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COMMENTS

RECENT DEVELOPMENTS

Cultural Preservation in Pacific Islands: Still a Good Idea—and Constitutional

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I. INTRODUCTION

When you land in American Samoa, the first thing you notice is how Samoan it is. You see the *fale*,[1] the *lava lava*,[2] the palm trees and mountains. The next thing you notice is how American it is; the American flags, the number of U.S. military veterans, the way everyone talks about a relative in one of the states. American Samoans are proud to be American. As such, they want their U.S. constitutional rights. American Samoans are also proud to be Samoan and do not want the U.S. Constitution applied in a way that will destroy their traditional Samoan culture. They do not, for example, want a U.S. court to say that unless their land is open for purchase by the highest bidder, they are guilty of racial discrimination. Nor do they want their *matai* (traditional leaders) system deemed an unconstitutional conferring of a title of nobility. They, in fact, would like to preserve as much of their traditional culture as they possibly can consistent with the demands of the 21st Century global, political and economic system.

A. The Application of the Constitution in the United States Territories, Revisited

In 1981, I wrote in the University of Hawai'i Law Review that the case law would support, and the federal courts should adopt, a rule to the following effect: There is a presumption that the U.S. Constitution applies in U.S. territories, but that presumption can be rebutted by a showing that a particular application in a particular case would be "impractical or

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[1] The traditional, open-air Samoan house.

[2] The colorful skirts worn by men and women.

anomalous."[3] In this context, "impractical" means that the constitutional provision in question would not work because the culture of the island involved would make it unworkable. For example, in one case that will be discussed later, it was alleged that jury trials in criminal cases would be impractical because the deep kinship that everyone on the island felt for each other would prevent anyone from being convicted. "Anomalous" means that applying the provision in the same way it would be applied in a state could damage or destroy the indigenous culture or some aspect of it. An example would be the claim that in a culture based upon communal land ownership, a constitutional interpretation that would allow outsiders an equal right to own land might undermine and eventually destroy the indigenous culture.

In 1992, the U.S. Court of Appeals for the Ninth Circuit in the case of *Wabol v. Villacrusis*[4] adopted such a rule, citing and quoting from the aforementioned University of Hawai'i Law Review article.[5] In rejecting a claim that the U.S. Constitution prevented the government of the Northern Mariana Islands from restricting land ownership to people of indigenous ancestry, the circuit court noted the important connection between land ownership and culture and U.S. promises to help preserve indigenous culture. Again citing and paraphrasing that same article, the court said: "The Bill of Rights was not intended to interfere with the performance of our international obligations. Nor was it intended to operate as a genocide pact for diverse native cultures."[6]

Naturally, I was pleased with the *Wabol* decision, but mainly because I firmly believe that it articulates a good and useful rule. It is a rule that allows the residents of U.S. territories to enjoy the core constitutional rights of U.S. citizens while at the same time avoiding a mechanical application of constitutional interpretations from the mainland that might damage or destroy their indigenous cultures. The facts of *Wabol* provide a good example. Land is scarce in the islands and usually the indigenous culture is very much intertwined with indigenous control of the land. The *Wabol* rule recognizes that the U.S. Constitution, in the words of my Hawai'i article paraphrased in the *Wabol* opinion, is not a genocide pact, "whether we define genocide as physically destroying a people or killing their culture."[7]

When I wrote that in 1981, few people questioned the *goal* of Samoans and other Pacific Island people; that is, the goal of preserving as much of their traditional culture as possible. Virtually everyone agreed that not only did Pacific Island peoples have a right to do so but that it was an appropriate goal

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[3] *See generally*, Stanley K. Laughlin, Jr., *The Application of the Constitution in United States Territories: American Samoa, A Case Study*, 2 U. HAW. L. REV. 337, 377 (1981).

[4] 958 F.2d 1450 (9th Cir. 1992).

[5] *Id.* at 1462.

[6] *Id.* (citing Laughlin, *supra* note 3, at 386-88).

[7] Laughlin, *supra* note 3, at 388.

for them to pursue. More than a few had doubts about whether it could be done in the face of late 20th century technology and communication, but nearly all thought it was a worthwhile goal to pursue.

Today, whether or not there is such a consensus is not so clear. Certainly, the support for cultural preservation is not universal. There are those who believe that the very idea of these islands protecting their indigenous culture is tantamount to pursuing a childish fantasy. An even bolder form of this criticism holds that attempts to preserve the indigenous culture are not only frivolous, but are in fact damaging to the well-being of island people. Today, that position is largely identified with supporters of free market economics, those who believe that the invisible hand of Adam Smith[8] will inevitably bring progress and happiness to the entire world. It is worth remembering, however, that a decade or two ago the tradition-hostile position was more identified with Marxist governments and those on the left, and therefore it is not the exclusive property of any one ideology.

A good example of current criticism of this type, from the free market perspective, is the work of Helen Hughes, formerly of the World Bank. In a report for the Centre for Independent Studies, Hughes writes:

> As the Pacific became a laboratory for anthropologists, the idealised [sic] views of Pacific societies came into prominence . . . . Roseate views of traditional life became dominant and were adopted as realistic and accurate by Pacific leaders. It was a short step to argue that traditional social institutions could be maintained without change and yet deliver the modern education, health, jobs and incomes that Pacific islanders, like people everywhere, want.[9]

Without any citation of authority, Hughes then makes the following ipse dixit: "Communal land ownership has held back indigenous entrepreneurship in the Pacific as it has everywhere in the world."[10] She then offers the island peoples this choice, again without citing supporting authority:

> Pacific Islanders who want to cling to communal land ownership rather than command individual property rights have every right to make that choice. They have to accept, however, that their living standards will not rise, and that the present levels of male underemployment, alcoholism and crime, will increase. Young men will continue to drift in and out of urban areas, spreading HIV/AIDS.[11]

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[8] Not Smith's own hand, of course, but the one he believed in.

[9] Helen Hughes, *Aid Has Failed the Pacific*, Issue Analysis Paper No.33, The Centre for Independent Studies, *at* www.cis.org.au/IssueAnalysis/ia33/ia33.htm (May 7, 2003).

[10] *Id.*

[11] *Id.*

That there is a connection between communal land ownership and AIDS is, so far as I know, without any empirical support, but Hughes asserts the position with zeal.

Thus, to those who believe that free market capitalism works all the time, for everyone, everywhere, the attempt of indigenous people to preserve their culture is not just a quaint anachronism but a downright detriment to their well-being because it interferes with the full reach of the market's invisible hand. Helen Hughes believes that anthropologists created an "airbrushed" version of Pacific history, and then "prescribed" the preservation of it.[12] This false view, she says, was readily adopted by island leaders.[13] Island people then began to believe that cultural preservation was consistent with economic prosperity (which in Hughes' view is untrue).[14]

Often aligned with the above, but distinct enough to be discussed separately, are critics of cultural preservation who consider any effort to protect people from their own deeds to be "paternalism" (even efforts by their own elected governments), and believe paternalism to be everywhere and always bad.[15] Many of these people are also free market capitalists, but the same type

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[12] *Id.*

[13] Hughes does not say why it was so readily adopted. Several explanations spring to mind. Most of us like to think our national history was essentially good. It may be true that, as at least one scholar has argued recently, there has been a trend in some Western nations (including the United States) for intellectuals to trash their own nation's past. *See* CHRISTOPHER LASCH, THE REVOLT OF THE ELITES AND THE BETRAYAL OF DEMOCRACY (1995). However, in the long historical pull this seems aberrational. Island leaders therefore are proud or even flattered when outsiders proclaim their past to be good.

Another explanation, urged in some anti-tradition quarters, is that there is in effect a conspiracy between anthropologists and traditional leaders to keep traditional leaders in power. Hughes may suggest this explanation, although she does not explicitly assert it. *See infra* note 15.

[14] As I will discuss further, later, Hughes' rather jaundiced opinion of island history does not seem to be based upon research, or at least none is cited. I note in passing that her cynical view of island culture extends even to the reputation of Pacific Islanders as navigators. In the same report, Hughes states: "Overpopulation that from time to time pushed people off from island shores in search of new lands to settle, *but more often to drown at sea*, was ignored." Hughes, *supra* note 9 (emphasis added).

Certainly, the conventional wisdom about ancient Pacific Islanders is that they were amazingly skillful navigators who traversed thousands of miles of open sea without electronic instrumentation. The fact that they did this was proved not only by their own oral history and historical chants and poems, but by anthropologists who documented how the Polynesian culture spread from one island to another. A few cynics pointed out that archeology only provides evidence of the successful voyages and that we do not know how many failed. Quite likely some did fail, but there is no evidence that emigrants "more often . . . drown[ed] at sea." Pacific Islanders should continue to believe that their ancestors were outstanding navigators, and the world should agree with them. The current evidence supports that belief.

[15] For example, one law journal book review author says, "the story of Puerto Rico's relationship with the United States . . . early stages are best summarized as *a painful and*

of criticism sometimes comes from the left. To the anti-paternalist, economic coercion does not exist or must be disregarded. It must be disregarded even when, for example, an island person is offered the equivalent of a lifetime of wages for a piece of beach land which has been in his family since time immemorial. If the owner takes the money and his grandchildren end up working at low-paying jobs in hotels built on what was once the family land (as happened in Hawai'i), that is, according to the anti-paternalist, a price government (and the citizen) must pay to avoid the government being labeled "paternalistic." This view is consistent, I would suppose, for the free market capitalist, but it seems incongruous when it comes, as it sometimes does, from liberals or the left.[16]

Finally, there are those who (not unlike myself) cut their constitutional eye teeth on the Warren Court or at least on its remnants in the person of Justice Brennan, and who still believe that an aggressively-applied U.S. Constitution is good for everybody, everyplace, all the time. There is a kind of naive optimism about this last group which is more appealing than the former groups but, in my view as we shall see, they are mistaken about what would be best for the people of the islands that are part of or affiliated with the United States.

B. The Larger Dimension

These are big issues for all of the Pacific islands, not just those that are part of or affiliated with the United States. Since the end of the Second World War, when the traditional cultures began to be threatened by the influx of Western technology, communications and values, the majority of the people on virtually every Pacific island have at least paid lip service to a desire to preserve as much of their traditional culture as possible. Up until the 1990's, most scholars, whether from anthropology, political science, economics or law, conceded that this was a legitimate and rational goal for islands peoples, and one that larger nations ought to respect. But today, as noted, that consensus is being threatened by the critiques enumerated above.

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embarrassing story of hypocrisy and paternalism," as if both qualities are equally painful and embarrassing. Christina Duffy Burnett, Book Review, 23 YALE J. INT'L. L. 561, 564 (1998) (emphasis added).

[16] *See, e.g., supra* note 15. This may simply be evidence of the uncertainty in recent years of what being on the "left" entails. According to some social critics such as Tom Wolfe, pure Marxism is virtually non-existent in intellectual circles in the United States today, and has been replaced by what he calls Rococo Marxism, a conglomeration of beliefs, many of which may be irrelevant to or even inconsistent with traditional leftist theory. TOM WOLFE, HOOKING UP 113-30 (2000).

C. A Concrete Example

To avoid talking too abstractly about the issue of preserving traditional cultures it might be worth a few pages to illustrate how distinct some of these cultures actually are. Let us take American Samoa as an example. What was the culture that the United States found when it first arrived (officially)[17] in the eastern part of the Samoan archipelago at the beginning of the 20th century (and promised to preserve as much of the traditional system as possible) and in what ways is that culture still distinctive today?

The society that existed in Samoa prior to 1830, when the first Westerners arrived, was one that spanned the entire archipelago without any recognition of the later-created division between Eastern and Western Samoa. An elaborate system of chiefly (*matai*) titles existed, the rank of each carefully determined by the seats of the *matai* in an archipelago-wide council known as the *Great Fono*. The *matai*[18] controlled all of the land and most of the other tangible assets in the islands and ultimately possessed power of life or death over the people.[19]

However, there were features that modified the hierarchical nature of the system. Succession to a chiefly title was not automatically determined by heredity. The people had a voice in the selection and retention of *matai*. There were a variety of councils on the islands. Virtually every person, regardless of sex or status, could serve on some council and have some voice in public affairs.[20] Unlike their counterparts in some other Polynesian societies, the chiefs did not arbitrarily impose death sentences or other severe penalties.[21] Usually punishment was meted out only in accordance with customary law and severe penalties were retained for serious offenses. While a system of taboo (*kapu*) existed on the islands, as it did in all Polynesian societies, some scholars have said that Samoans were less superstitious than

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[17] In 1899, a treaty was signed at Berlin, between the United States, Germany and Great Britain. Germany and Great Britain, as high contracting parties, agreed to stay out of that part of the Samoan archipelago east of the 171st meridian west of Greenwich. In 1900 and 1904, the United States obtained articles of cession from all but one of the chiefs of eastern Samoa, inviting it to administer the islands. The benefit to the Samoans from this administration was to be the establishment of domestic tranquility; i.e. the abolition of inter-tribal warfare. *See* STANLEY K. LAUGHLIN, JR., THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS, § 3.3 (Lawyers Cooperative Press 1995 & Supp. Westgroup 1997) [hereinafter LAUGHLIN, THE LAW OF UNITED STATES TERRITORIES].

[18] *Id.*

[19] *Id.*

[20] PETER S. BELLWOOD, THE POLYNESIANS: PRE-HISTORY OF AN ISLAND PEOPLE, 73-74 (1979).

[21] Stanley K. Laughlin, Jr., *U.S. Government Policy and Social Stratification in American Samoa*, 53 OCEANIA 29, 29 (1982).

other Pacific cultures and that the deference given to chiefs according to customary taboo was based more upon courtesy and respect than upon fear of either divine retribution or secular retaliation.[22] Furthermore, the power of the *matai* was seen from the earliest times as granted to him for the purpose of serving the people and the service that he in turn extracted from his *'aiga* (his cognatic descent group) was in theory, and usually in practice as well, for the common good rather than for his own self-aggrandizement.[23]

1. A brief survey of Samoan culture and its impact on Samoan legal institutions

The basic social unit in traditional Samoan society is the *'aiga*, described by anthropologists as a cognatic descent group.[24] That means all members of an *'aiga* trace their heritage to a common ancestor who thus defines the group. The relationship of a member may be established either through paternal or maternal lines or a combination thereof. A given individual may be eligible for membership in a number of *'aiga*, but for practical reasons active membership is usually maintained in only one *'aiga* at a time.[25] *'Aiga* vary in membership from a dozen or so individuals to over one thousand. Larger *'aiga* may be divided into subunits known as *faletama*. The smallest unit in the *'aiga* or *faletama* is the extended household. The land of an *'aiga* is owned in common. Although some individual land ownership is recognized today, most of the land in American Samoa is held by the various *'aiga* as family or "communal" property.[26]

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[22] Irving Goldman, ANCIENT POLYNESIAN SOCIETY, 254-55 (1970).

[23] *Id.* at 268-69.

[24] *See generally*, LOWELL HOLMES, SAMOAN VILLAGE, 19 (1974); MARGARET MEAD, Social Organization of Manua 40 (1930); Sharon W. Tiffany, *The Cognatic Descent Groups of Contemporary Samoa*, 10 Man(n.s.) 430 (1975); Sharon W. Tiffany, *Entrepreneurship and Political Participation in Western Samoa: A Case Study*, 46 OCEANIA 85, 85 (1975).

[25] Tiffany, *Entrepreneurship*, *supra* note 24, at 85-86.

[26] A. P. Lutali & William J. Stewart, *A Chieftal System in Twentieth Century America: Legal Aspects of the Matai System in the Territory of American Samoa*, 4 GA. J. INT'L. & COMP. L. 387, 391 (1974). Certain fee simple titles created prior to American control of the islands are freely alienable. These constitute about three percent of the total land in American Samoa today. All figures are at best rough estimates: First, because many of the land holdings in Samoa are neither surveyed nor recorded by written instruments. Second, because there are undoubtedly many conflicting claims that have not been settled by litigation. Often these boundaries are renegotiated from generation to generation. Individual land ownership by Samoans is not common, but has been recognized by the Samoan courts. Land that was thought to be communal is sometimes successfully claimed by individuals. Nouata v. Pasene, Am. Samoa 2d 25 (High Ct. App. Div. 1980). Sometimes land thought to be individually owned has been held communal. *See* Corp. of the Presiding Bishop v. Hodel, 830 F.2d 374, 383 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988). *See also* LAUGHLIN, THE LAW OF UNITED STATES TERRITORIES, *supra* note 17, at § 8.

The property and affairs of an *'aiga* are administered on behalf of the members by a high chief or *matai*.[27] Lesser ranking *matai* preside over *faletama* and households.[28] Matai are selected in family councils and serve for life unless removed. While primogenitor is not practiced *per se*, ancestry is considered along with leadership ability and knowledge of Samoan custom in the *matai* selection process.[29] The choice of a *matai* is supposed to reflect a consensus of the *'aiga* (rather than a simple majority), and the process therefore is often protracted.

While present-day *matai* have nothing close to the life-or-death powers possessed by their predecessors in pre-contact days, they continue to exercise important authority. In *Tiumalo v. Fuimaono*,[30] the High Court of American Samoa, in one of its first cases, held that the traditional practice of removing unpopular *matai* by force would not be tolerated under the American administration.[31] Thus, in a sense, American intervention in Samoan land and *matai* succession disputes may be seen as protective of the incumbent matai.[32] Those who argue that the authority of the traditional leaders has diminished point to the fact that *matai* authority over land is now subject to judicial review, but by the same legal system the *matai* is now protected against violent overthrow, and statutes effectively prevent secession of any portion of an *'aiga*. While there is a statutory procedure for removing a *matai*,[33] it is seldom invoked and even less often successful. On balance, then, it is not at all clear that the relative power of the *matai* is weakened.[34]

Modern *matai* functions include: (1) allocation of *'aiga* land to members for house sites and cultivation; (2) assessment of labor, goods, and money for ceremonial redistribution and for *'aiga* and village-sponsored projects; (3) custody and maintenance of other *'aiga* assets, such as an official house or a bank account; (4) mediation and arbitration of intra- and inter-*'aiga* disputes; (5) representation of the *'aiga* in *fono* (councils) at district, village, or other levels. While the terms of the traditional *matai* trust are not clearly defined, many Samoans assert that there are certain customary restrictions on matai authority over land. For example, Professor Walter Tiffany found that many Samoans believe that land use rights may not to be terminated or reassigned

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[27] *See generally* Lutali & Stewart, *supra* note 26, at 391-93.

[28] HOLMES, *supra* note 24, at 18-20.

[29] *See generally* Walter W. Tiffany, *The Role of the High Court in Matai Succession Disputes in American Samoa: The First Seventy Years*, 5 SAMOAN PAC. L.J. 11, 17, 26-27 (1979).

[30] 1 Am. Samoa 17 (High Ct., Trial Div. 1901).

[31] *Id.* at 19-20.

[32] *See* Laughlin, *supra* note 21.

[33] AM. SAMOA CODE ANN. § 1.0411 (2004).

[34] *See* Laughlin, *supra* note 21.

by a new *matai* without good cause.[35] In 1941, in the case of *Fiailoa v. Meredith*,[36] the High Court of American Samoa held that allocation of use rights terminated with the death of the *matai* who granted them.[37] These last two facts are not necessarily inconsistent because Samoans believe that the traditional obligations of a *matai* go beyond those imposed by law.

Samoan society also is organized horizontally on an inter-*'aiga* basis. Each village has a fono composed of chiefs from each *'aiga* represented in the village; district fono are structured analogously. The archipelago-wide *fono*, the *Great Fono*, made up of chiefs from the entire Samoan archipelago (the area now comprising both American Samoa and the independent Republic of Samoa), has not met in modern times. However, vestiges of it do exist. Reference to rank in the *Great Fono* still determines the relative status of chiefs.[38] For example, in the *Great Fono* meeting house the highest ranking chiefs sat with their backs to a roof post, so they could use the post as a back rest. Today, *matai* whose ancestors sat with their backs to the posts are still considered the highest ranking.

Other inter-*'aiga* councils deal with matters of special concern that affect more than one *'aiga*. These include the *aumaga* or council of untitled men and the *aualuma*, the village women's association.[39] While traditional Samoan social organization does not comport exactly with an American model of representative government, there is much citizen involvement and more than a semblance of participatory democracy.

Although the basic concepts of Samoan polity are somewhat different from those of the mainland, the governmental structure attempts to accommodate the difference. Since the Articles of Cession[40] the United States has promised, explicitly and implicitly, to preserve and protect Samoa culture and the traditional Samoan way of life: *fa'a Samoa*. It has made efforts to keep that promise and as a result the current American Samoan government is a curious admixture of Western democracy and Samoan custom.

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[35] Walter W. Tiffany, *High Court Influences on Land Tenure Patterns in American Samoa*, 49 OCEANIA 258, 265-68 (1979).

[36] 2 Am. Samoa 129 (High Ct., Trial Div. 1941).

[37] *Id.* at 133-35.

[38] LAUGHLIN, THE LAW OF UNITED STATES TERRITORIES, *supra* note 17, at 55. *See also* MEAD, *supra* note 24 at 10-18.

[39] *See* HOLMES, *supra* note 24 at 31-32; MEAD, *supra* note 24 at 92-93.

[40] The Articles of Cession are set forth in § 5 of LAUGHLIN, THE LAW OF UNITED STATES TERRITORIES, *supra* note 17.

2. Samoan culture and the legislature

Samoa's bicameral legislature is called the Fono after the traditional council of chiefs. The name literally translated means "gathering of the titles." Any U.S. national at least twenty-five years of age who has resided in American Samoa for five years is eligible to run for the lower chamber—the house of representatives[41]—and house members are chosen by secret ballot in a general election.[42] Eligibility for office in the upper house is quite different. Senators must hold a *matai* title[43] and are selected not by the electorate but by other *matai* in their respective county *fono*.[44] A number of potential constitutional problems are implicit in this accommodation to Samoan custom.

D. Forces for Change

This system still exists today inside a Samoan culture that is also seeing McDonald's become a popular island eating place as the island government and business leaders try to hang on to the two large tuna canneries and the fleet of purse seiners, in the face of increased competition from non-U.S. areas. Since the early 1990's, American Samoa has been under bipartisan pressure from Washington to become more economically independent. This has resulted in some efforts to bring in business, including a disastrous effort to follow the Northern Marianas into the garment industry. Through all that, being a *matai* is still important. It is important enough that lawyers and ranking government officials will still strive to obtain the position. For most rank and file Samoans, the traditional Samoan system also seems to be important. It adds meaning to their lives[45] and to their pride in being Samoan.

E. Choice

This then is the system that Helen Hughes and like-minded critics condemn. They do so on economic policy grounds, grounds which I find lacking in supportive data or persuasiveness. But suppose we concede for the moment that the critics are right, that it might be unwise for Pacific societies to try to preserve their indigenous cultures. The critics themselves would have to

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[41] AM. SAMOA CONST., art. II, § 3. Samoans are U.S. nationals at birth.

[42] *See id.* § 4.

[43] *See id.* § 3. Eligibility for succession to *matai* title requires, among other things, that the person be "of at least one-half Samoan blood." AM. SAMOA CODE ANN. § 1.0403 (2004). Priority generally is given to males over females. *See id.* § 1.0407(c)(1) (2004).

[44] AM. SAMOA CONST. art. II, § 4.

[45] Samoans are by and large a religious people. As I will discuss later, their religion is also closely intertwined with the traditional Samoan way of life.

concede that Pacific islanders have the right to choose to protect their system, if they are willing to take the economic risks that the critics argue exist.[46] But citizens of U.S. islands have an additional problem. If the universal constitutionalists (those who advocate *ex proprio vigore*) have their way, Samoans and other territorial citizens would not have that choice. The *Wabol* rule makes it possible for them to have it, academic critics to the contrary notwithstanding.

The seriousness of this issue is underlined by the fact that recently the *Wabol* rule has also encountered some judicial questioning. Not from the Ninth Circuit itself, or from other circuit courts or the U.S. Supreme Court, but from the U.S. District Court in the Commonwealth of Northern Mariana Islands (hereinafter "CNMI"), where the *Wabol* case arose. Adding to the significance of this decision, the Presiding Judge of the U.S. District Court of Guam was sitting by designation in the CNMI and concurred in the opinion that declined to follow the *Wabol* rule. These judges suggested that *Wabol* is inconsistent with U.S. Supreme Court precedent. Ironically, since the precedent that they cited was decided prior to Wabol, the criticism was not that *Wabol* has been superceded by subsequent Supreme Court precedent, but that the Ninth Circuit was wrong when it decided *Wabol*, an unusual approach for a lower court to take, to say the least.[47] I respectfully believe that the district judges' criticism of *Wabol* is the result of faulty analysis, as I will attempt to demonstrate in this article. I also believe that it would not serve territorial residents well to do away with the *Wabol* rule. Therefore, the issue is of considerable importance and I hope I can address it successfully here.

II. THE ANALYSIS LEADING TO *WABOL*

To save the reader the necessity of going back to the 1981 Hawai'i Law Review article, I begin by summarizing here my arguments in that earlier piece. I will then bring them up to date and demonstrate that the attempts to discredit *Wabol* on either case law or policy grounds are misguided.

A. Part I—The Development of Constitutional Doctrine

Although one occasionally hears suggestions to the contrary, it is indisputable that our Constitution from its inception contemplated that there would be parts of the United States that are not a part of any state. The Northwest

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[46] Hughes seems to concede this, see *supra* note 9 and accompanying text, albeit for Hughes, the choice for traditionalism is also a choice of alcoholism and AIDS.

[47] I will discuss later the propriety of a district court refusing to follow a precedent of its own circuit court because it disagrees with it. *See infra* note 141 and accompanying text.

Territory was a part of the United States at the time the Constitution was adopted and the Fourth Article of the Constitution specifically gives Congress the power to make rules for governing the territory of the United States [48] In 1820, in the case of *Loughborough v. Blake*,[49] the U.S. Supreme Court said that the name "United States of America" applies to states and territories alike. Justice John Marshall for the Court, said "[t]he District of Columbia, or the territory west of the Missouri is not less within the United States, than Maryland or Pennsylvania."[50]

Still, even given the fact that the territories are part of the United States, it does not necessarily follow that all federal law has the same effect there as in a state. The issue of whether the U.S. Constitution was fully applicable in territories arose, in a variety of contexts, not long after Marshall's statement in *Loughborough*. The earliest case law on the subject seemed to assume that the Constitution was fully applicable, although in some of those cases Congress had extended Constitutional guarantees to a particular territory by statute.[51] This doctrine of complete and automatic application, later came to be known as the *ex proprio vigore* ("of its own force") doctrine. Still later, it was known popularly as the proposition that "the Constitution follows the flag." An example of the use of this doctrine was the infamous *Dred Scott* case.[52] *Dred Scott* was set up as a test case by parties trying to establish the legal point that a slave taken into the Missouri territory, which Congress had declared to be a free territory, would thereupon become free. Instead, the Supreme Court held that while the U.S. Constitution indeed "followed the flag" into the territory, its effect was to invalidate the Missouri Compromise. The Court held that the Constitution protected not the slave's right to freedom, but the slave owner's property right in the slave.[53]

It is tempting to say that this is a historical lesson that should be a warning to those who would like to see the U.S. Constitution applied *carte blanche* in every situation, everywhere in the world.[54] However, Dred Scott does not have much relevance in the territories today. By the end of the 19th Century the *ex proprio vigore* doctrine was abandoned.

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[48] U.S. CONST. art IV, § 3, cl. 2.

[49] 18 U.S. 317 (1820).

[50] *Id.* at 319.

[51] A fact that would later become the basis for distinguishing those early cases.

[52] Scott v. Sandford, 60 U.S. 393 (1857).

[53] *Id.* at 453.

[54] *See, e.g.*, the dissents in United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

1. The Insular Cases *and their aftermath*

The most famous set of cases in territorial law are the *Insular Cases*, decided by the U.S. Supreme Court at its 1901 term. The best known of these is *Downes v. Bidwell*.[55] The *Downes* case arose in Puerto Rico, which had become a U.S. territory in 1899 as a result of the treaty ending the Spanish-American War.[56]

What was designated "the Opinion of the Court" in *Downes* was written by Justice Henry B. Brown. But the opinion in *Downes* which was destined to find a place in history was a concurring opinion by Justice Edward Douglas White. Brown's "opinion of the Court"[57] rested upon what was known as the "extension doctrine." That doctrine held that the Constitution applied in the United States' territory only to the extent that Congress had extended the Constitution to that territory.[58] However, the doctrine held that once extended to a territory the Constitution was there irrevocably, and Congress could not legislate in conflict with it.[59]

However, in the *Downes* case, more Justices concurred in the opinion of Justice Edward White than did in what was labeled the "opinion of the Court." Justice White's separate opinion created what came to be known as the "incorporation" doctrine.[60] He said that whether the Constitution was fully applicable in a territory depended upon whether that territory had been incorporated into and made a part of the United States. In an "unincorporated" territory only "fundamental rights" would be applicable. Within a few years it became apparent that the Court was following the incorporation doctrine and that Justice Brown's efforts to establish the extension doctrine had failed.[61]

The opinion of Justice White was not at all clear about how one determined whether or not a territory had been incorporated. Later cases suggested a

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[55] 182 U.S. 244 (1901).

[56] Treaty of Paris, Dec. 10, 1898, U.S.-Spain, 30 Stat. 1754.

[57] Later in this article, I discuss the fact that the Supreme Court has developed certain rules for determining, in a case where there is no majority opinion, which opinion states the law of the case. While such rules would have been relevant to interpreting the *Insular Cases* in the days immediately after *Downes* was decided, they have no direct relevance today, because a majority of the Court later adopted the position of Justice White as the binding rule. This is much the same as what the Court did in the recent Michigan affirmative action case, *Grutter v. Bollinger*, 539 U.S. 306 (2003). While there had been much debate in lower courts over whether Justice Powell's separate opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), stated the law of that case, the majority of the U.S. Supreme Court in the *Grutter* case said it did not matter because the Court was adopting Powell's position.

[58] *Downes*, 182 U.S. at 286-87.

[59] *Id.* at 271.

[60] *Id.* at 287 (White, J., dissenting).

[61] *See* LAUGHLIN, THE LAW OF UNITED STATES TERRITORIES, *supra* note 17, at ch. 7.

variety of tests, including one of whether or not it was contemplated that the territory would eventually become a state. The simple historical fact is that only one territory was ever clearly held to be incorporated. That was Alaska, which of course is today a state.[62] All currently existing territories are deemed to be "unincorporated."

That the incorporation doctrine was in some measure a product of a colonial mentality is hard to dispute. At times it served colonial purposes. The doctrine, for example, was used to deny trial by jury to the inhabitants of most territories. When all policy making officials for the territories were appointed in Washington, there was probably concern among appointed governors that locals on juries might use their position to nullify federal laws.

However, after the Second World War, the legal authority over the territories began to devolve to the local residents. By the late 1970's every territory had an elected legislature and elected governor.[63] During this period the incorporation doctrine became a basis for upholding local laws designed to protect indigenous people and their traditional culture. This was an important shift in the significance of the *Insular Cases* that many commentators seem to overlook.

One of the most important examples of this benign use of the doctrine is the case of land alienation laws. These laws prohibit the sale of land or alienation of land to people other than those of indigenous ancestry. Land alienation laws are considered important by many territorials because land is so scarce in the islands and often so central to their culture. These laws are at bottom racial classifications and probably would not pass constitutional muster in a state.

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[62] *See* Rassmussen v. United States, 197 U.S. 516 (1905). It has occasionally been suggested that Hawai'i was held to be incorporated in *Hawai'i v. Mankichi*, 190 U.S. 197 (1903). However, the *Mankichi* opinion was written by Justice Brown who still advocated the extension doctrine and never accepted the incorporation doctrine. At one point in the opinion Justice Brown referred to Hawai'i being "incorporated as a territory," but it was clear in context that he simply meant that it was being established as a territory (as, for example, a city is incorporated) and that he was not using incorporated in the sense of Justice White's incorporation doctrine, which Brown rejected. Subsequent history demonstrated that Hawai'i was not treated as incorporated, at least not until after the Second World War.

[63] *See* Stanley K. Laughlin Jr., *The Constitutional Structure of the Courts of the United States Territories: The Case of American Samoa*, 13 U. HAW. L. REV. 379 (1991). The judiciaries were usually hybrid. There were federal courts (created under Article IV rather than Article III) and there were territorial courts. Both locals and mainlanders served on these courts (although the typical pattern was to have mainlanders on the federal courts and the locals on the territorial courts). This seemingly had colonial overtones, although it could also be explained on the basis of the fact that the mainlander judges usually had law degrees while the local judges usually did not. *Id.*

The Supreme Court has struck down racial zoning[64] and racially restrictive covenants,[65] for example. Arguably, in some cases, laws protecting the rights of certain groups to exclusive ownership of certain lands might be defended on the ground that they meet standards for benign discrimination, similar to some affirmative action laws.[66] However, for many years, residents of various territories (e.g., American Samoa and Puerto Rico) have expressed concern that moving toward statehood might jeopardize their ability to protect indigenous people. A recent case seems to lend credence to that. In *Rice v. Cayetano*,[67] the U.S. Supreme Court held that the Fifteenth amendment to the U.S. Constitution prevented the state of Hawai'i from giving special voting rights to native Hawaiians even when it came to electing trustees for the Office of Hawaiian Affairs. While the Court noted that it was dealing with the Fifteenth Amendment and not the Fourteenth,[68] the decision, if anything, increased rather than decreased these concerns.

The *Rice* case is also threatening to arguments that the indigenous peoples of various islands, Samoans, for example, in American Samoa, and Chamorros in Guam and the Northern Marianians might rely on cases such as *Morton v. Mancari*.[69] *Mancari* involved the legality of a statute that gave preferences to Native American Indians in certain types of employment with the Bureau of Indian Affairs. It was challenged on the ground that it violated the Equal Employment Opportunity Act and the Fifth Amendment. The Court used legislative intent to find an exception from the EEOA.[70] It also rejected the Fifth Amendment challenge. But on the Fifth Amendment claim the Court said:

> The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. In the sense that there is no other group of people favored in this manner, the legal status of the BIA is truly *sui generis*.[71]

In *Rice*, the majority declined to (what it called) "extend" the *Mancari* principle to cover the situation involving native Hawaiians.[72] Thus, while the

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[64] Buchanan v. Warley, 245 U.S. 60 (1917).

[65] Shelley v. Kraemer, 334 U.S. 1 (1948).

[66] *Cf.* Grutter v. Bollinger, 539 U.S. 306 (2003).

[67] 528 U.S. 495 (2000).

[68] *Id.* at 522.

[69] 417 U.S. 535 (1974).

[70] *Id.* at 545-51.

[71] *Id.* at 554.

[72] *Rice*, 528 U.S. 495. The Court conceded that there is a plausible argument for applying the approach of *Mancari* to indigenous people in the Hawaiian islands. *Id.* (*comparing* Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95

argument for special consideration for laws protecting indigenous cultures in the insular territories is certainly plausible, it is by no mean a certain winner. It would seem to me to be safer to follow the *Wabol* route, that is, to argue that a different constitutional standard is applicable in territories.[73]

2. Reid v. Covert *and the ascendency of individual rights*

During the same post-WWII period, there were relevant changes in the incorporation doctrine itself, brought about by new interpretations of U.S. constitutional law. The most significant change came in a case that did not involve a territory as such, but nevertheless had profound effect on the law of U.S. territories. The case was *Reid v. Covert*.[74] The date was 1957. Mrs. Covert was the wife of a sergeant in the United States Air Force. She was accused of murdering her husband on a U.S. Air Force base in England.[75] Since the murder took place on British soil, albeit on land leased to the United States for the base, under international law Great Britain would have primary jurisdiction over the crime. However, there existed at the time between the United States and Britain a treaty and certain executive agreements which constituted what is known as a "status of forces agreement." Under this particular agreement, Great Britain ceded primary criminal jurisdiction over U.S. military personnel and their dependents back to the United States. The

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(1998) *with* Benjamin, *Equal Protection and the Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537 (1996)). However, the Court said it was not necessary to reach that issue in *Rice*. *Id.* at 519. The Court said:

> If Hawai'i's restriction were to be sustained under *Mancari* we would be required to accept some beginning premises not yet established in our case law. Among other postulates, it would be necessary to conclude that Congress, in reciting the purposes for the transfer of lands to the State—and in other enactments such as the Hawaiian Homes Commission Act and the Joint Resolution of 1993—has determined that native Hawaiians have a status like that of Indians in organized tribes, and that it may, and has, delegated to the State a broad authority to preserve that status. These propositions would raise questions of considerable moment and difficulty. It is a matter of some dispute, for instance, whether Congress may treat the native Hawaiians as it does the Indian tribes. We can stay far off that difficult terrain, however.

Id. at 518-19 (internal citations omitted). *See also* Doe v. Kamehameha Schools, 416 F.3d 1025 (9th Cir. 2005). One could anticipate that the Court might raise similar concerns about applying the principle to the indigenous peoples of U.S. territories.

[73] *See* Wabol v. Villacrusis, 958 F.2d 1450 (9th Cir. 1992). There is, however, no reason why the two approaches could not be used together. One could argue that the Constitution does not apply, but that if it does, the *Mancari* standard should as well.

[74] 354 U.S. 1 (1957).

[75] *Id.* at 4-5 (explaining that there was a companion case with similar facts that involved a women who had been accused of murdering her Army officer husband on a U.S. Army Base in Japan).

United States in turn promised Great Britain that it would try such individuals under its court martial jurisdiction. At the time there was no provision in the Uniform Code of Military Justice for jury trials in courts martial. So far as military personnel themselves were concerned this posed no U.S. constitutional problems, since it had always been understood that the Sixth Amendment right to trial by jury contains an implicit exception for military personnel subject to court martial jurisdiction. However, Mrs. Covert argued that there is no such exception implicit for civilian dependents accompanying the military overseas.[76] Therefore, she contended that the U.S. military's attempt to subject her to court martial, even though it was in pursuance of a treaty with the host country, violated her U.S. constitutional (Sixth Amendment) right to a jury trial.[77] The government countered by contending that under the *Insular Cases*, the U.S. Constitution was not applicable on a military base in Great Britain.[78] The government, in essence, analogized the base to a U.S. territory.

The government lost,[79] but the case did not produce a majority opinion. Justice Black wrote a plurality opinion for four justices. His opinion took the *Insular Cases* sternly to task, but in the final analysis distinguished them.

It was necessary for Justice Black to do so. He clearly would have preferred to return constitutional law to the *ex proprio vigore* or "constitution follows the flag" position. But he did not have a majority with him (a point some commentators seem to overlook). He wrote for a plurality of four justices. Justice Black needed the separate opinions of Justices Frankfurter and Harlan to make a majority for the judgment.

A plurality cannot overrule prior precedent. Not only that but in such a split decision, the plurality opinion does not necessarily even state the law of the case (another fact sometimes overlooked by law review writers and occasionally by judges). This is an important point which I will discuss in more detail later, but it bears mentioning now. The Supreme Court has repeatedly stated the rule, most recently in the Michigan affirmative action cases, as follows: when there is no majority opinion the law of the case is "that position taken by those Members who concurred in the judgments on the narrowest grounds."[80] It is important to keep this in mind, because many

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[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.* To be precise, the government lost on rehearing. The government had won the case in the U.S. Supreme Court in 1956. *See* Reid v. Covert, 351 U.S. 487 (1956). But in a very unusual move the Supreme Court granted the defendants' petitions for rehearing, had new briefing and arguments the following term, and reversed itself, issuing the opinions described herein.

[80] Grutter v. Bollinger, 539 U.S. 306, 325 (2003) (quoting Marks v. U.S., 430 U.S. 188, 193 (1976)).

writers and commentators, and even some judges seem to be under the mistaken impression that in a case where there is no majority opinion, the plurality opinion necessarily states the law of the case. But the Supreme Court has frequently and clearly said otherwise. The narrowest opinion in *Reid* was that of Justice Harlan.[81] Justice Harlan asserted that the *Insular Cases*, "properly understood, still have vitality."[82] He agreed with Justice Frankfurter, who said that the territorial cases mean "not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstance in every foreign place."[83] According to Justice Harlan:

> [T]he question is *which* guarantees of the Constitution *should* apply in view of the particular circumstances, the practical necessities, and the possible alternatives which Congress had before it . . . . The Government, it seems to me, has made an impressive showing that at least for the run-of-the-mill offenses committed by dependents overseas, [a jury trial] would be as impractical and as anomalous as it would have been to require jury trial for Balzac in Porto Rico (sic).[84]

But according to Justice Harlan these were not run-of-the-mill cases because the *Reid* defendants were charged with capital offenses. Given this added weight on the defendants' side, it was not impractical to require that the government devise some way to provide a jury trial even though the offense took place overseas.

This was a very narrow ground, specific to the offense with which the defendants were charged. Under the Supreme Court rule of interpretation described above, this was the law of Reid. The broader ramifications of the Harlan opinion are clear. The *Insular Cases*—as Justice Harlan interpreted them—still have vitality. The application of the Constitution outside the states is to be determined through an "impractical" and "anomalous" test or tests.

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[81] Justice Frankfurter also wrote a concurring opinion. As he was prone to do, Justice Frankfurter applied *ad hoc* balancing. *See* LAUGHLIN, THE LAW OF UNITED STATES TERRITORIES, *supra* note 17, at 134. Justice Frankfurter also approved the *Insular Cases*. He said "[t]he territorial [i.e. *Insular*] cases, in the emphasis put by them on the necessity for considering the specific circumstances of each particular case, are thus relevant in that they provide an illustrative method for harmonizing constitutional provisions which appear, separately considered, to be conflicting." *Reid*, 354 U.S. at 54 (Frankfurter, J., concurring).

[82] *Reid*, 354 U.S. at 67.

[83] *Id.* at 74 (Harlan, J., concurring) (emphasis added).

[84] *Id.* at 75-76.

3. *Jake King's case and the origins of the "impractical or anomalous" test*

During the 1960s and 1970s, the Supreme Court did not revisit these issues. Therefore, the Courts of Appeals were on their own in determining how *Reid* and the *Insular Cases*, read together, affected the application of the Constitution in U.S. Territories. One of the most influential cases to be decided during that period was *King v. Morton*, which involved the question of whether or not residents of American Samoa were entitled to a jury trial in serious criminal cases.[85] Jake King was a non-Samoan American citizen who for a number of years published the only newspaper in American Samoa, *The Weekly Samoan News*. In 1972, the Samoan government charged King with willful failure to pay Samoan income tax in 1969, and willful failure to file a return in 1970. The Chief Justice of the High Court of American Samoa, sitting as trial judge, denied the defendant's motion for a jury trial on the ground that the laws of American Samoa did not provide for one and the U.S. Constitution did not require one in unincorporated territories.

Jake King's attorneys faced a serious obstacle in trying to challenge this ruling. American Samoa is not in any judicial district or circuit and there is no statutory procedure for appealing the decisions of the High Court off the island.[86] King's attorneys successfully circumvented this obstacle by bringing suit against the Secretary of the Interior in the U.S. District Court for the District of Columbia. Although American Samoa is largely self-governing internally, the Secretary of the Interior is still nominally responsible for its government. The District of Columbia is, of course, the official domicile of the Secretary of the Interior. It was for that reason that the District of Columbia courts were the first to consider the effect of *Reid* on the *Insular Cases*.

To the U.S. District Court for the District of Columbia, Jake King's case initially seemed to require only a rather mundane application of *Downes*.[87] The government argued, and Jake King conceded, that American Samoa is an unincorporated territory and that under the *Insular Cases* only fundamental constitutional rights are applicable in an unincorporated territory. The

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[85] King v. Morton, 520 F.2d 1140 (D.C. Cir. 1975). As I mentioned earlier, the right to jury trial was one that was frequently omitted whenever Congress enumerated a Bill of Rights for various U.S. territories. This, I speculated, might early on have been due to the fact that allowing local citizens to effectively block criminal convictions would be incompatible with a colonial approach to those areas. However, as control devolved to the local governments, most of them did not rush to institute jury trials by statute. Why is a long and interesting question, but is beyond the scope of this particular article. Those who are interested may wish to look at LAUGHLIN, THE LAW OF UNITED STATES TERRITORIES, *supra* note 17, at 158-60.

[86] For a general discussion of this issue see LAUGHLIN, THE LAW OF UNITED STATES TERRITORIES, *supra* note 17, at ch. 13. *See also* Laughlin, *supra* note 63.

[87] Downes v. Bidwell, 182 U.S. 244 (1901).

government contended that the specific issue of whether a jury trial was fundamental in this context had been decided in the negative fifty years earlier in a case arising in Puerto Rico, *Balzac v. Porto Rico*.[88] The defendant argued that *Balzac* had been modified by later cases such as *Duncan v. Louisiana*,[89] which held that the right to trial by jury was a "fundamental right" for the purpose of determining whether the Sixth Amendment jury trial guarantee had been selectively "incorporated" into the Bill of Rights and thus made applicable to the states. The district court agreed with the American Samoa government. Basically, it held that the term "fundamental right" had a different meaning in different contexts. While the *Duncan* case might state the definition of "fundamental right" for the purpose of incorporation of the Bill of Rights into the Fourteenth Amendment, *Balzac* still controlled so far as the *Insular Cases* were concerned.

