognized that native Hawaiian gathering rights created by the Hawai'i Constitution inevitably conflicted with Western concepts of

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[103] HAW. REV. STAT. § 1-1 (2003).

[104] *See id.* § 7-1 (2003).

[105] 66 Haw. 1, 656 P.2d 745 (1982).

[106] *Id.* at 3, 656 P.2d at 747.

[107] *See id.* at 8, 656 P.2d at 749-50. An "ahupua'a" is an ancient form of land division in Hawai'i, which included a segment of land including resources from the mountains to the sea so as to provide a konohiki (lower-level chief) with enough resources to function within his own somewhat autonomous sub-kingdom. *Id.* at 6, 656 P.2d at 748. The court held that gathering rights only applied to lawful occupants of an ahupua'a but that "by 'lawful occupants' we mean persons residing within the ahupua'a in which they seek to exercise gathering rights." *Id.* at 8, 656 P.2d at 749.

exclusive real property ownership, but maintained that those rights were nevertheless protected by law.[108] The court struck a balance between western and native Hawaiian property concepts by limiting native gathering rights to *less than fully developed lands*.[109] In doing so, the court recognized the need to blend practical considerations with black letter law.[110]

Native gathering rights were also limited to those utilized in the practice of *native customs*.[111] The *Kalipi* court explained that the framers of the state constitution drafted the document with the preservation of customary practices in mind.[112] The court struck another practical compromise when it recognized the need to consider both the nature of the traditional practice and the harm

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[108] *Id.* at 4, 656 P.2d at 748 (discussing the conflict between fee simple ownership and native Hawaiian rights). The court stated that:

> We recognize that permitting access to private property for the purpose of gathering natural products may indeed conflict with the exclusivity traditionally associated with fee simple ownership of land. But any argument for the extinguishing of traditional rights based simply upon the possible inconsistency of purported native rights with our modern system of land tenure must fail. For the court's obligation to preserve and enforce such traditional rights is a part of our Hawai[']i State Constitution.

Id.

[109] *Id.* at 8, 656 P.2d at 750 (allowing for access on undeveloped lands). The court stated that:

> Our task is thus to conform these traditional rights born of a culture which knew little of the rigid exclusivity associated with the private ownership of land, with a modern system of land tenure in which the right of an owner to exclude is perceived to be an integral part of fee simple title. We believe that this balance is struck, consistent with our constitutional mandate and the language and intent of the statute, by interpreting the gathering rights of § 7-1 to assure that lawful occupants of an ahupua'a may, for the purposes of practicing native Hawaiian customs and traditions, enter undeveloped lands within the ahupua'a to gather those items enumerated in the statute.

Id. at 7, 656 P.2d at 749.

[110] *Id.* at 8, 656 P.2d at 750 (cautioning that the undeveloped land provision is not absolute). "The requirement that these rights be exercised on undeveloped land is not, of course, found within the statute. However, if this limitation were not imposed, there would be nothing to prevent residents from going anywhere within the ahupua[']a, including fully developed property, to gather the enumerated items." *Id.*

[111] *Id.* at 9, 656 P.2d at 750 (discussing the native customs requirement).

> [T]he requirement that the rights be utilized to practice native customs represents, we believe, a reasonable interpretation of the Act as applied to our current context. The gathering rights of § 7-1 were necessary to insure the survival of those who, in 1851, sought to live in accordance with the ancient ways.

Id.

[112] *Id.* at 10, 656 P.2d at 750-51 (discussing the Hawaiian usage exception).

> We perceive the Hawaiian usage exception to the adoption of the English common law to represent an attempt on the part of the framers of the statute to avoid results inappropriate to the isles' inhabitants by permitting the continuance of native understandings and practices which did not unreasonably interfere with the spirit of the common law.