However, on appeal, the Court of Appeals for the District of Columbia saw a new issue. Had not the *Insular Cases* themselves been modified by the Court's decision in *Reid*? The circuit court thought that they had. The court of appeals understood that the controlling opinion in Reid was that of Justice Harlan. It quoted him, saying,

> As Mr. Justice Harlan wrote in *Reid v. Covert*, "the particular local setting, the practical necessities, and the possible alternatives are relevant to a question of judgment, namely, whether jury trials *should* be deemed a necessary condition of the exercise of Congress' power to provide for the trial of Americans overseas."[90]

The court of appeals then took from Justice Harlan the phrase which became the touchstone not only of *King v. Morton*, and of my analysis in my 1981 University of Hawai'i article, but also of the rule adopted by the Ninth Circuit in *Wabol*. The language was as follows: "In short, the question is whether in American Samoa 'circumstances are such that trial by jury would be *impractical and anomalous*.'"[91]

The court of appeals said the question of whether or not the application of the Constitution would be impractical or anomalous was a question of fact. The court said that "a decision in this case [must] rest on a solid understanding of the present legal and cultural development of American Samoa. That

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[88] *See* LAUGHLIN, THE LAW OF UNITED STATES TERRITORIES, *supra* note 17, at ch. 7 for a discussion of this case.

[89] 391 U.S. 145 (1968).

[90] *King*, 520 F.2d at 1147 (internal citations omitted) (quoting Reid v. Covert, 354 U.S. 1, 75 (1957)). For a fuller discussion of this case see LAUGHLIN, THE LAW OF UNITED STATES TERRITORIES, *supra* note 17, at 161-62.

[91] *King*, 520 F.2d at 1147 (emphasis added) (quoting *Reid*, 354 U.S. at 75).

understanding cannot be based on unsubstantiated opinion; it must be based on facts."[92]

The court of appeals then remanded the case for trial. It was more from what happened at this trial than from the specific language of the court that I extrapolated the meaning of the words "impractical" and "anomalous" in this context. The American Samoa government's argument on remand seemed to be based upon the theory that certain aspects of Samoan culture would make a trial by jury impractical, in the sense of not workable. It seemed to be assumed by both sides that the government would have the burden of proof (or at least of going forward) on the issue of whether trial by jury was impractical or anomalous in the Samoan territory. The government went forward with evidence and the defendant seemed to concentrate upon refuting the government's evidence rather than trying to prove its own case. This was understandable in light of the inherent difficulty of proving a negative. The government put on witnesses who testified that, in some instances at least, *matai* might exercise improper control over members of the jury who were part of their *'aiga*. Some of those government witnesses were themselves *matai*. On cross-examination the defense attorney asked one of those *matai* witnesses whether he personally would exercise improper control over members of his *'aiga* who were serving on a jury. The witness, who also happened to a lawyer and a member of the territorial legislature, said that he would not. Defense counsel then asked how he could believe that other *matai* would do something that he would not do. I spoke with that *matai* witness in Pago Pago not too long after the trial. He said to me, "I knew that some of them would [try to unduly influence members of their *'aiga*] but how could I say so without sounding like a hypocrite?"[93] The district court found that *matai* control had diminished over the years of contact with the West and would not pose a problem.[94]

The government also argued that the "sense of oneness" of all Samoans would make it difficult for a Samoan juror to vote to convict a fellow Samoan. The defendant pointed out, and the judge agreed, that Samoans act as judges, police, and prosecutors and in those capacities had shown no reluctance to

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[92] *Id.*

[93] *See* LAUGHLIN, THE LAW OF UNITED STATES TERRITORIES, *supra* note 17, at 163.

[94] King v. Andrus, 452 F. Supp. 11, 14-15 (D.D.C. 1977). While I agree with the court's conclusion that most *matai* would not and do not try to influence jurors, the court's statement that *matai* had lost their influence in general was clearly an overstatement, and would be so today. In part, this is because the *matai* position and authority is formally recognized by the American Samoa government. In addition, one house of the Samoan legislature is made up entirely of *matai*. *See* LAUGHLIN, THE LAW OF UNITED STATES TERRITORIES, *supra* note 17, at 55. The fact that they are still recognized officially is evidence of the respect that American Samoans still have for traditional leaders.

send fellow Samoans to jail when the situation indicated that it was appropriate.[95]

Finally, the government invoked the concept of *ifoga*. The *ifoga* is a Samoan custom, a ceremony of restitution and apology whereby the *matai* of an offender's *'aiga* (cognatic descent group) makes an offer of gifts or money, and an apology, to the victim's *matai* in order to atone for a serious offense. The government argued that Samoan jurors would be unwilling to convict if an *ifoga* had taken place. The district court relied upon testimony to the effect that the *ifoga* seldom takes place anymore. The court may have been misinformed on this issue.[96] The government did not appeal but instead implemented jury trials.

From these cases, I abstracted the rule that I wrote about in the 1981 Hawai'i article. In the *King* case, everyone assumed that the government bore the burden of making a *prima facie* case that the application of the Sixth Amendment jury trial clause in American Samoa would be impractical or anomalous. That implied that the court presumed that the Constitution was applicable unless the government rebutted the presumption. That gave me the part of the rule which states that there is a presumption that all parts of the Constitution are applicable in the territories. The presumption is, however, as the case demonstrates, rebuttable.

In *Reid*, Justice Harlan (in the previously quoted sentence) joined "impractical" and "anomalous" in the conjunctive. Since the words are not synonyms, one might ask whether the government must show that a particular provision's application would be both impractical and anomalous before its application would be modified or abated. However, in the trial on remand in *King*, all of the government's arguments seemed to be aimed at showing that jury trials in

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[95] A study done shortly after jury trials were instituted in Samoa indicated that the Samoan jurors were somewhat more likely to convict than state jurors. *See* Richard E. Damon, *The First Jury Trials in American Samoa*, 5 SAMOAN PAC. L.J. 31, 38 (1979).

[96] The *ifoga* was traditionally done in a highly formalized ceremony. The offender's *matai* and other members of his *'aiga* sat in front of the house of the victim's *matai* with fine mats draped over their heads. Fine mats, woven from panadanus leaves but woven so tightly that they feel almost like cloth, were intended as a gift of restitution to the victim's *matai*. The offender's *matai* might sit for several days while additional gifts were brought and placed by his side. Eventually the victim's *matai* would agree to accept the restitution and the apology. A pig would be roasted and friendly relations would be reestablished between the families. While (as the court noted) formal *ifoga* ceremonies are rare today, the practice of an offender's *'aiga* making a less formal apology and offers of restitution to the victim's *'aiga* has continued. Sometimes the informality includes beer drinking and takes on a festive mood. *See* LAUGHLIN, THE LAW OF UNITED STATES TERRITORIES, *supra* note 17, at 163-64. Nevertheless, the transpiring of an *ifoga* does have an effect on how the Samoans think about punishment. How this does or should affect judicial proceedings is to some extent an unresolved issue. Comparable problems arise in Micronesia where the concept of a traditional apology ceremony also holds sway. *See id.* at 536-43.

Samoa would be "impractical," that is, that they would not work. Since the trial court seriously considered each of these arguments (albeit ultimately rejecting them) it must have believed that the government could have prevailed had it carried the burden of proof on one or more of them. This suggests that it would have been sufficient for the government to have proven that jury trials would be impractical, without also proving that they were anomalous. Consequently, I concluded that these are separate tests and that either one could justify a departure from mainland constitutional norms. It thus become important to define the two terms, "impractical" and "anomalous," as the courts[97] were using them.

The impractical branch of the test. Clearly, the test must be formulated in such a way that constitutional protections may not be defeated by mere inconvenience or expediency. Properly construed, the impractical branch of the test must be premised on the idea that the underlying value of a constitutional right warrants a substantial degree of inconvenience. The impracticality must be unique to a territory. Thus, a territory cannot argue that a particular constitutional provision should be inapplicable there for reasons that would be equally true in a state. For example, a territory cannot argue the Fourth Amendment should be inapplicable there because it might allow guilty persons to go unpunished. The problem is the same argument would be equally strong in a state, and that makes it inappropriate for this purpose. A territory could properly argue, as American Samoa did in the *King* case (albeit unsuccessfully), that the Samoan culture made it impractical to institute jury trials there. The American Samoa government argued that jury trials would not work there because in some cases chiefs would unduly influence jurors and in other cases it would be impossible to get a conviction because of the feelings of kinship that Samoans had for one another. The argument failed because the American Samoa government failed to prove the factual premises upon which it was based. However, the argument was conceptually sound, because it was based on allegedly unique features of Samoan culture that might, if they existed, have made application of the provision fail. It thus serves as a good example of what the impractical branch of the *King-Wabol* test means.

The anomalous branch of the test. More subtle and sensitive issues are involved in applying the anomalous portion of the test. The dictionary defines "anomalous," among other things, as "exhibiting or containing incongruous and often contradictory elements."[98] Here the question is the mirror image of the one asked by the "impractical" branch. There, the question was, would the

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[97] That is, the court of appeals and district courts in *King* and Justice Harlan in his opinion in *Reid.*

[98] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 89 (1971). I use this version of the dictionary because it was published in between the *Reid* and *King* decisions.

culture defeat the constitutional provision? Here the question is whether enforcement of the constitutional provision would damage the culture. The court only mentions that possibility in passing in *King* because the "anomalous" argument was not raised by the government. The district court, however, did note that the jury trial requirement would not affect the "communal" land system, which the court described as "[t]he obviously major cultural difference between the United States and American Samoa."[99] Thus the court acknowledged that the anomalous branch of the test was not offended. Significantly, it did so by bringing up, as I have noted earlier what is perhaps the most serious problem of constitutional application in territories: land laws.

4. The Supreme Court—only marginally involved

Since the Supreme Court's decision in *Reid*, the Court has not directly addressed the issue of the application of the Constitution in the territories. In fact, considering that *Reid* was not about the territories, but about a U.S. military base in a foreign land, the Court has not addressed the question directly since the 1920s.[100] The Supreme Court has in a number of cases considered challenges to the constitutionality of laws of U.S. territories or of federal laws applying to U.S. territories.[101] Most of these cases did not even discuss whether the Constitution was fully applicable in territories because they upheld the challenged laws under established constitutional doctrines. That is, since they held that the challenged laws would be constitutional under the precedents and standards applicable in the states, there was no need to determine whether the provision in question would be fully applicable in a territory; the law met the test even if it was. For example, in *Calero-Toledo v. Pearson Yacht Leasing Co.*,[102] the Supreme Court upheld a Puerto Rico deodands statute.[103] Having upheld such a statute against a due process challenge as it would be determined in a case arising in a state, the Court had no need to determine whether that or a lesser constitutional standard should be applied in Puerto Rico.

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[99] *Andrus*, 452 F. Supp. at 15.

[100] *See* Balzac v. Porto Rico, 258 U.S. 298 (1922).

[101] The most important of those cases are discussed in my book, THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS, *supra* note 17.

[102] 416 U.S. 663 (1974), *reh'g denied*, 417 U.S. 977 (1974).

[103] The legal term "deodands" comes from the Latin word *Deo dandum*, which means "given to God." It refers to laws whereby instrumentalities, e.g., cars or boats, that are used to commit felonies, e.g., transport drugs, are forfeited to the state. Originally the idea was that an animal, or even an inanimate object, causing death or serious harm was itself guilty, and had to be expatiated by forfeiture to the monarch as the representative of the diety.

There are a few cases where the Court did strike down a territorial law, but still without addressing the issue of why and how the Constitution applied. Some of these cases were summary (without opinion) affirmances. In some cases the issue of application was not raised by the litigants.

In *Examining Board v. Flores de Otero*,[104] the Supreme Court struck down a Puerto Rico statute which in effect provided that only American citizens could privately practice as civil engineers in Puerto Rico. In discussing whether and which parts of the Constitution were applicable to Puerto Rico, the Court said:

> The Court's decisions respecting the rights of the inhabitants of Puerto Rico have been neither unambiguous nor exactly uniform. The nature of this country's relationship to Puerto Rico was vigorously debated within the Court as well as within the Congress. It is clear now, however, that the protections accorded by either the Due Process Clause of the Fifth Amendment or the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply to residents of Puerto Rico.[105]

Thus, the Court relied upon the precedential value of various cases that had held that equal protection and due process were protected in Puerto Rico, but did not delve into the rationales of the precedent cases cited. That the Court now believes that the equal protection principle applies in Puerto Rico cannot be disputed. But that *Flores de Otero* did not in any sense refine or redefine the doctrines concerning application of the Constitution in non-state areas also cannot be disputed.

The Supreme Court case from this period that came the closest to dealing with the underlying doctrinal issue of when and how a U.S. constitutional provision is applicable in a non-state territory was *Terrol Torres v. Puerto Rico*.[106] Terry Terrol Torres was convicted of possession of marijuana based upon evidence obtained in a search of his luggage at the San Juan airport after he arrived on a flight from Miami.[107] The search was made without "probable cause" but justified on the basis of a statute authorizing airport searches on "suspicion."[108] The U.S. Supreme Court unanimously struck down the Puerto Rico statute that authorized searches of incoming air and ship passengers and their luggage when the police "have ground to suspect" that they may contain

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[104] 426 U.S. 572 (1976). The Court also discussed the interesting issue of whether it is the Fifth or Fourteenth Amendment that governs equal protection and due process in territories. *Id.* This problem is addressed in Chapter 12 of LAUGHLIN, THE LAW OF UNITED STATES TERRITORIES, *supra* note 17.

[105] *Flores de Otero*, 426 U.S. at 599-600 (internal citations omitted).

[106] 442 U.S. 465 (1979).

[107] *Id.* at 467.

[108] *Id. See also* P. R. LAWS ANN. § 1051 (1979).

firearms, explosives, narcotics, or controlled substances.[109] The Court was unanimous in its holding but not in its rationale. The majority reviewed the *Insular Cases* and what I call the "*Latter Insular Cases*"[110] and proceeded on the assumption that they are still good law. The Court did say, however, that:

> [B]ecause the limitation on the application of the Constitution in unincorporated territories is based in part on the need to preserve Congress' ability to govern such possessions, and may be overruled by Congress, a legislative determination that a constitutional provision practically and beneficially may be implemented in a territory is entitled to great weight.[111]

Puerto Rico has had a Fourth Amendment equivalent by virtue of federal statutes since 1917. Thus, since Congress had in essence "extended" the Fourth Amendment to Puerto Rico, a Congressional determination, such as that mentioned in the quotation above, had in fact been made. The Court held that the exclusionary rule was also applicable and therefore reversed the conviction.[112] The reasoning of the Supreme Court here is consistent with the modified *Insular Cases* approach adopted in *King* and in *Wabol*.

Two other Supreme Court cases from that era raised the issue of the application of the Constitution to congressional legislation affecting the territories. They were *Harris v. Rosario*[113] and *Califano v. Torres*.[114] Both cases upheld disparate federal welfare schedules for Puerto Rico, against the challenge that they violated the equal protection principle of the Fifth Amendment. Both cases, without elaborating, said that it was well established that Congress could treat territories "differently."[115]

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[109] *Id.* at 467.

[110] Cases after the *Insular Cases*, up to and including *Balzac v. Porto Rico*, 258 U.S. 298 (1922). *See* LAUGHLIN, THE LAW OF UNITED STATES TERRITORIES, *supra* note 17, at ch. 7, § 7.1.

[111] *Torres*, 442 U.S. at 470.

[112] *Id.* at 474.

[113] 446 U.S. 651 (1980). Justice Brennan, in a concurring opinion for four justices, took up the cudgels of Justice Black in *Reid*, criticizing the *Insular Cases* and arguing that they should be limited strictly to their facts. *Torres*, 442 U.S. at 474-75. Since there was a majority opinion in the case, Justice Brennan's opinion was merely a comment. Furthermore, it is not clear what Justice Brennan meant by limiting the *Insular Cases* "to their facts." Presumably, he did not mean limiting them to orange growers. In its essence, *Torres* seems fairly similar to the *Insular Cases* in that it involves the application of the Constitution to Puerto Rico. *See* LAUGHLIN, THE LAW OF UNITED STATES TERRITORIES, *supra*, note 17 at 184-85.

[114] 435 U.S. 1 (1978).

[115] *Harris*, 446 U.S at 651; *Califano*, 435 U.S. at 3 n.4. For a more detailed discussion of these cases and some other Supreme Court cases from this era, *see* Stanley K. Laughlin, Jr., *The Burger Court and the United States Territories*, 36 U. FLA. L. REV. 755. *See also* LAUGHLIN, THE LAW OF UNITED STATES TERRITORIES, *supra* note 17, at ch. 11.

During this era, Court again also cited the *Insular Cases* in a couple of cases that did not involve territories. One was *United States v. Verdugo-Urquidez*,[116] a case that involved the search of the home of a Mexican national in Mexico that was carried out jointly by U.S. and Mexican authorities. The Court simply cited the *Insular Cases* to illustrate the fact that it has never taken the position that the Bill of Rights applies to every U.S. government action taken anywhere in the world, at any time, against anybody. Since one lower court apparently read more into *Verdugo* than that, I will discuss it further, later.

How seldom the Court considers these issues is illustrated by how rarely the Court cites the *Insular Cases* or *Reid*. Since the *Torres* opinion in 1979 (25 years ago), the Court has cited (excluding dissents and concurrences) *Reid* six times, and none of those six cases involved U.S. territories. During the same period the Court cited the *Insular Cases* or *Downes* only three times. Only one of those case, *Ngiraingas v. Sanchez*,[117] involved a territory and it did not involve the application of the Constitution.

Many people anticipated that the Court might address the territorial issues in the recent case involving alleged enemy combatants detained on the U.S. Navy base at Guantanamo Bay, Cuba, *Rasul v. Bush*.[118] Indeed, some of the lower court opinions did look at the political status of the Guantanamo base and either tried to analogize it to or distinguish it from a U.S. territory. But the Supreme Court limited its inquiry to whether or not the writ of habeas corpus was available on behalf of the detainees, an issue it considered statutory. For jurisdictional purposes the Court considered the allegations that the detention was in violation of the Constitution or law of the United States.[119] The merits, which would presumably include the issue of whether the Constitution even applied, were left to the lower courts on remand.

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[116] 494 U.S. 259 (1990).

[117] 495 U.S. 182 (1990). *Ngiraingas* was a suit by alleged victims of police brutality against the government of Guam, its police department and a number of Guam officials in their official capacity. The suit was brought under 42 U.S.C. § 1983, which provides for redress against "any person" for deprivation of constitutional rights under the color of law of "any State or Territory." *See id.* The Court held that the suit could not be maintained because Guam was not a "person" within the meaning of § 1983, and a suit against individuals in their official capacity was in essence a suit against Guam. Since the Court found the case was not properly laid under § 1983 it did not reach the underlying constitutional claim. *Ngiraingas*, 495 U.S. at 192.

[118] 542 U.S. 466 (2004).

[119] Those laws would include treaties and international law. Treaties rank with the federal statutes in the hierarchy of federal law. U.S. CONST. art. VI, cl. 2. The Supreme Court has also held that international law is part of our law, although not supreme law.

B. Part 2—The Doctrine Is Brought Up to Date

It was against this background that the Ninth Circuit decided the important case of *Wabol*.[120] The facts of *Wabol* were rather complex, and are set out in some detail in the following footnote.[121] At bottom, however, the issue was simply one of whether the racial restrictions on alienation or long-term leasing of land in the Commonwealth of the Northern Mariana Islands violated the Equal Protection Clause (or equal protection principle) of the U.S. Constitution. It was this then that occasioned the Ninth Circuit to take a look

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[120] *Wabol v. Villacrusis*, 958 F.2d 1450 (9th Cir. 1992).

[121] In 1978, Filomenia Wabol Muna entered into an agreement with Victorino Villacrusis and Philippine Goods, Inc. ("PGI") to lease a parcel of land in the commonwealth of the Northern Mariana Islands for a period of 30 years, with an unconditional option in PGI to renew for an additional 20 years. *Id.* at 1452. The agreement was approved at the time by the plaintiff Concepcion S. Wabol. *Id.* Subsequently, Wabol obtained full ownership of the leased land in a partition action. *Id.* Muna, however, continued to collect the rents from PGI and Wabol brought this action seeking, among other things, a judgment voiding the lease because of its violation of that provision of the CNMI constitution prohibiting the sale or long term leasing of land to persons not of Marianan descent. *Id.* Northern Mariana exists in a status of U.S. Commonwealth, a political status similar to that of Puerto Rico. A commonwealth (in this sense) is established by a covenant by the United States Congress and the people of the particular commonwealth. Section 805 of the Covenant to Establish a Commonwealth in Political Union With the United States of America provides that, not withstanding any other federal law, the Commonwealth of the Northern Mariana's government shall regulate the alienation of local land to restrict the acquisition of long term interests to persons of Northern Mariana Islands descent only. Act of Mar. 24, 1976, Pub. L. No. 94-241, § 805, 90 Stat. 263 (1976). The Covenant recites that this action is taken "in view of the importance of the ownership of land for the culture and traditions of the people of the Northern Mariana Islands, and in order to protect them against exploitation and to promote their economic advancement and self-sufficiency." Article 12 of the Constitution of the Commonwealth of the Northern Mariana Islands implements that provision of the covenant. It provides that "the acquisition of permanent and long term interest in real property within the Commonwealth shall be restricted to persons of Northern Mariana descent." N. MAR. I. CONST. art XII. By the time this action arose the Constitution defined long term interest to include leaseholds of more than forty years including renewal rights. Section 4 of Article 12 of the CNMI Constitution defines a person of Northern Mariana descent:

> A person who is a citizen or national of the United States and who is of at least one-quarter Northern Marianian Chamorro or Northern Marianian Carolinian blood or a combination thereof or an adopted child of a person of Northern Marianian descent, if adopted while under the age of eighteen years. For purposes of determining Northern Marianian descent, a person shall be considered to be a full blooded Northern Mariana Chamorro or Northern Mariana Carolinian if that person was born or domiciled in the Northern Mariana Islands by 1950 and was a citizen of the Trust Territory of the Pacific Islands before the termination of the trusteeship with respect to the commonwealth.

Id. Villacrusis and PGI claimed that the aforementioned constitutional provisions violated the equal protection clause of the U.S. Constitution. *See Wabol*, 958 F.2d at 1453.

at the question of the applicability of the U.S. Constitution to a territory or commonwealth. After reviewing the history of the Commonwealth of the Northern Mariana Islands, tracing it through the Trust Territory of the Pacific Islands (of which the U.S. was trustee) and the transition to free association state, and noting the importance of land ownership to the preservation of the indigenous culture through all of these changes, the court began to review the applicable case law.

It noted that "the entire Constitution applies to a United States territory *ex proprio vigore*— of its own force—only if that territory is 'incorporated.'"[122] It repeated that dubious test of incorporation, that the issue turns on whether the territory was intended for statehood.[123] But it noted that it was undisputed that the CNMI is not incorporated. It also noted that prior case law suggests that the term "fundamental right" has different meanings when it is used to determine whether a provision of the Bill of Rights is incorporated into the Due Process Clause of the Fourteenth Amendment and made applicable to the states, and on the other hand when it is used to determine which parts of the Constitution are applicable in a territory.[124] Thus, the right to trial by jury could be "fundamental" for the purpose of incorporating it into the Fourteenth Amendment and making it applicable to the states, while not "fundamental" in terms of its applicability in U.S. territories. However, the court found that not much had been said about how to determine whether a right was fundamental for the purpose of applying it in a territory. Here then the court turned to cases that relied upon *Reid* and saw the importance of how that case had modified the *Insular Cases*. As we noted earlier, Justice Harlan had said in Reid that "properly understood," the *Insular Cases* still have vitality.[125] The *Wabol* court quoted from that opinion of Mr. Justice Harlan:

> "[T]he particular local setting, the practical necessities, and the possible alternatives are relevant to a question of judgment, namely, whether jury trials *should* be deemed a necessary condition of the exercise of Congress's power to provide for the trial of Americans overseas." The importance of the constitutional right at stake makes it essential that a decision . . . rest on a solid understanding of [present conditions in the territory]. That understanding cannot be based on unsubstantiated opinion; it must be based on facts. . . . In short, the question is whether in [the territory] "circumstances are such that trial by jury would be impractical and anomalous."[126]

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[122] *Wabol*, 958 F.2d at 1453.

[123] *Id.* at 1459-60.

[124] *See infra* notes 153-63 and accompanying text.

[125] Reid v. Covert, 354 U.S. 1, 67 (1956) (Harlan, J., concurring).

[126] *Wabol*, 958 F.2d at 1461 (alterations in original) (quoting King v. Morton, 520 F.2d 1140, 1147 (1975) (quoting *Reid*, 354 U.S. at 75 (Harlan, J., concurring))).

The *Wabol* court then went on to say: "In our view, *King* sets forth a workable standard for finding a delicate balance between local diversity and constitutional command, and one which is consistent with the principles we stressed in *Atalig*. We therefore consider whether the claimed right is one which would be *impractical or anomalous* in NMI."[127]

It will be noted that the court in *Wabol* construed *King* the same way I did and stated the test in the disjunctive, i.e., "impractical *or* anomalous." The court, rather than remanding, assayed the evidence on the issue of impractical or anomalous itself. The court went on to conclude, "[w]e think it clear that interposing this constitutional provision would be both impractical and anomalous in this setting."[128] The court explained its holding as follows: "Absent the alienation restriction, the political union would not be possible. Thus application of the constitutional right could ultimately frustrate the mutual interests that ultimately led to the Covenant. It would also hamper the United States' ability to form political alliances and acquire necessary military outposts."[129]

It is clear that the *Wabol* court was using "impractical" in the sense of "would not work." The court believed, based upon the evidence, that if the CNMI was not able to protect indigenous ownership of land because of an interpretation of the U.S. Constitution, it might try to leave the union, or at least regret having joined it. This, ultimately, would make it difficult for the United States to enter into such arrangements with other nations.

The court then went on to address the anomalous branch of the test.

> For the NMI people, equalization of access would be a hollow victory if it led to the loss of their land, their cultural and social identity, and the benefits of the

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[127] *Id.* (emphasis added). In *Northern Mariana Islands v. Atalig*, 723 F.2d 682 (9th Cir. 1984), the Ninth Circuit had taken the approach that the D.C. Circuit in *King v. Morton* had rejected as "simplistic." That is, the *Atalig* court set out unaided by criteria to determine whether or not the right to trial by jury is in some sense "fundamental." The defendant, in demanding a jury trial had relied, as had the defendant in *King*, upon the case of *Duncan v. Louisiana*, 391 U.S. 145 (1968). In *Duncan*, the U.S. Supreme Court had held that trial by jury was fundamental in the context of Anglo-American jurisprudence, and therefore made it applicable to the states through the Fourteenth Amendment. The Ninth Circuit in *Atalig*, like the trial court in *King*, refused to apply that test. But instead of applying the *King* test, it seemingly applied a test rejected by *Duncan*. The test was whether anywhere in the world a system could be found or imagined that could provide fundamental fairness without a trial by jury. Having framed the question that way, the defendant lost because to rule the other way would have condemned every legal system in the world that was not Anglo-American at its roots. The court, however, did not explain why, given the fact that it was going to determine what was "fundamental," the *Duncan* test was not appropriate, given the fact that the CMNI is part of the United States.

[128] *Wabol*, 958 F.2d at 1462.

[129] *Id.*

> United States sovereignty. It would truly be anomalous to construe the equal protection clause to force the United States to break its pledge to preserve and protect NMI culture and property. The Bill of Rights was not intended to interfere with the performance of our international obligations. Nor was it intended to operate as a genocide pact for diverse native cultures.[130]

Thus, the *Wabol* court joined the *King* court in recognizing that while the *Insular Cases* still have vitality (particularly insofar as they suggest that the Constitution is not universally applicable in every possible situation in an unincorporated territory), they must be read in light of the subsequent decision in *Reid*. The *Wabol* court also understood that given the Supreme Court guidelines for interpreting cases without majority opinions, the controlling opinion in *Reid* is that of Mr. Justice Harlan. The term "fundamental right" in this context now means a right that is "not impractical or anomalous." The focus is now on a particular cultural setting in which the court is asked to apply a particular part of the Constitution, and not upon some international gestalt based upon the vague contours of the word "fundamental."

C. Part 3—The Impractical or Anomalous Rule Survives Its Critics

There were criticisms of *Wabol* in some commentaries and law review articles. Some of them were based upon a simple misunderstanding of the previously mentioned rules the United States Supreme Court has laid down for determining the rule of a case in which there is no majority opinion.

1. Interpreting court opinions—the Marks *rule*

That rule is often referred to as the *Marks* rule because it was succinctly articulated in the case of *Marks v. United States*.[131] The rule actually predated *Marks*, for the *Marks* Court was simply reiterating an existing rule, not making new law. The rule was most recently quoted with approval in the Michigan Law School affirmative action case.[132] The rule is this: "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.'"[133]

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[130] *Id.* (internal citations omitted) (citing Laughlin, *supra* note 3, at 386-88). In a footnote the court said, "[a]s one commentator has observed, free alienation is impractical in this situation not because it would not work, but because it would work too well." *Id.* (citing Laughlin, *supra* note 3, at 386).

[131] 430 U.S. 188 (1977).

[132] Grutter v. Bollinger, 539 U.S. 306, 325 (2003).

[133] *Marks*, 430 U.S. at 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)).

It appears that a substantial number of lawyers and other legal writers, particularly those who are not in the area of constitutional law everyday, are simply unaware of the rule. These lawyers, and in some cases judges, simply jump to the conclusion that a plurality opinion is the law of the case. The plurality opinion, of course, could be the law of the case under the *Marks* rule, but it is not automatically so. If the plurality opinion is the law of the case, it is so because it is the narrowest ground upon which the case was decided, not because it is the opinion which has the most justices adhering to it. Some of the critics of *Wabol* simply jumped to the conclusion that the plurality opinions in *Reid* and Justice Brennan's concurring opinion in *Torres* were the law of those two cases. That is clearly not true.

The Supreme Court in *Grutter* noted that the rule in some situations "is more easily stated than applied."[134] However, in other cases it is not that difficult to apply the *Marks* rule. The facts of *Marks* itself can illustrate that. In *Roth v. United States*,[135] the Supreme Court first held that some material dealing with sex, that which could be deemed obscene, could be the basis of criminal prosecutions because obscenity was outside the protection of the First Amendment. The Court, however, was rather vague in defining exactly what material could be deemed obscene. Over the next decade, the Supreme Court began to struggle with standards for defining obscenity, all of the important cases being decided without a majority opinion. The most important was the case of *Memoirs v. Massachusetts*.[136]

In *Memoirs*, Justice Brennan's opinion for three members of the Court, while reversing a conviction for selling obscenity, laid down a three-pronged standard for judging when material could be deemed constitutionally obscene. The details are not important to us, but these standards dealt generally with whether the material (a) appealed to the prurient interest, (b) lacked social importance, and (c) exceeded contemporary community standards of candor

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[134] *Grutter*, 539 U.S. at 325 (quoting Nichols v. United States, 511 U.S. 738, 745 (1994)). One of those situations involved affirmative action in university admissions. Lower courts had divided over whether Justice Powell's solo opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), stated, under the *Marks* rule, the law of that case. In fact, in *Grutter*, the Michigan affirmative action case, the majority decided rather than to sort all of that out, it would simply adopt Powell's position in *Bakke*, therefore making it the law of the land whether or not it had been before. Of course, the Supreme Court is free to later adopt a minority or concurring position as its own. For example, the Court acknowledged in *Dennis v. United States*, 341 U.S. 494, 505-06 (1951), that it was following the early minority positions of Justices Holmes and Brandeis in free speech cases, rather than the majority opinions in those same cases. That may have been what happened *sub silento* with regard to the subsequent interpretations of the *Insular Cases*: Justice White's concurring opinion was followed rather than the self-labeled "opinion of Court" by Justice Brown.

[135] 354 U.S. 476 (1957).

[136] 383 U.S. 413 (1966).

in dealing with matters of sex.[137] To make a majority in favor or reversing the conviction, Justices Black, Douglas and Stewart concurred in the judgment. However, their decision rested upon their belief that the First Amendment does not allow suppression of any material simply because of its sexual content, except perhaps in rare cases where the state can prove that such material creates a clear and present danger.[138] Thus, it appeared that the rules upon which Black, Douglas and Stewart relied would make unconstitutional virtually all obscenity convictions. Justice Brennan's rule, on the other hand, would allow state statutes and state convictions to stand if the three above-mentioned criteria were met. In *Marks*, the Court had no difficulty in concluding that Justice Brennan's ground was the "more narrow." Therefore, Justice Brennan's opinion stated the law of the case, and thus the law of the land at the time that the *Marks* case arose.

Hence, *the narrowest ground is the ground that strikes down the least.* In other words, the narrowest ground is the ground that defers most to the other

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[137] *Id.* at 418.

> We defined obscenity in *Roth* in the following terms: "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

Id. (internal citations omitted) (quoting *Roth*, 354 U.S. at 489) (opinion of Justice Brennan, in which Chief Justice Warren and Justice Fortas concurred, announcing the judgment of the Court).

[138] Justice Douglas stated, "I base my vote to reverse on my view that the First Amendment does not permit the censorship of expression not brigaded with illegal action." *Memoirs*, 383 U.S. at 426 (Douglas, J., concurring in judgment). Mr. Justice Black and Mr. Justice Stewart concurred in the reversal "for the reasons stated in their respective dissenting opinions in Ginzburg v. United States, *post*, p. 476 and p. 497, and *Mishkin v. New York*, *post*, p. 515 and p. 518." *Id.* at 421 (Black & Stewart, JJ., concurring). In *Ginzburg*, Justice Black had said:

> I find it difficult to see how talk about sex can be placed under the kind of censorship the Court here approves without subjecting our society to more dangers than we can anticipate at the moment. It was to avoid exactly such dangers that the First Amendment was written and adopted. For myself I would follow the course which I believe is required by the First Amendment, that is, recognize that sex at least as much as any other aspect of life is so much a part of our society that its discussion should not be made a crime.

Ginzburg v. United States, 383 U.S. 463, 482 (1966) (Black, J., dissenting). In *Mishkin*, Justice Black had said, "I would reverse this case and announce that the First and Fourteenth Amendments taken together command that neither Congress nor the States shall pass laws which in any manner abridge freedom of speech and press—whatever the subjects discussed." Mishkin v. New York, 383 U.S. 502, 517-18 (1966) (Black, J., dissenting).

branches of government. Applying this to *Reid*, we see that Justice Harlan's opinion is the most narrow. Justice Black would have applied all parts of the Constitution to any actions taken by the federal government, at home or abroad, in a U.S. territory, on a U.S. military base, even perhaps at war in a foreign land. Anything that was unconstitutional if it occurred in a state would similarly be unconstitutional if it occurred in a territory or anywhere else.

Justice Harlan's view on the other hand, would allow exceptions to be made in situations where the application of the Constitution to a particular activity in a particular territory or other place would be "impractical and anomalous." Justice Harlan's view makes exceptions, Justice Black's makes none. Black's view obviously would lead to more government action being declared unconstitutional. Therefore, Harlan's view is the narrowest view and under the rule articulated in *Marks*, but in fact predating Reid, Justice Harlan's view would be the law of the case.

2. Wabol *passes the test*

I will later discuss more of the policy issues involved, but here it is my intent to defend *Wabol* against strictly analytical attacks. It is my view that *Wabol* is doctrinally sound. I mentioned earlier that *Wabol* had been questioned by a U.S. district court in the territories. The decision was by the U.S. District Court for the Northern Mariana Islands, of which Judge Alex R. Munson is the presiding judge and was author of the opinion in question. But John Unpingco, the Presiding Judge of the U.S. District Court for Guam was sitting on the appellate panel by designation, and concurred in the opinion. In *Rayphand v. Sablan*,[139] the court inserted a footnote that questioned the continued vitality of the *Wabol* rule, in light of the Supreme Court's opinion in *U.S. v. Verdugo*.[140] The footnote in its entirety read:

> While [*Wabol*] also stated that the court should consider whether the application of the right in the territorial context would be "impractical or anomalous," the vitality of that test is in doubt. This language came to [*Wabol*] from a concurring opinion of Justice Harlan in [*Reid*], via the District of Columbia Circuit decision in [*King v. Morton*]. In [*United States v. Verdugo-Urquidez*], however, the Court stated the central holding of the [*Insular Cases*] as, "[o]nly 'fundamental' constitutional rights are guaranteed to inhabitants of [unincorporated] territories." Only Justice Kennedy, in a concurring opinion, cited the "impractical or anomalous" test. Given this, we focus on the central test of [*Atalig*], [*Wabol*],

[139] 95 F. Supp. 2d 1133 (D.N. Mariana I. 1999).

[140] United States v. Verdugo-Urquidez, 494 U.S. 259 (1990).

> and the [*Insular Cases*], which is whether the given right is "the basis of all free government."[141]

This was a dubious way of proceeding for a district court, given the fact that *Verdugo* had already been decided by the U.S. Supreme Court when the Ninth Circuit made its decision in *Wabol*. The district court could not claim that *Wabol* was overruled by implication by a subsequent U.S. Supreme Court decision. Rather the district court, in essence, was saying "we think our circuit misinterpreted the law, so we will proceed with our own interpretation."[142] Be that as it may, it is my view that the Ninth Circuit in *Wabol* was clearly right, and the District Court for the Northern Mariana Islands was wrong, in the interpretation of the *Insular Cases* and *Reid*.[143]

In order to establish that fact it will be necessary to examine *Verdugo*, which *Rayphand* cited as its justification for not following *Wabol*. Verdugo-Urquidez ("Verdugo") was charged by the United States government with shipping illegal drugs into the United States from Mexico. At the request of the United States, Verdugo was arrested by Mexican authorities and turned

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[141] *Rayphand*, 95 F. Supp. 2d at 1139 n.11 (citations omitted) (some alteration in original).

[142] It is not unheard of, of course, for a lower court to decline to follow a higher court precedent on the grounds that the precedent had been implicitly overruled by other decisions of the higher court itself or by the U.S. Supreme Court. The situation arose in affirmative action litigation, where the Fifth Circuit refused to follow *Bakke* on the ground that subsequent U.S. Supreme Court decisions seemed to conflict with the rationale of *Bakke*. Emphasis, however, must be put on the word "subsequent." The unusual thing about the footnote of *Rayphand* is that *Wabol* was decided after *Verdugo*. So the U.S. District Court for the Northern Mariana Islands is not saying "we think that *Wabol* is no longer valid because later opinions of the U.S. Supreme Court conflict with it." Rather, the district court is saying "our court of appeals in *Wabol* never had it right." *Rayphand* is in effect saying the court of appeals in *Wabol* made a decision that conflicted with U.S. Supreme Court precedent *as it stood* when the opinion was written. This suggestion by a district court that its circuit court was wrong *ab initio* is more rare than the situation just mentioned involving the Fifth Circuit and *Bakke*. In the former sort of cases the lower court is saying the law has changed since our own higher court decided that case, and we are sure they would decide it differently today. Here, however, the District Court for the Northern Marianas is saying that the Ninth Circuit misinterpreted the law at the time it wrote its opinion. Such a way of proceeding is inherently problematic. We hear much recently about lower courts that allegedly fail to follow the U.S. Supreme Court. Usually, however, this refers to a situation in which the commentator believes that the circuit court has made an untenable interpretation of Supreme Court precedent. Sometimes, perhaps, it is an interpretation so strained that it begs the question of bad faith. Never though, or virtually never, does a circuit say we think the Supreme Court decision was wrong *ab initio* so we will not follow it. Obviously, if such a practice became common, the tiered judicial system would break down. There would be no point in having a Supreme Court if the circuit courts could reject its interpretation of the law. In the hierarchy of courts, it is just as troublesome when a district court rejects it own circuit's opinions and decides instead to proceed on its own view of what the law should be.

[143] Although probably not in the result that it reached.

over to United States authorities at the border. Mexican and United States authorities then conducted a search of Verdugo's residence in Mexicali, Mexico, which turned up incriminating evidence. The search apparently was consistent with Mexican law. The U.S. authorities did not seek a search warrant from any U.S. court for the seemingly good reason that no U.S. court has jurisdiction over Mexico.[144] Nevertheless, Verdugo argued that the incriminating evidence should be suppressed because the search in Mexico without a warrant from a U.S. court violated the Fourth Amendment. Three justices on the U.S. Supreme Court agreed with him, but the rest did not.[145] The Court decided the case on the basis of well-established precedent that holds an alien has no U.S. Constitutional rights with respect to actions that take place outside the territory of the United States, except in special circumstances.[146] The majority held that Verdugo's involuntary presence within the United States did not make him a part of the "people" whom the Fourth Amendment's right to be free from unreasonable searches and seizures protects. In rejecting the defendant's claims, the Court reviewed a wide range of precedents including the *Insular Cases* and *Reid*.

The Court mentioned the *Insular Cases*, and in particular *Downes*, only in response to the defendant's argument that the U.S. Constitution limits every action taken by any agent of the U.S. government any place in the world. The Court simply noted that under the *Insular Cases* the U.S. Constitution does not have such blanket and absolute application even in U.S. territories, and therefore, not in foreign nations.[147] The Court noted as a historical fact that under the *Insular Cases* only fundamental constitutional rights were guaranteed to inhabitants of territories.[148] However, the Court nowhere said or even suggested that the *Insular Cases* had never been modified or affected in any respect by later precedent. That issue was not before the Court. The Court was not applying the *Insular Cases*, but simply using them as an example.

In fact, four paragraphs later, the Court discusses *Reid* and clearly adopts the same approach to it as did the *Wabol* court; i.e., that Justice Harlan's and Justice Frankfurter's opinions were controlling. The defendant Verdugo had

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[144] Justice Stevens concurred in the judgment specifically on this ground; that is, that the U.S. government could not be expected to obtain a warrant because no U.S. court had jurisdiction over the residence in question. *Verdugo*, 494 U.S. at 279 (Stevens, J., concurring).

[145] Justice Brennan's dissent, for himself and Justice Marshall, seemed to hold that U.S. officials are required to obtain a search warrant for anything amounting to a search and seizure any where in the world. *Id.* at 279-97 (Brennan, J., dissenting). Justice Blackmun's dissent is discussed *infra* note 146.

[146] Justice Blackmun was not willing to go as far as Justice Brennan but believed special circumstances existed here because the defendant was in custody in the United States at the time the search of his house took place in Mexico. *Id.* at 297-98 (Blackmun, J., dissenting).

[147] *Id.* at 268.

[148] *Id.* at 268-69.

based his argument upon the plurality opinion in *Reid*. The Court clearly rejected that approach to the case. The *Verdugo* Court said:

> But the holding of *Reid* stands for no such sweeping proposition: it decided that United States citizens stationed abroad could invoke the protection of the Fifth and Sixth Amendments. The concurrences by Justices Frankfurter and Harlan in *Reid* resolved the case on *much narrower grounds* than the plurality and declined even to hold that United States citizens were entitled to the full range of Constitutional protections in all overseas criminal prosecutions.[149]

The opinion of the Court in *Verdugo* quoted approvingly from Justice Harlan's concurring opinion in *Reid*: "[T]he question of which specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case."[150] The district court in *Rayphand* apparently put some significance on the fact that the majority in *Verdugo* did not quote the "impractical and anomalous" language, which comes a few sentences later in Justice Harlan's opinion. But the Supreme Court had no reason to do so since it did not believe any part of *Reid* benefited Verdugo: "Since respondent is not a United States citizen, he can derive no comfort from the *Reid* holding."[151]

Justice Kennedy's concurring opinion in *Verdugo* does quote the "impractical and anomalous" language.[152] Oddly, the district court in *Rayphand* thought that this weakened the case for *Wabol* rather than strengthened it. The district court in *Rayphand* apparently thought that because Justice Kennedy wrote a concurring opinion in *Verdugo*, he was offering an alternative method for resolving the case, and that his opinion therefore could not be that of the majority. However, under the rules of interpretation, that is not true. The district court may have overlooked the fact that Justice Kennedy's opinion in *Verdugo* is a "concurring" opinion, not a "concurring in judgment" opinion. Justice Kennedy signed the majority opinion of the Court. A *concurring* opinion, as distinguished from a *concurring in judgment* opinion, does not offer a divergent approach, but rather seeks to elaborate on what that Justice understands the majority opinion to mean. Therefore, the relevance of the concurring opinion of Justice Kennedy is that it demonstrates that at least one justice in the majority believed that the majority opinion implicitly ratified the impractical and anomalous test. Thus, it supports, rather than weakens, the *Wabol* court's interpretation of Reid and the *Insular Cases*.

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[149] *Id.* at 270 (emphasis added).

[150] *Id.* (quoting Reid v. Covert, 354 U.S. 1, 75 (1957)) (Harlan, J., concurring).

[151] *Id.*

[152] *Id.* at 278 (Kennedy, J., concurring).

It seems quite clear that there is nothing in *Verdugo* that conflicts with *Wabol*. *Wabol* and the U.S. Supreme Court in *Verdugo* both take exactly the same approach to *Reid* and the *Insular Cases*. They both understand that Justice Harlan's opinion in *Reid* is the controlling one. That means they recognize that the *Insular Cases* stand today only for the proposition that the Constitution need not apply in every instance, in every U.S. territory or foreign land. To determine which provisions apply in territories in which situations, the Harlan opinion points the Court in the direction of determining whether such application would be "impractical" or "anomalous."

I have expressed my support for this rule in numerous fora and contexts. It has the effect of allowing territorial residents the maximum of U.S. constitutional rights, consistent with their desire to preserve their indigenous cultures. I may also add that it provides the courts with a more reasonable and systematic approach to determining the question of constitutional application.

3. Why the "impractical or anomalous" test makes sense

One only has to look at the tortured history of the incorporation of the Bill of Rights into the Fourteenth Amendment to see the difficulty inherent in injecting an undefined concept of "fundamental rights" into the judicial process. From the late 1930s up until the 1960s, the Supreme Court used a free-style "fundamental rights" approach for determining the extent to which the Bill of Rights was applicable to the states. The approach began with the Court's opinion in *Palko v. Connecticut*[153] and was sometime called the *Palko* rule.

In *Palko* the Court said:

> The right to trial by jury and the immunity from prosecution except as the result of an indictment may have value and importance. Even so, they are not of *the very essence of a scheme of ordered liberty*. To abolish them is not to violate a "principle of justice so *rooted in the traditions and conscience of our people* as to be ranked as fundamental."[154]

Later in the *Palko* opinion, the Court framed the question as: "Is that kind of double jeopardy to which the statute has subjected [Palko] a hardship so acute and shocking that our polity will not endure it? Does it violate those *'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'?*"[155]

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[153] 302 U.S. 319 (1937).

[154] *Id.* at 325 (citations omitted) (emphases added).

[155] *Id.* at 328 (citation omitted) (emphasis added).

For almost twenty years the Court used this fundamental rights approach to decide which provisions of the Bill of Rights were applicable to the states through the Fourteenth Amendment.

The phrases quoted above, i.e., "the very essence of a scheme of ordered liberty," "rooted in the traditions and conscience of our people" and "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" became the guidelines for determining whether a particular aspect of the Bill of Rights was applicable to the states by virtue of the Fourteenth Amendment. The Court used this approach despite persistent warnings from Justices Black and Douglas that the test was entirely too subjective to be applied consistently by lower courts.

The warning was accurate. The result was confusion bordering on chaos. Today that approach has been abandoned,[156] but the validity of the criticism that led to its abandonment is made clear by looking at some of the cases decided during that *Palko* era. In *Rochin v. California*[157] the Court, in an opinion by Justice Frankfurter, seized upon the "rooted in the traditions and conscience of our people" language and specifically on the word "conscience." The Court held that a suspect's fundamental rights were violated when evidence was obtained by forcibly pumping his stomach. Justice Frankfurter declared that such behavior "shocks the conscience."[158] Although Justices Douglas and Black concurred, they each questioned the "shocked the conscience" test. They would have preferred to decide the case on the grounds that the actions of the police had violated the Fourth Amendment, which they thought should be considered applicable to the states in its entirety. However, Justice Douglas noted that a majority of states would uphold the conviction. Such conduct apparently had not shocked the consciences of the police who obtained the evidence or of the prosecutors, judges, and jurors who had convicted the defendant based upon the evidence so obtained. Justice Douglas refused to call them uncivilized and argued that for that reason, a more objective standard of the Bill of Rights was necessary.[159]

The case of *Irvine v. California*[160] illustrated that the author of the *Rochin* opinion himself (Justice Frankfurter) and several of the Justices who had concurred in it, disagreed sharply over what it was in the precedent case that had "shocked the conscience" of the Court. In *Irvine*, a majority of the Court

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[156] In *Duncan*, the Court acknowledged that while the language of *Palko* was still being used, the Court had shifted to a position of "selective incorporation" whereby all but two provisions of the Bill of Rights have become fully applicable to the states. *See supra* note 89, at 164.

[157] 342 U.S. 165 (1952).

[158] *Id.* at 172.

[159] *Id.* at 177-79.

[160] 347 U.S. 128 (1954).

upheld a conviction where police officers had placed microphones in several locations in the defendant's home, including the bedroom where the defendant and his wife slept, and had re-entered the house on a number of occasions to reposition the microphones for better reception, all of this being done without a search warrant or any other judicial authorization. The majority in *Irvine* upheld the conviction and distinguished the *Rochin* stomach pumping case on the ground that in the *Irvine* microphone case there was no forcible physical intrusion into the defendant's body.[161] Justice Frankfurter wrote a vigorous dissent, arguing that the majority did not understand what had been "shocking to the conscience" in the *Rochin* stomach pumping case.[162] In doing so, he essentially proved the point of Justices Black and Douglas that the *Palko* test was too subjective to be of guidance to other courts (or for that matter to other Justices on the same Court). The great civil libertarian Justice Black, in his *Rochin* concurrence, outlined the difficulty inherent in judges trying to apply the values of the "community" without ending up simply applying their own.

> [W]e are told that "we may not draw on our merely personal and private notions"; our judgment must be grounded on "considerations deeply rooted in reason and in the compelling traditions of the legal profession." We are further admonished to measure the validity of state practices, not by our reason, or by the traditions of the legal profession, but by "the community's sense of fair play and decency"; by the "traditions and conscience of our people"; or by "those canons of decency and fairness which express the notions of justice of English-speaking peoples" . . . . [O]ne may well ask what avenues of investigation are open to discover "canons" of conduct so universally favored that this Court should write them into the Constitution? All we are told is that the discovery must be made by

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[161] "[*Rochin*] presented an element totally lacking here—coercion applied by a physical assault upon his person to compel submission to the use of a stomach pump . . . . However obnoxious are the facts in the case before us, they do not involve coercion, violence or brutality to the person, but rather a trespass to property, plus eavesdropping." *Id.* at 133.

[162] He stated:

> There was lacking here physical violence, even to the restricted extent employed in *Rochin*. We have here, however, a more powerful and offensive control over the Irvines' life than a single, limited physical trespass. Certainly the conduct of the police here went far beyond a bare search and seizure. The police devised means to hear every word that was said in the Irvine household for more than a month. Those affirming the conviction find that this conduct, in its entirety, is "almost incredible if it were not admitted." Surely the Court does not propose to announce a new absolute, namely, that even the most reprehensible means for securing a conviction will not taint a verdict so long as the body of the accused was not touched by State officials.

Id. at 145-146 (Frankfurter, J., dissenting). Later, the Court could not even agree on when physical intrusions to the body "shocked the conscience" sufficiently to constitute a violation of a fundamental right. *Compare* Breithaupt v. Abram, 352 U.S. 432 (1957) *with* Schmerber v. California, 384 U.S. 757 (1966).

> an "evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts."[163]

If federal courts in the territories were to go back to making *ad hoc* decisions about whether a right is "fundamental," is it not abundantly clear that Constitutional protection for territorial citizens would be left entirely to the subjective judgment of the particular judge sitting on a particular case? To avoid that, a court might take a freehand approach, as the Ninth Circuit did in *Northern Mariana Islands v. Atalig*.[164] If the courts take the *Atalig* approach, one can assume that the individual rights safeguards would be scarce indeed. There the court found that a jury trial was not a "fundamental" right because it was not one of "those fundamental limitations in favor of personal rights which are the basis of all free government"; that is, there are legal systems in free countries in the world that do not provide juries.[165] Of course, the same can be said of almost every one of the safeguards of the Bill of Rights. Take any one of the provisions, self-incrimination, right to confront witnesses, search warrants, etc., and in every case you can find at least one legal system in a country that is basically free that does not have that particular safeguard.

Of course, there is the opposite risk, that a judge with an active imagination and ideological commitments will hamstring island self-government with his or her own policy judgments disguised as "fundamental rights." Justice Black also foresaw that in his *Rochin* concurrence:

> There is, however, no express constitutional language granting judicial power to invalidate *every* state law of every kind deemed "unreasonable" or contrary to the Court's notion of civilized decencies; yet the constitutional philosophy used by the majority has, in the past, been used to deny a state the right to fix the price of gasoline, and even the right to prevent bakers from palming off smaller for larger loaves of bread.[166]

Not many of us were lawyers in the 1930s, but I was taught by professors who were. We have all studied that time in U.S. history when the U.S. Supreme Court hamstrung the federal government and the states by creating constitutional rights that had little or no textual support in the Constitution. These included such rights as "freedom to contract," by the use of which child labor laws, wage and hour laws, and other laws designed to ameliorate the condition of working people were struck down. My generation of law

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[163] *Rochin*, 342 U.S. at 175-76 (Black, J., concurring).

[164] 732 F.2d 682 (9th Cir. 1984).

[165] *Id.* at 690 (internal quotations omitted).

[166] *Rochin*, 342 U.S. at 176 (citations omitted). The cases cited were *Williams v. Standard Oil Co.*, 278 U.S. 235 (1928) (gas prices) and *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924) (bread). *Id.*

students learned that it was considered a great victory for liberal democracy when the courts backed off and allowed the sovereign people to express their will through their elected representatives. It is a lesson to be remembered. Vague notions like "fundamental rights," left largely undefined, encourage judicial legislation and unwarranted judicial activism. These rights more often than not turned out to be the rights of the rich and powerful and were used to prevent reform.[167] That is the lesson of "fundamental rights" law from the 1930s.

Of course, the terms "impractical" or "anomalous" would not, by themselves, be much better as guides, *except* for the fact that the *Wabol* and *King* courts have given them a specific meaning. *King* showed how they should be applied in the context of the right to jury trial:

> The importance of the constitutional right at stake makes it essential that a decision in this case rest on a solid understanding of the present legal and cultural development of American Samoa. That understanding cannot be based on unsubstantiated opinion; it must be based on facts. Specifically, it must be determined whether the Samoan mores and *matai* culture with its strict societal distinctions will accommodate a jury system in which a defendant is tried before his peers; whether a jury in Samoa could fairly determine the facts of a case in accordance with the instructions of the court without being unduly influenced by customs and traditions of which the criminal law takes no notice; and whether the implementation of a jury system would be practicable.[168]

On remand, the district court took evidence on those allegations, and concluded that the Samoan culture would not make it infeasible to implement a jury trial system there. Hence, jury trials were not "impractical" in American Samoa. Subsequent experience with the jury has demonstrated conclusively that the court was right.[169]

The term "anomalous," on the other hand, means that the constitutional provision would damage or defeat the culture. The *Wabol* court said, "As one commentator has observed, free alienation is impractical in this situation not because it would not work, but because it would work too well."[170] Evidence can be taken on the anomalous branch of the test as well. Take a case of land

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[167] It is significant to note that what we would consider important individual rights such as the right to counsel and freedom of speech were given short shrift by the same Court that was so activist in protecting individual rights. For example, the right to appointed counsel in felony, even capital cases, did not exist unless there were "special circumstances," such as a youthful and illiterate defendant. Powell v. Alabama, 287 U.S. 45 (1932). Speech could be regulated if it had a "dangerous tendency." Gitlow v. New York, 268 U.S. 652 (1925).

[168] King v. Morton, 520 F.2d 1140, 1147 (D.C. Cir. 1975).

[169] *See* LAUGHLIN, THE LAW OF UNITED STATES TERRITORIES, *supra* note 17, at 164.

[170] Wabol v. Villacrusis, 958 F.2d 1450, 1462 n.21 (9th Cir. 1992) (citing Laughlin, *supra* note 3, at 386).

alienation laws. Empirical data can be introduced on how land is owned currently. For example, in Americans Samoa, it could be shown that it is owned by the *'aiga*. Then there could be testimony by experts, such as anthropologists, on how that type of land ownership affects the culture. Once again, a very specific question would be addressed. The courts are cast in a role that they are suited to perform.[171]

4. A return to ex proprio vigore*?*

There is another brand of criticism, not so much of *Wabol* but more of the *Insular Cases* themselves, that holds that the courts should return to the *ex proprio vigore* doctrine; i.e., that the Constitution follows the flag. Some of this is based on the belief that every provision of the U.S. Constitution is good for everybody, all the time, everywhere. People who adhere to this view almost by definition do not give much weight to the value of allowing different societies to maintain their unique cultures. Some of my Supreme Court heroes, such as Hugo Black[172] and William Brennan,[173] stalwart defenders of constitutional rights, sometimes seemed to ignore the possibility that every constitutional right might not necessarily be entirely appropriate in every case in every place in the world.

Another source of this type of criticism of existing law (that is, advocacy of a return to *ex proprio vigore*) in recent years has been from Commonwealth of Puerto Rico scholars. With regard to those scholars who are statehood advocates, such as Judge Juan Toruella, the criticism is understandable.[174] Judge Toruella believes that Puerto Rico should be a state of the union and therefore clearly believes that all parts of the Constitution should be applic-

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[171] It is worth noting that some cases are so obviously not ones for making an exception that no argument of either kind is made. In 2001, the Ninth Circuit considered a case involving the violation of the right to vote and equal protection in connection with a school board election on the island of Rota in the Commonwealth of the Northern Mariana Islands. Charfauros v. Bd. of Elections, 249 F.3d 941 (9th Cir. 2001), *amended by* No. 99-15789, 2001 U.S. App. Lexis 15083 (9th Cir. July 6, 2001). The allegations (generally found to be true by the trial court) were that the elections board had deliberately manipulated its rules pertaining to eligibility to vote in order to affect the outcome of the election, and had accepted challenges to Republican voters while rejecting virtually identical challenges to Democratic voters, all for partisan purposes. In other words, it was an allegation that the defendants had intentionally deprived the plaintiffs of their right to vote and had discriminated against them because of their party affiliation. In such a case it would be pointless, and even insulting, to argue that some aspect of the culture of Rota made this more acceptable there than in the states.

[172] Reid v. Covert, 354 U.S. 1 (1957) (Black, J., plurality opinion).

[173] Torres v. Puerto Rico, 442 U.S. 465, 474-76 (1979) (Brennan, J., concurring).

[174] JUAN R. TORRUELLA, THE SUPREME COURT AND PUERTO RICO: THE DOCTRINE OF SEPARATE AND UNEQUAL (1985).

able there. However, it is interesting that a substantial amount of this criticism comes from persons who identify with the Puerto Rican independence movement. Ironically, they seem to overlook the fact that applying the Constitution *ex proprio vigore* could be considered more of an act of "colonial" control than allowing the Commonwealth in certain instances to pursue its own cultural norms, even if to do the same thing would be unconstitutional on the mainland.

Perhaps this is a tactical decision on their part; i.e., simply another ground to criticize Puerto Rico's relationship with the rest of the United States. But the end result of such an argument, if accepted, would be one that they might not like. *Ex proprio vigore* would force mainland values on Puerto Rico, even when they conflicted with Puerto Rican cultural norms. The genius of the *King-Wabol* approach is that it allows the insular areas to be full-fledged parts of the United States but, at the same time, recognizes that their cultures are substantially different from those of the mainland United States and allows some latitude in constitutional interpretation for the purpose of accommodating those cultures.

In my view, *Wabol* got it exactly right. It would be a shame if the courts went backward either to the *Insular Cases* as originally written or, even further back to the days of *ex proprio vigore*. Perhaps *ex proprio vigore* would not today produce another *Dred Scott* case, but I believe its results would nevertheless be pernicious. *Ex proprio vigore* might not protect slavery but it could kill cultures.

III. CONCLUSION

There are several reasons why island people should have the right to try to protect their indigenous cultures. First, even a harsh critic such as Helen Hughes concedes they should have a right to do so (although she would advocate against the choice). Independent islands have it, why should not those who chose to become part of our nation? Secondly, there is no evidence that the problems that Hughes enumerates and that to varying degrees U.S. islands do experience, are related to cultural preservation efforts. Certainly, Hughes cites none. Finally, it would be presumptuous for American courts to presume that mainland American culture is preferable to the indigenous culture of the various islands.[175] In fact, we in the states might learn from

[175] Arguably, indigenous people have a right under international law to attempt to preserve their traditional culture.

> Although indigenous peoples do not necessarily have the right to secede and become fully independent, they do have the right to enough autonomy and sovereignty to ensure that they are able to preserve themselves as a distinct cultural community and to make the fundamentally important decisions for themselves. By vigorously protecting this right, we

them. I cite the following example from Yap, one of the states of the Federated States of Micronesia, a nation in free association with the United States. It is anecdotal, but so also is the criticism of attempts to preserve traditional cultures.

Yap is one of the most traditional societies in the Pacific, certainly of those affiliated with the United States, and in the view of many, has one of the most effective governments and a culture that provides fulfillment to most of its citizens. In an article in *Pacific Magazine*, entitled "Wisdom Is In The Basket", the author, Scott Radway, tells of how the citizens of Yap donated land to the government for a necessary road. The story is illustrated by a picture of John Mangefel, the first elected governor of Yap, sitting on a box beside the new road, beautifying it by manually planting palm shoots on the roads edge. The seventy-one year-old ex-governor is quoted as saying, "Put death in the house." The author explains that it is an old Yapese saying: "It literally means that even in the case of a family death, if the community requires you, you must wait to bury the dead. It means even in extreme circumstances the community is more important than the individual."[176]

Perhaps most of us would not want to adopt that creed, but it seems to work in Yap. Who are American judges to say that Hughes' individualism is right and Mangefel's communitarianism is wrong? As a free association state, Yap can take the steps it chooses to preserve it traditional culture. But similar positive traits can be found in the cultures of islands that are permanent parts of the United States. The community spirit is one that stands out. Can it conceivably be in anyone's interest for mainland judges to tell the U.S. islands that they must abandon those cultures?

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can protect the inherent dignity of each group and ensure that the diversity of the world's populations will continue to enrich the lives of all peoples.

Jon M. Van Dyke , Carmen Di more-Siah & Gerald W. Berkley-Coats, *Self-Determination for Nonself-governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawai'i*, 18 U. HAW. L. REV. 623, 643 (1996).

While the U.S. Constitution is the supreme law of the land within the domestic American legal system, it is well established that "[i]nternational law is part of our law," *The Paquete Habana*, 175 U.S 677, 700 (1900), and that whenever possible U.S. law should be interpreted consistent with international law. Murray v. *The Charming Betsy*, 6 U.S. 64, 118 (1804).

[176] Scott Radway, Wisdom Is in the Basket, PAC. MAG., Nov. 2003, at 22.

Don't Smile, Your Image Has Just Been Recorded on a Camera-Phone: The Need For Privacy in the Public Sphere

"Perhaps the most important aspect of privacy is that it confers upon people the most important right of all—the right to be left alone."[1]

I. INTRODUCTION

By the late Nineteenth Century, "advances in photographic art . . . rendered it possible to take pictures surreptitiously,"[2] whereas prior, "photographic art was such that one's picture could seldom be taken without his consciously 'sitting' for the purpose."[3] Due to ever-evolving technology, surreptitious photography and videotaping have become more commonplace, rather than exceptional, today. Renowned photographer Walker Evans,[4] celebrated most recently for his collection of photographs taken from 1938 to 1941 in New York subways, secretly captured images of subway passengers "in violation of a ban on subway photography."[5] He took the photographs as part of a self-assigned photography project to "look at the people."[6] Regrettably, this ability for people to capture images of others surreptitiously for artistic purposes has taken on a markedly perverse twist—photos and video recordings of women's intimate areas—and is exacerbated by miniaturized technology. When combined with the accessibility and dissemination capabilities of the internet, invasions of privacy occur regularly and images can now be circulated, without the victim's knowledge, to millions of others instantaneously.

Imagine this: you are walking in the mall and notice someone who appears to be talking on a cell phone. Now imagine that as you pass, you hear the familiar "click" of a digital camera as it records a picture. You turn to identify

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[1] State v. Kam, 69 Haw. 483, 492, 748 P.2d 372, 378 (1988).

[2] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 211 (1890).

[3] *Id.*

[4] He is considered to be "one of the 20th century's most influential photographers and artists." Randy Kennedy, *Petals on a Wet Black Bough*, N.Y. TIMES, Oct. 31, 2004, § 7, at 6, *available at* http://query.nytimes.com/gst/fullpage.html? res=9D01E2D81E3AF932A05753C1A9629C8B63 (last visited Dec. 16, 2004).

[5] Sarah Boxer, *ART; Tunnel Visions*, N.Y. TIMES, Oct. 17, 2004, at § 2, at 32, *available at* http://query.nytimes.com/gst/abstract.html?res=F40D1EFD355F0C7488DDDA90994DC404482&incamp=archive:search (last visited Dec. 16, 2004). The Metropolitan Transportation Authority has proposed a reinstatement of the subway photography ban for security reasons. *Id.*

[6] Kennedy, *supra* note 4.

the source of the sound, but only see that person "on the phone." As you look closely at the phone, you realize that it has a camera lens and that your image may be recorded on the phone. Worse yet, imagine that you were unaware of this camera phone voyeur and that the unsolicited photograph ends up on the internet within seconds of your image being recorded. Unfortunately, this is the new reality of video voyeurism:[7] stealth and undetectable, easily transmitted images.[8]

Since camera-phones hit Japan's marketplace in 2001, and the United States in 2003, their popularity has skyrocketted.[9] It is anticipated that by the end of 2004, approximately 21 million camera-phones will have been sold in the United States, "accounting for roughly one in five phone sales."[10] This figure could double next year.[11] Figures are even more staggering worldwide. Predictions estimate worldwide sales of 150 million by the end of 2004, and as many as 656 million by 2008.[12] In fact, camera-phones are so popular that worldwide sales of camera-phones surpassed digital camera sales in 2003 for the first time.[13] This flood of camera-phones "will generate an additional 29 billion digital images captured this year."[14]

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[7] For the purposes of this Comment, the terms video voyeurism and voyeurism will be used interchangeably. They should be read to mean the same thing. All references to voyeurism concern the act of using a device to capture images of another person, and do not include "peeping tom" voyeurism, where no device is used.

[8] Although this Comment focuses on voyeurism, many other concerns have arisen with the advent of camera-phones. In light of elevated security following September 11th, camera-phones are sometimes banned from certain locations because of the secrecy with which photos or videos can be taken. Courthouses throughout the country have banned camera-phones. Mario R. Bordogna, *Lights, Camera, Liability: Camera Phones Affect Workplace Privacy*, 9 No. 9 W. VA. EMP. L. LETTER 3 (2004). Many employers have banned camera-phones in the workplace because of trade secret espionage; for the protection of other confidential documents; and the potential threat of employees surreptitiously taking photos of co-workers in the bathroom or locker room. *Id.*; *see also* Joseph C. Copa, *Camera Phones at Work: Not Just a Matter of Smiling, Saying 'Cheese'*, 13 NO. 5 WIS. EMP. L. LETTER 1 (2004).

[9] Jefferson Graham, *Camera phones rival DVD players as fastest growing Devices fly off shelves while prices plummet*, USA TODAY, Nov. 18, 2003, at 1B, *available at*, http://www.usatoday.com/usatonline/ 20031118/5687922s.htm (last visited Dec. 21, 2004).

[10] National Telecommunications Cooperative Association, Athena Plantis, *Smile! You're on Candid Camera Phone*, http://www.ntca.org/ka/ka-3.cfm?content_item_id=2472 &folder_id =490 (last visited Dec. 21, 2004).

[11] *Id.*

[12] *Worldwide Camera Phone Sales to Reach Nearly 150 Million in 2004*, http://cameras.about.com/b/a/084563.htm (last visited Dec. 21, 2004) [hereinafter *Worldwide Sales*]. This means that cameras would experience a compound annual growth rate of fifty-five percent. *Id.*

[13] Frances Gleeson, *Camera phones outsell digital cameras*, http://www.electricnews.net/news.html?code=9375927 (last visited Dec. 21, 2004).

[14] *Worldwide Sales*, *supra* note 12.

Given these remarkable statistics, it is not surprising that millions of unsolicited images make their way to various internet websites. With the advent of camera-phones and other miniaturized technology, old forms of voyeurism have become far easier to perpetrate. The most common forms of voyeurism in the public arena are upskirting[15] and downblousing.[16] There are hundreds of websites dedicated specifically to upskirt and downblouse images.[17] This disturbing market for voyeuristic photos captured through easily concealed mechanisms suggests the need to modify current laws to punish, and one hopes to deter, voyeurs from invading the privacy of innocent people while they are in public places.

It is well-established that people have a right to privacy in their homes and other non-public arenas.[18] This Comment focuses on the need to expand such a privacy right to the public sphere because of the ease with which invasion can occur via camera-phones and other technological devices. Although some might argue that one does not have a privacy right in public places, this Comment suggests the importance and efficacy of protecting such privacy rights. Privacy in public has become a significant concern because of the invasions that can occur at the hands of ordinary citizens (as opposed to the government, or previously, to those few individuals with access to easily concealable image recording devices).

This Comment discusses the need for greater privacy rights in light of technological advances, such as camera-phones, that threaten to invade one's privacy covertly in the public sphere. Part II summarizes the history of privacy: (1) the origins of the legal recognition of privacy, generally traced to Samuel D. Warren and Louis D. Brandeis and (2) privacy as a common law

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[15] Upskirting involves the use of cameras (video, phone, or otherwise) to capture images of unsuspecting women under their dresses or skirts. Stalking Resource Center, http://www.ncvc.org/src/main.aspx?dbID=DB_Is_It_Stalking158 (last visited Dec. 21, 2004). Another description of upskirting is as "a predatory sport that takes advantage of easily concealed, micro-camera technology – common in most mobile phones today – to secretly film unsuspecting victims in public. Voyeurs typically prey on potential victims in crowded places, such as slipping a bag with a camera under a woman's skirt in a shopping mall." Clay Calvert, *Revisiting the Voyeurism Value in the First Amendment: From the Sexually Sordid to the Details of Death*, 27 SEATTLE U. L. REV. 721, 727 & n.46 (2004).

[16] *See* H.R. REP. No. 108-504, at *3 (2004). Downblousing is also referred to as downshirting. 149 CONG. REC. S8234-01, *S8245 (daily ed. June 19, 2003) (statement of Sen. Dewine). Similarly intended to capture pictures of women's intimate areas, downblousing captures images of unsuspecting women down the front of their blouses/shirts. *Id.*; *see also* Stalking Resource Center, *supra* note 15.

[17] David D. Kremenetsky, *Insatiable "Up-Skirt" Voyeurs Force California Lawmakers to Expand Privacy Protection in Public Places*, 31 MCGEORGE L. REV. 285, 287 & n.20 (2000) ("Demand for 'up-skirt' pictures has produced more than one hundred Internet sites devoted to this genre.").

[18] *See infra* Part III.

right, as articulated by William Prosser. Part III discusses (1) privacy as a federally recognized right based on U.S. Supreme Court precedent and (2) Hawai'i's right to privacy, explicitly recognized in the Hawai'i Constitution as well as Hawai'i Supreme Court jurisprudence. Part IV analyzes the Video Voyeurism Prevention Act of 2004, the most recent piece of federal legislation that addresses camera-phones and their (mis)use to invade privacy. Part IV also discusses and compares various state statutes that address the same issue. Finally, Part IV includes an overview of cases involving invasions of privacy. Part V argues that the right to be free from intrusions in public should be recognized as a fundamental right and that Fourth Amendment protections should encompass expectations of privacy in public. Part V additionally offers suggestions for improving Hawai'i's voyeurism statute. Last, it proposes a video voyeurism tort, which would provide victims of voyeurism with a civil tort action. Part VI concludes this Comment, reiterating the need for privacy in public due to the invasions that occur because of technological advances.

II. ORIGINS OF PRIVACY AS A LEGAL CONCEPT

The legal right to privacy is by no means a new concept. Scholars have debated the subject since the late nineteenth century, most notably following an article written by Samuel D. Warren and Louis D. Brandeis, entitled *The Right to Privacy*.[19] William L. Prosser identified four common law torts encompassing this right to privacy, which the Restatement of Torts subsequently adopted.[20] These articles have so influenced privacy discourse that many people reflect and expand upon the ideas discussed within the articles to this day.

A. The Birth of Privacy as a Recognized Right

Spurred by concerns about technological advances, Samuel D. Warren and Louis D. Brandeis wrote their seminal Harvard Law Review article, *The Right to Privacy*,[21] which proclaimed "a right of privacy that had not previously

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[19] Quentin Burrows, Note, *Scowl Because You're on Candid Camera: Privacy and Video Surveillance*, 31 VAL. U. L. REV. 1079, 1084 (1997). *See also* Warren & Brandeis, *supra* note 2, at 193.

[20] Burrows, *supra* note 19, at 1085; *see also infra* Part II.B. The four torts are: (1) intrusion; (2) public disclosure of private facts, (3) false light in the public eye; and (4) appropriation. Maria Pope, *Technology Arms Peeping Toms With a New and Dangerous Arsenal: A Compelling Need For States to Adopt New Legislation*, 17 J. MARSHALL J. COMPUTER & INFO. L. 1167, 1172 & n.35 (1999).

[21] Warren & Brandeis, *supra* note 2.

existed."[22] Warren and Brandeis considered "whether the existing law affords a principle which can properly be invoked to protect the privacy of the individual; and, if it does, what the nature and extent of such protection is."[23] In particular, they expressed concern about the press overstepping its bounds[24] and about invasions of privacy resulting from "modern devices."[25] Regarding "modern devices," Warren and Brandeis proffered that because "modern devices afford abundant opportunities for the perpetration of such wrongs without any participation by the injured party, the protection granted by the law must be placed upon a broader foundation."[26]

Warren and Brandeis additionally discussed six limitations on the right to privacy: (1) "[t]he right to privacy does not prohibit any publication of matter which is of public or general interest";[27] (2) "[t]he right to privacy does not prohibit the communication of any matter, though in its nature private, when the publication is made under circumstances which would render it a privileged communication according to the law of slander and libel";[28] (3) "[t]he law would probably not grant any redress for the invasion of privacy by oral publication in the absence of special damage";[29] (4) "[t]he right to privacy ceases upon the publication of the facts by the individual, or with his consent";[30] (5) "[t]he truth of the matter published does not afford a defence";[31] and (6) "[t]he absence of 'malice' in the publisher does not afford a

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[22] Burrows, *supra* note 19, at 1085.

[23] Warren & Brandeis, *supra* note 2, at 197.

[24] *Id.* at 196. "The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade, which is pursued with industry as well as effrontery." *Id.*

[25] *Id.* at 211.

[26] *Id.*

[27] *Id.* at 214. Under this first limitation, Warren and Brandeis noted that the "law must . . . protect those persons with whose affairs the community has no legitimate concern, from being dragged into an undesirable and undesired publicity and to protect all persons . . . from having matters which they may properly prefer to keep private, made public against their will." *Id.* at 214-15. "[T]he matters of which the publication should be repressed may be described as those which concern the private life, habits, acts, and relations of an individual . . . ." *Id.* at 216.

[28] *Id.* "Under this rule, the right to privacy is not invaded by any publication made in a court of justice, in legislative bodies, . . . in municipal assemblies, or . . . practically by any communication made in any other public body . . . ." *Id.* The rule would similarly not "prohibit any publication made by one in the discharge of some public or private duty, . . . or in conduct of one's own affairs." *Id.* at 217.

[29] *Id.* "The injury resulting from such oral communications would ordinarily be so trifling that the law might well, in the interest of free speech, disregard it altogether." *Id.* & n.4.

[30] *Id.* at 218. It is important to note that "a private communication of circulation for a restricted purpose is not a publication within the meaning of the law." *Id.* & n.1.

[31] *Id.* at 218. "It is not for injury to the individual's character that redress or prevention is sought, but for injury to the right of privacy . . . . [because this] implies the right not merely to prevent inaccurate portrayal of private life, but to prevent its being depicted at all." *Id.*

defence."[32] In cases where an invasion of privacy has occurred, Warren and Brandeis suggested an action for tort damages or an injunction as possible remedies.[33]

B. Common-law Right of Privacy

Nearly seventy years later, William L. Prosser published an article, entitled *Privacy*, in response to this seminal article.[34] As defined by Prosser, the law of privacy is comprised of "four distinct kinds of invasion of four different interests of the plaintiff, which are tied together by the common name, but otherwise have almost nothing in common except that each represents an interference with the right of the plaintiff . . . 'to be let alone.'"[35] These four torts are: (1) "[i]ntrusion upon the plaintiff's seclusion or solitude, or into his private affairs";[36] (2) "[p]ublic disclosure of embarrassing private facts about the plaintiff";[37] (3) "[p]ublicity which places the plaintiff in a false light in the public eye";[38] and (4) "[a]ppropriation, for the defendant's advantage, of the plaintiff's name or likeness."[39]

1. Intrusion

According to Prosser, intrusion includes both physical and non-physical intrusion, such as eavesdropping via wiretapping.[40] The standard for finding an act intrusive, however, "must be something which would be offensive or objectionable to a reasonable man."[41] Second, "the thing into which there is prying or intrusion must be, and entitled to be, private."[42] On the other hand, a plaintiff does not have a right to be let alone "[o]n the public street, or in any other public place, . . . and it is no invasion of his privacy to do no more than

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[32] *Id.* "The invasion of privacy that is to be protected is equally complete and equally injurious, whether the motives by which the speaker or writer was actuated are, taken by themselves, culpable or not . . . . [T]his rule is the same pervading the whole law of torts, by which one is held responsible for his intentional acts, even though they are committed with no sinister intent." *Id.*

[33] *Id.* at 219.

[34] William L. Prosser, *Privacy*, 48 CAL L. REV. 383, 389 (1960).

[35] *Id.* (internal footnote omitted).

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.* at 390 & n.65.

[41] *Id.* at 390-91 & n.76.

[42] *Id.* at 391. Examples of non-private things: pre-trial testimony, photographs, fingerprints or measurements by police (when within their power), "inspection and public disclosure of corporate records." *Id.* & nn.77-79.

follow him about."[43] Likewise, it is not an invasion to take pictures of a plaintiff in these non-private arenas because "this amounts to nothing more than making a record . . . of a public sight which any one present would be free to see."[44]

2. Public disclosure of private facts

Unlike intrusion, public disclosure of private facts involves protecting one's reputation, "with the same overtones of mental distress that are present in libel and slander."[45] Prosser identified three limits to this privacy tort. The first requires that "the disclosure of the private facts must be a public disclosure, and not a private one."[46] The next stipulates that "the facts disclosed to the public must be private facts, and not public ones."[47] Last, "the matter made public must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities."[48]

3. False light in the public eye

Similar to disclosure of private facts, false light involves protecting reputation, "but the two differ in that one involves truth and the other lies, one private or secret facts and the other invention."[49] Both disclosure and false light require publicity.[50] False light invasion typically occurs in one of three ways. The first is when "publicity falsely attribut[es] to the plaintiff some opinion or utterance."[51] The second is "the use of the plaintiff's picture to illustrate

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[43] *Id.* at 391.

[44] *Id.* at 392.

[45] *Id.* at 398.

[46] *Id.* at 393. Examples of an invasion include "publish[ing] in a newspaper that the plaintiff does not pay his debts, or to post a notice to that effect in a window on the public street or cry it aloud in the highway." *Id.* & nn.90-92. It is not an "invasion to communicate that [plaintiff does not pay his debts] to the plaintiff's employer, or to any other individual, or even to a small group." *Id.* at 393 & nn.94-95.

[47] *Id.* at 394.

[48] *Id.* at 396.

> The law of privacy is not intended for the protection of any shrinking soul who is abnormally sensitive about such publicity. It is quite a different matter when the details of sexual relations are spread before the public gaze, or there is highly personal portrayal of his intimate private characteristics or conduct.

Id. at 397 & nn.119-21.

[49] *Id.* at 400.

[50] *Id.*

[51] *Id.* at 398 & n.129. Typical examples include "spurious books and articles, or ideas expressed in them, which purport to emanate from the plaintiff." *Id.* at 398-99 & n.132.

a book or an article with which he has no reasonable connection."[52] The third form "in which the tort occurs is the inclusion of the plaintiff's name, photograph and fingerprints in a public 'rogues' gallery' of convicted criminals, when he has not in fact been convicted of any crime."[53]

4. Appropriation

The last tort identified by Prosser is appropriation, which "consists of the appropriation, for the defendant's benefit or advantage, of the plaintiff's name or likeness."[54] Courts generally have employed a two-step inquiry to assess appropriation. The first question is "whether there has been appropriation of an aspect of the plaintiff's identity."[55] Following identification of the plaintiff, the next inquiry is "whether the defendant has appropriated the name or likeness for his own advantage."[56]

5. Common threads

Although the four torts differ from one another, Prosser mentioned that certain elements apply to all. First, the right of privacy is personal.[57] It therefore does not extend to family members unless their privacy is likewise invaded.[58] Similarly, invasion of privacy actions may or may not survive a plaintiff's death, depending on jurisdiction.[59]

C. Warren and Brandeis Revisited

There is no question that significant technological and social changes have taken place since the publication of *The Right to Privacy* and *Privacy*. As if

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[52] *Id.* at 399.

> [W]hen the face of some quite innocent and unrelated citizen is employed to ornament an article on the cheating propensities of taxi drivers, the negligence of children, profane love, "man hungry" women, juvenile delinquents, or the peddling of narcotics, there is an obvious innuendo that the article applies to him, which places him in a false light before the public and is actionable.

Id.

[53] *Id.*

[54] *Id.* at 401 & n.155. "It is the plaintiff's name as a symbol of his identity that is involved here, and not his name as a mere name." *Id.* at 403. "It is when [the defendant] makes use of the name to pirate the plaintiff's identity for some advantage of his own . . . that he becomes liable. It is in this sense that 'appropriation' must be understood." *Id.* & n.166.

[55] *Id.* at 403.

[56] *Id.* at 405.

[57] *Id.* at 408.

[58] *Id.* & nn.200-01.

[59] *Id.* at 408 & nn.203-04.

to have forecast the necessity for the law to accommodate social and technological changes, Warren and Brandeis, and Prosser, laid the ground work for the evolution of privacy rights. Privacy, like many other rights enjoyed by citizens, lies on a time continuum and is affected by social conditions. Warren and Brandeis focused a great deal on the media's role in exploiting personal, private information. But our expectations of the media have changed to the point that private information is almost expected to make its way to the news media (TV, newspaper, internet, magazine). The public demands to be informed regardless of the cost to the individual whose privacy is invaded. In the twenty-first century, this is especially problematic due to the abundance of and accessibility to media sources, resulting in the rapid and widespread dissemination of information.[60]

Various scholars, both individually and through symposia, revisited Warren and Brandeis's conceptions of privacy one hundred years after the publication of *The Right to Privacy*, to reevaluate the state of privacy in the 1990's, as compared to the late nineteenth century.[61] Class distinction; information regulation by only a few industries; strong community and family values; shared values; and social control epitomized the social climate that shaped notions of privacy in the late nineteenth century.[62] In the 1990's, on the other hand, concern about control over personal information; decentralized control of information and widely dispersed information; work as dominating one's identity (versus family and community values); individualism; and diverse

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[60] It is estimated that the average household has 2.24 televisions. *Television Statistics: Family Life*, http://www.csun.edu/~vceed002/health/docs/tv&health.html (last visited Dec. 21, 2004). Ninety-nine percent of households have at least one television. *Id.* Sixty-six percent have three or more sets. *Id.* On average, a television is on for six hours and forty-seven minutes per day in a home. *Id.* According to the census bureau, of 109,106 households surveyed in 2001, 56.3% had a computer and 50.4% had internet. Table 1A, http://www.census.gov/population/socdemo/computer/ppl-175.html (last visited Dec. 21, 2004). As far back as 1997, there were 46 million internet users over age seventeen. *Internet Statistics*, http://www.net-sites.net/stats.htm (last visited Dec. 21, 2004).

[61] *See, e.g.*, Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 647 (1991) (discussing the two distinct analyses in *The Right to Privacy*—descriptive and normative; the separation of personal and property rights; and the tort of appropriation); Frederick Schauer, *Reflections on the Value of Truth*, 41 CASE W. RES. L. REV. 699 (1991) (discussing the value of truth in relation to privacy torts and the power relationship that arises with knowledge); David W. Leebron, The Right to Privacy*'s Place in the Intellectual History of Tort Law*, 41 CASE W. RES. L. REV. 769 (1991) (discussing *The Right to Privacy* and its rights based approach in the scheme of tort law as well as the viability of privacy torts); David H. Flaherty, *On the Utility of Constitutional Rights to Privacy and Data Protection*, 41 CASE W. RES. L. REV. 831 (1991) (comparing privacy rights in the United States, Canada, and Germany and the protection of information technology); Gary T. Schwartz, *Explaining and Justifying a Limited Tort of False Light Invasion of Privacy*, 41 CASE W. RES. L. REV. 885 (1991) (discussing the false light tort in detail).

[62] Randall P. Bezanson, The Right to Privacy *Revisited: Privacy, News, and Social Change, 1890-1990*, 80 CAL. L. REV. 1133, 1139-44 (1992).

values reflected the priorities shaping privacy.[63] Many of the same social conditions exist today as they did the 1990's, but the explosion of technological advances has made individuals far more susceptible to invasions of privacy than ever before. America's voyeuristic tendencies and obsession with reality TV further exacerbates the problem because behaviors that might otherwise be considered unacceptable become normalized. Although the right to privacy has many facets, this Comment focuses primarily on invasions of privacy that involve unauthorized images of women's intimate areas.

III. FEDERAL AND HAWAI'I PRIVACY CASES

Notions of privacy have evolved substantially during the past century, and the U.S. Supreme Court has played an integral role in defining this right and creating the foundation upon which privacy is based today.[64] The cases in Part III.A trace the development of the federal right of privacy. Taking its cue from federal precedent, the Hawai'i Supreme Court has also analyzed privacy under the Hawai'i Constitution, which confers greater rights upon its citizens than does the U.S. Constitution.[65]

A. Privacy as a Federally Recognized Right

The right of privacy often is separated into two categories: privacy as a fundamental right and Fourth Amendment privacy. Fundamental rights privacy primarily involves intimate familial relationships and personal autonomy.[66] Fourth Amendment privacy contrastingly "stem[s] from criminal procedure cases."[67] Both strands have influenced and contributed to the development of current notions of privacy.

1. Fundamental right privacy

The U.S. Constitution does not explicitly recognize a right of privacy.[68] In

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[63] *Id.*

[64] *See infra* Part III.A.

[65] *See infra* Part III.B.

[66] *See infra* Part III.A.1.

[67] Burrows, *supra* note 19, at 1087.

[68] State v. Mueller, 66 Haw. 616, 620, 671 P.2d 1351, 1354 (1983) (The U.S. Constitution contains "no express provisions guaranteeing to persons the right to carry on their lives protected from the 'vicissitudes of the political process' by a zone of privacy or a right of personhood." (quoting L. Tribe, *American Constitutional Law* 893 (1978) (quotations omitted))). *See also* State v. Kam, 69 Haw. 483, 493, 74 P.2d 372, 378 (1988) (Privacy "is a right, that, though unstated in the federal Constitution, emanates from the penumbra of several guarantees of the Bill of Rights." (citing Committee of the Whole Rep. No. 15, at 1024)).

Griswold v. Connecticut,[69] however, the U.S. Supreme Court recognized the right of marital privacy as a fundamental right.[70] Justice Douglas found "that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."[71] According to Justice Douglas, these specific guarantees could be found in the First,[72] Third,[73] Fourth,[74] Fifth,[75] and Ninth[76] Amendments, thereby "creat[ing] zones of privacy."[77] Focusing on the Ninth Amendment, Justice Goldberg, in a concurrence, asserted that "the right of privacy in the marital relation is fundamental and basic—a personal right 'retained by the people' within the meaning of the Ninth Amendment."[78]

Subsequent to its recognition of marital privacy in *Griswold*, the Supreme Court has continued to expand the constitutional right of privacy. The Court

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[69] 381 U.S. 479 (1965).

[70] *Id.* at 485 (holding that the case "concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees"). This case is about a Connecticut statute that prohibited the use of contraceptives. *Id.* at 480.

[71] *Id.* at 484.

[72] "The right of association [is] contained in the penumbra of the First Amendment." *Id.* The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

[73] "The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy." *Griswold*, 381 U.S. at 484. The Third Amendment states: "[n]o Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law." U.S. CONST. amend. III.

[74] "The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.'" *Griswold*, 381 U.S. at 484. The Fourth Amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[75] "The Fifth Amendment in its Self-Incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment." *Griswold*, 381 U.S. at 484. The Fifth Amendment states, in relevant part: "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

[76] The Ninth Amendment states: "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. CONST. amend. IX.

[77] *Griswold*, 381 U.S. at 484.

[78] *Id.* at 499 (Goldberg, J., concurring). "In determining which rights are fundamental, judges . . . must look to the 'traditions and (collective) conscience of our people' to determine whether a principle is 'so rooted (there) as to be ranked as fundamental.'" *Id.* at 493 (quoting Snyder v. Com. of Massachusetts, 291 U.S. 97, 105 (1934)).

established that the right of privacy exists even outside the sacred realm of marriage.[79] Privacy rights were again expanded when the Court determined that the right of privacy includes a woman's decision to have an abortion.[80] Among the guarantees of personal privacy are activities relating to marriage, procreation, contraception, family relationships, and child-rearing and education.[81] Most recently, the Court determined that consensual homosexual conduct in the privacy of one's home is protected by the right to privacy.[82]

2. Fourth Amendment privacy

In addition to fundamental rights privacy, the right to privacy analysis includes Fourth Amendment privacy. The Fourth Amendment explicitly provides a right against "unreasonable searches and seizures."[83] The limitations on the right to privacy under the Fourth Amendment were provided for in *Katz v. United States*,[84] wherein Justice Stewart broadened constitutional privacy rights to protect that which an individual "seeks to preserve as private, even in an area accessible to the public."[85] Justice Stewart reasoned that "the Fourth Amendment protects people, not places."[86] He nonetheless cautioned that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.'"[87] In spite of this seeming limitation, the Court ultimately found that "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the [public] telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment."[88]

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[79] Eisenstadt v. Baird, 405 U.S. 438 (1972). This case also dealt with the distribution of contraceptives. *Id.*

[80] Roe v. Wade, 410 U.S. 113 (1973).

[81] *Id.* at 152-53. *See* Loving v. Virginia, 388 U.S. 1 (1967) (marriage); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation); *Eisenstadt*, 405 U.S. 438 (contraception); Prince v. Massachusetts, 321 U.S. 158 (1944) (family relationships); Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (child rearing and education).

[82] *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (The case involves "two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.").

[83] *See* U.S. CONST. amend. IV.

[84] 389 U.S. 347 (1967).

[85] *Id.* at 351. Therefore, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Id.*

[86] *Id.*

[87] *Id.* at 350.