Id.

that the practice may cause in a particular area.[113] The court, however, pointed out that where the practice caused no actual harm, its legal protection would be guaranteed.[114] Furthermore, the court noted that the nature and scope of rights protected by the Hawai'i Revised Statutes might instead be establish by custom, thereby exceeding those rights set forth in Hawai'i Revised Statutes section 7-1, and that the extent of those rights depended on the circumstances of each case.[115]

The scope of native gathering rights continued to expand in *Pele Defense Fund v. Paty*.[116] *Pele* involved a plaintiff who objected to the development of a geothermal plant on lands used by native Hawaiians for traditional practices in an ahupua'a where the plaintiff did not reside.[117] The Hawai'i Supreme Court seemingly flip-flopped from its position in *Kalipi* and held that, "native Hawaiian rights protected by article XII, § 7 may extend *beyond* the ahupua'a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner."[118] The *Pele* court also noted that the drafters of Article XII intended to protect a very broad spectrum of traditional rights.[119]

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[113] *Id.* at 10, 656 P.2d at 751. "[W]e believe that the retention of a Hawaiian tradition should in each case be determined by balancing the respective interests and harm once it is established that the application of the custom has continued in a particular area." *Id.*

[114] *Id.* "Where these practices have, without harm to anyone, been continued, we are of the opinion that the reference to Hawaiian usage in § 1-1 insures their continuance for so long as no actual harm is done thereby." *Id.*

[115] *See, e.g., id.* at 11-12, 656 P.2d at 751-52 (discussing the Hawaiian usage exception). The court stated that:

> We thus interpret *Oni* to stand for the proposition that § 7-1 expresses all commoners' rights statutorily insured at the time of the Mahele. However, inasmuch as the court did not expressly preclude the possibility that the doctrine of custom might be utilized as a vehicle for the retention of some such rights, we find no inconsistency in finding that the Hawaiian usage exception in § 1-1 may be used as a vehicle for the continued existence of those customary rights which continued to be practiced and which worked no actual harm upon the recognized interests of others.
>
> The precise nature and scope of the rights retained by § 1-1 would, of course, depend upon the particular circumstances of each case. We need not at this time, however, explore in detail the scope of any gathering and access rights which may have been demonstrated as a part of Plaintiff's case.

Id.

[116] 73 Haw. 578, 837 P.2d 1247 (1992).

[117] *Id.*

[118] *Id.* at 620, 837 P.2d at 1272 (emphasis added).

[119] *Id.* at 619-20, 837 P.2d at 1271 (explaining STAND.COMM.REP. No. 57, *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII OF 1978, at 637).

> The Committee on Hawaiian Affairs added what is now article XII, § 7 to reaffirm customarily and traditionally exercised rights of native Hawaiians, while giving the State the power to regulate these rights. Although these rights were primarily associated with tenancy within a particular ahupua'a, the committee report explicitly states that the new

The court articulated its most expansive interpretation of native Hawaiian rights in *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission* ("*PASH*").[120] In *PASH*, native Hawaiians sought to halt the development of a resort in an area where they claimed a right to harvest shrimp in brackish ponds.[121] The court made four significant clarifications regarding native rights. First, it noted that the reference to "custom" in section 1-1 of the Hawai'i Revised Statutes means custom "as it applies in our state,"[122] and traditional Blackstonian requirements do not apply.[123] For example, Section 1-1 does not contemplate "ancient" usages.[124] Rather, it contemplates usages established in practice as of *November 25, 1892*.[125] Second, the rights enumerated by Section 1-1 entitle native Hawaiians to protection *regardless of blood quantum*.[126] Third, the *PASH* court explained that "traditional and customary [native Hawaiian rights] remain intact, *notwithstanding arguable abandonment* of a particular site, although this right is potentially subject to regulation in the public interest."[127] Finally, the court mentioned that, "the State does not have the unfettered discretion to regulate the rights of ahupua'a tenants out of existence,"[128] and that, "to the extent feasible, [the state] must protect the reasonable exercise of customary or traditional rights."[129] The