[88] *Id.* at 353. "One who occupies [a telephone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world." *Id.* at 352. "No less than an individual in

Building upon Justice Stewart's majority opinion, Justice Harlan authored one of three concurring opinions. In his concurrence, Justice Harlan qualified Justice Stewart's assertion that the "Fourth Amendment protects people, not places,"[89] by noting that the protection afforded to people generally "requires reference to a 'place.'"[90] To determine this protection, one must satisfy a two-fold requirement: (1) "that a person have exhibited an actual (subjective) expectation of privacy"[91] and (2) "that the expectation be one that society is prepared to recognize as 'reasonable.'"[92] At present, the law generally does not protect an individual while he or she is in a public place because a reasonable expectation of privacy does not automatically extend to places outside of one's home.[93]

B. Privacy in Hawai'i

Hawai'i's privacy scheme differs from the federal right of privacy in that it confers a greater privacy right to its citizens. Most important, the Hawai'i Constitution, as contrasted with the U.S. Constitution, explicitly recognizes a right of privacy. The Hawai'i Constitution states: "The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right."[94]

Furthermore, the Hawai'i Constitution, like the Fourth Amendment, provides that "[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable searches, seizures and invasions of privacy shall not be violated."[95] Several Hawai'i Supreme Court and Intermediate Court of Appeals cases have interpreted the foregoing privacy rights, creating boundaries for their applicability.[96] Although these decisions attempt to define a right of privacy in Hawai'i, questions remain as to when this right is protected. Based on the primary privacy cases, however, the right to privacy does not generally extend to the public arena in Hawai'i.[97]

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a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment." *Id.* (footnotes omitted)

[89] *Id.* at 361 (Harlan, J., concurring) (quotations omitted).

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] Pope, *supra* note 20, at 1176-77 & n.70.

[94] HAW. CONST. art. I, § 6.

[95] *See id.* § 7.

[96] *See infra* Part III.B.1-5.

[97] *See infra* Part III.B.1-5.

1. State v. Mueller

In *State v. Mueller*,[98] the first in the line of Hawai'i's right to privacy cases, the Hawai'i Supreme Court held that "the right to privacy guaranteed by Article I, Section 6 of the Hawai'i Constitution is [not] broad enough to include a decision to engage in prostitution."[99] After analyzing the U.S. Supreme Court privacy cases,[100] the court reasoned that engaging in sex for hire is not a fundamental right "in the concept of liberty that underlies our society."[101] Thus, even though the framers of the Hawai'i Constitution created broader privacy rights than those afforded by the U.S. Constitution and federal law, the Hawai'i Supreme Court did not consider prostitution, an "immoral and degrading"[102] practice, to fall within the intended scope of article I, section 6.[103]

2. State v. Kam

In *State v. Kam*,[104] the Hawai'i Supreme Court extended article I, section 6 to "encompass[] the privacy right to read or view pornographic material in one's own home."[105] Because "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."[106] In this case, the state could not demonstrate a compelling government interest that justified the prohibition of the sale of pornographic material.[107] Justice Hayashi, writing for the majority, asserted that the

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[98] 66 Haw. 616, 671 P.2d 1351 (1983).

[99] *Id.* at 630, 671 P.2d at 1360 & n.9.

[100] *See* Griswold v. Connecticut, 381 U.S. 479 (1965) (contraceptives for married couples); Eisenstadt v. Baird, 405 U.S. 438 (1972) (contraceptives for unmarried individuals); Roe v. Wade, 410 U.S. 113 (1973) (abortion); Stanley v. Georgia, 394 U.S. 557, 568 (1969) ("We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. . . . [Although] the States retain broad power to regulate obscenity[,] that power simply does not extend to mere possession by the individual in the privacy of his own home.").

[101] *Mueller*, 66 Haw. at 630, 671 P.2d at 1360 (citing Palko v. Connecticut, 302 U.S. 319, 325 (1937)).

[102] *Id.* at 629, 671 P.2d at 1360.

[103] *Id.* at 630, 671 P.2d at 1360.

[104] 69 Haw. 483, 748 P.2d 372 (1988).

[105] *Id.* at 496, 748 P.2d at 380.

[106] *Id.* at 495, 748 P.2d at 380. "It is obvious that an adult person cannot read or view pornographic material in the privacy of his or her own home if the government prosecutes the sellers of pornography . . . and consequently bans any commercial distribution." *Id.* at 495, 748 P.2d at 379.

[107] *Id.*

"Hawai'i Constitution article I, section 6 . . . affords much greater privacy rights than the federal right to privacy."[108] It follows, therefore, that "[a]s the ultimate judicial tribunal with final, unreviewable authority to interpret and enforce the Hawai'i Constitution, [the Hawai'i Supreme Court is] free to give broader privacy protection than that given by the federal constitution."[109]

Diverging from its characterization of prostitution in *Mueller*, the court determined here that "[r]eading or viewing pornographic material in the privacy of one's own home in no way affects the general public's rights."[110] Moreover, Justice Hayashi adopted the reasoning set forth in *Stanley v. Georgia*:[111] "[i]f the First Amendment means anything, it means that *a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch.*"[112] He did so to bolster his conclusion that pornography, when viewed in one's home, is distinguishable from non-protected rights such as prostitution, and is therefore encompassed by a right to privacy.[113]

3. Baehr v. Lewin

The next privacy case evaluated by the Supreme Court of Hawai'i was *Baehr v. Lewin*.[114] *Baehr* addressed, for the first time, whether the fundamental right of marriage extends to same-sex couples.[115] In a plurality opinion, Justice Levinson held that same-sex couples "do not have a fundamental constitutional right to same-sex marriage arising out of the right to privacy or otherwise."[116] He reasoned that "same-sex marriage is [not] so rooted in the traditions and collective conscience of our people that failure to recognize it would violate the fundamental principles of liberty and justice

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

[109] *Id.* One significant factor of this case is that it "focuses squarely on *the home* as the situs of privacy." State v. Mallan, 86 Hawai'i 440, 444, 950 P.2d 178, 182 (1998). Additionally, the "freedom of speech and freedom of the press are strongly implicated." *Id.* at 445, 950 P.2d at 183.

[110] *Kam*, 69 Haw. at 494, 748 P.2d at 379.

[111] 394 U.S. 557 (1969).

[112] *Kam*, 69 Haw. at 494, 748 P.2d at 379 (quoting *Stanley*, 394 U.S. at 564-65) (quotations omitted).

[113] *Id.* at 496, 748 P.2d at 380. The court addressed *Mueller* rather flippantly, stating merely that *Kam* is distinguishable "because prostitution was not protected by the right to privacy." *Id.*

[114] 74 Haw. 530, 852 P.2d 44 (1993).

[115] *Id.* at 552, 852 P.2d at 55.

[116] *Id.* at 557, 852 P.2d at 57.

that lie at the base of all our civil and political institutions."[117] Nor is it "implicit in the concept of ordered liberty."[118]

Justice Levinson adopted the *Mueller* approach in his decision not to recognize same-sex marriage as a new fundamental right.[119] This deference and adherence to federal precedent arguably cut against the court's declaration in *Kam* that it has the power to "give broader privacy protection than that given by the federal constitution."[120] While Justice Levinson recognized the court's power to be expansive, he nonetheless opted to abide by the *Mueller* holding, which found Hawai'i's privacy right under article I, section 6 similar to the corresponding federal right.[121]

4. State v. Mallan

Last in the line of privacy cases, *State v. Mallan*[122] involved the recreational use of marijuana.[123] As might be expected, the Hawai'i Supreme Court, in a plurality opinion, declined to recognize the possession and use of marijuana for recreational purposes as a fundamental right.[124] The court refused to validate Mallan's contention that even though he smoked marijuana in a public parking lot, he was in the privacy of his car and should therefore be protected by the right to privacy.[125]

Citing committee reports from the Hawai'i Constitutional Convention, Justice Ramil determined that the "delegates who spoke in favor of the privacy provision did so based on their understanding that the right to privacy would

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[117] *Id.* at 556-57, 852 P.2d at 57.

[118] *Id.* at 557, 852 P.2d at 57. *Baehr*, like *Mueller*, employed a fundamental rights analysis, whereby "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' are included in this guarantee of personal privacy." State v. Mallan, 86 Hawai'i 440, 443, 950 P.2d 178, 181 (1998) (quoting State v. Mueller, 66 Haw. 616, 628, 671 P.2d 1351, 1355 (1983)) (quotations omitted).

[119] *Baehr*, 74 Haw. at 556, 852 P.2d at 57.

[120] State v. Kam, 69 Haw. 483, 491, 748 P.2d 372, 377 (1988).

[121] *Baehr*, 74 Haw. at 555-56, 852 P.2d at 57 (citing *Mueller*, 66 Haw. at 630, 671 P.2d at 1360).

[122] 86 Hawai'i 440, 950 P.2d 178.

[123] *Id.* at 442, 950 P.2d at 180.

[124] *Id.* at 445, 950 P.2d at 183.

[125] *Id.* at 447, 950 P.2d at 185 ("We are not prepared to extend the right of privacy this far."). But, it is difficult to determine whether the court would have found differently if Mallan had smoked marijuana in his car in his driveway, for example. After all, in *Kam*, the court focused, in large part, on "the home as the situs of privacy." Additionally, what about the fact that Mallan was alone and caused no harm to anyone else? Being alone and causing no harm to anyone else was justification for protecting the right to view pornography and the correlative right to purchase pornography. *See Kam*, 69 Haw. at 494-95, 748 P.2d at 379-80. Of course, *Kam* involved the First Amendment, whereas *Mallan* did not involve explicit Constitutional rights.

neither hinder law enforcement nor further criminal activity."[126] He further asserted that the "voters who later ratified the privacy provision"[127] similarly "did not intend to legalize contraband drugs."[128] Even though the majority declined to extend the scope of article I, section 6 based on the facts in this case, Justice Ramil's opinion did not foreclose the possibility of an expansion of privacy in the future.[129]

5. State v. Augafa

A separate element of Hawai'i's privacy scheme is the right to privacy analysis of Hawai'i's Constitution, article I, section 7, which mirrors Fourth Amendment privacy.[130] Under this analysis, as discussed in *State v. Augafa*,[131] privacy is not viewed as a fundamental right, "but [rather] a test of whether the prohibition against unreasonable searches and seizures [in article I, section 7 of the Hawai'i Constitution] applies."[132] Yet the court reaffirmed the principle, previously asserted by the Hawai'i Supreme Court, that "[a] person has a 'halo' of privacy wherever he goes and can invoke a protectable right to privacy wherever he may legitimately be and reasonably expect freedom from governmental intrusion."[133] The court qualified this, however, by stating that an individual's expectations of privacy may extend to his person but not necessarily to places where the individual might be.[134] Employing the same two-tiered reasonableness test identified by Justice Harlan in *Katz*,[135] the court determined that there is "no objectively reasonable expectation of privacy for persons, objects, or activities which [are] visible to the public and hence captured by the video camera."[136] It follows that privacy rights are not

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[126] *Mallan*, 86 Hawai'i at 450, 950 P.2d at 188.

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *See supra* text accompanying note 95.

[131] 92 Hawai'i 454, 992 P.2d 723 (Haw. Ct. App. 1999). This case involved the video surveillance of Augafa engaged in a drug transaction in public. *Id.* at 456-60, 992 P.2d at 725-29.

[132] *Id.* at 463, 992 P.2d at 732 (alterations in original).

[133] *Id.* at 464, 992 P.2d at 733 (quoting State v. Bonnell, 75 Haw. 124, 143, 856 P.2d 1265, 1275 (1993)) (alterations in original) (quotations omitted).

[134] *Id.*

[135] *See supra* text accompanying notes 91-92.

[136] *Augafa*, 92 Hawai'i at 467, 992 P.2d at 736. Factors to be considered in assessing the second prong of the *Katz* test are: "(1) 'the nature of the area involved'; (2) 'the precautions taken to insure privacy'; and (3) the 'type and character of [the] governmental invasion' employed." *Id.* at 464, 992 P.2d at 733 (quoting *Bonnell*, 75 Haw. at 143, 856 P.2d at 1275) (alterations in original).

violated when video surveillance records only what an observer standing in the same place would see with the naked eye.[137]

C. Reconciliation of the Hawai'i Privacy Cases

The foregoing privacy analysis reflects the Hawai'i judiciary's limited willingness to protect privacy rights. But the court's rationales are in conflict with regard to when and under what circumstances those rights are protected by the Hawai'i Constitution. Part of this conflict exists because of inconsistent privacy analyses. The court has the power to set the boundaries of privacy rights[138] but nevertheless tends to limit its analysis to federal precedent.[139] The Hawai'i Supreme Court has identified two approaches it employs as an initial step in privacy cases that implicate article I, section 6 of the Hawai'i Constitution: (1) *Stanley/Kam* and (2) *Mueller/Baehr*.[140] The *Stanley/Kam* approach involves "*the home* as the situs of privacy."[141] The home has traditionally been the one place where the Constitution confers greater rights upon individuals than they otherwise might be entitled to.[142] A

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[137] *Id.* at 467, 992 P.2d at 736 (citing State v. Costin, 720 A.2d 866, 870 (Vt. 1998)). *Cf.* State v. Viglielmo, 105 Hawai'i 197, 95 P.3d 952 (2004). In *Viglielmo*, a case involving the constitutional right to distribute pamphlets at Ala Moana Center (private property), the Hawai'i Supreme Court adopted U.S. Supreme Court precedent and held that "property does not 'lose its private character [for free speech purposes] merely because the public is generally invited to use it for designated purposes.'" *Id.* at 208, 95 P.3d at 963 (quoting Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972)) (alterations in original). Justice Levinson, writing for the majority, went on to state: "Notwithstanding Ala Moana's size, number of visitors monthly, central bus transfer station, United States Post Office, and Honolulu satellite city hall, we cannot conclude on the record before us that Ala Moana is akin to a state actor." *Id.* at 212, 95 P.3d at 967. More than two million people visit Ala Moana Center each month and it is home to over two hundred retail stores. *Id.* at 202, 95 P.3d at 957. The foregoing figures are staggering. The court has truly made a statement by upholding Ala Moana Center's private status in spite of the very "public" nature of the mall. Although *Viglielmo* addresses First Amendment rights versus privacy rights, the point can be arguably made that if the Hawai'i Supreme Court were to define privacy rights at a "private" although "public" location such as Ala Moana Center today, it might hold that there is indeed a reasonable expectation of privacy even when a person is in "public." *See id.* at 212, 95 P.3d at 967 ("Viglielmo's proposition that property is, without more, somehow converted from private to public for free speech purposes because it is openly accessible to the public is simply wrong as a matter of law.").

[138] *See supra* text accompanying notes 108-09.

[139] *See supra* text accompanying notes 120-21.

[140] State v. Mallan, 86 Hawai'i 440, 443-44, 950 P.2d 178, 181-82 (1998).

[141] *Id.* at 444, 950 P.2d at 182.

[142] *Id.* at 445, 950 P.2d at 183 ("The Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, child rearing, and education." (quoting United States v. Orito, 413 U.S. 139, 142 (1973) (quotations omitted))).

"second aspect of the *Stanley/Kam* approach is that freedom of speech and freedom of the press are strongly implicated."[143]

By contrast, the *Mueller/Baehr* approach focuses on intimate relationships.[144] When applying this approach, the court has "tended to focus on 'personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education.'"[145] If the right that one seeks to protect under the umbrella of privacy is deemed fundamental, that right is "'subject to interference only when a compelling state interest is demonstrated.'"[146]

While the court has identified these two distinct approaches, there is a question as to whether the court would adhere to such an analysis today. Two of the aforementioned privacy cases were plurality decisions.[147] In *Mallan*, the most recent of the privacy cases previously discussed, Justice Klein's concurrence (with whom Justice Nakayama joined) disagreed with the use of the above approaches "as an initial step in the [privacy] analysis."[148] Justice Klein instead asserted that "the right of privacy embodied in article I, section 6 is a *fundamental right in and of itself*,"[149] and that "[a]ny infringement of the right to privacy must be subjected to the compelling state interest test."[150] He proposed an approach for analyzing privacy that evaluates conduct and "the circumstances under which it is prohibited to determine whether it is reasonable to give the conduct constitutional protection."[151] This proposed case-by-case determination could lead to even more inconsistent results, but its mere assertion by Justice Klein arguably marks a potential shift in the analysis of future privacy claims in Hawai'i.

IV. FEDERAL AND STATE VOYEURISM STATUTES

The advent of miniaturized and dual-purpose technology has led to many invasions of privacy both in public and private spheres. In response to the increasing number of voyeurism cases, many states have passed statutes specifically addressing voyeurism.[152] But the punishment for the offense, as

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[143] *Id.*

[144] *Id.* at 444, 950 P.2d at 182.

[145] *Id.* (quoting State v. Mueller, 66 Haw. 616, 627, 671 P.2d 1351, 1359 (1983)).

[146] *Id.* at 443, 950 P.2d at 181 (quoting Comm. Whole Rep. No. 15, in 1 Proceedings of the Constitutional Convention of Hawai'i 1978, at 1024 (1980)).

[147] Both *Baehr* and *Mallan* were plurality decisions.

[148] *Mallan*, 86 Hawai'i at 510, 950 P.2d at 248 (Klein, J., concurring) (internal quotations omitted).

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *See infra* Part IV.B-C.

well as the intent required for a violation, varies greatly depending on jurisdiction. Most recently, Congress passed the Video Voyeurism Prevention Act of 2004 ("VVPA").[153]

A. Video Voyeurism Prevention Act of 2004

Originally introduced by Representative Oxley of Ohio[154] in 2003, the VVPA

> amends the Federal Criminal Code to prohibit a person, in the special maritime and territorial jurisdiction of the United States, from intentionally capturing an image of a private area of an individual without the individual's consent and the person capturing the image knowingly does so under circumstances in which the individual has a reasonable expectation of privacy.[155]

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[153] Video Voyeurism Prevention Act of 2004, S. 1301, 108th Cong. (2004) [hereinafter "VVPA"]. The VVPA provides:

> (a) Whoever, in the special maritime and territorial jurisdiction of the United States, has the intent to capture an image of a private area of an individual without their [sic] consent, and knowingly does so under circumstances in which the individual has a reasonable expectation of privacy, shall be fined under this title or imprisoned not more than one year, or both.
>
> (b) In this section—
>
> (1) the term "capture", with respect to an image, means to videotape, photograph, film, record by any means, or broadcast;
>
> (2) the term "broadcast" means to electronically transmit a visual image with the intent that it be viewed by a person or persons;
>
> (3) the term "a private area of the individual" means the naked or undergarment clad genitals, pubic area, buttocks, or female breast of that individual;
>
> (4) the term "female breast" means any portion of the female breast below the areola; and
>
> (5) the term "under circumstances in which that individual has a reasonable expectation of privacy" means—
>
> (A) circumstances in which a reasonable person would believe that he or she could disrobe in privacy, without being concerned that an image of a private area of the individual was being captured or
>
> (B) circumstance in which a reasonable person would believe that a private area of the individual would not be visible to the public, regardless of whether that person is in a public or private place.
>
> (c) This section does not prohibit any lawful law enforcement, correctional, or intelligence activity.

Id.

[154] 150 CONG. REC. H7267-01, *H7268 (daily ed. Sept. 21, 2004). Senator DeWine of Ohio passed the companion bill in the Senate. *Id.*

[155] H.R. REP. NO. 108-504, at *2 (2004). *See supra* note 153 for definitions of "private area" and "circumstances in which the individual has a reasonable expectation of privacy."

It was enacted to address the increasing incidence of video voyeurism.[156] By design, the VVPA "criminalize[s] the appalling practice of filming or photographing victims without their knowledge or consent under circumstances violating their privacy."[157] The limitation of the VVPA is that it only criminalizes video voyeurism on federal property.[158] Notable features of the VVPA include: (1) the recognition of a right to privacy in *public* places[159] and (2) model legislation for states without such laws in place, or those with outdated or inadequate laws for properly dealing with the invasions that result from advances in technology.[160] Violations under this act are punishable by up to one year in prison, a fine not exceeding $100,000, or both.[161]

Congress realized that although many states have enacted laws to address voyeurism, loopholes in these laws undermine privacy protection.[162] Legislative history for the VVPA recognized that "[t]he development of small, concealed cameras and cell phone cameras, along with the instantaneous distribution capabilities of the Internet, have combined to create a threat to the privacy of unsuspecting adults, high school students, and children."[163] Individuals whose privacy has been violated often find the violation "compounded when the pictures or photographs find their way to the Internet."[164] Ohio State Representative Ed Jerse acknowledged the terrifying reality that a woman's (or man's) "privacy could be violated millions of times"[165] if her picture were posted on the Internet.

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[156] 149 CONG. REC. S8234-01, *S8245 (daily ed. June 19, 2003). "The widespread availability of low-cost, high-resolution cameras has lead to an increase in the number of high-profile cases of 'video-voyeurism' all over our country. Reports of women being secretly videotaped through their clothing at shopping malls, amusement parks, and other public places are far too common." *Id.*

[157] *Id.*

[158] 150 CONG. REC. H7267-01, *H7267. Federal property includes national parks and federal buildings. *Id.*

[159] This right is based on the "well-accepted legal concept that individuals are entitled to a reasonable expectation of privacy." *Id.*

[160] *Id.* at *H7267-68.

[161] H.R. REP. NO. 108-504, at *3 (2004).

[162] *Id.* at *2.

[163] *Id.*

[164] *Id.* "The impact of video voyeurism on its victims is greatly exacerbated by the Internet. As a result of Internet technology, the pictures that a voyeur captures can be disseminated to a worldwide audience in a matter of seconds." 149 CONG. REC. S8234-01, *S8245 (daily ed. June 19, 2003).

[165] 149 CONG. REC. S8234-01, *S8245.

B. Hawai'i Addresses Voyeurism

Hawai'i currently has a video voyeurism statute,[166] signed into law in 2003 by Governor Linda Lingle.[167] The passage of the bill followed the well-publicized story about Tyler Takehara, a voyeur who shot video up the skirts of unsuspecting women at Ala Moana Center in Honolulu, Hawai'i.[168] Takehara, a 50 year old male, taped at least 29 women at Ala Moana Center in August, 2002.[169] He managed to escape conviction because of a legal loophole—at the time, Hawai'i law prohibited only the installation of tiny cameras in private places, such as bathrooms.[170]

To commit a violation of privacy in the second degree (a misdemeanor) under the statute, a person must intentionally "covertly record[] or broadcast[] an image of another person's intimate area underneath clothing, by use of any device, and that image is taken while that person is in a public place and without a person's consent."[171] Courts may impose appropriate penalties and "order the destruction of any recording made in violation of this section."[172]

C. State Statutes

Many states have enacted similar statutes to deal with voyeurism. Legislators often passed such laws to address disturbing instances of voyeurism that could not properly be prosecuted due to gaps in existing laws. While most of the statutes share common elements, their intent requirements, offense classifications, and punishments differ somewhat across jurisdictions. Some of the more prominent state statutes include those of Louisiana, Ohio, Washington, and Minnesota.

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[166] HAW. REV. STAT. § 711-1111 (2004), *amended by* 2004 Haw. Sess. Laws Act 83 (S.B. 2377).

[167] Associated Press, Bruce Dunford, *Lingle Signs "Video Voyeur" Bill Into Law* (May 10, 2003), *available at* http://starbulletin.com/2003/05/10/news/story6.html (last visited Dec. 21, 2004).

[168] *Id.* Ala Moana Center is the largest shopping mall in the state of Hawai'i. *Id.*

[169] *Id.*

[170] *Id.*

[171] HAW. REV. STAT. § 711-1111(1)(d). "'Intimate areas underneath clothing' does not include intimate areas visible through a person's clothing or intimate areas exposed in public." *See id.* § 711-1111(3). "'Public place' means an area generally open to the public, regardless of whether it is privately owned, and includes but is not limited to streets, sidewalks, bridges, alleys, plazas, parks, driveways, parking lots, buses, tunnels, buildings, stores, and restaurants." *See id.*

[172] *See id.* § 711-1111(4).

1. Louisiana

Louisiana was the first state to elevate video voyeurism to a felony.[173] Prior to this law, Louisiana had not made video voyeurism an illegal act.[174] The failure of laws to keep pace with technology is an unfortunate reality. No one understands this better than Susan Wilson. A Monroe, Louisiana resident, Wilson was the victim of an extremely invasive case of video voyeurism.[175] Over the course of months, Wilson's neighbor watched her and her family in their home via video camera equipment that he installed in their attic.[176]

Following this gross invasion of privacy, Louisiana enacted a broad law specifically addressing video voyeurism. It defines video voyeurism as (1) the use of a device that can record an image for the purpose of capturing an image of a person who has not consented to the same and (2) the image is taken for a "lewd or lascivious purpose."[177] In other words, a person who records any type of image of another, without that person's consent, for any lewd purpose, has committed video voyeurism. Punishment for this offense is determined not only by the number of times an individual is convicted of voyeurism, but also based on the egregiousness of the offense. For a first conviction of video voyeurism, an individual shall "be fined not more than two thousand dollars or imprisoned, with or without hard labor, for not more than two years, or both."[178] A second conviction results in a fine of "not more than two thousand dollars and imprison[ment] at hard labor for not less than six months nor more than three years without benefit of parole, probation, or suspension of

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[173] Calvert, *supra* note 15, at 725 & n.29.

[174] H.R. REP. NO. 108-504, at *3 (2004).

[175] *Id.* This author recognizes that the Susan Wilson situation is different from the invasions of privacy discussed herein because it took place within the home, a private space. However, the anecdotal reference was made to illustrate a particularly egregious case of invasion of privacy; one so offensive that the Louisiana legislature responded with a statute that imposes severe punishments.

[176] *Id.*

[177] LA. REV. STAT. § 14:283(A) (2004). The full text states:

> A. Video voyeurism is:
>
> (1) The use of any camera, videotape, photo-optical, photo-electric, or any other image recording device for the purpose of observing, viewing, photographing, filming, or videotaping a person where that person has not consented to the observing, viewing, photographing, filming, or videotaping and it is for a lewd or lascivious purpose; or
>
> (2) The transfer of an image obtained by activity described in Paragraph (1) of this Subsection by live or recorded telephone message, electronic mail, the Internet, or a commercial online service.

See id.

[178] *See id.* § 14:283(B)(1).

sentence."[179] Significantly harsher punishments are imposed when someone commits video voyeurism (as earlier defined)[180] and such voyeurism involves sex acts or uncovered intimate areas,[181] or children under seventeen years of age with the intention of sexual gratification or arousal.[182] In both cases, punishment involves a fine of not more than ten thousand dollars, but the imprisonment range is twice as long for violations of the latter.[183] Moreover, a violation under this statute is considered a sex offense and the offender must therefore register as a sex offender.[184] This statute, by broadly defining voyeurism, protects fully-clothed individuals whose images are captured by another when that person does so "for a lewd or lascivious purpose."[185]

2. Ohio

Ohio, like Louisiana, has experienced its share of publicized incidents of voyeurism and responded at state and federal levels. The state legislature responded by enacting a statute prohibiting voyeurism. Moreover, U.S. Representative Oxley (R-Ohio) and U.S. Senator DeWine (R-Ohio) also did so by introducing the VVPA in Congress.[186] In his introduction of the VVPA, Senator DeWine cited an incident in Ohio that exemplified the need for voyeurism statutes.[187] A voyeur (whose video camera was hidden in his bag)

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[179] *See id.* § 14:283(B)(2).

[180] *See supra* note 177.

[181] *See* LA. REV. STAT. § 14:283(B)(3).

> Whoever commits the crime of video voyeurism when the observing, viewing, photographing, filming, or videotaping is of any vaginal of anal sexual intercourse, actual or simulated sexual intercourse, masturbation, any portion of the female breast below the top of the areola or of any portion of the pubic hair, anus, cleft of the buttocks, vulva, or genitals shall be fined not more than ten thousand dollars and be imprisoned at hard labor for not less than one year or more than five years, without benefit of parole, probation, or suspension of sentence.

See id.

[182] *See id.* § 14:283(B)(4).

> Whoever commits the crime of video voyeurism when the observing, viewing, photographing, filming, or videotaping is of any child under the age of seventeen with the intention of arousing or gratifying the sexual desires of the offender shall be fined not more than ten thousand dollars and be imprisoned at hard labor for not less than two years or more than ten years without benefit of parole, probation, or suspension of sentence.

See id.

[183] *See supra* notes 181-82.

[184] LA. REV. STAT. § 14:283(F).

[185] *See id.* § 14:283(A)(1).

[186] 150 CONG. REC. H7267-01, *H7268 (daily ed. Sept. 21, 2004).

[187] 149 CONG. REC. S8234-01, *S8245 (daily ed. June 19, 2003).

was caught videotaping up a woman's dress at a church festival as the woman bent over to put her sixteen-month old daughter in her stroller.[188]

Ohio has a statute that criminalizes voyeurism,[189] although the punishment for these acts is not as severe as that provided for in the Louisiana statute.[190] The statute specifically provides, in relevant part, that "[n]o person shall secretly or surreptitiously videotape, film, photograph, or otherwise record another person under or through the clothing being worn by that person for the purpose of viewing the body of, or the undergarments worn by, that other person."[191] A violation of the foregoing provision is a first degree misdemeanor,[192] generally punishable by less than one year of imprisonment.[193]

3. Washington

In Washington, there is not only a statute prohibiting voyeurism,[194] but case law as well. Washington is one of the few jurisdictions in which the courts already have addressed the state's voyeurism statute.[195] Two cases discuss the former version of the voyeurism statute, which provided that

> A person commits the crime of voyeurism if, for the purpose of arousing or gratifying the sexual desire of any person, he or she knowingly views, photographs, or films another person, without that person's knowledge and consent, while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy.[196]

It is under this version that the Washington Supreme Court found, in *State v. Glas*,[197] that "the voyeurism statute, as written, does not prohibit upskirt photography in a public location."[198] The court reasoned that the plain language of the statute did not cover intrusions in public, even if the legislature

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[188] *Id.* The perpetrator had taken video of 13 women on the same day. *Id.*

[189] *See* OHIO REV. CODE ANN. § 2907.08 (West 2000).

[190] *See id.*

[191] *See id.* § 2907.08(E).

[192] *See id.* § 2907.08(F)(4).

[193] *See id.* § 2901.02(F) (West 2005).

[194] It should be noted that the Washington statute combines all types of voyeurism—video and conventional viewing-only voyeurism.

[195] *See infra* text accompanying notes 197-207.

[196] State v. Larson, No. 51169-6-I, 2003 WL 22766043, at *2 (Wash. App. Div. 1 Nov. 23, 2003) (quoting RCW 9A.44.115(2)).

[197] 54 P.2d 147 (Wash. 2002) (en banc). In this case, the first defendant, Glas, was caught taking pictures up two women's skirts at a mall in Union Gap, Washington. *Id.* at 149. The second defendant, Sorrells, took video up the dresses and skirts of little girls and adults at Seattle Center. *Id.*

[198] *Id.* at 150.

might have intended for it to do just that.[199] Thus, "the plain language of RCW 9A.44.115 [(former version)] does not cover an expectation of privacy in a public place."[200] Even though the court characterized the defendants' behavior as "disgusting and reprehensible," it nevertheless held that the voyeurism statute did "not apply to actions taken in purely public places."[201]

Taking its cue from *Glas*, the Court of Appeals of Washington determined, in *State v. Larson*,[202] that "a private nursing home is not a purely public place analogous to a shopping mall or Seattle Center."[203] The defendant in this case, Donald Larson, took video of a nursing home resident's breasts by sticking his video camera up her blouse.[204] He contended that a nursing home is a public place, so his conduct was not criminal.[205] In its analysis, the court focused on one of two definitions of "a place where a person would have a reasonable expectation of privacy,"[206] which means "where one may reasonably expect to be safe from casual or hostile intrusion or surveillance."[207] Relying on this definition, the court highlighted the purpose of a nursing home—"to protect [residents] from casual or hostile intrusion or surveillance"[208]—to distinguish it from public places where voyeurism was not illegal.[209]

In May of 2003, Washington legislators responded to the *Glas* decision by adding a specific provision that criminalizes the taking of photographs or other images ("for the purpose of arousing or gratifying the sexual desire of *any person*"[210]) of "[t]he intimate areas of another person without that person's knowledge and consent and under circumstances where the person has a reasonable expectation of privacy, whether in a *public* or private place."[211] An intimate area is defined as "any portion of a person's body or

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[199] *Id.* at 151.

[200] *Id.* at 152.

[201] *Id.* at 154.

[202] No. 51169-6-I, 2003 WL 22766043, at *3 (Wash. App. Div. 1 Nov. 23, 2003). Although this case was decided after the current version of the voyeurism statute took effect, the old statute applied. *Id.* at *1.

[203] *Id.* at *3.

[204] *Id.* at *1.

[205] *Id.* at *3.

[206] *Id.* at *2.

[207] *Id.* (quoting WASH. REV. CODE § 9A.44.115(1)(b)(ii) (current version at WASH. REV. CODE ANN. § 9A.44.115(1)(c)(ii) (West 2003)) (quotations omitted). The other definition is "where a reasonable person would believe that he or she could disrobe in privacy, without being concerned that his or her undressing was being photographed or filmed by another." *Id.* (quoting RCW 9A.44.115(1)(b)(i)) (quotations omitted); WASH. REV. CODE ANN. § 9A.44.115(1)(c)(i).

[208] *Larson*, 2003 WL 22766043, at *3.

[209] *Id.*

[210] WASH. REV. CODE ANN. § 9A.44.115(2) (emphasis added).

[211] *See id.* § 9A.44.115(2)(b) (emphasis added).

undergarments that is covered by clothing and intended to be protected from public view."[212] Like the Louisiana voyeurism statute, this statute classifies the crime as a felony.[213] Unlike Louisiana, however, voyeurism in Washington requires that the images be of intimate areas.

4. Minnesota

The Minnesota Court of Appeals recently rendered a decision in *State v. Morris*,[214] an upskirt case which involved a violation of Minnesota's voyeurism statute. In *Morris*, the defendant concealed a video camera in a bag and proceeded to take video underneath the skirt of a sales clerk at J.C. Penney.[215] The issue before the court was whether the defendant violated Minnesota Statute section 609.746(1)(d).[216] The court determined that the defendant had indeed violated the statute.[217] Of quite innovative significance, the court chose to characterize the opening in the victim's skirt as a "place where a reasonable person has an expectation of privacy."[218] It asserted that "the area under a skirt . . . *is* a place or location. . . . By reason of the act of wearing of a covering, the person has defined a spatial location, associated with his or her intimate parts, as a zone of privacy."[219] Therefore, the court upheld the defendant's conviction,[220] because he "surreptitiously positioned a video camera lens underneath [the sales clerk]'s skirt, a place where [she] had a

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[212] *See id.* § 9A.44.115(1)(a).

[213] *See id.* § 9A.44.115(3). Class C felony punishment shall not exceed five years confinement in a state correctional institution, a fine of ten thousand dollars as fixed by the court, or both such confinement and fine. *See id.* § 9A.20.021(1)(c) (West 2004).

[214] 644 N.W.2d 114 (Minn. Ct. App. 2002).

[215] *Id.* at 115. "The videotape clearly demonstrated that the camera had been placed under [the sales clerk]'s skirt, and that film had been taken of her underpants, which directly cover her intimate parts. In fact, it is obvious that the camera was placed under her skirt several different times, and that many such pictures were taken." *Id.* at 115-16.

[216] *Id.* at 116. The statute provides:

A person is guilty of a misdemeanor who:

(1) surreptitiously installs or uses any device for observing, photographing, recording, amplifying, or broadcasting sounds or events through the window or other aperture of a sleeping room in a hotel, . . . a tanning booth, or other place where a reasonable person would have an expectation of privacy and has exposed or is likely to expose their intimate parts, . . . or the clothing covering the immediate area of the intimate parts; and

(2) does so with intent to intrude upon or interfere with the privacy of the occupant.

Id. (quoting MINN. STAT. § 609.764(1)(d) (2000)) (quotations omitted).

[217] *Id.* at 118.

[218] *Id.* at 117.

[219] *Id.*

[220] *Id.* Defendant received a sentence of 90 days in jail and a $1,000 fine. *Id.* at 116.

reasonable expectation of privacy, so as to photograph the clothing covering the immediate area of the intimate parts of her body, with the intent to intrude upon or interfere with her privacy."[221]

These cases and state statutes reflect the range of punishments and varying requirements that prosecutors must satisfy in order convict a defendant of voyeurism. Many other states have enacted their own versions of the preceding laws.[222] Until these laws are applied and assessed by the courts, however, it is difficult to say whether a general right to privacy in public will become the new standard of privacy law.

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[221] *Id.* at 118.

[222] COLO. REV. STAT. ANN. § 18-7-801 (West 2004) (criminal invasion of privacy; crime is misdemeanor; knowing requirement; reasonable expectation of privacy); IOWA CODE ANN. § 709.19A (West 2004) (invasion of privacy—a misdemeanor—statute requires the following: knowingly and for sexual gratification; without consent; full or partial nudity; reasonable expectation of privacy); ME. REV. STAT. ANN. tit. 17-A § 511 (West 2004) (violation of privacy statute requiring intent to observe or photograph in a public place when portion of body is "concealed from public view under clothing and a reasonable person would expect it to be safe from surveillance."); MICH. COMP. LAWS ANN. § 750.539j (West 2004) (the crime involves photographing or otherwise recording underwear or unclad intimate areas; individual should have reasonable expectation of privacy; punishment is felony); MO. ANN. STAT. § 565.252 (West 2004) (invasion of privacy statute with key elements such as knowingly photographing or filming without consent; reasonable expectation of privacy; state of full or partial nudity; subsequent distribution or transmission of image captured); MO. ANN. STAT. § 565.253 (West 2002) (same with added provision constituting invasion: "uses a concealed . . . camera . . . to secretly videotape, photograph, or record by electronic means another person under or through the clothing worn by that other person for the purpose of viewing the body of or the undergarments worn by that other person without that person's consent."); OR. REV. STAT. § 163.700 (2001) (knowing requirement; reasonable expectation of privacy; state of nudity; for sexual gratification; crime is a misdemeanor); PA. STAT. ANN. tit. 18, § 7507.1 (West 2004) (invasion of privacy statute with key elements such as knowingly photographing or filming without consent; full or partial nudity; reasonable expectation of privacy; crime classified as misdemeanor); S.D. CODIFIED LAWS § 22-21-4 (Michie 2004) (invasion of privacy statute—misdemeanor—prohibits secret photographing, filming of person without clothing or under or through clothing; sexual gratification requirement; reasonable expectation of privacy; without consent); TENN. CODE ANN. § 39-13-605 (2000) (invasion of privacy statute prohibiting knowing photography of individual without consent where there is a reasonable expectation of privacy if (1) would embarrass or offend person and (2) for sexual gratification purposes; misdemeanor, but felony if photographs are disseminated); UTAH CODE ANN. § 76-9-702.7 (2004) (voyeurism statute where individual has reasonable expectation of privacy in his or her body, whether covered by clothes or not; misdemeanor unless committed against a child under 14 years or if images are disseminated, in which case it is a felony); W. VA. CODE § 61-8-28 (2000) (invasion of privacy statute; full or partially nude; reasonable expectation of privacy; knowingly portrays another person; misdemeanor).

V. A NEW LOOK AT INVASIONS OF PRIVACY

The recent passage of the VVPA and the numerous state statutes addressing voyeurism begs the questions: is this enough? If yes, for how long? And if not, where do we go from here? What is satisfactory now might be inadequate in a matter of months. Existing statutes cannot keep pace with rapidly developing technological innovations that spark novel methods of invading privacy. While various state legislatures enact new laws constantly to protect against invasions of privacy, technology creates loopholes in those laws by making tools available for invasions not contemplated by lawmakers, and thus not addressed in the statutes. In effect, voyeurs go unpunished because their conduct has yet to be prohibited. Even when voyeurism is punishable, the crime is classified largely as a misdemeanor.[223] Because rather inconsequential sentences accompany misdemeanors, potential offenders are unlikely to be deterred.

Another problem facing victims of voyeurism is the general failure of tort law to recognize intrusions in the public sphere. Without a remedy in tort, these victims have no way to collect damages for their injuries. Although the injuries are primarily emotional (as opposed to physical) in nature, and therefore difficult to measure, victims nonetheless should have the opportunity to prove such injuries.

Last, but not least, U.S. Supreme Court decisions do not readily recognize privacy in public.[224] Even so, states can protect the right to privacy, for the "right to be let alone by other people . . . [is] left largely to the law of the individual States."[225] Because individual states such as Hawai'i can and do afford greater rights to their citizens, they should recognize privacy in public. This recognition can be limited to certain circumstances (i.e. privacy for covered intimate areas) but is necessary in light of voyeurism and technology today.

A. Where Does Hawai'i Go From Here?

As previously discussed, the Hawai'i Constitution and the Hawai'i Supreme Court recognize privacy rights greater than those afforded under the U.S. Constitution or federal law.[226] These broader rights should involve express recognition of a fundamental right against invasions of privacy in public places or a reasonable expectation of privacy in public, or both. In particular,

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[223] *See supra* note 222.

[224] Pope, *supra* note 20, at 1176-77.

[225] Katz v. United States, 389 U.S. 347, 350-51 & n.7 (1967).

[226] *See supra* Part III.A-B.

this Comment focuses on protection from voyeuristic invasion. The challenge in dealing with the privacy right proposed herein is that it does not involve governmental intrusion or the constitutionality of a statute. So, the privacy cases earlier discussed serve primarily as guides for how this privacy right against voyeurism might be analyzed by the U.S. or Hawai'i Supreme Courts.

The legislature and Governor Lingle have already taken steps to criminalize voyeurism through the voyeurism statute.[227] But this statute has its shortcomings. The public would benefit if the statute were amended to reflect more closely the punishment imposed by the VVPA and other state statutes, such as Louisiana.

1. Recognition of the fundamental right against invasion in public and/or Fourth Amendment reasonable expectation of privacy in public

Now that voyeurs increasingly are invading people's privacy in the public sphere, the Hawai'i Supreme Court should distinguish the circumstances under which it found no privacy rights in public from the voyeurism issues facing many people (namely women) today. Specifically, the court should recognize a fundamental right to be free from voyeuristic, uninvited/unwanted invasions in public. Some might argue that fundamental rights are traditionally reserved for intimate relationships and rights exercised within the privacy of one's home. This author agrees, but proposes that the right to protect one's body (especially covered intimate areas) from invasions in public (images captured without consent) should be recognized as a fundamental right and is warranted based on the ease with which voyeurs invade privacy using camera-phones and other similar devices. It would not be reasonable to protect people only while they are in their homes. Additionally, if rights such as procreation, contraception, family relationships, consensual sex, etc. are deemed fundamental, then the right to protect against unwanted intrusions should be classified similarly. The right to control one's body arguably is more fundamental than some of these already-recognized rights. People should have the power to determine if and/or when others may capture images of their most private and personal areas.

It is difficult to determine whether the U.S. Supreme Court will recognize the right to be free from public invasions by camera-phones or other recording devices in the near future. A lack of federal recognition, however, would not preclude the Hawai'i Supreme Court from identifying the right as fundamental. Because the Hawai'i Constitution confers greater rights upon its

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[227] *See supra* Part IV.B.

citizens than does the U.S. Constitution, the court has the power to broaden the rights of Hawai'i's citizens.[228]

The crucial distinction between the Hawai'i cases that limited the right to privacy by adhering to federal precedent (*Mueller*, *Baehr*, *Mallan*) and voyeurism cases today is that when a woman places herself in the public sphere, she does not correspondingly place her covered intimate areas in public for exposure. The *Morris* decision perhaps best articulated this principle. The Minnesota Court of Appeals characterized the area under a woman's skirt (this author would also contend that this would logically extend to a woman's chest area) as a place where a reasonable person would have an expectation of privacy[229] and that a zone of privacy is created because the area is covered.[230] Just because someone is in public (and therefore not in the confines and protection of the home), it should not follow that he or she lacks privacy rights. It is this author's hope that if the court has the occasion to evaluate the right to be free from voyeuristic invasions, it will employ the case-by-case analysis proposed by Justice Klein's concurrence in *Mallan* "in order to give voice to the fundamental right to privacy [Hawai'i] citizens have incorporated as one of their explicit constitutional protections."[231]

Citizens also have privacy rights under article I, section 7 of the Hawai'i Constitution (and the Fourth Amendment). The types of invasions discussed in this Comment and jurisprudence regarding article I, section 7 are distinguishable. According to *Augafa*, video surveillance does not invade privacy if a person standing in the same place can observe the same thing with the naked eye.[232] Voyeurism by way of camera-phone is especially offensive because it generally involves capturing images that cannot easily be seen. First of all, upskirt and downblouse video or photographs do not qualify as images which would be easily seen with the naked eye; it takes effort to capture these images. If voyeurs were to see the images they capture with the naked eye, their victims and others around them would be aware of the perverse behavior.[233] Second, even if someone could successfully contend that these covered intimate areas can sometimes be seen with the naked eye (and that a photograph or video of such does not therefore invade privacy), this

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[228] *See supra* text accompanying notes 108-09.

[229] *See supra* text accompanying note 218.

[230] *See supra* text accompanying note 219.

[231] State v. Mallan, 86 Hawai'i 440, 510, 950 P.2d 178, 248 (1998) (Klein, J., concurring).

[232] State v. Augafa, 92 Hawai'i 454, 467, 992 P.2d 723, 736 (Haw. Ct. App. 1999) (citing State v. Costin, 720 A.2d 866, 870 (Vt. 1998)).

[233] For example, when a voyeur takes an upskirt image, the recording device has to be placed under a woman's skirt. And only by doing this is the voyeur able to see the woman's intimate area. If a voyeur were to see such an intimate area with his or her naked eye, the voyeur's body would have to be contorted in a manner that would put others on notice of the behavior.

author highly doubts that the drafters of the Hawai'i Constitution intended to protect citizens from invasions only to allow voyeurs to capture images of these citizens' covered intimate areas because those areas are visible to the naked eye.[234] The holding in *Augafa*—that there is no reasonable expectation of privacy in public[235]—is therefore not especially applicable to voyeurism.

The recent *State v. Viglielmo*[236] decision further lends support to the possibility of privacy rights in "public" spaces when that space is privately owned. Just because the public is invited to Ala Moana Center, Ala Moana does not lose its private character.[237] If this concept is extended to privacy rights, *Viglielmo* would protect individuals from invasions in "public" places like Ala Moana Center (where a well-publicized incident occurred) because these locations are nonetheless private by virtue of ownership. Even if Hawai'i courts do not apply the concept of a private designation for a public location to privacy rights, this author contends that individuals are entitled to an expectation of privacy in public. Perhaps the most effective way to address voyeurism, however, is through Hawai'i's voyeurism statute.