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section "reaffirms *all* rights customarily and traditionally held by ancient Hawaiians." The committee contemplated that some traditional rights might extend beyond the ahupua'a; "for instance, it was customary for a Hawaiian to use trails outside the ahupua'a in which he lived to get to another part of the Island." The committee intended this provision to protect the broadest possible spectrum of native rights:

> Your Committee also decided that it was important to eliminate specific categories of rights so that the courts or legislature would not be constrained in their actions. *Your Committee did not intend to remove or eliminate* any statutorily recognized rights or *any rights of native Hawaiians from consideration under this section, but rather your Committee intended to provide a provision in the Constitution to encompass all rights of native Hawaiians, such as access and gathering. Your Committee did not intend to have the section narrowly construed or ignored by the Court.*

Id. (citations, brackets, and page numbers omitted).

[120] 79 Hawai'i 425, 903 P.2d 1246 (1995).

[121] *Id.* at 435, 903 P.2d at 1256.

[122] *See id.* at 447, 903 P.2d at 1268.

[123] *Id.*; *but see* State v. Hay, 462 P.2d 671 (Or. 1969) (holding that public's right to access dry sand area was established under Blackstonian custom where the practice was ancient, uninterrupted, peaceable, reasonable, certain, obligatory, and consistent with other customs and laws).

[124] *PASH*, 79 Hawai'i at 448, 903 P.2d at 1269.

[125] *Id.* at 447, 903 P.2d at 1268.

[126] *Id.* at 449, 903 P.2d at 1270.

[127] *Id.* at 450, 903 P.2d at 1271 (emphasis added).

[128] *Id* at 451, 903 P.2d at 1272.

[129] *Id.*

court's generous interpretation in *PASH* demonstrates its commitment to protecting the traditional rights of Hawaiians.

Native Hawaiian rights can also give rise to a defense in criminal prosecutions. A defendant accused of criminal trespassing claimed native rights as a constitutional defense in *State v. Hanapi*.[130] Hanapi claimed that he entered the private land in question in order to monitor the landowner's grading of an area near fishponds, which he viewed as a "the desecration of [a] traditional ancestral cultural site."[131] The court nevertheless convicted Hanapi because he failed to present any evidence "establishing 'stewardship' or 'restoration and healing of lands' as an ancient traditional or customary native Hawaiian practice."[132] The court explained that, "[t]o establish the existence of a traditional or customary native Hawaiian practice, . . . there must be an adequate foundation in the record connecting the claimed right to a firmly rooted traditional or customary native Hawaiian practice."[133]

The state's obligation to native Hawaiians also creates affirmative duties for state agencies. In *Ka Pa'akai O Ka'aina v. Land Use Commission, State of Hawai'i*,[134] the court held that the Land Use Commission's boundary reclassification of land from a "conservation" use to an "urban" use was void because the Commission failed to properly assess the impact of the reclassification on native Hawaiian rights.[135] The court remanded the case to the Commission and instructed it to make determinations regarding:

> (1) the identity and scope of "valued cultural, historical, or natural resources" in the petition area, including the extent to which traditional and customary native Hawaiian rights are exercised in the petition area; (2) the extent to which those resources—including traditional and customary native Hawaiian rights—will be affected or impaired by the proposed action; and (3) the feasible action, if any, to be taken by the LUC to reasonably protect native Hawaiian rights if they are found to exist.[136]

The court bolstered its position by emphasizing the State House of Representatives' observation of the state's failure to adequately protect native Hawaiian rights.[137]

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[130] 89 Hawai'i 177, 970 P.2d 485 (1998).

[131] *Id.* at 178, 970 P.2d at 486 (alteration in original).

[132] *Id.* at 187, 970 P.2d at 495.

[133] *Id.* (footnote omitted).

[134] 94 Hawai'i 31, 7 P.3d 1068 (2000).

[135] *Id.*

[136] *Id.* at 52, 7 P.3d at 1089.