2. Refining Hawai'i's voyeurism statute

As with many of the statutes adhered to by other states, voyeurism is classified as a misdemeanor under Hawai'i Revised Statutes ("HRS") section 711-1111. But the deterrent value of a misdemeanor is significantly less than the deterrent value of a felony offense.[238] First, the voyeur commits an act surreptitiously, which means that there is a good chance that the majority of voyeurs do not get caught. Second, if they are caught, they must be found guilty of the crime. Last, the sentence imposed is rarely the most severe, especially for first time offenders. In light of this potential shortcoming of HRS section 711-1111, Hawai'i should look to the punishment schemes of the VVPA and states such as Louisiana or Washington.

Most of the well-publicized voyeurism cases to date have dealt with surreptitious videotaping, but the statutes enacted in response generally criminalize voyeuristic photography and other recording methods as well. Camera-phones

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[234] This author does not contend that an individual should be protected if he or she decides to go out in public exposing his or her intimate areas. The discussion here is limited to the intimate areas covered by clothing or undergarments.

[235] *Augafa*, 92 Hawai'i at 467, 992 P.2d at 736.

[236] 105 Hawai'i 197, 95 P.3d 952 (2004).

[237] *Id.* at 208, 95 P.3d at 963.

[238] In Hawai'i, punishment for a felony involves imprisonment, the duration of which exceeds one year. HAW. REV. STAT. § 701-107(2) (2003). Punishment for a misdemeanor involves imprisonment for the maximum term of one year. *See id.* § 701-107(3). This likely does not deter many voyeurs because the threat of actually serving any time in prison is minimal.

are one of newest low-cost tools in a voyeur's arsenal. As was mentioned earlier, camera-phones are perhaps a greater threat than video cameras or conventional digital cameras because they look like phones but have the capabilities of a digital camera and access to the internet. The lenses on camera-phones are so inconspicuous that it is difficult to identify cell phones as camera-phones without making a conscious effort. Voyeurism is invasive enough as is. But technology enables voyeurs to easily and covertly perpetrate this wrong. Because of the offensive nature of voyeurism and the accessibility of voyeurism devices, Hawai'i should enhance its punishment for this crime. Louisiana and Washington's sentencing/fine scheme are good models because they both classify voyeurism as a felony. Additionally, Louisiana employs progressive sentencing based on the number of offenses and the egregiousness of the captured images.[239]

First, Hawai'i should adopt Washington's punishment for felonies (no more than five years in a state correctional facility and fine not greater than ten thousand dollars, or both) because both statutes similarly criminalize the taking of images of intimate areas covered by clothing.[240] The prospect of multiple years in jail and such a significant monetary fine might deter potential voyeurs. The VVPA also imposes greater fines than Hawai'i's statute. Under the VVPA, the punishment may involve up to a $100,000 fine.[241] Hawai'i need not impose as substantial a fine, but ought to consider the benefits of a hefty fine. Second, Hawai'i should adopt Louisiana's progressive punishment scheme for multiple offenses of video voyeurism and increase

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[239] It should be noted that the Hawai'i and Louisiana statutes are not parallel. The voyeurism statute (actually a violation of privacy statute) in Hawai'i requires that the images captured be of covered intimate areas. *See id.* § 711-1111(1)(d) (2004). Louisiana does not have such a requirement. It broadly protects fully clothed individuals whether the images are taken of intimate areas or not, so long as the voyeur has a lewd or lascivious purpose and designates special, severe punishment for more egregious images, such as sex acts, women's nude intimate areas, and children. LA. REV. STAT. § 14:283(A)-(B) (2004). The Washington statute is more similar to Hawai'i's statute, but requires that the victim have a reasonable expectation of privacy whether in public or private and that the images be captured for the purpose of sexual gratification or arousal of *any person*. WASH. REV. CODE ANN. § 9A.44.115(2)(b) (West 2003) (emphasis added).

[240] Even though Washington has the added requirements of (1) reasonable expectation of privacy and (2) sexual gratification purpose, it can be analogized. In Washington, a person can have a reasonable expectation of privacy in public so it is similar to Hawai'i's statute. With regard to the sexual gratification purpose, the image can be taken for the purpose of arousing any person. It is difficult to imagine that any image of an intimate area is not taken for that purpose. Therefore, this requirement does not create much of a distinction from the Hawai'i statute.

[241] H.R. REP. NO. 108-504, at *3 (2004).

sentencing as necessary. Likewise, sentencing could increase based on the offensiveness of the images.[242]

Another noteworthy feature of the Louisiana statute is the sex offense classification of the crime, which thereby mandates registration with the sex offender registry. Hawai'i should similarly classify voyeurism as a sex offense and require those convicted of the crime to register as sex offenders.[243] It might seem harsh to do so, but the fact is that video voyeurism in this context is a crime of a sexual nature. Following such a violation, the victim's interest, not the defendant's interest, ought to be protected. Given the current definition of sex offender under Hawai'i law, however, it is unlikely that this crime will constitute a sexual offense requiring registration, unless committed against a minor. Perhaps in the case of adults, the legislature could amend the law to require registration with the registry after a second conviction.

In addition to the foregoing proposals, the legislature might consider adding a sexual gratification requirement to section 711-1111(1)(d). This of course could present problems for prosecutors, but it might be an effective way to ensure that only individuals with ill-intentions are punished. The statute already includes a scienter requirement, presumably to prevent the punishment of those who might capture images inadvertently of people's underwear in public[244]—a concern expressed by Senate Judiciary Chairwoman Colleen Hanabusa (D, Nanakuli-Makua) while the bill was under consideration.[245] Thus, the proposed addition might be redundant. But it does not hurt to implement safeguards so that only those who have actually violated the statute are punished (especially in light of this author's proposed increase in sentencing).

These recommendations are not meant to imply that Hawai'i has not accomplished something significant by passing HRS section 711-1111. In actuality, the statute is well drafted and explicitly criminalizes *public* voyeurism. This attempt to protect privacy in public is notable. If the punishment matches the force of the statute itself, Hawai'i residents can walk through public places and feel secure knowing that anyone who might be intentionally capturing inappropriate images of them will suffer severe consequences.

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[242] This is already covered somewhat by HRS section 711-1110.9. This section addresses voyeurism in private places that captures images of undress or sexual acts. HAW. REV. STAT. § 711-1110.9 (2004), *amended by* 2004 Haw. Sess. Laws Act 83 (S.B. 2377).

[243] Hawai'i Revised Statute section 846E-1 defines a sex offender as someone who is convicted of a "sexually violent offense" or a "criminal offense against a victim who is a minor." HAW. REV. STAT. § 846E-1 (2003). Video voyeurism does not constitute the former, but could be possibly construed to fall under the latter.

[244] This is assuming that those individuals would not retain or disseminate those images.

[245] Dunford, *supra* note 167.

B. Hawai'i Should Adopt a Progressive Tort that Recognizes Privacy in Public

Beyond HRS section 711-1111, a criminal statute, victims of voyeurism also should have a remedy in tort. Although Prosser played an integral role in defining the common law right of privacy, a new tort needs to be created to address twenty-first century problems. Common law privacy does not recognize a right of privacy in public. But a right of privacy in public is consistent with Warren and Brandeis, and Prosser's assertion that a plaintiff has a right to be let alone. Thus, the first step in creating a new tort is to perpetuate this right by recognizing privacy in public. Tort law is designed to protect plaintiffs against harm. If defendants' rights (in this case, capturing lewd images) supercede a plaintiff's right against public invasions, the whole premise of tort law would be undermined. Forty years ago, privacy in public was not the issue it has become with the advent of miniaturized recording devices. There is now a need for "public privacy," a term borrowed from Professor Mcclurg.[246] "Public privacy" essentially means that one does not sacrifice privacy rights merely because he or she "ventures from a place of physical solitude into a light of public view."[247] This concept does not lack authority. States legislators have already drafted statutes that explicitly criminalize voyeurism in *public*. Though we are here dealing with torts, this recognition of privacy in public by lawmakers reflects a shift in the conceptualization of privacy.

A video voyeurism tort would create a cause of action for the uninvited recordation of one's image, when that image is of covered intimate areas.[248] Besides privacy issues, the crux of the tort is the permanence of recorded images.[249] To compound the problem, digital images and the internet enable rapid, widespread dissemination of the images. Because video voyeurism can

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[246] *See* Andrew Jay Mcclurg, *Bringing Privacy Out of the Closet: A Tort Theory of Liability For Intrusions in Public Places*, 73 N.C. L. REV. 989, 1044 (1995).

[247] *Id.*

[248] This is consistent with Prosser's tort of intrusion, which included non-physical intrusions. Prosser, *supra* note 34, at 390 & n.65. Prosser's analysis of the tort of invasion, however, classified the taking of a photograph of an individual in public as no more than making a record and therefore not an invasion of privacy. *Id.* at 391-92.

[249] A photograph intensifies an invasion of privacy in three important ways. First, because it makes a permanent record of a scene, it allows the invader to, in effect, take a part of the subject with him . . . . Second, because of this permanent record, information may be revealed that would not be noticed by transitory observation with the naked eye . . . . Most important, because a photograph creates a permanent record of a scene, it has the potential to multiply the impact of the original invasion through wide dissemination . . . . [as well as] to different audiences than the subject intended.

Mcclurg, *supra* note 246, at 1042-43.

be perpetrated with varying degrees of severity, a progressive tort is fitting. The tort is divided into three tiers: (1) the basic act—the recording of an image; (2) intent; and (3) distribution/dissemination. The harm suffered by the plaintiff increases with each tier and also can increase depending on factors within each tier. Ultimately, greater harm will amount to a larger award of damages to the plaintiff.

1. The basic act—recording an image

A defendant may be held liable under this tort for recording an image[250] in public of another's intimate area(s), without that person's consent. Intimate areas are defined similarly to the VVPA definition of private areas.[251] Thus, an intimate area might include naked or underwear-clad genital or chest regions. Intimate areas not protected include those exposed for public view. This tort targets lewd images, as opposed to non-lewd images, such as a person's face. It is not designed to prohibit uninvited image capturing altogether.

In proving liability under this tort, four factors should be assessed: (1) the content of the images; (2) the person who took the images (defendant); (3) the number of images captured; and (4) the person whose image was captured (plaintiff). The content of the images can affect damages. At minimum, plaintiffs must prove that the captured images are of intimate areas. The more offensive the depicted image, therefore, the greater the harm that plaintiffs can establish. If it turns out that the defendant captured partially nude images, or worse, when the plaintiff's intimate areas were not in public view,[252] then the plaintiff could argue that he or she suffered a greater harm and claim higher damages. Besides privacy issues, the crux of this tort is the permanence of recorded images.

The second factor looks at who took the image. This factor is a mitigating factor. There is a significant difference between an adult capturing an image and a child doing the same. This has a lot to do with (1) society's expectations and (2) intent, which is discussed later. Society expects and accepts the

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[250] This includes any recording device, whether photographic or videographic, or otherwise.

[251] *See supra* note 153.

[252] For example, many downblouse and upskirt photos capture images of partially nude women while the women are bent over. This does not mean that the women's intimate areas are exposed in public view; it simply makes it easier for the voyeur to surreptitiously capture images. Just because a woman wears underwear, it does not mean that the underwear will cover her intimate areas entirely. Skimpy thongs, bras, and other similar lingerie are commonly worn, and can shift with the slightest movement of the wearer, thereby exposing intimate areas partially, albeit underneath clothing. This should not compromise women's expectation of privacy for those intimate areas.

curiosity and exploration of children. If children capture an image contemplated by this tort, their actions would be likely dismissed as accidental.

The third factor—number of images captured—is self-explanatory. The more images captured, the greater the harm suffered by the plaintiff which means larger potential damages for the plaintiff. The person whose image is captured, the last factor, determines the severity of the act. Voyeurism is offensive when committed against an adult, but rises to the level of reprehensible when committed against a minor, especially when that minor is a young child.

As is often the case with sexually based offenses, defendants in this tort action might claim that the plaintiff "asked for it." Some women admittedly dress provocatively to attract attention. But much of today's fashion is also sexy and/or minimal by design. Is it fair to blame women for enticing another to take lewd images of them by virtue of their attire? Do women in short skirts and low cut blouses—both of which are considered "normal" by today's fashion standards—have a lower expectation of privacy than those wearing turtlenecks and long pants? The answer to both should be "no." Privacy in public should not be violated because of a person's attire, as long as that attire covers the person's intimate areas.

2. Intent

Just as the foregoing factors can affect a defendant's liability, so too can the defendant's intent. Some defendants capture images accidentally (negligently) and others, intentionally. The tort can be separated into negligent and intentional video voyeurism. A plaintiff would need only to prove the basic tort, as defined earlier, for negligent video voyeurism ("NVV"). Under NVV, a plaintiff would be limited to compensatory damages. This is to protect defendants who did not set out to capture the image, but did so anyway. For example, someone might capture a lewd image by happenstance, while taking a picture of something else. Or, as earlier discussed, the defendant might be a minor who lacks culpability.[253] Whatever the case may be, one can think of many instances where a defendant might not have captured the image with bad intention, or any intention at all.

On the flip side, there are those defendants who commit video voyeurism intentionally. When bringing a claim of intentional video voyeurism ("IVV"), plaintiffs must prove that the basic tort, as earlier defined, was committed intentionally. Under IVV, there could be two levels of culpability: active and

[253] Children and teens sometimes behave inappropriately because they do not realize that their actions are wrong. Other times, they are curious and feel compelled to experiment and test boundaries.

passive voyeurism. Passive voyeurism is the less serious of the two and would involve, for example, a voyeur who records an image of a woman's intimate area (her underwear is visible when she sits down in a skirt) when he sits across the way. Active voyeurism, on the other hand, would pertain to voyeurs who seek out victims, such as Tyler Takehara. If plaintiffs can satisfy their burden of proof for either degree of IVV, they should be entitled to both compensatory and punitive damages. By establishing that the defendant committed active voyeurism, however, plaintiffs may be entitled to more damages.

Defendants could try to raise a defense that they took the pictures for artistic purposes, i.e., that the act was intentional but excusable. One does not have to look far to find secretly captured images of people, who did not consent to their taking, that are celebrated as art.[254] There is a significant difference between art and perversion, however. Artists such as Walker Evans may have taken photographs surreptitiously, but Evans focused on people, not people's intimate areas. Perverse images, in which the subject did not consent, have no place in "art." Images of intimate areas arguably are captured for sexual gratification, or at least impliedly so. But if plaintiffs can prove that the defendant's intention was in fact sexual gratification, they may claim higher damages.

3. Distribution/dissemination

One of the more troubling aspects of video voyeurism is the broad dissemination of an image because of both the ease with which it can be done and the number of people who might see the image. A plaintiff can be violated millions of times over if his or her image makes its way to the internet. This proposed tort recognizes the degree to which the subsequent dissemination of an image can drastically increase the harm to a plaintiff. When a defendant disseminates images on the internet, the plaintiff should be automatically entitled to punitive damages to compensate for the added injury. It would be extraordinarily disconcerting to know that your image was circulating on the internet for anyone to see and that you had no control over who would see it or how many people would see it.

4. Damages

Based on the invasion of privacy that results when images of intimate areas are captured, plaintiffs should be entitled to damages. The damages that plaintiffs receive will depend on the harms they can prove. This can be challenging

[254] Walker Evans' subway photographs are a prime example of this.

because of the non-physical nature of the invasion. Emotional trauma is difficult to measure, but it can be just as injurious as physical harm, if not more so. It is time for tort law to address this technologically-spurred harm, which will provide a civil action that complements already-existing criminal voyeurism statutes.

C. Remedies

Victims of video voyeurism currently seek relief under two torts. One is intentional infliction of emotional distress.[255] Where a "plaintiff can prove that the voyeur engaged in extreme or outrageous conduct and acted either intentionally or recklessly,"[256] the voyeur might be held liable for the victim's severe emotional distress.[257] Another tort commonly asserted is the tort of trespass.[258] The plaintiff's burden of proof under this tort is "that the voyeur either entered upon her land or caused something or someone else to do so."[259] The shortcoming of this tort is that many invasions are perpetrated in public.

The right to privacy with regard to protection against video voyeurism is far from settled. None of the existing torts adequately addresses voyeurism in public. This leaves victims with little, if any, remedy. Many state legislatures have enacted criminal statutes to address video voyeurism but have yet to create a corresponding tort. It is time for tort law to catch up with twenty-first century technology.

VI. CONCLUSION

The preservation of privacy rights in public has never been more crucial. The advent of modern technology in the form of camera-phones and very compact video cameras has facilitated voyeurism. This problem is further exacerbated by the ease with which voyeurs can gain access to and utilize the internet for worldwide dissemination of the images they capture.

The VVPA and several state statutes, including Hawai'i's, paved the way for a revolution in the treatment of twenty-first century voyeurism. One can only hope that these statutes are regularly and consistently enforced, so that voyeurs who prey on unsuspecting victims while those victims are in public will be prosecuted and punished. Tort remedies are lacking, however. In light

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[255] Antonietta Vitale, *Video Voyeurism and the Right To Privacy: The Time For Federal Legislation is Now*, 27 SETON HALL LEGIS. J. 381, 388 & n.41 (2003).

[256] *Id.* at 388 & n.42.

[257] *Id.* at 388 & n.44.

[258] *Id.* at 388. This tort "provides a more accessible remedy for victims of voyeurism." *Id.* & n.45.

[259] *Id.* at 389 & n.46.

of the harm suffered by victims as a result of voyeuristic intrusions, states ought to create torts, such as the one proposed herein, so that victims may be compensated for their suffering.

Moreover, Hawai'i should recognize a right of privacy against intrusion (by voyeurism) in public. It is illogical and impractical to suspend privacy rights merely because individuals leave the protected confines of their homes. Previously held notions of privacy are outdated and simply do not allow for adequate protection today. It will be a great day when all women can walk through a shopping mall, or down the street, and not be forced to "look under their skirt," for fear that they have just unwittingly flashed an audience of millions.

Aimee Jodoi Lum[260]

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[260] J.D. Candidate 2005, William S. Richardson School of Law, University of Hawai'i at Manoa. This Comment is dedicated in loving memory of my grandmother, Shizuka Yamada. I would like to thank Dean Aviam Soifer for his mentorship and encouragement. As always, thank you Jr. and my family.

When (Moving) Dirt Hurts: How the Ninth Circuit in *Borden Ranch Partnership v. United States Army Corps of Engineers* Could Have Better Justified Its Decision to Protect Wetlands

I. INTRODUCTION

"God made dirt, and dirt don't hurt."

This retort, made by a defiant child found in a pool of mud, is occasionally placating to her parents. It is not, however, met with similar amusement or concurrence when the speaker is a land developer and the listener is the Army Corps of Engineers ("the Corps").[1] The Corps is authorized under section 404 of the Clean Water Act ("CWA") to protect the quality of the nation's waters through a permitting process for the discharge of dredged and fill materials[2] when the discharge results in the addition of a pollutant to the water.[3] The Corps takes its duty particularly seriously when the disputed discharge results in the destruction of wetlands. Because wetlands serve vital ecological functions, such as filtering toxins from water, providing a habitat to a variety of species, and slowing surface runoff to prevent flooding,[4] their destruction or degradation "is considered to be among the most severe environmental impacts"[5] covered by the section 404 permitting process.

A particularly controversial case concerning the destruction of wetlands, *Borden Ranch Partnership v. United States Army Corps of Engineers*,[6] appeared at the trial court level in California in 1999. In this case, the court found that a real estate developer who obstinately referred to himself as a farmer violated the Clean Water Act 348 times by deep ripping and consequentially destroying wetlands under the Corps's jurisdiction without a

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[1] *See, e.g.*, Kelly v. EPA, 203 F.3d 519 (7th Cir. 2000). The court wrote a rather biting, though humorous, opinion reprimanding a developer who disagreed with the power bestowed upon the Corps under the CWA.

[2] 33 U.S.C. § 1344(a) (2003). *See infra* Part II for detailed definitions.

[3] Borden Ranch P'ship v. U.S. Army Corps of Eng'rs, 261 F.3d 810, 814 (9th Cir. 2001), *aff'd per curiam*, 537 U.S. 99 (2002) (citing 33 U.S.C. § 1362(12) (2001)) [hereinafter *Borden II*].

[4] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 134 (1985).

[5] 40 C.F.R. § 230.1 (2003).

[6] No. S-97-0858, 1999 U.S. Dist. LEXIS 21389 (E.D. Cal. Nov. 8, 1999), *aff'd*, 261 F.3d 810 (9th Cir. 2001), *aff'd per curiam*, 537 U.S. 99 (2002) [hereinafter *Borden I*].

permit.[7] In order to convert ranch land to smaller parcels for orchards and vineyards, the developer, Angelo Tsakopoulos, used bulldozers and tractors to drag four to seven foot long metal prongs through the wetlands, puncturing the clay bottom of the wetland and overturning the soil.[8] When the protective clay layer was destroyed, the water drained downward and destroyed the wetland.[9] The Ninth Circuit affirmed, holding that the redeposit of dirt from within the wetland during the ripping constituted an "addition of a pollutant" to the water and was therefore under the Corps's jurisdiction.[10] The dissenting opinion posited that this redeposit should not qualify as an "addition" because, among other factors, the material was not moved a sufficient distance to have been "added" to the water.[11] The decision of the circuit court's majority stood, however, as the U.S. Supreme Court split 4-4 after granting certiorari.[12]

This casenote supports the Ninth Circuit in its ultimate decision but suggests that the court reached the right decision despite relying upon improper factors. In addition, the court, by focusing on the broad concept of "redeposits," neglected to recognize a valuable parallel between sidecasting, a type of redeposit that has been accepted as subject to section 404 regulation,[13] and deep ripping. Part II provides a detailed background of the Corps's jurisdiction over the regulation of dredged and fill materials under the CWA, including the controversial concept of redeposits. Part III provides a summary of the *Borden* trial court opinion, the majority and dissenting opinions of the Ninth Circuit, and the oral argument heard by the Supreme Court.[14] Part IV analyzes the reasoning of the circuit court's majority and suggests that it improperly analyzed some of the major issues in determining that deep ripping could be regulated. In addition, by not recognizing deep ripping's similarity to sidecasting, the majority failed to silence the dissent and left the issue of deep ripping vulnerable to future litigation. Part V concludes that the labored

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[7] *Id.*

[8] *Borden II*, 261 F.3d at 812.

[9] *Borden I*, 1999 U.S. Dist. LEXIS 21389 at **12-13.

[10] *Borden II*, 261 F.3d at 815.

[11] *Id.* at 819-20 (Gould, J., dissenting).

[12] Borden Ranch P'ship v. U.S. Army Corps of Eng'rs, 537 U.S. 99 (2002) (per curiam) [hereinafter *Borden III*]. The case was heard by only eight Justices because Justice Kennedy, an acquaintance of Tsakopoulos, recused himself. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 682 (2003). A careful analysis of the Ninth Circuit's decision is thus particularly important because a similar case in the future would be heard by all nine Justices upon appeal and could result in *Borden II* being overruled.

[13] *See, e.g.*, United States v. Deaton, 209 F.3d 331 (4th Cir. 2000) (holding that sidecasting results in the "addition of a pollutant" into a wetland); United States v. Hummel, No. 00 C 5184, 2003 WL 1845365 (N.D. Ill. Apr. 8, 2003) (same).

[14] The Supreme Court's *per curiam* opinion stated simply, "The judgment is affirmed by an equally divided Court." *Borden III*, 537 U.S. at 100. The opinion gave no further reasoning and did not reveal which Justices were in favor of reversal. *See id.*

analysis of redeposits in cases where the real damage to a wetland is done by draining should be mercifully laid to rest by Congressional extension of the Corps's jurisdiction under a new statute to draining as well as discharges.

II. BACKGROUND: THE CORPS'S JURISDICTION UNDER THE CWA

To fulfill the protective and restorative goals of the CWA,[15] discharges which result in the addition of a pollutant from a point source to the Nation's waters are prohibited[16] unless an appropriate permit for the type of discharge is obtained.[17] If the discharge is of dredged or fill material, the Corps has the permitting authority under section 404.[18]

Section 404 authorizes the Secretary of the Army, through the Corps, to issue permits for the "discharge of dredged or fill material into navigable waters at specified disposal sites."[19] "Navigable waters" are the "waters of the United States, including the territorial seas."[20] The "waters of the United States" need not be navigable in the ordinary understanding of the word, but

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[15] The Act's purpose is "to restore and maintain the chemical, physical, and biological integrity of the Nation's water." United States v. Akers, 785 F.2d 814, 818 (9th Cir. 1986) (citing 33 U.S.C. § 1251(a) (1982)).

[16] *See* 33 U.S.C. § 1311(a) (2003). The Act defines "discharge of a pollutant" as, among other things, "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (2003). The term "point source" is broadly defined as "any discernible, confined and discrete conveyance." *See id.* § 1362(14) (2003). As noted in the discussion below, "navigable waters" is also broadly defined and includes wetlands adjacent to navigable waters. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 139 (1985) (approving the Corps's inclusion of wetlands adjacent to navigable waters in its regulations). To determine whether there is an "addition of a pollutant," the same analysis described in the discussion below regarding discharges and redeposits is used. The term "pollutant" is defined as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. § 1362(6) (2003). This list is not exclusive, and a court may classify another discharged substance as a pollutant even if it is not enumerated in the definition. *See* Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 566 (5th Cir. 1996). In typical dredge and fill cases, the pollutant is usually described by the court as some combination of "dredged spoil, . . . biological materials, . . . rock, sand, [and] cellar dirt." *See, e.g.*, Weiszmann v. Dist. Eng'r, U.S. Army Corps of Eng'rs, 526 F.2d 1302, 1306 (5th Cir. 1976) (dredged spoil); Minnehaha Creek Watershed Dist. v. Hoffman, 597 F.2d 617, 621 (8th Cir. 1979) (rock, sand, and cellar dirt); United States v. Weisman, 489 F. Supp. 1331, 1337 (M.D. Fla. 1980); United States v. M.C.C. of Fla., Inc., 772 F.2d 1501, 1505 (11th Cir. 1985), *vacated and remanded on other grounds*, 481 U.S. 1034 (1987), *readopted in relevant part*, 848 F.2d 1133 (11th Cir. 1988).

[17] Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 922, 924 (5th Cir. 1983).

[18] 33 U.S.C. § 1344 (a),(d) (2003).

[19] *See id.* § 1344 (a).

[20] *See id.*

must fall within seven categories given by the Corps, and include interstate lakes, rivers, mudflats, wetlands, prairie potholes,[21] tributaries of these waters,[22] and wetlands adjacent to waters.[23]

The protection of wetlands is particularly vital to the achievement of the broad statutory goals of the CWA.[24] The Corps has described the important ecological functions performed by wetlands:

> [Wetlands] may serve to filter and purify water draining into adjacent bodies of water, and to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion. In addition, adjacent wetlands may serve significant natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic species.[25]

In the guidelines of factors the Corps is to consider when issuing section 404 permits, the EPA stresses that the destruction or degradation of wetlands "is considered to be among the most severe environmental impacts covered by these Guidelines."[26]

A. Dredged and Fill Material Defined

The term "dredged material" is defined as "material that is excavated or dredged from waters of the United States."[27] This term is interpreted rather liberally, as the Corps recognizes that landclearing, ditching, channelization, and in-stream mining can possibly result in the discharge of dredged material.[28] "Fill material" means "material placed in waters of the United States where the material has the effect of replacing any portion of a water of the United States with dry land or changing the bottom elevation of any portion of a water of the United States."[29] Typical examples of fill material

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[21] 33 C.F.R. § 328.3(a)(3) (2003).

[22] *See id.* § 328.3(a)(5) (2003).

[23] *See id.* § 328.3 (a)(7) (2003).

[24] Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 923 (5th Cir. 1983).

[25] United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 134-35 (1985) (internal citations and quotations omitted); *see also* 40 C.F.R. § 230.41(b) (2003) (describing the possible loss of ecological values associated with the destruction of wetlands); Kelly v. EPA, 203 F.3d 519, 521 (7th Cir. 2000) (listing the ecological functions and species of the wetland in dispute); United States v. Cumberland Farms of Conn., Inc., 647 F. Supp. 1166, 1169-70 (D. Mass. 1986) (listing in great detail the species of plants, birds, and other animals living in the disputed wetland).

[26] 40 C.F.R. § 230.1(d) (2003). The Corps works in conjunction with the EPA in administering section 404. *See* 33 U.S.C. §§ 1344(b); 1361(a) (2003).

[27] 33 C.F.R. § 323.2(c) (2003).

[28] *See id.* § 323.2(d)(2)(i) (2003).

[29] *See id.* § 323.2(e)(1)(i),(ii) (2003). This effects-based definition, created in May 2002, is a potentially drastic change from the former definition of "fill material" which required it to

include rock, sand, soil, construction debris, plastic, and wood chips,[30] materials that are often used in activities such as site-development or protection/reclamation devices like dams, seawalls, and levees.[31] The CWA provides limited exceptions where a permit is not required for the discharge of dredge or fill material, including where the discharge is from the maintenance of these protection/reclamation devices or from ongoing farming activities like plowing.[32]

B. "Discharge" and Redeposits

Fundamental to the authority given to the Corps under section 404 is that a "discharge of dredged or fill material"[33] must occur before the Corps can assert jurisdiction over an activity. Therefore, for example, developers who recognize the Corps's authority over the use of fill material to convert wetlands to dry can avoid the need for a section 404 permit by using pumps or ditches to drain the lands instead of filling them.[34] The Corps itself acknowledged in 2001 that if water were pumped from wetlands with no movement of sediment downstream, a permit would not be required despite the resulting destruction of the wetlands.[35] "The existence of discharge is critical"[36] and draining alone is outside the jurisdiction of the Corps.

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have the *purpose* of creating dry land or changing the bottom elevation. *See* Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129, 31,132-33 (May 9, 2002) (to be codified at 33 C.F.R. pt. 323, 40 C.F.R. pt. 232).

[30] 33 C.F.R. § 323.2(e)(2) (2003).

[31] *See id.* § 323.2(f) (2003).

[32] 33 U.S.C. § 1344(f)(1) (2003). These exceptions are further qualified by the so-called "recapture provision," which states that these activities may still be regulated if they result in navigable waters being put to a new use or the impairment of their flow, reach, or circulation. *See id.* § 1344(f)(2) (2003).

[33] *See id.* § 1344(a) (2003).

[34] *See, e.g.*, Orleans Audubon Soc'y v. Lee, 742 F.2d 901, 911 (5th Cir. 1984) (holding that although the construction of two drainage culverts and a drainage canal would destroy wetlands, the court cannot extend the Corps's jurisdiction to cover draining as well as discharges). *See also* Save Our Cmty. v. EPA, 971 F.2d 1155, 1167 (5th Cir. 1992) (holding that section 404 clearly by its language regulates only discharges and not draining).

[35] *See* Further Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material," 66 Fed. Reg. 4,550, 4,554 (Jan. 17, 2001) (to be codified at 33 C.F.R. pt. 323, 40 C.F.R. pt. 232) ("[W]e acknowledge that some suction dredging operations can be conducted in such a manner that if the excavated material is pumped to an upland location or other container outside waters of the U.S. and the mechanized removal activity takes place without re-suspending and relocating sediment downstream, then such operations generally would not be regulated.").

[36] *Save Our Cmty.*, 971 F.2d at 1163.

The definition of what exactly constitutes a "discharge," however, has only developed after a tortured and confusing history. Congress has defined the "discharge of a pollutant" to mean "any *addition* of any pollutant to navigable waters from any point source."[37] The Corps has defined the "discharge of fill material" to mean "the *addition* of fill material to waters of the United States."[38] It has also defined the "discharge of dredged material" to mean "any *addition* of dredged material into, *including any redeposit* of dredged material other than incidental fallback within, the waters of the United States."[39] As seen in these definitions, the concept of a discharge as an "addition" is well accepted.

While only the definition of "discharge of dredged material" specifically stresses that "redeposits" are included in the concept of "addition," case law has accepted that the redeposit of pollutants[40] and redeposit of fill material[41] are also "additions" of pollutants and fill material, and hence, discharges that can be regulated. The same analysis regarding the ability of redeposits to be an "addition" is used regardless of which substance is being discussed.[42]

Three leading cases hold that the term "addition" includes redeposits. The first court to find thusly was the Fifth Circuit in 1983 in *Avoyelles Sportsmen's League, Inc. v. Marsh*.[43] The court found that burying and discing burned vegetation and soil from a wetland in that same wetland, as a

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[37] 33 U.S.C. § 1362(12) (2003) (emphasis added).

[38] 33 C.F.R. § 323.2(f) (2003) (emphasis added).

[39] *See id.* § 323.2(d)(1) (2003) (emphases added).

[40] *See, e.g.*, Rybachek v. EPA, 904 F.2d 1276, 1285-86 (9th Cir. 1990) (holding that the resuspension of dredged spoil, rock, sand, and cellar dirt (pollutants) could be the addition of pollutants); United States v. M.C.C. of Fla., Inc., 772 F.2d 1501, 1506 (11th Cir. 1985), *vacated and remanded on other grounds*, 481 U.S. 1034 (1987), *readopted in relevant part on remand*, 848 F.2d 1133 (11th Cir. 1988) (holding that the redeposit of dredged spoil (sediment from a channel bottom in this case), a statutory pollutant, could be an addition of a pollutant).

[41] *See, e.g.*, Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 923-24 (5th Cir. 1983) (holding that "addition" could include "redeposits").

[42] Indeed, many cases confuse their analysis by referring in one section to the "addition of pollutants" (as in section 301) and then to the "addition of materials" (as in section 404) in another. *See, e.g., id.* at 922-23; United States v. Wilson, 133 F.3d 251, 259-60 (4th Cir. 1997) (opinion of Neimeyer, J.). Because the "pollutant" in section 404 cases is typically rock, sediment, or dredged spoil, a tangible material, this fluctuation in terminology is somewhat understandable. The Corps explained in its final rule that the analysis for what is an "addition" is relevant for both the discharge of dredged and fill material, regardless of which material was being discussed in the case. *See* Further Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material," 66 Fed. Reg. 4,550, 4,558 (Jan. 17, 2001) (to be codified at 33 C.F.R. pt. 323, 40 C.F.R. pt. 232).

[43] 715 F.2d 897.

redeposit, was an addition of materials to the wetland and hence a discharge.[44] The court justified its logic on policy grounds by reasoning:

> [T]his reading of the definition is consistent with both the purposes and legislative history of the statute. The CWA was designed to restore and maintain the chemical, physical, and biological integrity of the Nation's waters, and . . . the legislative history indicates that Congress recognized the importance of protecting wetlands as a means of reaching the statutory goals. There is ample evidence in the record . . . that the landowners' redepositing activities would significantly alter the character of the wetlands and limit the vital ecological functions served by the tract.[45]

To summarize, the court found that because the redeposit would alter the character of the wetlands and limit their ecological functioning, it must qualify as a discharge in order to satisfy the broad purpose of the Act.

In *United States v. M.C.C. of Florida, Inc.*,[46] in 1985, the Eleventh Circuit held that the sediment dug up by the propellers of a tugboat and flung onto adjacent sea grass beds fell under the scope of section 404 as a redeposit of a pollutant.[47] The court followed the decision of the Fifth Circuit in *Avoyelles* and reasoned that the redeposit was counter to the Act's goal of protecting the natural integrity of the water, as "[t]he damage done to [the sea grass beds] was too severe for nature to be able to restore them to their natural condition herself."[48] The Ninth Circuit followed these decisions in 1990, in *Rybachek v. EPA*,[49] holding that the resuspension of rock, sand, and dirt sifted back into the stream from whence it came[50] qualified as an addition of a pollutant under the CWA.[51]

This logical progression in the regulation of redeposits came to a halt in 1998, when the D.C. Circuit, in *National Mining Ass'n v. United States Army Corps of Engineers*,[52] invalidated a Corps regulation from 1993, stating that "*any* redeposit of dredged material" required a permit.[53] The court reasoned

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[44] *Id.* at 923-24.

[45] *Id.* at 923 (citations omitted).

[46] 772 F.2d 1501 (11th Cir. 1985), *vacated and remanded on other grounds*, 481 U.S. 1034 (1987), *readopted in relevant part on remand*, 848 F.2d 1133 (11th Cir. 1988).

[47] *Id.* at 1506.

[48] *Id.*

[49] 904 F.2d 1276 (9th Cir. 1990).

[50] *Id.* at 1282. This sifting occurred in a process called placer mining. In a gravity-separation process called sluicing, ore is placed in a sluice box and water is run over it, typically in the streambed from which the ore was removed. Heavier materials, like gold, fall through and the lighter sand, dirt and clay are left suspended in the wastewater.

[51] *Id.* at 1285.

[52] 145 F.3d 1399 (D.C. Cir. 1998).

[53] *Id.* at 1405 (emphasis added). In response to a lawsuit in 1993, *North Carolina Wildlife Federation v. Tulloch*, No. C90-713-CIV-5-BO (E.D.N.C. 1992), where the only potential

that incidental fallback, "when redeposit takes place in substantially the same spot as the initial removal,"[54] such as dirt falling from a bucket as it is being used to excavate material from a river bottom,[55] could not possibly qualify as an addition of material to the water.[56] As explained by the court:

> [T]he straightforward statutory term "addition" cannot reasonably be said to encompass the situation in which material is removed from the waters of the United States and a small portion of it happens to fall back. Because incidental fallback represents a net withdrawal, not an addition, of material, it cannot be a discharge .... [W]e fail to see how there can be an addition of *dredged material* when there is no addition of *material*.[57]

The court was careful to stress, however, that its holding was only that the regulation of *any* redeposit (i.e., *all* redeposits), including incidental fallback, was beyond the authority of the Corps; the Corps was free to regulate other forms of redeposits.[58] The court even cited the regulation of redeposits in *Avoyelles* (redeposit from mechanized landclearing), *M.C.C.* (material moved a further distance from removal) and *Rybachek* (resuspension of material) with approval.[59]

The fallout from *National Mining Ass'n* has caused the Corps to rewrite its regulations and to focus upon the movement and quantity of the redeposit rather than upon its environmental effects to determine whether it can be regulated or is mere incidental fallback.[60] The new and current rule, finalized in 2001, defines the "discharge of dredged material" as "any addition of dredged material into, including redeposit of dredged material other than incidental fallback within, the waters of the United States."[61] The Corps

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"discharge" during dredging of wetlands was the small amount of dirt that fell from the bucket as it was being raised, the Corps altered its 1986 regulation that exempted de minimis (small quantity) soil movement from the permit requirement. The new "Tulloch Rule" imposed the permit requirement on *any* redeposit of material, including "incidental fallback" like that in Tulloch's case. *See Nat'l Mining Ass'n*, 145 F.3d at 1402.

[54] *Nat'l Mining Assn*, 145 F.3d at 1401.

[55] *Id.* at 1403.

[56] *Id.* at 1404.

[57] *Id.*

[58] *Id.* at 1405.

[59] *Id.* at 1405-06.

[60] *See* Further Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material," 66 Fed. Reg. 4,550, 4,564 (Jan. 17, 2001) (to be codified at 33 C.F.R. pt. 323, 40 C.F.R. pt. 232) ("We have chosen to define our jurisdiction based not on the effects of the discharge, but on its physical characteristics—i.e., whether the amount and location of the redeposit renders it incidental fallback or a regulated discharge.").

[61] 33 C.F.R. § 323.2(d)(2)(ii) (2003). Incidental fallback is defined as:

> the redeposit of small volumes of dredged material that is incidental to excavation activity in waters of the United States when such material falls back to substantially the same

recognized that even small redeposits and the mere disturbance of the bottom sediment of wetlands and some river and stream bottoms can cause the release of nutrients, heavy metals, and toxic organic compounds,[62] but the Corps declined to use an effects based test to determine whether a redeposit can be regulated.[63] Instead, the Corps determined that "the nature and amount of transport and resettling of excavated material downstream from the area of removal, or release of pollutants previously bound up in sediment beyond the place of initial removal, are relevant factors to consider in determining if movement and relocation other than incidental fallback has occurred."[64]

To summarize, the Corps will look mainly to the quantity of material disturbed, the distance it was moved, and the movement of pollutants from within that material in determining whether it can be regulated as a redeposit. This analysis is consistent with Judge Silberman's concurring opinion in *National Mining Ass'n*, which reasoned that "the word addition carries both a temporal and geographic ambiguity."[65]

III. BORDEN RANCH PARTNERSHIP V. UNITED STATES ARMY CORPS OF ENGINEERS

A. Facts

In 1993, Angelo K. Tsakopoulos, acting as general partner of the Borden Ranch Partnership, purchased 8348 acres of land straddling Sacramento and San Joaquin counties in California for $8.3 million.[66] Tsakopoulos, a real estate developer since the 1960's, had applied for section 404 permits from the Corps on several other separate occasions.[67] The vast acreage contained a significant number of wetlands, including swales and vernal pools.[68] A swale is "a sloped wetland containing aquatic plant life which allows the passage of small animal life, slows peak water flows, filters water, and minimizes erosion

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place as the initial removal. Examples . . . include soil that is disturbed when dirt is shoveled and the back-spill that comes off a bucket. . . .

Id.

[62] *See Further Revisions*, 66 Fed. Reg. at 4,564.

[63] *Id.*

[64] *Id.* at 4,566-67.

[65] Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1410 (D.C. Cir. 1998) (Silberman, J., concurring).

[66] Borden Ranch P'ship v. U.S. Army Corps of Eng'rs, No. S-97-0858, 1999 U.S. Dist. LEXIS 21389, at *2 (E.D. Cal. Nov. 8, 1999), *aff'd*, 261 F.3d 810 (9th Cir. 2001), *aff'd per curiam*, 537 U.S. 99 (2002) [hereinafter *Borden I*]. By April 1996, he had sold 4036 acres of the parcel for approximately $16.2 million. *Id.* at *15.

[67] *Id.* at *5-6.

[68] *Id.* at *3.

and/or sedimentation."[69] Vernal pools, features found in the United States primarily in California, are low points that seasonally collect rainwater and support exotic species, some of which have been deemed threatened or endangered under the Endangered Species Act.[70] Both of these hydrological features exist because a dense layer of clay below the soil prevents the water from draining downward.[71]

The Borden Ranch property had been used mainly as rangeland for cattle grazing prior to Tsakopoulos's purchase, but he planned to convert it from ranchland to vineyards and orchards and subdivide it into smaller plots for sale.[72] Vineyards, however, require a deep root system, which the restrictive clay layer of the wetlands would not permit.[73] To support the vineyard root systems, the clay pan layer had to be penetrated and destroyed by a process called "deep ripping."[74]

Deep ripping is a process in which "four- to seven-foot long metal prongs are dragged through the soil behind a tractor or a bulldozer."[75] The prongs tear through the restrictive clay layer of the soil,[76] "alter[ing] the movement of surface and subsurface water in the ripped areas by moving earth, rock, sand, and biological matter both horizontally and vertically. This allows the water to percolate to greater depths and limits and destroys the ability of jurisdictional waters to retain water."[77] The wetland is effectively destroyed in the process.[78]

Tsakopoulos and the Corps disagreed about the Corps's authority to regulate the deep ripping of the Borden Ranch wetlands from the time he purchased the property in 1993.[79] In 1994, the Corps issued a retroactive permit for the ripping Tsakopoulos had done since 1993, contingent upon agreed mitigation requirements.[80] In the spring of 1995, however, the Corps discovered that Tsakopoulos had done more deep ripping in protected

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[69] *Id.*

[70] *Id.* at **3-4.

[71] Borden Ranch P'ship v. U.S. Army Corps of Eng'rs, 261 F.3d 810, 812 (9th Cir. 2001), *aff'd per curiam*, 537 U.S. 99 (2002) [hereinafter *Borden II*].

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] Borden Ranch P'ship v. U.S. Army Corps of Eng'rs, No. S-97-0858, 1999 U.S. Dist. LEXIS 21389, at *5 (E.D. Cal. Nov. 8, 1999), *aff'd*, 261 F.3d 810 (9th Cir. 2001), *aff'd per curiam*, 537 U.S. 99 (2002) [hereinafter *Borden I*].

[78] *See Borden II*, 261 F.3d at 814.

[79] *Id.* at 812.

[80] *Id.*

wetlands without a permit and issued a cease and desist order.[81] Tsakopoulos did not desist, however, and from July 1995 to November 1995, completed more ripping without a permit.[82] On one particular parcel, the swales had been deep ripped and disced, "resulting in their complete obliteration . . . . [O]nly some of the vernal pools had been flagged by the plowing crews. Those not flagged had been filled in with soil."[83] Despite an agreement in May 1996, where Tsakopoulos agreed to refrain from further unpermitted ripping, the Corps again found in March 1997, that more violations had occurred.[84] The next month, EPA investigators visited the ranch and found deep rippers in the process of ripping jurisdictional wetlands.[85] The EPA then issued an administrative order to Tsakopoulos for violating the CWA and ordered him to cease the unauthorized ripping.[86]

B. District Court Opinion

In response to the administrative order, Tsakopoulos filed a lawsuit against the Corps and the EPA, challenging its authority to regulate deep ripping.[87] The United States filed a counterclaim seeking injunctive relief and civil penalties for the CWA violations.[88] Both parties moved for summary judgment.[89] The district court ruled that the Corps had jurisdiction over deep ripping, but because an issue of material fact remained regarding whether the deep ripping had actually occurred, the case went to trial in 1999.[90]

The district court found that Tsakopoulos violated the Clean Water Act 348 times by ripping the swales and ten times by ripping the vernal pools.[91] The court found that the CWA had been violated when the rippers caused *fill material* to be deposited in the hydrological features from 1995 through

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[81] *Id.* at 813.