[137] *Id.* at 35, 7 P.3d at 1072 (quoting Act 50, H.B. NO. 2895, H.D. 1, 20th Leg. (2000)). The Act stated that:

> This urgent need to reach a better balance is underscored by the Hawai'i State legislature's recent finding that, "although the Hawai['']i State Constitution and other state laws mandate the protection and preservation of traditional and customary rights of native

The aforementioned cases can be consolidated into a three part test for determining whether or not a person may claim the existence of a constitutionally protected Hawaiian right. First, the person must be a descendant of an inhabitant of Hawai'i in the year 1778.[138] Second, the right being asserted must be a reasonable and non-commercial customary usage which existed before November 25, 1892.[139] Finally, the usage must be claimed on less than fully developed land.[140]

2. Native Hawaiian Rights at Point Panic

Individuals of native Hawaiian ancestry clearly have a right to use surfboards at Point Panic. According to *Hanapi*, native Hawaiians cannot be convicted of criminal acts constituting reasonable practices of customary rights on undeveloped land.[141] For native Hawaiian surfers, the question becomes whether using a surfboard at Point Panic is a reasonable practice of customary rights on undeveloped land. This part answers that question in the affirmative.

To receive constitutional protection, native practices must be reasonable. Given the world wide popularity of surfing and the fact that board surfing is permitted at almost all of Hawai'i's other beaches, the DLNR's argument that surfing is an unreasonable activity justifying the state's regulation of a customary Hawaiian practice must fail. The mere presence of body surfers at Point Panic does not make board surfing an unreasonable activity there.

Protected native customs must also be non-commercial. This is because protected native Hawaiian rights must relate to subsistence, religious, or cultural uses.[142] Despite the fact that surfing brings large sums of money into the state, the act of board surfing at Point Panic is clearly a non-commercial and recreational activity.

In addition to being reasonable and non-commercial, a protected practice must be customary. Surfing's ancient origins reveal that surfing existed in Hawai'i prior to 1892, the cut-off point set for traditional Hawaiian customs

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> Hawaiians," those rights have *not* been adequately preserved or protected: [T]he past failure to require native Hawaiian cultural impact assessments has resulted in the loss and destruction of many important cultural resources and has interfered with the exercise of native Hawaiian culture. The legislature further finds that due consideration of the effects of human activities on native Hawaiian culture and the exercise thereof is necessary to ensure the continued existence, development, and exercise of native Hawaiian culture.

Id. (quoting Act 50, H.B. NO. 2895, H.D. 1, 20th Leg. (2000)) (alteration in original).

[138] *See* HAW. CONST. art. XII, § 7.

[139] *See* Public Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n, 79 Hawai'i 425, 447, 903 P.2d 1246, 1268 (1995).

[140] *See* Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 7, 656 P.2d 745, 749 (1982).

[141] *See* State v. Hanapi, 89 Hawai'i 177, 970 P.2d 485 (1998).

[142] *See* HAW. CONST. art. XII, § 7.

in *PASH*.[143] Furthermore, the intimate connection between surfing and Hawai'i's ancient religious and cultural practices make surfing exactly the type of activity that the Hawai'i Constitution seeks to protect.[144] Also, the fact that surfing was nearly corralled into extinction by missionaries during the 19th century further justifies the sport's protection.[145]

Finally, surfing at Point Panic occurs on less than fully developed land. There are no buildings or structures in the Point Panic ocean waters. The fact that the "land" at Point Panic is part of the public trust makes the enforcement of the ordinance against native Hawaiians all the more suspect, while making the state's duty to scrutinize the restriction of rights there even more pressing.