[82] *Id.* Another cease and desist order was then issued. *See id.*

[83] Borden Ranch P'ship v. U.S. Army Corps of Eng'rs, No. S-97-0858, 1999 U.S. Dist. LEXIS 21389, at *13 (E.D. Cal. Nov. 8, 1999), *aff'd*, 261 F.3d 810 (9th Cir. 2001), *aff'd per curiam*, 537 U.S. 99 (2002) [hereinafter *Borden I*].

[84] *Borden II*, 261 F.3d at 813. Under the agreement, Tsakopoulos also promised to set aside a 1368 acre preserve. Although it is not totally clear, the court's language implies that he actually did create the preserve: "Under the agreement, Tsakopoulos set aside a 1368 acre preserve and agreed to refrain from further violations." *Id.*

[85] *Id.*

[86] *Borden I*, 1999 U.S. Dist. LEXIS 21389 at **24-25.

[87] *Borden II*, 261 F.3d at 813.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

1997.[92] The court simply noted that section 404 requires a permit for the discharge of dredged or fill material,[93] and called the deposits to the wetlands "fill" without explanation.[94] The farming exception from section 404 did not apply, according to the court, because it applies only to ongoing farming activities.[95] The bulk of the court's opinion focused upon calculating the penalty for the repeated violations of the Act.[96] Tsakopoulos was finally given the option of paying $1.5 million or $500,000 plus restoring four acres of wetlands, and he opted for the latter alternative.[97]

C. *The Ninth Circuit Majority Opinion*

The Ninth Circuit affirmed the decision of the district court and held that the Corps did in fact have jurisdiction over the deep ripping of the wetland swales.[98] The court based its determination first, on the CWA's prohibition of "the discharge of any pollutant into the nation's waters,"[99] and second, according to the court, on the prohibition against "discharg[ing] pollutants into wetlands without a permit from the Army Corps of Engineers."[100]

The court first noted that the CWA prohibits "any addition of any pollutant to navigable waters from any point source."[101] Because a "point source" is broadly defined as "any discernible, confined and discrete conveyance,"[102] and because other courts have found bulldozers and backhoes to be point sources, the court concluded that the bulldozers and tractors used to pull the rippers

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[92] Borden Ranch P'ship v. U.S. Army Corps of Eng'rs, No. S-97-0858, 1999 U.S. Dist. LEXIS 21389, at *44 (E.D. Cal. Nov. 8, 1999), *aff'd*, 261 F.3d 810 (9th Cir. 2001), *aff'd per curiam*, 537 U.S. 99 (2002) [hereinafter *Borden I*].

[93] *Id.* at *41.

[94] *Id.* at *44. The court simply concluded, "Tsakopoulos violated the Clean Water Act when, without a permit from the Corps, he allowed deep rippers to plow and cause fill to be deposited into [the swales and vernal pools] in 1995 through 1997." *Id.*

[95] *Id.* at *41.

[96] *Id.* at **46-71.

[97] Borden Ranch P'ship v. U.S. Army Corps of Eng'rs, 261 F.3d 810, 813 (9th Cir. 2001), *aff'd per curiam*, 537 U.S. 99 (2002) [hereinafter *Borden II*]. Four acres represents approximately twice the amount of wetlands destroyed by the unlawful deep ripping. *See Borden I*, 1999 U.S. Dist. LEXIS 21389, at *72.

[98] *Borden II*, 261 F.3d at 819. The court reversed with regard to the violations of the vernal pools because the Supreme Court had ruled in 2001 that isolated wetlands were not within the Corps's jurisdiction. *Id.* at 816 (citing Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001)).

[99] *Id.* at 813-14 (citations omitted).

[100] *Id.* at 814. Note that the court used the word "pollutants" instead of "dredged or fill material." This substitution will be addressed in Part IV.

[101] *Id.* at 813-14 (citing 33 U.S.C. § 1362(12) (2001)).

[102] *Id.* at 814 (citing 33 U.S.C. § 1362(14) (2001)).

were also point sources.[103] Although the swales qualified as navigable waters,[104] the court found that the vernal pools were outside the Corps's jurisdiction in light of a 2001 Supreme Court decision that invalidated the Corps's authority over isolated waters.[105] The court defined the "pollutants" in this case as "dredged spoil, . . . biological materials, . . . rock, sand, [and] cellar dirt."[106]

For its "addition" of a pollutant analysis, the court followed the Ninth Circuit precedent of *Rybachek* and the reasoning of other circuits to conclude that the redeposit of materials can constitute the addition of a pollutant.[107] The court cited with particular approval the Fourth Circuit's decision in *United States v. Deaton*,[108] a sidecasting[109] case where the Fourth Circuit rejected the argument that a redeposit could not be an addition of material because no net increase in material resulted.[110] The Fourth Circuit had stressed that the CWA prohibits the addition of a pollutant, not the addition of material.[111] Once the soil in the wetland is upturned, the material is transformed into "dredged spoil," a statutory pollutant whose addition, and redeposit, is prohibited.[112] The Ninth Circuit majority also found persuasive the ecological focus of *Deaton*, *Rybachek*, and *Avoyelles*, noting that "these cases recognize that activities that destroy the ecology of a wetland are not immune from the Clean Water Act merely because they do not involve the introduction of material brought in from somewhere else."[113]

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[103] *Id.* at 815.

[104] *Id.* at 812.

[105] *Id.* at 816 (citing Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159 (2001)).

[106] *Id.* at 814 (citation omitted).

[107] *Id.* at 814-15.

[108] 209 F.3d 331 (4th Cir. 2000).

[109] Sidecasting occurs when a ditch is dug through a wetland, usually to drain it, and the removed material is sloppily tossed to the sides of the ditch, filling portions of the wetland. *See id.* at 333, 335.

[110] *Borden II*, 261 F.3d at 814.

[111] *Id.* (citing *Deaton*, 209 F.3d 331). This is technically true. Section 301 of the CWA prohibits the discharge of pollutants into the Nation's waters. *See* 33 U.S.C. § 1311(a) (2003). Section 404, however, prohibits the discharge of dredged or fill *material* without a permit. *See id.* § 1344(a) (2003). Hence the confusion of *Nat'l Mining Ass'n* speaking in terms of "material" and *Deaton* speaking in terms of "pollutants." It would appear that proper analysis would address both—whether the addition of a pollutant had occurred to determine if the Clean Water Act was applicable, and then whether an addition of dredged or fill material had occurred to determine if a section 404 permit was appropriate.

[112] *Borden II*, 261 F.3d at 814 (citing *Deaton*, 209 F.3d at 335-36). This logic of the "legal metamorphosis" was rejected in *Nat'l Mining Ass'n*. *See* Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1404 (D.C. Cir. 1998).

[113] *Borden II*, 261 F.3d at 814-15.

The court concluded that Tsakopoulos's deep ripping had essentially poked a hole through the bottom of the wetlands that caused the water to drain out.[114] While no new material had been introduced, "the soil was wrenched up, moved around, and redeposited somewhere else,"[115] resulting in the introduction of a "pollutant."[116] The court analogized the *Borden Ranch* case to *Deaton* and *Rybachek* and rejected Tsakopoulos's reliance on *National Mining Ass'n* by stressing that "deep ripping does not involve mere incidental fallback, but constitutes environmental damage sufficient to constitute a regulable redeposit."[117]

The court agreed with the district court that Tsakopoulos's activities did not fall under the normal farming exception of section 404, not because they were not "ongoing," but because another section in the Act precludes the exceptions if they bring the waters into a new use or cause "substantial hydrological alterations."[118] Finally, the court affirmed the district court's factual findings and remanded the case for recalculation of the civil penalty.[119]

D. The Ninth Circuit's Dissent

In his dissenting opinion, Judge Gould stated first that *National Mining Ass'n* should be controlling in this case, and second, that some of Tsakopoulos's actions should be exempt under the farming exception.[120] Judge Gould followed the logic of the D.C. Circuit in *National Mining Ass'n*; that because no material had been added to the wetland, no pollutant could have been added either.[121] Because no pollutants had been added, according to Gould, the Act had not been violated; the change in the hydrological regime of the wetlands was irrelevant.[122] The concurring opinion in *National Mining Ass'n* had stated that "the word addition carries both a temporal and geographic ambiguity."[123] Relying on this reasoning, Judge Gould distinguished *Rybachek*; he reasoned that the dirt in *Rybachek*, unlike the dirt in Borden Ranch, had been moved to a substantially different geographic location and

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[114] *Id.* at 815.

[115] *Id.*

[116] *Id.*

[117] *Id.* at n.2. This unfortunate language was seized upon by the dissent and is discussed in the Analysis. *See infra* Part IV.A.

[118] *Id.* at 815-16 (quoting United States v. Akers, 785 F.2d 814, 820 (9th Cir. 1986) (citing § 1344(f)(2) (1985) (the recapture provision))).

[119] *Id.*

[120] *Id.* at 819-21 (Gould, J., dissenting).

[121] *Id.* at 819-20.

[122] *Id.* at 820.

[123] *Id.* (quoting Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1410 (D.C. Cir. 1998) (Silberman, J., concurring)).

had been held out of the water for a period of time.[124] He then distinguished *Deaton* by stating that he did not believe that sidecasting and deep ripping were comparable.[125] Finally, he referred to Tsakopoulos as a farmer rather than a developer and believed that any unintentional indentations made to the swales when the tractor merely drove over them should fall under the farming exception.[126] Judge Gould concluded by warning that the court had made new law by calling a plow a point source and by finding that deep ripping results in a discharge of pollutants—conclusions, he believed, that should be made by Congress instead.[127]

E. Highlights of the Oral Argument Before the Supreme Court

On December 10, 2002, only eight Justices of the Supreme Court heard oral arguments for *Borden*[128] because Justice Kennedy, an acquaintance of Tsakopoulos, had recused himself from the case.[129] The per curiam opinion issued by the Court six days later stated simply, "The judgment is affirmed by an equally divided Court."[130] The opinion gave no further reasoning and did not reveal which Justices were in favor of reversal.

Naturally, the oral argument drifted from issue to issue depending upon the questions posed by the Justices, but the two main issues discussed were whether the deep ripper was a point source and whether the ripping resulted in a regulable redeposit. Tsakopoulos argued that the ripper was not a point source because it did not convey the material or move it from one place to another.[131] When Justice Souter pointed out that the dirt was moved vertically, Tsakopoulos finally conceded that it was moved in small degrees.[132] The Corps reasoned that because the Act provides an exception for farmers

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[124] *Id.*

[125] *Id.* Judge Gould did not, however, explain *why* he did not think deep ripping and sidecasting were comparable.

[126] *Id.* at 821.

[127] *Id.*

[128] Transcript of Oral Argument, Borden Ranch P'ship v. U.S. Army Corps of Eng'rs, 537 U.S. 99 (2002) (per curiam) (No. 01-1243), *available at* 2002 WL 31808793.

[129] *See* PERCIVAL ET AL., *supra* note 12.

[130] *Borden III*, 537 U.S. at 100.

[131] Transcript of Oral Argument at **12-17, *Borden Ranch P'ship* (No. 01-1243).

[132] *Id.* at *17. Another Justice compared the plow blades to the propeller blades in *M.C.C.*. In this case, however, the plow blades pulled up clay instead of mud. Tsakopoulos responded by saying that *M.C.C.* was a suspect case. *Id.* at **22-23. This is a rather surprising statement because even *Nat'l Mining Ass'n* recognized the validity of that decision. While it is true that *M.C.C.* was vacated on other grounds, it was readopted in relevant part on remand. *See* United States v. M.C.C. of Fla., Inc., 772 F.2d 1501 (11th Cir. 1985), *vacated and remanded on other grounds*, 481 U.S. 1034 (1987), *readopted in relevant part on remand*, 848 F.2d 1133 (11th Cir. 1988).

engaged in plowing, Congress must have intended a plow to be a point source.[133]

As for the redeposit issue, Tsakopoulos stressed the need for geographic movement of the material or temporal change, citing to Judge Silberman's concurrence from *National Mining Ass'n*.[134] He distinguished sidecasting from deep ripping because the soil was moved a greater distance in sidecasting and stated that no homogenization of the soil actually occurs during deep ripping (implying that the clay is not brought to the surface).[135] The Corps stressed that the clay pan actually was brought to the surface and that the district court had expressly found just that.[136] In response to one Justice's observation that the real damage to the wetland had been caused by the draining, the Corps responded that the disturbance of the soil could have led to the release of new materials like heavy metals and arsenic.[137] Tsakopoulos also stressed that the Corps cannot assert jurisdiction unless dredged or fill material is discharged, not merely when a pollutant is added,[138] an issue that the Ninth Circuit did not address.

IV. ANALYSIS

A. Erroneous Reasoning of the Ninth Circuit's Majority Opinion

The Ninth Circuit majority made two glaring errors in its legal analysis. First, by not addressing whether the deep ripping resulted in the discharge of dredged or fill material, it left a critical part of determining whether the Corps had jurisdiction unanswered. Second, by holding that the redeposit was regulable because of its environmental effects rather than because of the distance it was moved, it ignored the factors to be used in consideration set forth in *National Mining Ass'n* and by the Corps itself.

1. Discharge of dredged or fill material

As discussed above, a discharge must result in the addition of a pollutant to be regulable under the CWA, and also in the addition of dredged or fill material to fall under the permit requirements of section 404.[139] The Ninth

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[133] Transcript of Oral Argument at *33, *Borden Ranch P'ship* (No. 01-1243).

[134] *Id.* at **9-10.

[135] *Id.* at **5-6, 10. This conclusion that there is no vertical movement of soil is directly counter to the express finding of the district court in *Borden I*.

[136] Transcript of Oral Argument at **28-29, *Borden Ranch P'ship* (No. 01-1243).

[137] *Id.* at *43.

[138] *Id.* at *18.

[139] *See supra* Part III.

Circuit in *Borden II* began its analysis by misstating the law, asserting that it is unlawful "to discharge *pollutants* into wetlands without a permit from the Army Corps of Engineers."[140] Section 404 clearly states, however, that the Corps may issue permits for "the discharge of *dredged or fill material*."[141] As discussed above, "dredged material" and "fill material" have statutorily defined meanings that are not synonymous with "pollutant."[142] Although dredged and fill material may be composed of statutory pollutants like dredged spoil, rock, and sand, dredged or fill material, as defined in the regulations, must be discharged before the Corps can assert jurisdiction under section 404.[143]

While the Ninth Circuit did not specify if or whether dredged or fill material had been discharged from the deep rippers, the district court found that "fill" had been deposited in the wetlands.[144] At the time of the trial in 1999, "fill material" was defined as "any material used for the *primary purpose* of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody."[145] In light of this definition, the deposit in *Borden* only weakly qualifies as fill because the overturned clay was not deposited with the *purpose* of filling the wetland with the clay itself, but rather was overturned when the wetland was purposefully drained.[146]

Had the *Borden* case been brought today, however, the discharge would almost certainly qualify as fill material. The definition of fill material was changed in May 2002, and the term now means "material placed in waters of the United States where the material *has the effect* of . . . [r]eplacing any portion of a water of the United States with dry land . . . or . . . changing the bottom elevation of any portion of a water of the United States."[147] The clay

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[140] Borden Ranch P'ship v. U.S. Army Corps of Eng'rs, 261 F.3d 810, 814 (9th Cir. 2001), *aff'd per curiam*, 537 U.S. 99 (2002)(citing 33 U.S.C. § 1344(a), (d) (2001)) (emphasis added) [hereinafter *Borden II*].

[141] 33 U.S.C. § 1344(a) (emphasis added).

[142] *See supra* Part III.A.

[143] *See* 33 U.S.C. § 1344(a), 33 C.F.R. § 323.2 (c), (e) (2003).

[144] Borden Ranch P'ship v. U.S. Army Corps of Eng'rs, No. S-97-0858, 1999 U.S. Dist. LEXIS 21389, at *44 (E.D. Cal. Nov. 8, 1999), *aff'd*, 261 F.3d 810 (9th Cir. 2001), *aff'd per curiam*, 537 U.S. 99 (2002) [hereinafter *Borden I*].

[145] United States v. Bay-Houston Towing, 33 F. Supp. 2d 596, 607 (E.D. Mich. 1999) (citing 33 C.F.R. § 323.2(e)) (emphasis added).

[146] *But cf.* Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897, 923 (5th Cir. 1983) (finding that materials buried in the wetland with the purpose of filling it qualified as fill material).

[147] 33 C.F.R. § 323.2(e)(1)(i)-(ii) (emphasis added). The Corps believed that the new effects-based test would result in greater consistency, ensuring that discharges that resulted in the same environmental harm would be treated the same. It also eliminates the confusion of a subjective, purpose-based test. *See* Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," 67 Fed. Reg. 31,129, 31,132-33 (May 9, 2002) (to be codified at 33 C.F.R. pt. 323, 40 C.F.R. pt. 232).

pan dragged up in *Borden* certainly had the *effect* of replacing the wetland with dry land, although it could be argued that the process of ripping up the clay pan had the effect of converting the wetland, not the material itself.

The court could also conceivably have defined the clay pan in *Borden II* as dredged material. "Dredged material" is defined in the Corps's regulations as "material that is excavated or dredged from waters of the United States."[148] The facts in *M.C.C.*, where the court found that dredged material had been discharged,[149] are highly comparable to those in *Borden*. The mud dug up by a boat's propellers and then flung onto adjacent sea grass from that case[150] is analogous to the clay pan dragged up by the rippers in *Borden*. In both cases the material was ripped upward by a metal blade and redeposited nearby. Based on this analogy, the *Borden* court could have described the clay pan as dredged material and addressed a vital issue in determining whether the Corps had jurisdiction under section 404.

2. Improper focus upon the environmental effects of the redeposit rather than upon soil movement

The court also erred by focusing upon the environmental effects of the redeposit of the clay pan rather than the distance it was moved in determining whether it was regulable.[151] The court correctly observed that *Deaton*, *Rybachek*, and *Avoyelles* were concerned about the environmental dangers posed by redeposits.[152] The court in *National Mining Ass'n* and the Corps itself, however, stated that other factors, especially geographic movement, should be controlling.[153] The Corps reiterated, when creating the rule defining

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[148] 33 C.F.R. § 323.2(c).

[149] 772 F.2d 1501, 1506 (11th Cir. 1985), *vacated and remanded on other grounds*, 481 U.S. 1034 (1987), *readopted in relevant part on remand*, 848 F.2d 1133 (11th Cir. 1988).

[150] *Id.*

[151] *See* Borden Ranch P'ship v. U.S. Army Corps of Eng'rs, 261 F.3d 810, 814-15 (9th Cir. 2001), *aff'd per curiam*, 537 U.S. 99 (2002) (citing 33 U.S.C. § 1362(12) (2003)) [hereinafter *Borden II*]. The court also distinguished the material at issue from incidental fallback because it "constitute[d] environmental damage sufficient to constitute a regulable redeposit." *Id.* at 815 n.2.

[152] *See id.* at 814-15 ("These cases recognize that activities that destroy the ecology of a wetland are not immune from the Clean Water Act merely because they do not involve the introduction of material brought in from somewhere else.").

[153] *See* Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1407 (D.C. Cir. 1998) (stressing the need for "redeposits [to be] at some distance from the point of removal"); *id.* at 1410 (Silberman, J., concurring) (stating that temporal and geographic factors must be considered); Further Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material," 66 Fed. Reg. 4550, 4566-67 (Jan. 17, 2001) (to be codified at 33 C.F.R. pt. 323, 40 C.F.R. pt. 232) [hereinafter Further Revisions] (stating that the Corps would not distinguish incidental fallback from other redeposits by environmental damage, but by

the discharge of dredged material, that it would not distinguish incidental fallback from other redeposits by the environmental damage done, but by the quantity of material moved, how far it was moved, and whether any pollutants from within the sediment were moved downstream.[154] The dissent from *Borden II* quickly seized upon the majority's improper focus on the altered hydrological nature of the wetlands and stressed that no addition to the wetlands had occurred because the clay pan was not moved a sufficient distance.[155] Judge Gould relied upon Judge Silberman's concurrence from *National Mining Ass'n*, stressing the importance of a temporal or geographic change,[156] but did not cite the Corps's own reasoning from the promulgation of the new rule that would have even further supported his stance.

Even if the factors stressed by Gould and the Corps *had* been used in analyzing the movement of the ripped soil, however, the decision of the Ninth Circuit would still stand. Judge Gould and the Corps both focus upon the need for the geographic movement of the redeposit. The cases offered in support of this requirement are *M.C.C.* and sidecasting cases like *Deaton*, where the horizontal movement of the soil was found to constitute sufficient movement to qualify as a regulable redeposit.[157] What the Ninth Circuit majority did not note was that the district court had found that the ripping had caused soil to be moved both horizontally and vertically.[158] In its oral argument before the Supreme Court, the Corps stressed that the district court had found the clay pan had been moved vertically, and Justice Souter even noted that the ripper "move[d] the stuff up and down."[159] Scientific evidence also supports that deep ripping causes the clay pan to rise to the surface.[160] One study of the effects of deep ripping on surface soil found that "mixing of

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considering the quantity of material moved, how far it was moved, and whether any pollutants from within the sediment were moved).

[154] Further Revisions, 66 Fed. Reg. at 4566-67.

[155] *Borden II*, 261 F.3d at 820 (Gould, J., dissenting).

[156] *Id.*

[157] *See id.* (acknowledging that the sidecasting in *Deaton* resulted in a regulable redeposit); Further Revisions, 66 Fed. Reg. at 4,558 (citing United States v. Deaton, 209 F.3d 331 (4th Cir. 2000); United States v. M.C.C. of Fla., Inc., 772 F.2d 1501, 1505 (11th Cir. 1985), *vacated and remanded on other grounds*, 481 U.S. 1034 (1987), *readopted in relevant part on remand*, 848 F.2d 1133 (11th Cir. 1988) (giving examples of regulable redeposits because of the nature of relocation)).

[158] *See* Borden Ranch P'ship v. U.S. Army Corps of Eng'rs, No. S-97-0858, 1999 U.S. Dist. LEXIS 21389, at *5 (E.D. Cal. Nov. 8, 1999), *aff'd*, 261 F.3d 810 (9th Cir. 2001), *aff'd per curiam*, 537 U.S. 99 (2002) [hereinafter *Borden I*].

[159] Transcript of Oral Argument at *16, *Borden Ranch P'ship*, (No. 01-1243).

[160] *See* J.C. Bateman & D. S. Chanasyk, *Effects of deep ripping and organic matter amendments on Ap horizons of soil reconstructed after coal strip-mining*, 81 CAN. J. SOIL SCI. 113-20 (Feb. 2001); L.G. Wetter, G.R. Webster, & J. Lickacz, *Amelioration of a Solonetzic Soil by Subsoiling and Liming*. 67 CAN. J. SOIL SCI., 919-30 (Nov. 1987).

topsoil and subsoil materials occurred as a result of deep ripping,"[161] and that "[c]lay content of the surface soil increased by 4.7%."[162] A similar study found that deep ripping "increased the clay content of the [surface] from 16 to 27%."[163] Thus, although the clay pan from the wetlands may not have moved a substantial horizontal distance, evidence indicates that it moved to a new location *vertically*, and its redeposit therefore constituted an addition of material under the CWA.

The Corps also noted in its promulgation of the post-*National Mining Ass'n* rule that in addition to the distance the material moved, the "release of pollutants previously bound up in sediment beyond the place of initial removal"[164] is also a relevant factor to consider when determining whether a redeposit can be regulated.[165] Scientific studies on the effects of deep ripping found that the surface soil had a higher pH[166] after ripping and contained increased levels of calcium salts[167] and sodium ions.[168] While these substances are not clearly listed in the statutory definition of "pollutant,"[169] they may qualify as "chemical waste" or may be considered pollutants anyway because they need not be specifically listed to be a pollutant.[170] These pollutants were released from the sediment and were moved from their initial location by rising to the surface, arguably meeting the requirements set forth by the Corps to define a regulable redeposit.

B. Deep Ripping's Similarity to Sidecasting

In finding that redeposits could qualify as additions, the Ninth Circuit's majority in *Borden II* relied upon the reasoning of the Fourth Circuit in *Deaton*, which held that sidecasting, where material excavated from a wetland

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[161] Bateman & Chanasyk, *supra* note 160, at 119.

[162] *Id.* at 115.

[163] Wetter et al., *supra* note 160, at 919 (abstract).

[164] Further Revisions to the Clean Water Act Regulatory Definition of "Discharge of Dredged Material," 66 Fed. Reg. 4,550, 4,566 (Jan. 17, 2001) (to be codified at 33 C.F.R. pt. 323, 40 C.F.R. pt. 232).

[165] *See* United States v. Wilson, 133 F.3d 251, 273 (4th Cir. 1997) (Opinion of Payne, J.)

> The sub-surface material extracted by the excavation or dredging is added to the water . . . . Whether that which is thusly discharged is highly toxic kepone laying a few inches beneath the silted over bed of the James River or perhaps not so toxic fertilizer, biological material, rocks, or sand from the bottom of a wetland, a pollutant is added to the waters.

Id.

[166] Bateman & Chanasyk, *supra* note 160, at 118; Wetter et al., *supra* note 160, at 923.

[167] Wetter et al., *supra* note 160, at 923, 927.

[168] Bateman & Chanasyk, *supra* note 160, at 118-19.

[169] *See* 33 U.S.C. § 1362(6) (2003).

[170] *See* Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 566 (5th Cir. 1996).

is tossed back into that same wetland, constitutes the discharge of a pollutant under the Clean Water Act.[171] While the Ninth Circuit quoted large sections of *Deaton*'s analysis about redeposits in general[172] and stated that it could "see no meaningful distinction between [deep ripping] and the activities at issue in *Rybachek* and *Deaton*,"[173] it did not recognize the extent of the parallel between deep ripping and sidecasting.

In sidecasting, a ditch is dug though wetlands in order to drain them, and the excavated dirt is sloppily piled on either side of the ditch.[174] As noted above, the Corps cannot enforce section 404 merely for the draining of a wetland; a discharge of dredged or fill material must occur.[175] Accordingly, the Corps asserts jurisdiction in sidecasting cases not through the digging of the ditch, which does the real damage to the wetland,[176] but through the discharge of the fill material (the material excavated from the ditch) back into the wetland surrounding the ditch.[177]

Because redeposits from sidecasting have been recognized as being regulable by the courts[178] and by the Corps,[179] any parallel between deep ripping and sidecasting would reinforce the Corps's jurisdiction over the activity. The parallel is fairly obvious: both activities result in the draining of wetlands by digging into them and pulling up the bottom sediment, but the Corps is forced to focus on the movement of the sediment rather than on the draining itself. The only difference is that the movement of the sediment is mainly vertical in deep ripping and mainly horizontal in sidecasting. As discussed above, movement of soil, whether vertical or horizontal, should factor into the analysis of

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[171] United States v. Deaton, 209 F.3d 331, 335 (4th Cir. 2000).

[172] Borden Ranch P'ship v. U.S. Army Corps of Eng'rs, 261 F.3d 810, 814 (9th Cir. 2001), *aff'd per curiam*, 537 U.S. 99 (2002) [hereinafter *Borden II*].

[173] *Id.* at 815.

[174] *See Deaton*, 209 F.3d at 333. *See also* United States v. Wilson, 133 F.3d 251, 254 (4th Cir. 1997).

[175] *See supra* Part III.B.

[176] *See, e.g.*, United States v. Cumberland Farms of Conn., Inc., 647 F. Supp. 1166, 1174 (D. Mass. 1986) (finding that the facts showed that after a ditch had been dug through wetlands, "the level of the swamp appeared to be a good two or three feet, if not more, below the evident root system."); *Wilson*, 133 F.3d at 254 (noting that the defendants attempted to drain the land by digging the ditches).

[177] *See Deaton*, 209 F.3d at 333.

[178] *See, e.g., id.* at 335; *Cumberland*, 647 F. Supp. at 1176-77 (finding that the Corps had jurisdiction over the dredge and fill activities in the swamp, though not specifically referring to the ditch digging as sidecasting). Even *National Mining Ass'n* implies that sidecasting has always been regulable under section 404.

[179] *See* Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399, 1402 (D.C. Cir. 1998) (citing 58 Fed. Reg. 45,008, 45,013/3 (Aug. 25, 1993)) (noting that sidecasting has "always been regulated under Section 404").

whether a redeposit can be regulated. Noting the similarities of these activities would greatly have strengthened the Ninth Circuit's analysis.[180]

V. CONCLUSION

The Corps's ability to assert jurisdiction over the destruction of wetlands hinges upon the existence of a discharge of dredged or fill material into the water. Although the Ninth Circuit in *Borden II* correctly held that the Corps had authority over the redeposit of the sediment overturned by the deep rippers, the court incorrectly considered the environmental damage from the draining to be the controlling factor in whether the redeposit could be regulated. Had the actual factor of soil movement been addressed, however, the court's holding would still stand, albeit only after painstaking analysis.

It seems both foolish and dishonest to spend such effort in tracking the movement of dirt within a wetland when the true concern is over the draining activity that is causing the movement of the dirt. The EPA and the Corps have proven their dedication to restraining the destruction of wetlands, even though they must do so through this roundabout manner of regulation. It would benefit all parties involved—the Corps, the developers, and the courts—if Congress would mercifully lay the redeposit analysis to rest by officially extending the Corps's jurisdiction under a new statute to the draining of wetlands.

Before Congress can expand the Corps's jurisdiction, however, two Constitutional issues must be confronted: first, whether Congress has the power to bestow such authority upon the Corps, and second, whether the effect of such additional regulation on property owners would result in a taking of their property under the Fifth Amendment. Because a Congressional grant of authority cannot be based upon "ecological importance,"[181] Congress could justify the extended protection of wetlands on its Commerce Clause authority over navigable waters, the same basis it uses now for regulating the discharge of dredged or fill material into non-isolated wetlands.[182] A Fifth Amendment partial taking claim, depending upon the extent of the loss of value of the

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[180] Although Judge Gould stated in his dissent in *Borden II* that, in his view, deep ripping and sidecasting were not the same, he did not give any basis for this view. *See* Borden Ranch P'ship v. U.S. Army Corps of Eng'rs, 261 F.3d 810, 820 (9th Cir. 2001), *aff'd per curiam*, 537 U.S. 99 (2002) [hereinafter *Borden II*]. Deep ripping is also similar to the dredging done by the boat's propellers in *M.C.C.*, as both involved the vertical movement of sediment by metal blades. *See* United States v. M.C.C. of Fla., Inc., 772 F.2d 1501, 1505 (11th Cir. 1985), *vacated and remanded on other grounds*, 481 U.S. 1034 (1987), *readopted in relevant part*, 848 F.2d 1133 (11th Cir. 1988).

[181] *See* Vickie V. Sutton, *Wetlands Protection—A Goal Without a Statute*, 7 S.C. ENVTL. L.J. 179, 203 (1998).

[182] *See id.* at 189.

property at issue, could arise only if the Corps used its new authority to prohibit the destruction of wetlands.[183]

Although other bills attempting to extend the Corps's jurisdiction have failed,[184] giving the Corps authority over the draining of wetlands remains the best alternative in ensuring their protection. First, by demanding the issuance of section 404 permits for redeposits within wetlands, the Corps, along with the EPA, has demonstrated its understanding of the ecological importance of wetlands and its persistence in providing for their protection. Second, because the Corps already has constitutional authority to regulate activities affecting navigable waters, its regulation of activities that drain and destroy navigable waters should be included as part of this authority. Third, and finally, taking claims would be unlikely because the Corps rarely denies section 404 permits,[185] focusing instead upon mitigation factors within the permits. No reason exists to believe that the Corps would behave any differently in issuing permits for the draining of wetlands, preventing the "complete prohibition of destruction" scenario from occurring. By issuing permits with mitigation requirements for the draining of wetlands under a new statute, the Corps would be constitutionally protecting a valuable ecological resource while allowing landowners to utilize their private property.

In the case of *Borden*, the Corps's authority would have been unquestionable. Tsakopoulos could have developed his land while incorporating the required mitigation measures to protect or replace the wetlands, as he ended up doing anyway under the Corps's existing authority under section 404. The courts, however, would have been relieved of a complicated and painstaking legal dispute in the process.

Kara Marciniec[186]

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[183] *See id.* at 197-98.

[184] *See* Am. Mining Cong. v. U.S. Army Corps of Eng'rs, 951 F. Supp. 267, 276 n.19 (D.D.C. 1997), *aff'd sub nom.* Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs, 145 F.3d 1399 (D.C. Cir. 1998) (citing failed bills that proposed to regulate drainage, channelization, and excavation and to regulate any addition of dredged or fill material into navigable waters incidental to any activity that has or would have the effect of destroying or degrading any area of navigable waters).

[185] *See* Sutton, *supra* note 181, at 198 ("[I]n 1995, there were over 62,000 § 404 permit applications, yet only 274 (or 5%) of the permits were denied.") (citations omitted). This low denial rate, plus the fact that as of 1998, only three judicial decisions have found property takings from federal wetland regulations, make the possibility of Fifth Amendment takings practically a non-issue. *See id.*

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Avoiding the Next Hokuli'a: The Debate over Hawai'i's Agricultural Subdivisions

I. INTRODUCTION

As an island state with finite land resources, Hawai'i struggles with balancing two competing and equally important interests: housing for Hawai'i's people and preservation of agricultural lands. This struggle is inscribed in state and county laws, which reflect constant compromises between the two goals. Enshrined in Hawai'i's Constitution is a mandate to conserve and protect important agricultural lands.[1] The mandate was forged out of mutual concessions from pro-urbanization and pro-preservation delegates at the Hawai'i Constitutional Convention of 1978.[2] Hawai'i's State Plan[3] also accommodates both concerns within its policies, priority guidelines, and goals and objectives. Lastly, the tug-of-war between Hawai'i's State Land Use Law[4] and the county codes[5] reveals a practice of blending preservation and urbanization needs in the form of agricultural subdivisions.

Recently, controversy intensified over the legality of one agricultural subdivision, Hokuli'a.[6] The proposed project, a luxury residential subdivision centered around a golf course, to be built on 1550 acres of state-zoned agricultural land, prompted renewed concerns over appropriate development within the agricultural district.[7] In the debate over Hokuli'a, two key problems with Hawai'i land use law rose to prominence. The first problem is that not all agricultural lands are created equal; the agricultural district has long been a holding zone for half the land in the state,[8] the majority of which is not suitable for agriculture. Marginal agricultural lands should be put to better use: in this case, housing.

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[1] *See* HAW. CONST. art. XI, § 3.

[2] *See infra* Part III.A.1.

[3] *See* HAW. REV. STAT. §§ 226-1 to -107 (2001).

[4] *See* HAW. REV. STAT. §§ 205-1 to -18 (2001).

[5] *See generally* HAWAI'I, HAW., HAWAII COUNTY CODE, § 25 (1983); KAUA'I, HAW., REVISED ORDINANCES OF THE COUNTY OF KAUAI, art. 7 (1976); MAUI, HAW., CODE OF THE COUNTY OF MAUI, chs. 18, 19 (1980); HONOLULU, HAW., LAND USE ORDINANCE, § 21 (2003).

[6] *See infra* Part II.B for background discussion of the 'Hokuli'a project.

[7] *See infra* Part II.B.

[8] *See* DAVID L. CALLIES, REGULATING PARADISE: LAND USE CONTROLS IN HAWAII 7 (1984) ("Hawai['i]'s land area is divided into four district classifications roughly as follows: urban, 5 percent; agricultural, 47 percent; conservation, 47 percent; and rural, 1 percent." (citation omitted)).

The second problem is that the State Land Use Law[9] governing the agricultural district contains a loophole so large that entire subdivisions have been squeezing through it for decades. The requirement that residences in the agricultural district be "farm dwellings"[10] is not specific enough to preclude agricultural subdivisions. If subdivisions are truly inappropriate uses of agricultural district lands, then the Hawai'i State Legislature must amend the State Land Use Law.[11]

The legislature and the courts are in the process of addressing these two problems. First, through House Bill 2800 ("HB 2800")[12] and Senate Bill ("SB 3052"),[13] the legislature is on the verge of solving the first problem, identifying important agricultural lands ("IALs"). The legislature's solution will not thoroughly balance both preservation and urbanization needs, however, because it plans to leave all land, important and unimportant, in the agricultural district.[14] Some unimportant agricultural land should be reclassified as rural, thereby facilitating housing development for Hawai'i's people.

While marginal lands remain in the agricultural district, pressure to build within the agricultural district will continue. As a result, conflicts over the interpretation of the State Land Use Law will only intensify. The legislature must clarify what it considers appropriate development in the agricultural district. The alternative is to leave interpretation open to the circuit courts, which should not be called upon to create land use policies for half the state's land.

This Comment attempts to reconcile the competing needs of agricultural preservation and necessary development. Part II describes the socio-historical background of agriculture and housing in Hawai'i and the current controversy surrounding Hokuli'a. Part III examines legislative and judicial attempts to solve the two problems surrounding land use in the agricultural district: first, the identification of IALs; and, second, the lack of clarity in the State Land Use Law governing development on agricultural land. Part IV recommends a course of action for balancing the competing needs of preservation and urbanization in Hawai'i. Part V concludes with a request that the Hawai'i State Legislature clarify the policies behind its land use designations.

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[9] HAW. REV. STAT. §§ 205-1 to -18.

[10] *See id.* § 205-4.5.

[11] *See infra* Part IV.

[12] H.B. 2800, 22d Leg., Reg. Sess. (Haw. 2004).

[13] S.B. 3052, 22d Leg., Reg. Sess. (Haw. 2004).

[14] *See* H.B. 2800; S.B. 3052.

II. BACKGROUND

Land use in Hawai'i originated with the native Hawaiians, who balanced the needs of their human communities with the bounties and limitations of their natural resources. After Western contact, the commercialization of land drastically transformed the Hawaiian landscape; agriculture locked up millions of acres in sugar cane and pineapple production. As the state now emerges from the demise of plantation agriculture and faces modern pressures, it has searched for a new balance between urbanization and preservation. Hokuli'a has, like a lightning rod, focused and channeled the recent land use debate. This Part briefly traces the background of agricultural land use in Hawai'i, leading up to the Hokuli'a decision.

A. Socio-historical Background: Agriculture and Housing in Hawai'i

The indigenous population of Hawai'i successfully struck a balance between the competing land uses of housing and agriculture for over a millennium.[15] Prior to Western contact in 1778, native Hawaiians lived in "a highly organized, self-sufficient, subsistent social system based on communal land tenure."[16] The basic unit of land was the *ahupua 'a*, a segment of land that ran from the mountains to the sea, that was designed to provide for all of its residents' subsistence needs,[17] including agriculture and housing.

As Western explorers, missionaries, and businessmen began migrating to the islands, they pressured the Hawaiian monarchs to create a secure land tenure system in the Western image.[18] Western coercion culminated in the Great Mahele[19] of 1846, which converted much of the land of Hawai'i to private ownership.[20] The new Western owners of Hawaiian land first sought "ways to turn agriculture into profit."[21] Towards the end of the nineteenth century, sugar emerged as Hawai'i's premiere export crop.[22] Soon afterwards, pineapple cultivation became increasingly profitable as well.[23] By the 1960s, sugar and pineapple plantations covered "a third of a million acres, or one-

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[15] *See* THOMAS H. CREIGHTON, THE LANDS OF HAWAII: THEIR USE AND MISUSE 150 (1978).

[16] S.J. Res. 19, 103d Cong., 107 Stat. (1993) (enacted).

[17] *See In re* Boundaries of Pulehunui, 4 Haw. 239, 241 (1879).

[18] *See* NATIVE HAWAIIAN RIGHTS HANDBOOK 5 (Melody Kapilialoha MacKenzie, ed., 1991).

[19] Mahele means "land division."

[20] *See* NATIVE HAWAIIAN RIGHTS HANDBOOK, *supra* note 18, at 7.

[21] CREIGHTON, *supra* note 15, at 135.

[22] *See id.* at 137.

[23] *See id.* at 139.

twelfth of the state's surface and almost three-fourths of its prime agricultural land."[24]

Within the last two decades,[25] as tourism replaced agriculture as Hawai'i's economic base,[26] plantation agriculture began its "steep decline."[27] With hundreds of thousands of former plantation lands now relegated to the agricultural district, conflicts over how best to use those lands have inevitably sharpened.[28] A perennial concern is sufficient quality housing for Hawai'i's people.[29]

Agricultural land is the most amenable to housing development.[30] Most of the land is not suited for farming[31] and might not belong in the district to begin with. Of the 1.9 million acres in the district, only one quarter are classified as A or B (prime) lands.[32] In fact, the agricultural district is regarded as a "catch-all" district; lands not easily classified as urban, conservation, or agriculture are "put into [the] agricultur[al district] by default."[33] The agricultural district thus "contains far more acreage than will ever be actively cultivated and thousands of acres that are poorly suited to any kind of farming."[34] Pressure to build within the agricultural district has been mounting for decades.[35] Misclassified land in the agricultural district may be better used for housing, and many developers have already done just that.

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[24] *Id.*

[25] *See* Pat Omandam, *Market Upheaval Prompts Review of Farm Land Policy*, HONOLULU STAR-BULLETIN, Aug. 29, 2001, at A5.

[26] *See* CREIGHTON, *supra* note 15, at 146-47.

[27] DAVID L. CALLIES, PRESERVING PARADISE 12 (1994).

[28] *See* Omandam, *supra* note 25, at A5.

[29] *See* CREIGHTON, *supra* note 15, at 149.

[30] Much of this land is level and already serviced by roads, water, and electricity. *See* HAROLD L. BAKER, LAND CLASSIFICATION AND THE DETERMINATION OF HIGHEST AND BEST USE OF HAWAII'S AGRICULTURAL LANDS 24 (1972).

[31] *See infra* notes 32-34 and accompanying text.

[32] *See* Floor Debate on H.B. 1063, 13th Leg., Reg. Sess. (1985) (Statement of Sen. Aki), *reprinted in* 1985 HAW. HOUSE J. 689, 691. For a discussion on how agricultural land in Hawai'i is graded, *see infra* note 80.

[33] Bruce Dunford, *Lingle Aims to Reevaluate Farm Land Designations*, HONOLULU STAR-BULLETIN, Sept. 29, 2003, at A5 (quoting Governor Linda Lingle); Richard Borreca, *Lingle Tells Developers to Cultivate Legislators*, HONOLULU STAR-BULLETIN, Oct. 16, 2003, at A8 ("Lingle said that agricultural land is used as the catch-all category for all land that doesn't fit in another land use designation.").

[34] AMERICAN PLANNING ASSOCIATION, HAWAI'I CHAPTER, DRAFT: RENEWING HAWAII'S LAND USE SYSTEM, Dec. 3, 2003; CALLIES, *supra* note 27, at 14 ("Hawai['i] has, by several hundred thousand acres, more land classified for agricultural use than it can conceivably use or need for the next fifty years at least.").

[35] *See* AMERICAN PLANNING ASSOCIATION, *supra* note 34, at 1.

Development in the agricultural district is nothing new.[36] Even those most opposed to the practice recognize that the counties "have allowed numerous agricultural subdivisions to be built [even] without any apparent agricultural connection."[37] Big Island Mayor Harry Kim explained, "Everybody knows that [agricultural subdivisions are] an abuse of the word ag, but it is not an abuse of the zoning. It is legal."[38] Hawai'i State Senator Paul Whalen has said, "The ag land issue has the courts and the lawyers involved and people suing [left and right]. There's nothing wrong with one-acre 'gentleman' farms."[39] Indeed, the agricultural-less agricultural subdivision "has become a standard"[40] throughout the counties. This standard practice went unchallenged in the courts until Lyle Anderson's Hokuli'a Project.[41]

B. Hokuli'a

Perched 1250 feet above Kealakekua Bay on the Island of Hawai'i sits the now idle Hokuli'a development.[42] The development spans 1550 acres of predominantly agricultural district land classified by the state as C, D, and E (marginal) land.[43] Those who have seen the land characterize it as unsuitable for agriculture. Craig Watase, president of Mark Development and past president of the Building Industry Association asserted, "[N]othing was growing out there, not even weeds."[44] Others note the following:

> The Hokulia project land is "agricultural" only in the most liberal sense of the word. It is mostly scrub kiawe on the thinnest layers of "soil" over lava. That soil . . . cannot sustain virtually any meaningful agricultural use except for

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[36] *See* Borreca, *supra* note 33, at A8 ("Using land zoned for agriculture for 'gentleman farms' and exclusive residences is nothing new, Lingle said.").

[37] DAVID KIMO FRANKEL, PROTECTING PARADISE: A CITIZEN'S GUIDE TO LAND AND WATER USE CONTROLS IN HAWAI'I 51 (1997).

[38] Stu Dawrs, *Restoring Faith*, HONOLULU WEEKLY, Mar. 21, 2001, at 8 (quoting Big Island Mayor Harry Kim).

[39] Andrew Perala, *Isle Legislators Urge Participation*, WEST HAWAII TODAY, Nov. 14, 2003, at 4A.

[40] Edwin Tanji, *Planning Director Says Buyers of Parcels on Former Pioneer Mill Fields Need to Be Farming*, MAUI NEWS, *available at* http://www.maui-tomorrow.org/issuespages/ag/conversion.html (last visited Feb. 21, 2005).

[41] *See infra* Part II.B.

[42] *See* Timothy Hurley, *Ruling Revives Anti-Business Tag*, HONOLULU ADVERTISER, Sept. 11, 2002, at A1.

[43] *See* Kelly v. 1250 Oceanside Partners, Civ. No. 00-1-0192K (3d Cir. Ct. Haw. Sept. 9, 2003) (Findings of Fact, Conclusions of Law, Order Regarding Trial on Count IV of the Fifth Amended Complaint); David Callies, *Case for Hokulia: Let the Public Judge*, HONOLULU ADVERTISER, Sept. 21, 2003, at B3.

[44] Dunford, *supra* note 33, at A5.

> grazing a few head of cattle, and then only during Kona's wet season. The previous owners abandoned even this limited use as impractical.[45]

Despite starting off with land of such limited agricultural capacity, the developers offered prospective homebuyers a range of agricultural activities to engage in, including choosing "from a list of crops approved by the developer [and farming] their own land . . . or allow[ing] the homeowners' association to take care of their crops."[46] Said Watase, The Lyle Anderson Company "made that place beautiful only because of their investment."[47]

The Lyle Anderson Company's plans included a 730-lot development, golf course, guest lodge, and shoreline park.[48] Its target market buyer is:

> 46 to 60 years old, is an established Fortune 500 executive, possesses a household income of $300,000 or more, has a net worth of $5 million plus, is an avid golfer, is "residential equity rich" (owns homes in several destinations around the world), and owns a primary home on the West Coast or in Japan.[49]

The lots in Hokuli'a sell for $650,000 to $2.5 million.[50] In short, the Hokuli'a plan was to transform a dry plateau into a verdant playground for the wealthy.

Between 1993 and 1997, developer The Lyle Anderson Company, Inc. received "Hawai'i county official assurances . . . after 30 public hearings and county planning, zoning, permitting and subdivision approvals."[51] The developer entered into a development agreement[52] with Hawai'i County[53] and subsequently spent hundreds of millions of dollars on the Hokuli'a project.[54]

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[45] Callies, *supra* note 43, at B3.

[46] Lyn Danninger, *Hokulia Workers Face Layoffs*, HONOLULU STAR-BULLETIN, Sept. 18, 2003, at C1 (The developer has a nursery of coffee trees and native Hawaiian hardwood seedlings.).

[47] Dunford, *supra* note 33, at A5.

[48] *See* Rod Thompson, *Big Island's Hokulia Development Halted*, HONOLULU STAR-BULLETIN, Sept. 10, 2003, at A3.

[49] *Growing Fig Leaves: That's Not Agriculture*, HONOLULU ADVERTISER, Sept. 21, 2003, at B2.

[50] *See* Kevin Dayton, *Judge Stops Construction at Hokulia*, HONOLULU ADVERTISER, Sept. 10, 2003, at A12.

[51] Callies, *supra* note 43, at B3.

[52] In Hawai'i, the process for entering into a development agreement is codified in sections 46-121 to -132 of the Hawai'i Revised Statutes ("HRS").

[53] *See* Lynn Danninger, *Hokulia Supporters Say Ruling on Land Use Damaging*, HONOLULU STAR-BULLETIN, Nov. 26, 2003, at C5; Kelly v. 1250 Oceanside Partners, Civ. No. 00-1-0192K (3d Cir. Ct. Haw. Sept. 9, 2003) (Findings of Fact, Conclusions of Law, Order Regarding Trial on Count IV of the Fifth Amended Complaint) at 14.

[54] *See* Callies, *supra* note 43, at B3.

Lyle Anderson thought he had done everything necessary to ensure his right to proceed with his development.[55]

Two groups vehemently opposed the Hokuli'a project: one group, led by Walter Jack Kelly, was composed of Kona residents; the other group, Protect Keopuka Ohana, was composed of lineal and cultural descendents of Native Hawaiians of the area.[56] They sued to enjoin the development as, among other things, an illegal use of agricultural district land.[57] After a bench trial in July, 2003, a Third Circuit Court judge declared that the development violated Hawai'i Revised Statutes ("HRS") section 205[58] and enjoined any further development on the project site until 1250 Oceanside Partners obtains from the state Land Use Commission ("LUC") a reclassification of the project land from agricultural to urban.[59] The order was unexpected and shocking to both sides.[60]

Reaction to the decision and order was immediate. A steady stream of letters to the editor praised the decision and chastised 1250 Oceanside Partners' "flouting," "skirting around," "violating", or "ignoring" state law.[61] The letters reflected general public sentiment that development on agricultural

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[55] It would appear that 1250 Oceanside Partners acquired vested rights to proceed with their development, and government is equitably estopped from repudiating its prior assurances. *See* County of Kauai v. Pac. Standard Life Ins., 65 Haw. 318, 653 P.2d 766 (1982):

> 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.

Id. at 327, 653 P.2d at 774 (citing Life of the Land v. City Council, 61 Haw. 390, 453, 606 P.2d 866, 902 (1980)).

[56] *See* Bobby Command, *Hokulia Developers back in Court Again*, WEST HAWAII TODAY, Feb. 4, 2001, at 1A.

[57] Other issues included Clean Water Act violations and treatment of native Hawaiian burials and other cultural sites on the property. *See* Dayton, *supra* note 50, at A12. These issues are beyond the scope of this paper.

[58] *See 1250 Oceanside Partners*, Civ. No. 00-1-0192K, at 15-16.

[59] *See id.* at 30.

[60] *See* Terrence Sing, *Hokulia Developer Files Motion*, PAC. BUS. NEWS, Sept. 26, 2003, at 50 (Oceanside Partners Vice President Dick Frye said, "None of us, including the plaintiffs, expected the judge to rule the way he did.").

[61] *See* Jack Kelly, Letter to the Editor, *Slowing Creeping Urban Growth on Our Ag Lands*, HONOLULU ADVERTISER, Sept. 16, 2003 at A9; Karina Umehara, Letter to the Editor, *Hokulia Developers Ignored Hawaii's Laws*, HONOLULU STAR-BULLETIN, Sept. 17, 2003, at A12; Matt Binder, Letter to the Editor, *Hokulia Developer Should Play by Rules*, HONOLULU ADVERTISER, Sept. 17, 2003, at A19; Ralph Johansen, Letter to the Editor, *Hokulia Developer Got What Was Coming*, HONOLULU ADVERTISER, Sept. 18, 2003, at A13.

land was illegal, and that it was time that one was stopped.[62] One plaintiffs' attorney added, "[T]here were a number of cases on the Big Island where urban developments [on agricultural land] slipped through without the required scrutiny by the LUC, but the practice was not challenged until the lawsuit over Hokuli'a . . . . Someone has to be made an example of, and Oceanside might be that developer."[63]

Other reactions were just as passionate in criticizing the unfairness of the decision and order.[64] Lawyers, real estate agents, developers, and landowners voiced concern that the decision would create uncertainty in Hawai'i's land use system.[65] To them, the decision reinforced Hawai'i's reputation as "anti-business and anti-development"[66] and created a "chilling effect on anyone considering investing in Hawai'i."[67] Developer Lyle Anderson called the decision unfair, adding, "If there's an issue about the land-use law, they need to fix that . . . . This remedy that [the judge] is trying to do isn't fixing anything . . . we are being singled out."[68] Even Governor Linda Lingle called the decision "unfair . . . because the developer had already complied with county zoning requests."[69] In contrast to the decision and order and public perception that Hokuli'a's agricultural subdivision was illegal, Governor Lingle stated, "Which side is going to win out in this judicial proceeding [the appeal of the Hokuli'a decision and order] remains to be seen, but the fact is the classification system that we have not only allowed this to happen, it encouraged it to happen."[70]

As Lingle suggests, the root of the problem is the law governing the agricultural district.[71] In order to prevent another Hokuli'a, whether one views the case as a miscarriage of justice or as a misuse of agricultural land, two inter-related problems must be solved. The first is that the most important agricultural lands must be identified, incentives for agricultural preservation provided, and the remaining non-important agricultural lands reclassified as rural to facilitate development.[72] The second is that the existing definitions

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[62] *See supra* note 61.

[63] Dayton, *supra* note 50, at A12 (quoting Native Hawaiian Legal Corporation Attorney Moses Haia).

[64] *See* Vicki Viotti, *Ruling Heats Up Land-Use Debate*, HONOLULU ADVERTISER, Sept. 22, 2003, at A1; Danninger, *supra* note 53, at C1.

[65] *See* Danninger, *supra* note 53, at C1 (quoting John Ray, President of the Hawaii Leeward Planning Conference, as saying "A number of projects have been put on hold already . . . .").

[66] Hurley, *supra* note 42, at A1.

[67] Danninger, *supra* note 46, at C5.

[68] Viotti, *supra* note 64, at A2.

[69] Borreca, *supra* note 33, at A8.

[70] Dunford, *supra* note 33, at A5.

[71] *See* HAW. REV. STAT. §§ 205-1 to -18 (2001).

[72] *See infra* Part IV.

regarding uses in the agricultural district must be strengthened.[73] Without this multi-prong approach, reconciliation of preservation and housing needs will remain elusive.

III. ANALYSIS

Both the Hawai'i State Legislature and a Hawai'i Circuit Court have attempted to solve the current problems with agricultural land use. The legislature has been engaged in the process of identifying important agricultural lands. The Hawai'i Circuit Court has interpreted HRS section 205 to preclude agricultural subdivisions. The appropriateness of the legislative and judicial responses is explored in this Part.

A. Responses to the First Problem: The Legislature's Plan to Identify Important Agricultural Lands

The Hawai'i State Legislature is under a state constitutional mandate to preserve and conserve and protect IALs.[74] To date, it has not passed legislation to even identify which lands should be designated IALs.[75] The result is that land that is not vital for agriculture remains in the agricultural district for no reason.[76]

1. Hawai'i's constitutional mandate to conserve and protect agricultural lands

Hawai'i's Constitution expresses the following commitment to agricultural lands and agriculture in general:

> The State shall conserve and protect agricultural lands, promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands. The legislature shall provide standards and criteria to accomplish the foregoing.
>
> Lands identified by the State as important agricultural lands needed to fulfill the purposes above shall not be reclassified by the State or rezoned by its political subdivisions without meeting the standards and criteria established by the legislature and approved by a two-thirds vote of the body responsible for the reclassification or rezoning action.[77]

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[73] *See infra* Part IV.

[74] *See* HAW. CONST. art. XI, § 3.

[75] *See infra* notes 86-96 and accompanying text.

[76] *See supra* notes 32-34 and accompanying text.

[77] HAW. CONST. art. XI, § 3.

The Hawai'i State Legislature proposed this amendment during the Hawai'i Constitutional Convention of 1978.[78] To understand the significance of this amendment, one must consider the historical context within which it arose. At the time of the Constitutional Convention, the urbanization of agricultural land had accelerated.[79] The Legislative Reference Bureau noted, "From 1962-1974, 80 per cent of the petitions to change from agricultural to urban classifications were approved. These decisions converted over half of the lands in question, or 34,906 acres, 3,190 of which could be classified as 'prime.'"[80] The Legislative Reference Bureau criticized the pre-1978 Hawai'i Constitution for setting forth no "priorities in the tensions between 'conservation, development and utilization.'"[81]

Taking up the challenge, Hawai'i Constitutional Convention Delegate Jeremy Harris spoke in favor of amending the Hawai'i State Constitution in order to preserve important agricultural lands. He emphasized that "the preservation of agricultural land is the prime objective of the land use law"[82] and that the state LUC had been too lenient in removing land from the agricultural district.[83] Most importantly, Delegate Harris, who was unequivocally pro-preservation, considered the new Constitutional mandate a "reasonable compromise" between agricultural land preservation and urbanization.[84]

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[78] *See* ANNE FEDER LEE, THE HAWAII CONSTITUTION: A REFERENCE GUIDE 163 (1993).

[79] *See id.*

[80] LEGISLATIVE REFERENCE BUREAU, HAWAII CONSTITUTIONAL CONVENTION STUDIES, ARTICLE X: CONSERVATION AND DEVELOPMENT OF RESOURCES 54-55 (1978) (citing LUC records). Under the Agricultural Lands of Importance to the State of Hawai'i ("ALISH") System, agricultural land is divided into three categories: Prime Lands, Unique Lands, and Other Lands; *see also* CAROL A. FERGUSON, ET. AL., AN APPRAISAL OF THE HAWAII LAND EVALUATION AND SITE ASSESSMENT ("LESA") SYSTEM (1990) for another inventory of lands divided into "Important" and "Not Important" categories; *see also* HAROLD L. BAKER, *supra* note 30, at 8, in which the Land Study Bureau ("LSB") divides agricultural land into Classes A, B, C, D, or E, A being of highest quality, depending upon a calculus of factors including soil texture, soil structure, rooting depth, drainage, geologic parent material, stoniness, topography, climate, and rain.

Both LESA and ALISH grade land according to soil quality and availability of water. Telephone Interview with Donna Wong, Executive Director, Hawaii's Thousand Friends (Apr. 26, 2004). These systems were put in place during the reign of plantation agriculture. Telephone Interview with Dean Uchida, Executive Director, Land Use Research Foundation (Apr. 26, 2004).

[81] LEGISLATIVE REFERENCE BUREAU, *supra* note 80, at 55.

[82] Com. Whole Rep. No. 18, *reprinted in* 1 PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF HAWAII 440 (1978).

[83] *See id.*

[84] *See id.*

2. The legislative response: HB 2800/SB 3052, an essential first step in agricultural land preservation

Despite such a clear mandate, the Hawai'i State Legislature has not yet taken the first step to conserving and protecting agricultural lands: it has not yet created "standards and criteria" to identify IALs.[85] The unfulfilled mandate has led to uncertainty and litigation over agricultural land use. In the case of *Save Sunset Beach Coalition v. City and County of Honolulu*,[86] a coalition of neighborhood activists opposed a proposed subdivision of "expensive, ranch-style houses"[87] on state-designated agricultural land. The group argued that such a development was "contrary to the intent of an agricultural district designation."[88] The group also specifically opposed the City and County of Honolulu's rezoning of the land from agricultural to country[89] without a two-thirds majority vote of the City Council,[90] pursuant to Hawai'i Constitution Article XI, Section 3.[91] The Hawai'i Supreme Court found for the defendant developers on this issue, stating that the Article XI, Section 3 mandate was "inoperative" and not "self-executing."[92] "The legislature," said the court, "has made no . . . significant efforts to satisfy its assigned duty since the adoption of Article XI, Section 3. Thus, no 'standards and criteria' have been enacted after [1978]."[93] Further, the court stated that one existing land classification system, ALISH,[94] "was not incorporated into Article XI, section 3,"[95] and did not set forth the necessary standards and criteria. As it stands, none of the land classifications systems sufficiently identifies IALs.[96]

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[85] *See infra* notes 86-96 and accompanying text.

[86] 102 Hawai'i 465, 78 P.3d 1 (2003).

[87] *Id.* at 468, 78 P.3d at 5.

[88] *Id.*

[89] *See id.* at 472, 78 P.3d at 8.

[90] *See id.* at 476-77, 78 P.3d at 12-13.

[91] The constitutional provision reads in relevant part, "Lands identified by the State as important agricultural lands . . . shall not be reclassified by the State or rezoned by its political subdivisions without meeting the standards and criteria established by the legislature and approved by a two-thirds vote of the body responsible for the reclassification or rezoning action." HAW. CONST., art. XI, § 3.

[92] *Save Sunset Beach*, 102 Hawai'i at 476, 78 P.3d at 12.

[93] *Id.*

[94] *See supra* note 80 for more information on the ALISH classification system.

[95] *Save Sunset Beach*, 102 Hawai'i at 477, 78 P.3d at 13 n.23.

[96] ALISH, LESA, and LSB classifications are all based on water and soil conditions on a parcel of land. The classifications are outdated and may no longer reflect the land's current potential for agricultural production. For instance, lands once designated as highly productive might have had irrigation systems that have since fallen into disrepair. Also, lands not designated as highly productive may nevertheless be ideal for hothouses or growing coffee. The limitations of the existing classification systems highlight the need for the legislature to identify

In Summer 2001, in an effort to remedy this shortcoming, the State House Committees on Agriculture and Water, Land Use, and Hawaiian Affairs convened the Agricultural Working Group ("AWG") to address the long-standing mandate and to draft legislation for consideration by the 2004 Legislature.[97] The 2003 Hawai'i State Legislature formally recognized the AWG's efforts in House Concurrent Resolution 157.[98] The AWG is composed of a cross-section of Hawai'i's people who have a stake in agricultural land use, including "state and county government agencies, private landowners, conservationists, farm organizations, and other interested parties."[99] After logging thousands of hours, meeting monthly for three years, flying in mainland experts from the American Farmland Trust, and coming to a consensus on how to proceed in fulfilling the constitutional mandate, the AWG presented its legislative package, HB 2800/SB 3052.[100]

HB 2800/SB 3052 finally identifies as IALs the following:

> (1) [Lands that a]re capable of producing sustained high agricultural yields when treated and managed according to accepted farming methods and technology;
> (2) [Lands that c]ontribute to the economic base of the State and produce agricultural commodities for export or local consumption; or
> (3) [Lands that a]re needed to promote the expansion of agricultural activities and income for the future, even if not currently in production.[101]

The Bill also sets forth standards and criteria for identifying IALs.[102] The counties are in charge of designating IALs, according to the standards and criteria articulated in the bill, and they will be supervised by the LUC.[103] The LUC may also independently identify IALs in each county.[104] The Bill also

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important agricultural lands by criteria other than water and soil conditions. One criterion that has emerged from farmers' practical experience on agricultural land is market conditions. Telephone Interview with Dean Uchida, Executive Director, Land Use Research Foundation (Apr. 26, 2004).

[97] *See* H.C.R. 157, 22d Leg., Reg. Sess. (Haw. 2003) (enacted).

[98] *See* H. STAND. COMM. REP. NO. 455, 22d Leg., Reg. Sess. (Haw. 2004).

[99] H.R. 201, 22d Leg., Reg. Sess. (Haw. 2004).

[100] *See id.*

[101] H.B. 2800, 22d Leg., Reg. Sess. (Haw. 2004); S.B. 3052, 22d Leg., Reg. Sess. (Haw. 2004).

[102] *See id.* Land meeting these standards and criteria include land currently in agriculture, land with good soil quality and growing conditions, land already identified as prime or productive under such systems as ALISH and LSB, lands associated with traditional native Hawaiian agricultural uses, lands with sufficient water, land whose designation as important is consistent with county general and community plans, land which contributes to a critical mass of agricultural land, land with or close to agricultural infrastructure, land that will provide a margin for future agricultural needs, and land voluntarily designated as important by the landowner. *See id.*

[103] *See id.*

[104] *See id.*

contains a crucial express declaration that its intent is "to ensure that agricultural incentive programs to promote agricultural viability and the long-term use and protection of important agricultural lands for agricultural use shall be developed concurrently with the process of identifying important agricultural lands."[105] The counties and the LUC can identify IALs only after a responsible body develops incentive programs.[106] Possible incentives include grant assistance to farmers and agribusiness, preferential tax assessments, and funding mechanisms for agricultural preservation.[107]

The AWG's legislative package was a momentous achievement; were it not trapped in committee and deferred,[108] it would have ended a twenty-six year old struggle.[109] One important question did remain, however. After incentives are created and important and non-important agricultural lands are identified through AWG's new process, the non-important agricultural lands will remain in the agricultural district.[110] AWG's two convenors, Dr. Andrew Hashimoto[111] and Sandra Kunimoto[112] recognized that HB 2800/SB 3052 did not address the future of non-important agricultural lands. Dr. Hashimoto said that the AWG did not have time to address the non-IALs when it drafted its legislative package.[113] Ms. Kunimoto noted that one bill, HB 2339, which did expressly concern non-IALs, had been deferred by the legislature.[114]

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[105] *Id.*

[106] *See id.* The various legislative drafts of the bills name the responsible body as a task force, the Agricultural Development Commission, or the state Department of Agriculture. *See id.*

[107] *See id.*

[108] *See* Hawai'i State Legislature, 2004 Legislative Session, Bill Status for H.B. 2800, *available at* http://www.capitol.hawaii.gov/session2004/status/HB2800.asp (last visited Feb. 21, 2005); Hawai'i State Legislature, 2004 Legislative Session, Bill Status for S.B. 3052, *available at* http://www.capitol.hawaii.gov/session2004/status/SB3052.asp (last visited Feb. 21, 2005).

[109] H.R. 201, 22d Leg., Reg. Sess. (Haw. 2004).

[110] *See* H. STAND. COMM. REP. NO. 455, 22d Leg., Reg. Sess. (Haw. 2004), which states the following:

> Lastly, your Committees recognizing the lands in the agricultural district as a valuable resource and realizing that lands in the agricultural district will be designated IALs, find it imperative to declare that it is the intent of this bill that the lands remaining in the agricultural district after the designation of IALs remain in the agricultural district.

Id.

[111] Dean of the College of Tropical Agriculture and Human Resources, University of Hawai'i at Manoa.

[112] Chairperson of the Hawai'i Department of Agriculture.

[113] E-mail from Dean Hashimoto, Dean of the College of Tropical Agriculture and Human Resources, University of Hawai'i at Manoa, to author (Feb. 27, 2004, 11:07 PST) (on file with author).

[114] E-mail from Sandra Kunimoto, Chairperson, Hawai'i Department of Agriculture, to author (Feb. 28, 2004, 17:51 PST) (on file with author).

The practical effect of identifying non-important lands yet leaving all of them in the agricultural district will be to continue to keep from the people of Hawai'i land that is probably not ideal for agriculture but may be suitable for development. Building in the agricultural district will most likely continue, because HRS section 205 does not expressly forbid it,[115] but conflicts over development in the agricultural district will increase. These conflicts will inevitably center around the "farm dwelling" loophole in HRS section 205-4.5, discussed below.

B. Responses to the Second Problem: Clarifying HRS Section 205

The state and each respective county share control over land use in the agricultural district.[116] In order to appreciate the conflict over the interpretation of "farm dwelling" as a conflict between preservation and urbanization, and between state and county authority, some background information on state and county laws is necessary. What follows is an analysis of HRS section 205, the county codes, and the Hawai'i State Plan.

1. Hawai'i's state land use framework and agricultural lands

Hawai'i was one of the first states to regulate land use at the state level.[117] Hawai'i is divided into four land use districts: urban, rural, agricultural, and conservation.[118] In establishing the boundaries of the agricultural district, the Land Use Commission is charged with according the "greatest possible protection . . . to those lands with a high capacity for intensive cultivation."[119] Thus the statute calls for protection of lands most suitable for agriculture, not all agriculturally zoned land. The language of HRS section 205-2(d) contemplates that all of the land within the agricultural district may not be "suited to, agricultural and ancillary activities by reason of topography, soils, and other related characteristics."[120]

In general, activities and uses which may take place in the agricultural district include a variety of traditional as well as nontraditional agricultural pursuits. Examples of traditional agricultural activities and uses include "cultivation of crops, orchards, forage[,] forestry, . . . animal husbandry, . . . mills,

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[115] *See infra* Part III.B.1.

[116] *See* CALLIES, *supra* note 8, at 7.

[117] *See* FRED BOSSELMAN & DAVID CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL 5 (1972).

[118] *See* HAW. REV. STAT. § 205-2 (2001); HAW. ADMIN. R. § 15-15-17 (1999).

[119] HAW. REV. STAT. § 205-2(a)(3).

[120] *See id.* § 205-2(d); HAW. ADMIN. R. § 15-15-19 (1999).

storage facilities, roadside stands."[121] Examples of nontraditional uses not readily discernible as "agricultural," include "wind-generated energy production, . . . small-scale meteorological, air quality, noise, and other scientific and environmental data collection and monitoring facilities, . . . and golf courses."[122]

Notably, residences, referred to simply as "farm dwellings,"[123] are allowed in agricultural districts, if they are accessory to the other uses enumerated in HRS section 205-2(d)[124] though not necessarily "on the same premises as the agricultural activities to which they are accessory."[125] HRS section 205-4.5 further defines "farm dwelling" as a "single-family dwelling located on and used in connection with a farm, . . . where agricultural activity provides income to the family occupying the building."[126] The HRS does not specify how much income a family must derive from agricultural activity.[127] Likewise, the Hawai'i Administrative Rules ("HAR") are silent on the matter.[128]

Beyond allowing isolated farm dwellings, the HRS appears to permit entire subdivisions in the agricultural district. HRS section 205-4.5(b) grandfathers in agricultural subdivisions created before June 4, 1976.[129] Further, HRS section 205-4.5(b) holds counties to the prescribed uses of agricultural land in HRS section 205-4.5 only for lands classified as A or B and conditions subdivision on the landowner's pursuit of an agricultural activity.[130] In this way, the statute fulfills its stated purpose of giving "greatest possible protection . . . to lands with a high capacity for intensive cultivation,"[131] yet it still leaves the counties broad authority to approve subdivisions on agricultural land of all grades.

Under HRS section 205, the counties are authorized to zone their own lands within the state agricultural district.[132] HRS section 205-5 sets the minimum lot size as one acre in the agricultural district, although counties are free to set

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[121] HAW. REV. STAT. § 205-2(d).

[122] *See id.* Golf courses may not be located on lands classified by the land study bureau as Class A or B as of right; they require a special permit under HRS section 205-6. *See also* Maha'ulepu v. Land Use Commission, 71 Haw. 332, 790 P.2d 906 (1990). HRS section 205-2's list of activities and uses pertains to LSB land classified as C, D, E, and U and is more permissive than HRS section 205-4.5's list of activities and uses, which pertains to LSB land classified as A and B. *See also* Haw. Admin. R. § 15-15-25 (1999).

[123] HAW. REV. STAT. § 205-2(d).

[124] *See supra* notes 121-22 and accompanying text.

[125] HAW. REV. STAT. § 205-2(d).

[126] *See id.* § 205-4.5(a)(4) (2001).

[127] *See id. See also* Callies, *supra* note 43, at B3.

[128] *See* HAW. ADMIN. R. § 15-15-03 (1999).

[129] *See* HAW. REV. STAT. § 205-4.5(a)(4).

[130] *See id.* § 205-4.5(b) (2001).

[131] *See id.* § 205-2(a)(3) (2001).

[132] *See id.* § 205-5 (2001); *see also infra* Part III.B.2.

larger minimum lot sizes.[133] Counties are also free to create a list of permitted activities and uses which is more restrictive[134] than HRS sections 205-2 or 205-4.5. Lastly, counties are charged under HRS section 205-12 with the ultimate enforcement of HRS section 205-4.5.[135] The counties wield tremendous power in deciding which farm dwellings or larger agricultural subdivisions comply with the state land use law.[136]

2. County codes

The State of Hawai'i is divided into four counties: Hawai'i County, Kauai County, the City and County of Honolulu, and Maui County. Of the four counties, all but Maui County allow farm dwellings and even agricultural subdivisions in the state Agricultural District in their county codes.[137] Hawai'i County, Kauai County, and the City and County of Honolulu, all define "farm dwelling"[138] similarly to HRS section 205-4.5. These codes have not attempted to close the HRS section 205-4.5 loophole at the county level.

Maui County is the only one of the four counties that has developed interim restrictions, prohibiting agricultural subdivisions[139] and creating criteria for determining which farm dwellings support bona fide agricultural uses. An

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[133] *See* HAW. REV. STAT. § 205-5 (b).

[134] *See id.*

[135] *See id.* § 205-12 (2001). Section 205-12 reads as follows:

> The appropriate officer or agency charged with the administration of county zoning laws shall enforce within each county the use classification districts adopted by the land use commission and the restriction on use and the condition relating to agricultural districts under section 205-4.5 and shall report to the commission all violations.

Id.

[136] *See* SEN. STAND. COMM. REP. NO. 568, 10th Leg., Reg. Sess., (1980), *reprinted in* 1980 HAW. HOUSE J. 1529 ("Your Committees [on Water, Land Use, Development and Hawaiian Affairs and Agriculture] note that the *counties have the primary responsibility* in the enforcement of land use district regulations including the enforcement of the restriction on use and the condition relating to agricultural districts under section 205-4.5." (emphasis added)).

[137] *See infra* notes 138-40 and accompanying text.

[138] *See, e.g.*, HAWAII, HAW., HAWAII COUNTY CODE, § 25-5-67(b) (1995) (defining a "farm dwelling" as a "single family dwelling located on or used in connection with a farm or if the agricultural activity provides income to the family occupying the dwelling"); KAUAI, HAW., REVISED ORDINANCES OF THE COUNTY OF KAUAI §§ 8-7.2, 8-7.5 (1976) (allowing "single family detached dwellings" as of right in agricultural zones, without specifying any level of income derived from agricultural production to the family occupying the dwelling); HONOLULU, HAW., LAND USE ORDINANCE, § 21-3.50-3(a)(8) (2003) (allowing farm dwellings in agricultural zones, subject only to the requirement that the City and County of Honolulu first assess the "feas[ibility] of agricultural use" on these lots, and without specifying any level of income derived from agricultural production to the family occupying the dwelling).

[139] *See* CODE OF THE COUNTY OF MAUI, §§ 18.50.010 to -.040 (1991).

agricultural district lot owner must provide proof of two of the following in order for his farm dwelling to be considered legal:

> a) Provide proof of at least $35,000 of gross sales of agricultural product(s) per year, for the preceding two consecutive years, for each farm labor dwelling on the lot, as shown by State general excise tax forms and federal Schedule F forms;
> b) Provide certification by the Maui board of water supply that agricultural water rates are being paid if the lot is served by the County water system; or
> c) Provide a farm plan that demonstrates the feasibility of commercial agricultural production.[140]

Thus, Maui is the only one of the counties that has decided that it will further define "farm dwelling" and prohibit agricultural subdivisions. In all of the other counties, ordinances governing development in the agricultural district are as unclear as HRS section 205.

There is another way to assess the legitimacy of the county codes which allow agricultural subdivisions. The county practice of balancing preservation and urbanization by allowing agricultural subdivisions is consistent with the Hawai'i State Plan,[141] which sets forth goals, objectives and policies, and priority guidelines to "serve as a guide for the future long-range development of the State."[142] The State Plan also reflects both preservation and urbanization goals. Agricultural goals include: to "[a]ssure the availability of agriculturally suitable lands with adequate water to accommodate present and future needs";[143] to "promote the continued viability of the sugar and pineapple industries";[144] to "promote the growth and development of . . . agriculture [through] [i]dentif[ication], conserv[ation], and protect[tion of] agricultural . . . lands of importance and initiat[ion of] affirmative and comprehensive programs to promote economically productive agricultural . . . uses of such lands";[145] and to "[r]equire agricultural uses in agricultural subdivisions and closely monitor the uses in these subdivisions."[146] These preservation goals seem to coexist with the following State Plan priority guidelines regarding housing for Hawai'i's people: to "[m]ake available marginal or nonessential agricultural lands for appropriate urban uses while maintaining agricultural lands of importance in the agricultural district"[147] and to "[s]eek to use

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[140] *See id.* §§ 19.30A.050(B)(1)(a) to –(c) (1991), *available at* http://ordlink.com/codes/maui/index.htm (last visited Feb. 21, 2005). This section was re-enacted in 1998. *See id.*

[141] HAW. REV. STAT. §§ 226-1 to -28 (2001).

[142] *See id.*

[143] *See id.* § 226-7(b)(10).

[144] *See id.* § 226-103(d)(1) (2001).

[145] *See id.*

[146] *See id.* § 226-103(d)(9) (2001).

[147] *See id.* § 226-104(b)(2) (2001).

marginal or nonessential agricultural land . . . to meet housing needs of low- and moderate-income and gap-group households."[148]

Thus, the majority of the county codes as well as the Hawai'i State Plan recognize and value both preservation of agricultural land and the need for housing on marginal agricultural land. This duality reflects a need to strike a balance between preservation and urbanization. That need perhaps may be best fulfilled, for now, by development on marginal agricultural land.

3. Kelly v. 1250 Oceanside Partners: *further obscuring HRS section 205*

As HRS section 205 stands now, it is not illegal to build houses or even entire subdivisions in the agricultural district in three counties, especially with county approval.[149] The legislature has not clarified the definition of farm dwelling so as to preclude an agricultural subdivision, even one as luxurious as Hokuli'a.[150] At this time, any judicial effort that seeks to interpret HRS section 205 so that an agricultural subdivision newly becomes illegal is misplaced. The Hokuli'a Decision and Order provides a good example of how judicial efforts to curb development in the agricultural district are not appropriate; the legislature must make fundamental changes to HRS section 205

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[148] *See id.* § 226-106(1) (2001).

[149] *See supra* Part III.B.1-2.

[150] *See* Callies, *supra* note 43, at B3 for the following:

> The state legislature has entertained many formal proposals to amend the law and close what some construe as a loophole permitting agricultural subdivision projects on state-classified agricultural land, but it has declined to do so. The state Land Use Commission recently heard a similar proposal to limit the kinds of dwellings and maximize the income that an agricultural lot must have and generate. It also declined to amend its rules.

Id.

The Legislature has amended HRS section 205-4.5 five times and has not made any major changes to the vague "farm dwelling" requirement. *See* Act of May 31, 1977, No. 136, § 1, 1977 HAW. SESS. LAWS 243, 243 (codified as amended at HAW. REV. STAT. § 205-4.5 (2001); Act of Apr. 17, 1980, No. 24, § 3, 1977 HAW. SESS. LAWS 33, 35-36 (codified as amended at HAW. REV. STAT. § 205-4.5 (2001); Act of June 12, 1982, No. 217, § 1, 1982 HAW. SESS. LAWS 402, 402-404 (codified as amended at HAW. REV. STAT. § 205-4.5 (2001); Act of June 18, 1991, No. 281, § 3, 1991 HAW. SESS. LAWS 673, 674-75 (codified as amended at HAW. REV. STAT. § 205-4.5 (2001; Act of June 21, 1997, No. 258, § 11, 1997 HAW. SESS. LAWS 568, 572-73 (codified as amended at HAW. REV. STAT. § 205-4.5 (2001).

The LUC does not often amend the HAR. The HAR pertaining to the LUC were last amended in 1986 and 2000, with minor amendments in the interim. The LUC has not amended the HAR to clarify the "farm dwelling" requirement. LUC Planner Bert Saruwatari explained that the LUC will take its cues from the legislature and make amendments to HAR as amendments to HRS accumulate. The LUC has also waited to see whether legislation to clarify "farm dwelling" would pass, in which case it would amend the HAR. But, as explained *supra* this note, that has not happened yet. Telephone Interview with Bert Saruwatari, Planner, Land Use Commission (Apr. 29, 2004).

first. As one commentator reported, "[A] system in which judges are ruling on land-use policies is inefficient and uncalled for."[151]

Nevertheless, a well respected Third Circuit Judge halted the Hokuli'a project, declaring it an illegal use of agricultural land.[152] The judge found as fact the following:

> 2. Oceanside's legal disclosure of the land for which property is being offered for sale is a "high-quality community to be enhanced with agriculture." The agricultural component of the project will be located in common areas and roadways. Some agriculture may occur on easements on lots if deemed necessary and appropriate by the homeowners' association. The intended agricultural use is to enhance the beauty of Hokuli'a. "Buyers should not expect material financial benefits from agricultural activities."[153]
>
> 9. [A] lot owner need only place 20% of his/her one-acre lot in active agriculture.[154]

Based on these facts, the judge concluded that "Hokuli'a residences are not farm dwellings,"[155] that "[t]he primary use and activities within the agricultural lots are not agriculture; and, [f]urthermore, the agricultural use and activities are insubstantial."[156] The judge concluded that de minimus agriculture would not satisfy HRS section 205's requirements and that it would be an "absurd result that the Legislature could not have intended."[157] This conclusion in the Decision and Order invites the question, what did the legislature intend?

4. The legislative intent behind HRS section 205-4.5

HRS section 205's legislative history[158] and State Attorney General's opinions are key extrinsic aids to its interpretation. There is no legislative history on HRS section 205-4.5's farm dwelling requirement that defines how much land must be put into, or how much income must be derived from,

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[151] Jacy L. Youn, *Breaking New Ground: Fixing Hawaii's Land-Use Process,* HAW. BUS., Feb. 2004, at 32.

[152] *See* Kelly v. 1250 Oceanside Partners, Civ. No. 00-1-0192K (3d Cir. Ct. Haw. Sept. 9, 2003) (Findings of Fact, Conclusions of Law, Order Regarding Trial on Count IV of the Fifth Amended Complaint) at 16.

[153] *Id.* at 6 (citations omitted).

[154] *Id.* at 7.

[155] *Id.* at 17.

[156] *Id.* at 15.

[157] *Id.* at 16 (citing Kim v. Contractor's License Bd., 88 Hawai'i 264, 270, 965 P.2d 806, 812 (1998) (holding that the legislature is presumed not to intend an absurd result)).

[158] *See Kim*, 88 Hawai'i at 269, 965 P.2d at 811.

agricultural production.[159] Moreover, legislative history surrounding the creation of and amendments to HRS section 205 reveal that prime and marginal agricultural lands did not receive the same amount of concern.[160]

In 1961, the Committee on Lands and Natural Resources remarked that its goal in creating the State LUC was primarily to "protect *productive* agricultural lands . . . through state zoning."[161] In 1976, the legislature amended HRS section 205 to give only fertile Class A and B agricultural lands "additional protection . . . [against county approval of] agricultural subdivisions."[162] House Representative Kawakami dismissed concern over the development of agricultural subdivisions throughout Hawai'i, stating that they were "not anything new[; i]t has been going on for years now."[163] His main concern was that agricultural subdivisions were "getting to a point where [they were] occurring on . . . prime lands."[164]

Lastly, in 1980, the legislature emphasized the distinction between prime and marginal lands and vigorously debated the uses appropriate within marginal lands. During floor debate over restoring golf courses as permitted uses on marginal agricultural lands, Senator Young opposed the bill by saying, "I would rather see a proposal utilizing marginal agricultural lands for . . . housing . . . . [T]here is a lot of frustration and anger out there. Hawai['i]'s families want, more than anything else, to be able to own a home."[165] Senator Kawasaki, who supported the bill, nevertheless bemoaned the following state of affairs: "It seems to me, using land, even marginal land, as agricultural subdivisions is one that is more profitable [than golf courses] . . . . What worries me is that there's not much effort around here . . . to make the creation of [agricultural] subdivisions easier . . . ."[166] The Legislature clearly would see no problem with allowing subdivisions like Hokuli'a on marginal agricultural land.

The State Attorney General's Office also views prime and marginal agricultural land uses differently. The Attorney General's oft-quoted 1975 opinion about agricultural subdivisions' being an abuse of HRS section 205 relates

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[159] *See* Callies, *supra* note 43, at B3.

[160] *See infra* notes 161-66 and accompanying text.

[161] SEN. STAND. COMM. REP. 580, 10th Leg., Reg. Sess. (1961), *reprinted in* 1961 HAW. SEN. J. 883, 883 (emphasis added).

[162] SEN. CONF. COMM. REP. 2-76, 8th Leg., Reg. Sess. (1976), *reprinted in* 1976 HAW. SEN. J. 836, 836.

[163] Floor Debate on H.B. 3262-76, 8th Leg., Reg. Sess. (1976), *reprinted in* 1976 HAW. SEN. J. 836, 836.

[164] *Id.*

[165] Floor Debate on H.B. 1063, 13th Leg., Reg. Sess. (1985) (Statement of Sen. Young), *reprinted in* 1985 HAW. SEN. J. 689, 692-693.

[166] *Id.* at 699.

only to prime agricultural land.[167] A quotation from the opinion, which follows, is silent on whether an agricultural subdivision on marginal lands would be an abuse of state law:

> [W]e conclude that the proposed subdivision of 141.456 acres of substantially prime agricultural land at Mokuleia into sixty-five lots that appear to be too small for economically feasible agricultural use is, in all likelihood, intended for purposes contrary to the Legislature's stated goal of preservation of *prime* agricultural land . . . and may be an attempted circumvention of the land use district amendment procedure . . . . [The] City and County of Honolulu . . . should disapprove the subdivision application.[168]

The legislature and LUC have not amended their laws and regulations to close the agricultural land use loophole.[169] Legislative history reveals acceptance and even encouragement of agricultural subdivisions on marginal land.[170] The Attorney General's opinion discouraged agricultural subdivisions only on prime land.[171] Taken together, these records suggest one conclusion: the legislature would not consider agricultural subdivisions like Hokuli'a to work an "absurd result" under HRS section 205. An agricultural subdivision on marginal land, with 20% of each lot engaged in active agriculture, producing even de minimus income, satisfies HRS section 205.

In many ways, the Hokuli'a development is easy to vilify. The idea of multinational millionaires losing their luxury homes does not stir people to righteous indignation. But merely vilifying the wealthy distracts from the real, wide-ranging implications of the decision. What happened with Hokuli'a affects "everyone from the individual lot owner who is going to build a family home all the way through major developers."[172] Now even modest agricultural subdivisions, built to alleviate Hawai'i's housing crisis, are also at stake. The Decision and Order effectively cut off one alternative way for ordinary people to secure housing, disrupting the balance the counties had struck between preservation and urbanization. If agricultural subdivisions are truly illegal, the legislature must make fundamental changes to Hawai'i's Land Use Law.

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[167] *See infra* note 168 and accompanying text.

[168] Haw. Op. Att'y Gen. 75-8 (Sept. 3, 1975) (emphasis added).

[169] *See supra* note 150.

[170] *See supra* notes 161-66 and accompanying text.

[171] *See supra* note 168 and accompanying text.

[172] *See* Lyn Danninger, *Interim Plan for Hokulia is Too Late, Attorney Says*, HONOLULU STAR-BULLETIN, Sept. 24, 2003, at C5 ("[President of the Maryl Group Inc. Mark] Richards said, 'There are profound implications on what county permits are worth . . . . [A developer] may have done everything that the law says [she] needs to do, then a judge can say "no."'").

IV. RECOMMENDATION

The legislature should make these fundamental changes at multiple levels. First, the legislature should pass the next iteration of HB 2800/SB 3052.[173] This means crafting incentives for agricultural preservation, then allowing the counties to follow the bill's standards and criteria to identify IALs. Second, the legislature should reclassify some of the non-important agricultural lands to the rural district. Those lands would be better utilized for housing. Third, with the pressure to build on highly productive agricultural lands thus relieved, the legislature must close the loophole in HRS section 205-4.5 so that development in the agricultural district is truly related to farm production.

Other states have also faced a crisis in balancing farmland preservation and urban growth. The loss of agricultural land is occurring nationwide.[174] States that have endeavored to preserve agricultural land do so by enacting a variety of measures: special tax incentive programs, recognition of agricultural districts, right-to-farm laws, Purchase of Development Rights ("PDR") programs, Transfer of Development Rights ("TDR") programs and agricultural zoning.[175]

Hawai'i already has in place several of these measures, including agricultural districts,[176] a right-to-farm law,[177] and agricultural zoning.[178] In fact, Hawai'i has the potential to lead the nation in agricultural preservation. Unlike many other states, Hawai'i manages its agricultural lands at the state level.[179] Legal scholars and practitioners who have studied the farmland crisis conclude that agricultural zoning "has emerged as the foundation of most farmland preservation measures."[180] Comprehensive, statewide agricultural zoning, in combination with other measures, is the most effective framework

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[173] *See* H.B. 2800, 22d Leg., Reg. Sess. (Haw. 2004); S.B. 3052, 22d Leg., Reg. Sess. (Haw. 2004).

[174] *See* Myrl L. Duncan, *Agriculture as a Resource: Statewide Land Use Programs for the Preservation of Farmland,* 14 ECOLOGY L. Q. 401, 401-02 (1987) ("Every year in the United States nearly three million acres of agricultural land—an area almost three times the size of the State of Delaware—disappears.").

[175] *See* Mark W. Cordes, *Agricultural Zoning: Impacts and Future Directions*, 22 N. ILL. U. L. REV. 419, 420-22 (2002).

[176] *See* HAW. REV. STAT. §§ 205-1 to -18 (2001).

[177] *See id.* §§ 165-1 to -4 (2001).

[178] *See id.* §§ 205-1 to -18.

[179] See BOSSELMAN & CALLIES, *supra* note 117, at 5.

[180] Cordes, *supra* note 175, at 422. *See also* Teri E. Popp, *A Survey of Governmental Response to the Farmland Crisis: States' Application of Agricultural Zoning,* 11 U. ARK. LITTLE ROCK L. J. 515, 551 (1989) ("From the foregoing comparisons of states which utilize state level comprehensive plans and states that employ nonintegrated farmland preservation tactics, it is blatantly apparent that the comprehensive programs are far superior.").

for agricultural preservation.[181] Hawai'i should seize the opportunity to experiment with additional measures like special tax incentive programs, PDRs, and TDRs.

Special tax incentives include "(1) farm circuit-breakers; (2) restrictive agreements; (3) pure preferential assessments; and (4) deferred taxation."[182] Circuit-breaker programs "provide farmers with relief from property tax burdens in excess of a certain percentage of the farmer's income."[183] A landowner entering into a restrictive agreement with local government promises "not to convert farmland to nonagricultural uses for a specified period of time, [thereby receiving] a preferential tax assessment for the term of the contract."[184] Pure preferential tax programs assess land at its current use (farming) rather than at market value,[185] and deferred taxation programs require landowners to pay back property tax relief gained through preferential assessment if they take their land out of agricultural use.[186] Tax incentives are somewhat effective at encouraging landowners to keep land in agricultural use.[187] The converse, tax penalties, has not been successful in preserving agricultural land in Hawai'i.[188]

Hawai'i could also set up a program to purchase conservation easements on agricultural land. Through purchase of development rights programs, the government or a land trust buys the development rights on agricultural land, "paying the landowner the difference between the property's value if more intensive development were allowed and its value as farmland";[189] and, in exchange, "a landowner agrees to permanently restrict the development and possible uses of the land in furtherance of conservation values."[190] Most states

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[181] *See generally* Edward Thompson, Jr., *"Hybrid" Farmland Protection Programs: A New Paradigm for Growth Management*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 831, 840-44 (1999).

[182] Sam Sheronick, *The Accretion of Cement and Steel onto Prime Iowa Farmland: A Proposal for a Comprehensive State Agricultural Zoning Plan*, 76 IOWA L. REV. 583, 590 (1991).

[183] Popp, *supra* note 180, at 522-23.

[184] Sheronick, *supra* note 182, at 591.