An assertion that native Hawaiian rights only exist on dry land is nothing more than a play on words. A plain reading of the *PASH* line of cases reveals that the "less than fully developed land" distinction was made in reference to property rights of private landowners.[146] Traditional Hawaiian law recognized titles in submerged lands "to the same extent and in the same manner as fast lands."[147] In light of this fact, it would be odd for the drafters of the Hawai'i Constitution to have intended to enforce native Hawaiian rights against private property owners, but to disregard those rights when asserted against the public trust. Furthermore, the Hawai'i Supreme Court has recognized native Hawaiian rights with respect to the public trust in the past.[148]

Proponents of the Point Panic ordinance will raise several counter-arguments. First, they will argue that native Hawaiian rights are subject to regulation in the public interest and that native Hawaiian rights have never been used to circumvent a law enacted in the name of public safety. The public trust section of this article discussed the public's interest in the promotion of surfing.[149] An ordinance that bans board surfing under the guise of making body surfing safer at Point Panic does not further the public interest. Furthermore, because native Hawaiian customs are expressly protected by the state constitution, the DLNR's argument that its Point Panic ordinance is entitled to the customarily high presumption of validity associated with agency actions is without merit.

The ordinance's proponents will also argue that board surfing, as practiced at Point Panic no longer is, or never was, a Hawaiian custom. Such an argument is unconvincing. Surfing occurred all over the Honolulu and Waikiki

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[143] *See supra* note 10.

[144] *See supra* note 5.

[145] *See supra* notes 11-14.

[146] *See generally* Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 656 P.2d 745 (1982); Pele Defense Fund v. Paty, 73 Haw. 578, 837 P.2d 1247 (1992); *Hanapi*, 89 Hawai'i 177, 970 P.2d 485.

[147] *See* Kaiser Aetna v. United States, 444 U.S. 164, 167 (1979).

[148] *See generally In re* Wai'ola O Moloka'i, Inc., 103 Hawai'i 401, 83 P.3d 664 (2004).

[149] *See supra* Part III.B.3.

area in ancient times.[150] The fact that board surfing may have disappeared from the area for a period of time is irrelevant because native rights remain intact notwithstanding abandonment of a particular site.[151] The argument that modern surfboards differ from traditional Hawaiian surfboards is also untenable because the ordinance effectively bans all types of wave riding except for body surfing, and because Hawai'i courts recognize that ancient rights may be practiced in modern ways.[152]

Additionally, bodysurfing enthusiasts will argue that bodysurfing is just as much of a native Hawaiian right as board surfing and it should thus be protected. This argument fails for several reasons. First, bodysurfing is already protected at a number of beaches.[153] The relatively light crowds at these beaches indicate that the level of protection afforded to bodysurfing is adequate. Second, the historic popularity of board surfing makes it inappropriate to endorse body surfing at the expense of board surfing. Third, traditional Hawaiian values such as cooperation and non-interference militate against a state-endorsed distinction between the right to body surf and the right to board surf at surf spots suitable for both activities.[154]

Based on the foregoing, the Point Panic ordinance is unenforceable against individuals descended from residents of Hawai'i prior to 1778, regardless of blood quantum.[155] In creating the ordinance, the DLNR, like the Land Use Commission in *Ka Pa'akai*, failed to properly consider the state's duty to protect the native Hawaiian rights discussed in *Kalipi*, *Pele*, and *PASH*. Therefore, according to *Hanapi*, native Hawaiians charged with violating the ordinance possess a viable constitutional defense to their "crimes."[156]

If the Point Panic ordinance were deemed to apply to non-Hawaiians only, a new problem would arise regarding its enforcement. The public trust section of this article touched on the current costs of enforcing the Point Panic ordinance, however, selectively enforcing the ordinance against non-Hawaiians would create new enforcement costs. In most cases, DLNR field agents would

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[150] *See supra* note 9.

[151] *See* Pub. Access Shoreline Hawai'i v. Hawai'i County Planning Comm'n, 79 Hawai'i 425, 450, 903 P.2d 1246, 1271 (1995).

[152] *See, e.g.*, Haiku Plantations Assn. v. Lono, 1 Haw. App. 263, 266, 618 P.2d 312, 314 (1980) (explaining that Hawai'i Revised Statutes Section 7-1 access rights contemplated modern forms vehicular access).

[153] *See* HAW. ADMIN. R. § 13-254 (1994) (regulating Makapu'u Beach, Brennecke Beach, and Kailua Bay).

[154] *See, e.g.*, Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 9, 656 P.2d 745, 750 (1982) ("[I]t would conflict with our understanding of the traditional Hawaiian way of life in which cooperation and non-interference with the well-being of other residents were integral parts of the culture.").

[155] *See supra* Part III.C.

[156] *See* State v. Hanapi, 89 Hawai'i 177, 188, 970 P.2d 485, 495 (1998).

have no way of immediately determining which surfers are Hawaiian and which surfers are not. It is not surprising that an irrational ordinance gives rise to such an unwieldy problem. The next part provides practical alternatives to the Point Panic predicament in the event that the courts decide not to strike it down completely.

IV. ALTERNATIVE APPROACHES TO THE PROBLEM

As a state agency, the DLNR should consider the effects its regulations have on the general public as well as on native Hawaiians. Indeed, the holdings in *Wai'ola* and *Ka Pa'akai* reveal that the DLNR has a duty to revisit the ordinance to consider its impact and utility. Currently, the ordinance places its entire burden on the shoulders of board surfers.[157]

While the total removal of restrictions on surfing at Point Panic would be ideal, a less restrictive approach to the "problem" could also yield equitable and practical results. For example, the state could establish alternative days on which board surfing is permissible at Point Panic. The DLNR currently uses similar rules to regulate Hawai'i's fisheries.[158] Such an approach would allow all types of surfers to enjoy Point Panic's waves. Furthermore, fewer violations of the ordinance would likely occur because surfers are likely more willing to wait for one day to surf Point Panic, than to wait forever. Fewer violations would lead to lower enforcement costs. Additionally, such an approach would result in a more efficient allocation of public trust resources.

If such an approach is undertaken, the fairest method of apportionment would be one which provides for board surfing on even numbered days in even numbered years, and on odd numbered days in odd numbered years. This method has several useful benefits. First, it is easy to remember. More importantly, it removes an array of biases. For example, it does not discriminate against surfers who, because of other obligations, are unable to surf on certain days of the week. Furthermore, it eliminates the bias toward holidays that occur on odd or even numbered days of the year.

It should also be noted that this approach would be more equitable if enforced equally against surfers and body surfers. If surfing is illegal on certain days, then body surfing should be illegal on certain days. It would be unfair to give body surfers exclusive rights to the surf spot on some days, while only giving board surfers non-exclusive rights on other days.

Another practical consideration relates to enforcement. If the DLNR reworded the penalty section of the ordinance to be enforceable against board surfers only when body surfers are in the water at Point Panic, a smaller

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[157] *See supra* Parts III.B.2, C.1.

[158] *E.g.*, HAW. ADMIN. R. § 13-48-2 (1988) (making it illegal to fish in a certain area in alternating years).

number of waves would be wasted and the ordinance's purported purpose of preventing collisions between surfers and body surfers would be equally served. Of course, the same rule could apply to body surfers on board surfing days when board surfers are not present.

This list of suggestions is by no means exhaustive. The oppressive nature of the Point Panic ordinance makes it very easy to dream up attractive alternatives to the current situation. With a little bit of creativity, the DLNR could make the Point Panic ordinance much more fair, if it chose to do so. Whether the DLNR is able to set aside its arbitrary and capricious preference for body surfers at Point Panic remains to be seen.

V. CONCLUSION

The ordinance banning the use of surfboards at Point Panic is invalid in light of the public trust doctrine and the native Hawaiian rights guaranteed by the Hawai'i State Constitution. Even if the state could justify the regulation of surfing at Point Panic, the method the DLNR has chosen for regulating the spot is suspect because it unilaterally favors a small group of wave riders without providing a rational reason for doing so. Lifting the ban on surfboards at Point Panic will let all wave riders enjoy the spot equally while eliminating unnecessary enforcement costs. At the very least, the DLNR should implement a less restrictive and more equitable ordinance. The state's police powers do not allow the DLNR to exclusively endorse body surfing at Point Panic. Hawai'i's world class surf spots should be accessible to all surfers.

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