[185] *See* Popp, *supra* note 180, at 522.

[186] *See id.* at n.71.

[187] *See* Cordes, *supra* note 175, at 421.

[188] *See* Nina Wu, *Farmers at Odds with City on Tax*, PAC. BUS. NEWS, Jan. 23, 2004, at 1 (discussing new Honolulu City Council taxes on agricultural subdivision lot owners). The tax was raised from flat to fair-market value to punish gentleman farmers. *See id.* The problem was that innocent farmers, who did not file in time to receive exemptions, found themselves taxed at up to twenty times their original rate. *See id.* The City Council has since extended the deadline for filing. *See id.*

[189] Cordes, *supra* note 175, at 421.

[190] Adam E. Draper, *Conservation Easements: Now More than Ever—Overcoming Obstacles to Protect Private Lands*, 34 ENVTL L. 247, 249 (2004).

already have PDR programs in place.[191] Some also have state funding programs for purchasing conservation easements.[192]

Hawai'i could also implement a transfer of development rights program, whereby a landowner is compensated for lost development rights "but instead of cash[,] landowners are given development rights that can be used elsewhere."[193] Many states utilize TDRs in planning for orderly urban growth.[194] Though it has not yet implemented a statewide TDR program, the Hawai'i legislature has already made findings that TDRs "can help to ensure proper growth, while protecting . . . areas that have significant agricultural . . . value."[195]

Regardless of the form that incentives take, it is imperative that the development of incentives precede the identification of IALs. Not only is this what HB 2800/SB 3052 calls for,[196] but it makes good economic sense. In order to fulfill the constitutional mandate, the state must make a commitment to agriculture as a major industry. The state's first task is to create the market conditions that will encourage farming as a profitable use of agricultural land;

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[191] *See, e.g.*, ALA. CODE § 35-18-1 (Supp. 2003); ALASKA STAT. § 34.17.060 (Michie 2002); ARIZ. REV. STAT. ANN. § 3-3301 (West 1956); ARK. CODE. ANN. § 15-20-402 (Michie 1987); CAL. GOV'T CODE § 51256 (West Supp. 2005); CAL. PUB. RES. CODE § 10211 (West 2005); COLO. REV. STAT. § 38-30.5-102 (2003); DEL. CODE. ANN. tit. 7, § 6901 (2001); D.C. CODE ANN. § 42-201 (2001); FLA. STAT. ANN. 704.06 (West 2000); GA. CODE ANN. § 44-10-2 (2002); IDAHO CODE § 55-2101 (Michie 2003); 505 ILL. COMP. STAT. ANN. 35/1-3 (West 2004); IND. CODE ANN. § 32-23-5-2 (Michie 2002); IOWA CODE ANN. § 457A.1 (West 2004); KY. REV. STAT. ANN. §§ 382.800 (Banks-Baldwin 2004); ME. REV. STAT. ANN. 33 § 476 (West 1964); MICH. COMP. LAWS ANN. § 324.2140 (West Supp. 2004); MINN. STAT. ANN. § 84C.01 (West 2004); MISS. CODE. ANN. § 89-19-3 (1972); NEV. REV. STAT. §§ 111.410 (2003); N.M. STAT. ANN. §§ 47-12-1 to -6 (Michie 1995); N.C. GEN. STAT. § 106-744 (2003); OHIO REV. CODE ANN. § 5301.67 (1989); OKLA. STAT. ANN. tit. 60, § 49.2 (Supp. 2005); 3 PA. CONS. STAT § 903 (1995); S.D. CODIFIED LAWS § 1-19B-56 (2003); UTAH CODE ANN. § 57-18-2 (2000); VA. CODE ANN. § 10.1-1009 (Michie 1998); W. VA. CODE ANN. § 20-12-3 (Michie 2002); WIS. STAT. ANN. § 700.40 (West 2001).

[192] *See, e.g.*, CAL. PUB. RES. CODE ANN. § 10230 (West 1996); MICH. COMP. LAWS ANN. § 324.36203 (Supp. 2004); 3 PA. CONS. STAT §§ 914.1 to .4 (1995); *see id.* §§ 1207.2 to .3; UTAH CODE ANN. § 11-38-302 (2003); VA. CODE ANN. § 3.1-18.10 (Michie Supp. 2004); WASH. REV. CODE ANN. §§ 89.08.530 to .540 (West 2004).

[193] Cordes, *supra* note 175, at 421.

[194] *See, e.g.*, ARIZ. REV. STAT. § 48-5702 (West 2005); CAL. PUB. RES. CODE ANN. § 10236 (West Supp. 2005); COLO. REV. STAT. § 30-28-401 (2003); CONN. GEN. STAT. ANN. § 22-26CC (West 2001); MINN. STAT. ANN. §§ 394.25 (West 1997); *see id.* § 462.357 (West 2001); N.J. STAT. ANN. § 4:1C-51 (West 1998); N.Y. GEN. CITY LAW § 20-f (McKinney 2003); N.Y. TOWN LAW § 261-a (McKinney 2004); N.Y. VILLAGE LAW § 7-701 (McKinney 1996); 53 PA. CONS. STAT § 10105 (West 1997); VT. STAT. ANN. tit. 24, § 4348a (2004).

[195] HAW. REV. STAT. § 46-161 (2005).

[196] *See supra* Part III.A.2.

its second task is to then provide the farm industry with the land it needs.[197] Without incentives, the pressure to move land from agricultural use to its highest and best use (development) will continue.[198]

Second, the legislature should reclassify non-important agricultural land to the rural district.[199] Unimportant agricultural land should not remain lumped together by default with important agricultural land. It should be immediately available for housing, in order to take the urbanization pressures off of important agricultural land.[200]

Lastly, to protect the lands remaining in the agricultural district from urbanization, the legislature should strengthen HRS section 205-4.5 to provide some objective criteria for "farm dwelling."[201] Possible requirements could include a specific income derived from agricultural activity and a minimum lot size. Other states require certain percentages of gross income or dollar amounts resulting from agricultural activity.[202] Also, requiring a minimum lot size would discourage fragmentation of agricultural land into parcels too small to support productive farming. The minimum lot size should correspond to the "minimum size of commercial farms in the area,"[203] which, in Hawai'i, is

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[197] Telephone Interview with Dean Uchida, Executive Director, Land Use Research Foundation (Apr. 26, 2004). Uchida said that economic incentives must precede the identification of IALs. *Id.* To operate in reverse would create a "Field of Dreams complex," where the state would first designate land, without regard to market conditions, then wait for agriculture to spring up, unaided. *Id.*

[198] Telephone Interview with Donna Wong, Executive Director, Hawaii's Thousand Friends (Apr. 26, 2004).

[199] *See* Dunford, *supra* note 33, at A5. ("Lingle's administration is working with all interested parties on a state reclassification plan to be submitted to next year's Legislature, possibly suggesting a new 'rural' category.").

[200] *See* Jan TenBruggencate, *Farmland Boom Hurting Growers*, HONOLULU ADVERTISER, Jan. 26, 2003, at A6 ("More rural-designated land would create a new liquidity in that class, said John Summers, administrative planning officer with the Maui County Planning Department.").

[201] Alan Murakami, Attorney for Native Hawaiian Legal Corporation, considers HRS section 205's language a clear prohibition against agricultural subdivisions, but he suggests that the law be strengthened. Alan Murakami, Presentation: The Hokuli'a Decision: Land and Water in Hawai'i (Feb. 24, 2004).

[202] *See, e.g.*, DEL. CODE ANN. § 8333 (Michie 1989) (requiring that land actively devoted to agriculture generate $10,000 per year); IDAHO CODE ANN. § 63-604 (Michie 2002) (requiring, for taxation purposes, that agriculturally zoned land produce "for sale or home consumption the equivalent of fifteen percent (15%) or more of the owners' or lessees' annual gross income; or . . . gross revenues in the immediately preceding year of one thousand dollars ($1,000) or more."); 505 ILL. COMP. STAT. ANN. § 5/3.06 (West 2004) (defining "active farmer[s]" to be those individuals "actively involved in the day-to-day operation or management of a farm and deriving at least 50% of [their] income from such management or operation.").

[203] Cordes, *supra* note 175, at 423.

around five[204] to ten acres.[205] The bottom line is that the legislature must clarify Hawai'i's land use laws to make sure certain lands are used for the public benefit to which they are best suited, whether it be agriculture or housing.

V. CONCLUSION

In the words of LUC Vice Chair Roy Catalani, the primary question about agricultural land use today is, "What is the real purpose of agriculture?"[206] In order for the state to fulfill its constitutional mandate to conserve and protect IALs, it is crucial to articulate why they are important to the state. Their value is primarily in their potentially dynamic contribution to the state's economy,[207] not in their passive role as open space zones[208] or quaint tourist attractions. The perception that Hawai'i is at an agricultural land-use "crossroads"[209] stems from the uneasy realization that the state has not demonstrated a commitment to agriculture as part of its land use framework. As Donna Wong lamented, there is no "agricultural ethic" in Hawai'i.[210] In order for a balance between urbanization and agricultural preservation to exist, the state must "do more than simply protect agricultural land: [it] must undertake to protect agriculture itself."[211] Without commitment to agriculture as an industry, stopping development in the name of protecting agriculture is disingenuous.

There is a balancing process involved in true agricultural preservation. The forces of conservation and control must give in to the forces of development and growth, and vice versa:

> [Agricultural l]and . . . is both a resource and a commodity . . . . Conservationists who view land as only a resource are ignoring the social and economic impact

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[204] *See* Duncan, *supra* note 174, at 428 (referring to ECKBO, DEAN, AUSTIN, & WILLIAMS, INC., STATE OF HAWAII LAND USE DISTRICTS AND REGULATIONS REVIEW 80 (1969)).

[205] *See* Sean Hao, *Hawai'i's Farms Smaller, But More Profitable*, HONOLULU ADVERTISER, Feb. 21, 2004, at A7 ("64% of Hawai'i farms were ten acres or less . . . .").

[206] Roy Catalani, Vice Chair, Land Use Commission, Panel Discussion: Fixing Hawai'i's Land Use Process (Apr. 15, 2004).

[207] *See* HAW. CONST. art. XI, § 3 (requiring the state to identify important agricultural lands in order to "promote diversified agriculture, increase agricultural self-sufficiency and assure the availability of agriculturally suitable lands").

[208] Catalani, *supra* note 206 (posing the question, "Is open space a land use value?").

[209] Ronna Bolante, Standing at the Crossroads, HAW. BUS. (Nov. 2003) at 42; Jack Kelly, *Agriculture in Hawaii at the Crossroads: It's Decision Time for Hawaii's Sustainable Future*, *available at* http://www.hawaiiislandjournal.com/stories/10b03d.html (last visited Feb. 21, 2005).

[210] Telephone Interview with Donna Wong, Executive Director, Hawaii's Thousand Friends (Apr. 26, 2004).

[211] Duncan, *supra* note 174, at 401.

> that would come with any massive restrictions on the free alienability [of] land. But land speculators who view land as only a commodity are ignoring public realization that our finite supply of land can no longer be dealt with in the free-wheeling ways of our frontier ancestors.[212]

Each side will yield to the other only if clear policy reasons for the compromise exist. The state must articulate which lands will serve which uses best and why. Only then can land use decisions proceed in a principled and purposeful way.

In time, Hokuli'a and other subdivisions like it will be land use relics, reflecting a period in Hawai'i's history when the appropriate uses for two million acres of land were yet unclarified. The agricultural subdivision would seem to be just the rational outcome of a combination of the following forces: no state commitment to agriculture as an industry, vague land use laws, and the inexorable push to put land to its highest and best use. Hawai'i now has the opportunity to get to the root of its agricultural land use problem. The state must take responsibility for the future of its economy and citizens' well-being by formulating the real policies underlying its land use designations.

Adrienne Iwamoto Suarez[213]

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[212] *Id.* at 409.

[213] B.A., Columbia University 1997; M.A., Columbia University 2000; J.D. Candidate 2005, William S. Richardson School of Law, University of Hawai'i at Manoa. The author would like to give credit to Professor David L. Callies, for whose Second-Year Seminar class this article was originally written, for being an outstanding mentor. The author also gratefully acknowledges Dean Uchida and Donna Wong for their perspectives on agricultural preservation. The author also wishes to thank the Real Property and Financial Services Section of the Hawai'i State Bar Association for awarding this paper its annual prize and publishing a condensed version of it in the April 2005 issue of its newsletter, KA NU HOU. The author would also like to thank the Young Lawyers Division of the Hawai'i State Bar Association for selecting this paper for its annual award. Finally, the author wishes to express her deepest thanks to her husband, William Suarez, for constant encouragement and laughter.

Adarand Constructors, Inc. v. Slater and *Concrete Works of Colorado, Inc. v. City of Denver*: Breathing Life into *Croson*'s Passive Participant Model

I. INTRODUCTION

A construction site sign proclaimed "no niggers allowed." Individuals at job sites were targets of mistreatment. Minority workers' tools were stolen from job sites and minority firms were unable to obtain loans to finance projects. In 1990, a committee established by New Haven, Connecticut, conducted hearings at which representatives of minority-owned construction firms testified to these incidents, illustrating the current state of discrimination in the New Haven construction industry.[1]

Sworn testimony in the federal district court in Colorado included:

> graphic examples of racial and gender slurs and epithets, humiliating, condescending and patronizing criticisms and comments, graffiti with racial and gender insults, the sabotage of equipment and vehicles and dangers of physical harm from conduct fairly attributable to resentment of their presence at the work site. Some of these incidents had direct financial consequences such as the need to reassign employees, interruptions of work and repairing damaged work and equipment. Some minority employees refused to work on some jobs because of these conditions.[2]

In 1999, African American men, Hispanic men, and women testified in court, revealing their direct experiences with harassment at the work site by Denver employees, management level employees of prime contractors, and workers employed by other contractors.[3]

These stories clearly convey Justice O'Connor's view that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality."[4] Discrimination is prevalent in the construction industry, where informal, racially exclusionary business networks dominate and seek to end competition from

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[1] Associated Gen. Contractors of Conn. v. City of New Haven, 791 F. Supp. 941, 945 (D. Conn. 1992), *vacated on other grounds*, 41 F.3d 62 (2d Cir. 1994).

[2] Concrete Works of Colo., Inc. v. City of Denver, 86 F. Supp. 2d 1042, 1073 (D. Colo. 2000), *rev'd on other grounds*, 321 F.3d 950 (10th Cir. 2003), *cert. denied*, 540 U.S. 1027 (2003).

[3] *Id.*

[4] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995) [hereinafter *Adarand III*].

minority-owned firms.[5] Various ordinances and minority business enterprise ("MBE") preference programs have been enacted by the federal, state, and local governments to level the playing field for MBEs.[6] A clear majority of preference programs that have been challenged in court have been struck down. They failed to survive the strict scrutiny standard articulated in *City of Richmond v. J.A. Croson, Co.*[7] for state and local racial classifications, and later, *Adarand Constructors, Inc. v. Pena*[8] for federal racial classifications.

In a six to three decision, *Croson* held that state or local government affirmative action programs must withstand the strict scrutiny standard of review to be constitutional.[9] For a preference program to be upheld under strict scrutiny, the government must present a "strong basis in evidence"[10] that the program is narrowly tailored to serve a compelling interest.[11] While remedying the effects of past or present racial discrimination in a specific industry is a generally accepted compelling interest,[12] jurisdictions differ on the requisite level of proof necessary to show a strong basis in evidence that discrimination existed or still exists.[13] Not surprisingly, the level of proof required by a court usually determines whether a preference program is upheld.

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[5] Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1171 (10th Cir. 2000) [hereinafter *Adarand VII*]. *See id.* (quoting *The Meaning and Significance for Minority Business of the Supreme Court Decision in the* City of Richmond v. J. A. Croson*: Hearing Before the Legislative and Nat'l Sec. Subcomm. Of the House Comm. on Gov't Operations*, 100th Cong. 107 (1990) (statement of E.R. Mitchell, Jr., President of E.R. Mitchell Construction Company and President of the Atlanta Chapter of the National Association of Minority Contractors) ("[Q]ualified black firms are outside the business network of established white firms. By virtue of being outsiders to their communications loop, it is impossible to successfully bid because we remain forever strangers to white owners and developers.")).

[6] *See, e.g.*, 42 U.S.C. § 6705(f)(2) (1976); City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 477-78 (1989) (citing RICHMOND, VA., CODE § 12-156(a) (1985)); *Concrete Works*, 86 F. Supp. 2d at 1049-50 (citing DENVER, COLO., ORDINANCE no. 948 (1998)).

[7] 488 U.S. 469.

[8] 515 U.S. 200.

[9] *See Croson*, 488 U.S. at 493.

[10] *Id.* at 500 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (Powell, J., plurality opinion) (internal quotation marks omitted)).

[11] *Id.* at 493-500.

[12] *See* Shaw v. Hunt, 517 U.S. 899, 909 (1996) (stating that "[a] State's interest in remedying the effects of past or present racial discrimination may in the proper case justify a government's use of racial distinctions") (citing *Croson*, 488 U.S. at 498-506); NAACP v. Seibels, 31 F.3d 1548, 1565 (11th Cir. 1994) (recognizing that the interest of remedying past or present discrimination is "widely accepted as compelling").

[13] *Croson* and *Adarand III* stated the appropriate standard of review for "benign" racial classifications. The two cases, however, did not state what level of proof is necessary to show a strong basis in evidence in allowing the use of race-conscious relief to compensate for the effects of past and present discrimination.

The lack of guidance in *Croson* unleashed uncertainty among the states, counties, and municipalities that had established affirmative action programs.[14] More significant, *Croson* at first glance effectively shut the door on affirmative action programs in the construction industry.[15] Despite this initial reaction towards *Croson*, the Tenth Circuit recently uncovered and relied upon suggestive language in *Croson* to uphold two affirmative action programs in the face of constitutional challenges. In *Adarand Constructors, Inc. v. Slater*[16] and *Concrete Works of Colorado, Inc. v. City of Denver*,[17] the Tenth Circuit upheld, respectively, a federal program and city ordinance, which gave preference to minority-owned firms in construction projects.[18] Relying on *Croson*'s "passive participant" language, the Tenth Circuit establishes a framework to meet the strong basis in evidence requirement.[19] Prior to the Tenth Circuit's actions, however, no other Circuit had relied on the passive participant model to meet the strong basis in evidence requirement mandated by *Croson*. This Comment argues that the Tenth Circuit's innovative analysis fits smoothly with the Court's own evolving interpretation of the strict scrutiny standard. The Tenth Circuit's analysis proves that strict scrutiny does not have to be fatal to appropriate MBE programs and ordinances.

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[14] *See* Docia Rudley & Donna Hubbard, *What a Difference a Decade Makes: Judicial Response to State and Local Minority Business Set-Asides Ten Years After* City of Richmond v. J.A. Croson, 25 S. ILL. U. L.J. 39, 42 (2000) (noting that the many jurisdictions attempting to "*Croson*-proof" their affirmative action programs faced difficulty and uncertainty in creating a properly constructed program).

[15] *See Croson*, 488 U.S. at 529 (Marshall, J., dissenting).

> [*Croson*] marks a deliberate and giant step backward in [the] Court's affirmative-action jurisprudence. Cynical of one municipality's attempt to redress the effects of past racial discrimination in a particular industry, the majority launches a grapeshot attack on race-conscious remedies in general. The majority's unnecessary pronouncements will inevitably discourage or prevent governmental entities, particularly [s]tates and localities, from acting to rectify the scourge of past discrimination.

Id. See also Nicole Duncan, Croson *Revisited: A Legacy of Uncertainty in the Application of Strict Scrutiny*, 26 COLUM. HUM. RTS. L. REV. 679, 679-80 (1995) (noting that *Croson* caused an increase in the attacks on MBE affirmative action programs in the construction industry).

[16] 228 F.3d 1147 (10th Cir. 2000) [hereinafter *Adarand VII*]. The first opinion issued in the *Adarand* line of cases was in 1992, from the federal district court in Colorado and written by District Judge Carrigan. Adarand Constructors, Inc. v. Skinner, 790 F. Supp. 240 (D. Colo. 1992). The case finally culminated in 2001, when the U.S. Supreme Court unanimously dismissed certiorari as improvidently granted earlier that year. Adarand Constructors, Inc. v. Mineta, 534 U.S. 103 (2001) (per curiam). The Tenth Circuit decision in 2000 is controlling in the *Adarand* line of cases and thus is the main decision discussed in this paper.

[17] 321 F.3d 950 (10th Cir. 2003) [hereinafter *Concrete Works III*].

[18] *See Adarand VII*, 228 F.3d at 1176; *Concrete Works III*, 321 F.3d at 992.

[19] The Eighth Circuit has already adopted the Tenth Circuit's analysis in *Sherbrooke Turf, Inc. v. Minnesota Department of Transportation*, 345 F.3d 964 (8th Cir. 2003).

Part II presents the U.S. Supreme Court's response to the enactment of affirmative action programs designed to combat existing discriminatory practices in the construction industry. It briefly describes the evolution of the strict scrutiny standard of review. Part III reveals the difficulties faced by lower courts in dealing with the aftermath of *Croson*. Specifically, what level and type of proof is needed to constitute a "strong basis in evidence" for the government's conclusion that remedial action was appropriate? This part also discusses the Tenth Circuit's opinions in *Adarand VII* and *Concrete Works III*. Part IV examines *Croson*'s application in *Adarand VII* and *Concrete Works III*, noting how the Tenth Circuit's model comports with the guidelines set out in *Croson*, as well as with the Court's evolving equal protection jurisprudence. Part V briefly highlights the continuing discrimination faced by MBEs in the construction industry, emphasizing the barriers that minority contractors face as a result of past discrimination. Part VI concludes that courts should use strict scrutiny in a less reflexive manner to take past and present discrimination faced by MBEs into consideration when reviewing affirmative action programs. Applying strict scrutiny flexibly will give renewed hope to minorities. The appropriate, limited use of racial preferences can help eradicate deeply-rooted discrimination in the private sector of the construction industry.

II. THE EVOLUTION OF THE STRICT SCRUTINY STANDARD

The U.S. Supreme Court's rulings in the affirmative action area have been aptly characterized as a "fractured prism,"[20] fraught with plurality, split opinions and the overruling of recent precedents.[21] These rulings complicate the lower courts' task of "identifying and applying an appropriate form of equal protection review."[22] With *Grutter v. Bollinger*,[23] the Court now seems to be heading towards a less rigid strict scrutiny review, making it possible that strict scrutiny may be less fatal to appropriate MBE programs in the future.[24]

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[20] *Adarand VII*, 228 F.3d at 1161.

[21] *Id.*

[22] *Id.*

[23] 539 U.S. 306 (2003).

[24] *But see* Gratz v. Bollinger, 539 U.S. 244, 275 (2003) (holding that the University of Michigan's use of race in its undergraduate admissions policy was not narrowly tailored to achieve the University's asserted compelling interest in diversity). *Gratz* was the companion case to *Grutter*. *See infra* Part II.B.

A. The Court's Response to Early Affirmative Action Programs in the Construction/Contracting Industry

In *Fullilove v. Klutznick*,[25] the Court in 1980 addressed a facial constitutional challenge to a MBE provision in the Public Works Employment Act of 1977.[26] This congressional spending program required that, in the absence of an administrative waiver, "10 [percent] of the federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned and controlled by members of statutorily identified minority groups."[27] The explicit legislative objectives of the MBE provision included assurances that grantees in the program would not employ discriminatory procurement practices that Congress had determined might hinder minority access to public contracting opportunities.[28]

In a plurality opinion, Chief Justice Burger, joined by Justices White and Powell, applied what appeared to be a standard of review more deferential than traditional strict scrutiny:

> A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with *appropriate deference* to the Congress, a co-equal branch charged by the Constitution with the power to "provide for the . . . general Welfare of the United States" and "to enforce, by appropriate legislation," the equal protection guarantees of the Fourteenth Amendment.[29]

Applying this standard of review, the plurality upheld the constitutionality of the MBE provision, finding that the congressional program was narrowly tailored to serve the objective of remedying the present effects of past discrimination.[30]

Nine years later, the Court adopted a very different approach. In *Croson*, the Richmond City Council enacted a plan requiring "prime contractors to whom the city awarded construction contracts to subcontract at least 30% of

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[25] 448 U.S. 448 (1980).

[26] *Id.* at 453-54 (citing 42 U.S.C. § 6705(f)(2) (1976)).

[27] *Id.* at 453. For purposes of the MBE set-aside, MBEs were defined as businesses owned and controlled by individuals who could be classified as "Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." *Id.* at 454 (quoting 42 U.S.C. § 6705(f)(2)).

[28] *Id.* at 459-61. Among the major difficulties Congress found confronting MBEs were "deficiencies in working capital, inability to meet bonding requirements, disabilities caused by an inadequate 'track record,' lack of awareness of bidding opportunities, unfamiliarity with bidding procedures, preselection before the formal advertising process, and the exercise of discretion by government procurement officers to disfavor minority businesses." *Id.* at 467 (quoting U.S. Commission on C.R., *Minorities and Women as Government Contractors*, at 16-28, 86-88 (1975)).

[29] *Id.* at 472 (emphasis added) (quoting U.S. CONST. art. I, § 8, cl. 1).

[30] *Id.* at 491-92.

the dollar amount of the contract to one or more [MBEs]."[31] The Richmond City Council relied on a "rich trove of evidence"[32] that discrimination was extensive in the Richmond construction industry when enacting its plan.[33] The Court, however, struck down the plan.[34]

In striking down the plan, the Court dismissed arguments that a state's power to remedy racial discrimination is the same as that of Congress under Section 5 of the Fourteenth Amendment.[35] Yet the Court did not completely foreclose the use of racial preferences by states. The Court accepted the argument that "a state or local subdivision . . . has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction."[36] More important, the Court emphasized that in some circumstances, a state or city can use its spending powers to remedy private discrimination:

> [I]f the city could show that it had essentially become a "passive participant" in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system. It is beyond dispute that any public entity, state or federal, has a

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[31] City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 477 (1989) (citation omitted). Justice O'Connor wrote the opinion for the Court. *Id.* at 476.

[32] *Id.* at 530 (Marshall, J., dissenting). Some of the testimony the Richmond City Council heard included these stark facts:

> [A]lthough minority groups made up half of the city's population, only 0.67% of the $24.6 million which Richmond had dispensed in construction contracts during the five years ending in March 1983 had gone to minority-owned prime contractors . . . . [T]he major Richmond area construction trade associations had virtually no minorities among their hundreds of members . . . . [N]ot a single person who testified before the city council denied that discrimination in Richmond's construction industry had been widespread.

Id. at 534-35 (citations omitted).

[33] *Id.* at 530.

[34] Although *Croson* was a 6-3 decision, certain portions of Justice O'Connor's "majority" opinion in *Croson* had been joined by only a plurality of the Court.

[35] *Croson*, 488 U.S. at 489-91. On this issue, Justice O'Connor was joined only by Chief Justice Rehnquist and Justice White. *Id.* at 476. Invoking original intent, the plurality restricted the states' powers in using race as a criterion for legislative action:

> The mere recitation of a benign . . . purpose for the use of a racial classification would essentially entitle the States to exercise the full power of Congress under § 5 of the Fourteenth Amendment and insulate any racial classification from judicial scrutiny under § 1. We believe that such a result would be contrary to the intentions of the Framers of the Fourteenth Amendment . . . .

Id. at 490-91. Justice Marshall described the plurality's decision of restricting the states' powers as equivalent to concluding that the Fourteenth Amendment preempts state action in matters of race. *Id.* at 557-61 (Marshall, J., dissenting). Justices Brennan and Blackmun joined Justice Marshall's dissent. *Id.* at 528.

[36] *Id.* at 491-92.

> compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.[37]

A plurality of the Court then rejected the idea that the level of scrutiny depends on the nature of the racial classification employed, whether "benign" or "remedial."[38] A majority of the Court proceeded to find two fatal flaws in the Richmond Plan: (1) failure to make specific findings concerning the market to be addressed by the remedy and (2) failure to provide limits to the scope of the remedy that seemed to address only generalized assertions of past discrimination.[39] Thus, the *Croson* Court concluded that Richmond did not have a strong evidentiary basis for its conclusion that remedial action was necessary,[40] despite Richmond's stark evidence of identified discrimination in its construction industry.[41]

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[37] *Id.* at 492.

[38] *Id.* at 493-96. The plurality declared that "the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification." *Id.* at 494 (citation omitted). Here, Justice O'Connor was joined by Chief Justice Rehnquist and Justices White and Kennedy. *See id.* at 476. Although Justice Scalia did not join the plurality, he did agree that "strict scrutiny must be applied to all governmental classification by race, whether or not its asserted purpose is 'remedial' or 'benign.'" *Id.* at 520 (Scalia, J., concurring).

[39] *Id.* at 498. These two fatal flaws were the same as those identified in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986) (Powell, J., plurality opinion), which struck down the use of a race-based layoff program by local school authorities pursuant to an agreement reached with the local teachers' union. *Id.* at 283-84.

[40] *Croson*, 488 U.S. at 500. The *Croson* Court did not further describe this "strong basis in evidence" requirement. One approach the Court suggested was if "there [wa]s a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise." *Id.* at 509.

The *Croson* Court, however, did mention that the district court's five "findings," singly or together, did *not* constitute a "strong basis in evidence" for Richmond's conclusion that remedial action was necessary:

> (1) the ordinance declares itself to be remedial; (2) several proponents of the measure stated their views that there had been past discrimination in the construction industry; (3) minority businesses received 0.67% of prime contracts from the city while minorities constituted 50% of the city's population; (4) there were very few minority contractors in local and state contractors' associations; and (5) in 1977, Congress made a determination that the effects of past discrimination had stifled minority participation in the construction industry nationally.

Id. at 499-500 (citation omitted). The district court relied on these five findings in reaching its conclusion that there was an adequate basis for the Richmond plan. *Id.* at 499.

[41] In his dissent, Justice Marshall noted the irony of the Court precluding Richmond, the one-time capital of the Confederacy, from "act[ing] forthrightly to confront the effects of racial discrimination in its midst." *Id.* at 528 (Marshall, J., dissenting).

In 1995, the Court once again wrestled with the issue of what standard of judicial review to apply to "benign" federal racial classifications. *Adarand III*[42] involved a challenge to a Department of Transportation ("DOT") program under which prime contractors could be awarded financial bonuses if they hired subcontractors certified as small businesses and owned and controlled by "socially and economically disadvantaged individuals."[43] Without ruling on the merits of the case, the Court held that "all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."[44] In so holding, the Court overruled a post-*Croson* case, in which the Court had adopted intermediate scrutiny as the standard of review for congressionally mandated "benign" racial classifications.[45] Despite its announcement of a purportedly rigid strict scrutiny review for all types of racial classifications, the Court reiterated the notion that while strict scrutiny may be "strict in theory," it does not have to be "fatal in fact."[46]

B. The Court's Current Formulation of Strict Scrutiny

Embracing the notion that strict scrutiny does not have to be fatal, the Court in *Grutter* upheld, against constitutional challenge, University of Michigan Law School's affirmative action program, which took race and ethnicity into consideration in its admissions decisions.[47] In holding that student body

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[42] Justice O'Connor delivered the opinion for the Court again.

[43] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 206-10 (1995) [hereinafter *Adarand III*]. The program required prime contractors to presume that "socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act." *Id.* at 205 (alteration in original).

[44] *Id.* at 227.

[45] *See* Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990). In *Adarand III*, the Court questioned the holding of *Fullilove*: "[T]o the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling." *Adarand III*, 515 U.S. at 235. The *Adarand III* Court also firmly rejected *Croson*'s distinction concerning the standard of review between federal and state racial classifications: "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Id.* at 224 (quoting Buckley v. Valeo, 424 U.S. 1, 93 (1976)).

[46] *Adarand III*, 515 U.S. at 237. Professor Gerald Gunther first published the oft-used phrase describing strict scrutiny: "'strict' in theory and fatal in fact." *See* Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[47] Grutter v. Bollinger, 539 U.S. 306, 343-44 (2003). Justice O'Connor once again delivered the Court's opinion. *Id.* at 311.

diversity is a compelling governmental interest, the Court took context[48] and "relevant differences" of racial classifications[49] into consideration in its application of strict scrutiny review.[50] In addition, the Court afforded considerable deference to the Law School's judgment that it had a compelling interest in attaining student body diversity.[51] Insisting that it was applying strict scrutiny, the Court declared that its "scrutiny of the interest asserted by the Law School [was] *no less strict* for taking into account complex educational judgments in an area that lies primarily within the expertise of the university."[52]

While *Grutter* approved of the use of racial preferences in attaining the Law School's asserted compelling interest of diversity, *Gratz v. Bollinger*[53] held otherwise in the context of undergraduate admissions.[54] *Gratz* stemmed from the University of Michigan Office of Undergraduate Admissions ("OUA")'s policy of automatically awarding twenty points to all applicants from underrepresented minority groups.[55] In addressing the reverse discrimination lawsuit,

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[48] *Id.* at 327 ("Context matters when reviewing race-based governmental action under the Equal Protection Clause."). *See* Gomillion v. Lightfoot, 364 U.S. 339, 343-44 (1960). The Court cautioned:

> [I]n dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts.

Id.

[49] Justice O'Connor's opinion in *Grutter* cited to *Adarand III* for the proposition that strict scrutiny does take relevant differences into account: "The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to *distinguish* legitimate from illegitimate uses of race in governmental decisionmaking." *Adarand III*, 515 U.S. at 228 (emphasis added).

[50] *Grutter*, 539 U.S. at 327. The Court observed that in fact the fundamental purpose of strict scrutiny is to take "relevant differences" into account. *Id.*

[51] *Id.* at 328. "The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer." *Id. But see* Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (Powell, J., plurality opinion) (rejecting the Jackson Board of Education's interest of retaining minority role models for its minority schoolchildren by implementing a race-based layoff program).

[52] *Grutter*, 539 U.S. at 328 (emphasis added). The Court likely afforded a greater degree of deference to University of Michigan Law School due to the educational setting. *See id.* ("[G]iven the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."); Brief of Amici Curiae Coalition for Economic Equity et al. at 23 n.11, *Grutter*, 539 U.S. 306 (No. 02-241) ("In education cases, application of a flexible strict scrutiny standard is even more appropriate because the social interest and academic freedom issues in promoting diversity are much greater than in contracting cases.").

[53] 539 U.S. 244 (2003).

[54] *Id.* at 249-51.

[55] *Id.* at 256. The OUA awarded points based on high school grade point average, standardized test scores, academic quality of an applicant's high school, strength or weakness

the Court held that the OUA's policy was not narrowly tailored to achieve the University's asserted compelling interest in diversity.[56]

Despite *Gratz*'s limitation on the use of racial preferences, *Grutter* proves that strict scrutiny does not completely bar the use of "benign" racial classifications. *Grutter* emphasizes that strict scrutiny should take context and relevant differences into account.[57] Significantly, the *Grutter* Court has signaled that it is important to "carefully examin[e] the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race *in th[e] particular context*"[58] when applying strict scrutiny review.

III. DEALING WITH THE AFTERMATH OF *CROSON*

Even after fifteen years, *Croson* is still the leading and most influential case concerning affirmative action programs designed to remedy the effects of past and present discrimination in the construction industry.[59] While *Croson* established the basic principle that the governmental actor must provide a strong basis in evidence for its conclusion that remedial action is necessary,[60] the application of this rule has produced conflicting results.[61] Unfortunately,

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of high school curriculum, in-state residency, alumni relationship, personal essay, and personal achievement/leadership. *Id.* at 255. Under a "miscellaneous" category, an applicant was awarded twenty points "based upon his or her membership in an underrepresented racial or ethnic minority group." *Id.* Underrepresented minorities included African-Americans, Hispanics, and Native-Americans. *Id.* at 253-54. An applicant could score a maximum of 150 points in the OUA's "selection index," where 100 points guaranteed admission. *Id.* at 255.

[56] *Id.* at 275. Unlike in *Grutter*, where the Law School conducted individualized determinations of every applicant, the OUA quantified its factors in making admissions decisions, presumably due to the volume of applicants applying to University of Michigan's undergraduate program. *See id. See also* discussion *supra* note 55.

[57] *See* discussion *supra* notes 48-50 and accompanying text.

[58] Grutter v. Bollinger, 539 U.S. 306, 327 (2003) (emphasis added).

[59] *See* Derek M. Alphran, Articles, *Proving Discrimination After* Croson *and* Adarand*: "If it Walks Like a Duck"*, 37 U.S.F. L. REV. 887, 892-93 (2003). In his comment, Alphran states:

> This watershed case [*Croson*] spurred a national debate on the future of affirmative action at local levels and the obligation upon local governments to meet the heightened standard of strict scrutiny. While the Court did not disavow the use of race-conscious remedies to address the problem of racial discrimination, *Croson* nonetheless marked a change in the Court's willingness to treat racial classifications differently than other types of classifications.

Id.

[60] City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 500 (1989) (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986)).

[61] *See* Patricia L. Donze, Comment, *The Supreme Court's Denial of Certiorari in* Dallas Firefighters *Leaves Unsettled the Standard for Compelling Remedial Interests*, 50 CASE W. RES. L. REV. 759, 779 (2000) (finding that some circuits require clear proof of the casual connection between past discrimination and present effects to satisfy the strong basis in evidence

Croson did not offer guidance as to what amount and type of factual showing would provide a strong basis in evidence that discrimination existed in a particular industry.[62]

A. What is a "Strong Basis in Evidence?"

In reviewing MBE preference programs in the context of the construction industry, courts generally consider three different types of evidence to determine whether the governmental actor had a strong basis in evidence to implement race-conscious relief.[63] These three types of evidence are: (1) statistical or disparity studies;[64] (2) anecdotal evidence;[65] and (3) post-enactment evidence.[66] Each of these three types of evidence will be discussed briefly below.

1. Statistical or disparity studies[67]

In *Croson*, the Court did not specify what type of proof was necessary for a city to show that it had a strong basis in evidence of discrimination warranting race-conscious relief.[68] The Court suggested[69] disparity studies[70]

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requirement, whereas other circuits let an inference suffice).

[62] *See* Alphran, *supra* note 59, at 902 (noting that *Croson* did not produce a clear framework for courts to follow in deciding "whether a governmental actor has made a sufficient showing regarding the discriminatory effects alleged to exist or have existed in the public or private workplace in question").

[63] *Id.* at 904, 916, 920.

[64] *See id.* at 904.

[65] *See id.* at 916.

[66] *See id.* at 920. For further discussion, *see id.* at 904-31 (discussing the use of statistical, anecdotal, and post-enactment evidence by the governmental actor to help establish a sufficient factual predicate to satisfy the strong basis in evidence requirement).

[67] For the purpose of this comment, "statistical comparisons" and "disparity studies" will be used interchangeably.

[68] The *Croson* Court apparently did not place much weight on the fact that Continental Metal Hose was the only MBE that submitted a bid to J.A. Croson, Co., the general contractor of the project. Indeed, Continental Metal Hose was unable to even submit its bid on time, citing the difficulty of obtaining credit approval and a supplier's refusal to quote prices for certain fixtures as obstacles hindering its submission of a prompt bid. City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 482 (1989).

[69] *See* discussion *supra* note 40.

[70] A typical disparity study:

> estimate[s] the number of available firms for each ethnic group (or gender group) and compare[s] each group's availability with its share of public-contracting dollars. If a disparity study indicates that [MBEs] are significantly underutilized, then [the governmental actor] can better argue that it has a compelling interest in using a race-conscious remedy.

Jeffrey M. Hanson, Note, *Hanging by Yarns?: Deficiencies in Anecdotal Evidence Threaten*

as one appropriate type of evidence. Most local and state jurisdictions that have used disparity studies focus on the following *Croson* "statistical test": "Where there is a significant statistical disparity between the number of qualified minority contractors willing and able to perform a particular service and the number of such contractors actually engaged by the locality or the locality's prime contractors, an inference of discriminatory exclusion could arise."[71] Determining who is qualified, willing, and able to perform the particular job has proven to be a daunting task for analysts conducting early disparity studies.[72] Writers have commented that the use of statistics to prove discrimination involves complex methodologies, often requiring the use of divergent approaches that courts should acknowledge but often do not.[73] As a result, district courts tend to be overly critical of disparity studies, frequently finding particular MBE programs unconstitutional because they were not supported by the "proper" statistics.[74]

2. *Anecdotal evidence*

The *Croson* Court implicitly endorsed the use of anecdotal evidence[75] to

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the Survival of Race-Based Preference Programs for Public Contracting, 88 CORNELL L. REV. 1433, 1445 (2003) (footnote omitted). Disparity studies are generally conducted in the context of public contracting within the construction industry, and often include anecdotal evidence of discrimination along with the statistical analysis. *Id.*

[71] *Croson*, 488 U.S. at 509.

[72] *See* Hanson, *supra* note 70, at 1445-46 ("One fundamental criticism [of disparity studies] is that most [of them] fail to take into account the differing qualifications and capacities of contracting firms, despite *Croson*'s language calling for a comparison of firms that are 'qualified[,] . . . willing and able to perform a particular service.'") (footnotes and citations omitted).

[73] *See, e.g.*, Alphran, *supra* note 59, at 915 (noting that despite the complex nature of using statistics to prove discrimination, "courts too often substitute their own judgment for those of the legislative bodies involved in particular cases. Courts have been overly critical of the census approach, where it has been used to identify the market share of contract dollars going to minority firms or to assess these firms' availability.").

[74] *See, e.g.*, Concrete Works of Colo., Inc. v. City of Denver, 86 F. Supp. 2d 1042 (D. Colo. 2000), *rev'd*, 321 F.3d 950 (10th Cir. 2003) [hereinafter *Concrete Works II*]; Webster v. Fulton County, 51 F. Supp. 2d 1354 (N.D. Ga. 1999), *aff'd mem.*, 218 F.3d 1267 (11th Cir. 2000); Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade County, 943 F. Supp. 1546 (S.D. Fla. 1996), *aff'd*, 122 F.3d 895 (11th Cir. 1997); Contractors Ass'n of E. Pa., Inc. v. City of Phila., 893 F. Supp. 419 (E.D. Pa. 1995), *aff'd*, 91 F.3d 586 (3d Cir. 1996); Alphran, *supra* note 59, at 915 ("Criticism of disparity studies persists, despite the fact that many such studies have shown a disparity index sufficient to establish more than a mere inference of discrimination.").

[75] Anecdotal evidence is comprised of "[p]ersonal accounts of actual discrimination or the effects of discriminatory practices." Concrete Works of Colo., Inc. v. City of Denver, 36 F.3d 1513, 1520 (10th Cir. 1994) [hereinafter *Concrete Works I*]. Anecdotal evidence of discrimination is usually collected through surveys, public hearings, and interviews, or it is introduced into court via testimony or affidavits. Hanson, *supra* note 70, at 1451.

complement a governmental actor's use of statistical evidence.[76] Although courts have held that anecdotal evidence alone does not provide a strong evidentiary basis to show discrimination in a given industry under *Croson*, anecdotal evidence "vividly complement[s]"[77] statistical evidence of discrimination.[78] Despite the potential strength of anecdotal evidence, many government officials have not taken affirmative steps to collect specific anecdotal evidence of discrimination.[79] This is especially true in the state and local context.[80]

3. Post-enactment evidence

Croson did not directly address the issue of whether post-enactment evidence[81] could be used by the government to establish the requisite strong basis in evidence of discrimination.[82] Post-*Croson* courts that have faced this issue have been disposed to answer in the affirmative, often relying on the fact that "the Supreme Court has never required that, before implementing affirmative action, the employer must have already proved that it has discriminated. On the contrary, formal findings of discrimination need neither precede nor

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[76] *See Croson*, 488 U.S. at 509 ("[E]vidence of a pattern of individual discriminatory acts can, if supported by appropriate statistical proof, lend support to a local government's determination that broader remedial relief is justified.").

[77] *Concrete Works I*, 36 F.3d at 1520.

[78] *See* Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1166 (10th Cir. 2000) [hereinafter *Adarand VII*]; *Concrete Works I*, 36 F.3d at 1520; Contractors Ass'n of E. Pa., Inc. v. City of Phila., 6 F.3d 990, 1003 (3d Cir. 1993); Coral Constr. Co. v. King County, 941 F.2d 910, 919 (9th Cir. 1991); Cone Corp. v. Hillsborough County, 908 F.2d 908, 916 (11th Cir. 1990). In the context of Title VII employment discrimination suits, the Court has stated that anecdotal evidence may bring "cold numbers convincingly to life." Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339 (1977).

[79] *See* Hanson, *supra* note 70, at 1437 (arguing that state and local MBE programs and ordinances "are unlikely to survive serious court challenges unless government officials insist on fundamental changes in consultants' methodologies for collecting and analyzing anecdotal evidence").

[80] *See supra* note 79. The federal government is more fully equipped to collect a wider range of anecdotal evidence of public and private discrimination in the construction industry.

[81] Post-enactment evidence is "evidence based on data related to [the] years *following*" the initial enactment of a particular preference program. Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade County, 122 F.3d 895, 911 (11th Cir. 1997).

[82] Some language in *Croson* may shed light on the use of post-enactment evidence: "While the States and their subdivisions may take remedial action when they possess evidence that their own spending practices are exacerbating a pattern of prior discrimination, they must identify that discrimination, public or private, *with some specificity before* they may use race-conscious relief." City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 504 (1989) (emphasis added). It follows that *Croson* does not foreclose the government's use of post-enactment evidence in order to establish its factual predicate of discrimination.

accompany the adoption of affirmative action."[83] Some courts have explicitly rejected the use of post-enactment evidence, however, when it is invoked to justify the government's enactment of affirmative action programs.[84] These courts often rely on the Court's 1996 opinion in *Shaw v. Hunt*,[85] which they have interpreted to bar the use of post-enactment evidence in determining whether the government had a compelling interest in using race-conscious relief.[86] Competing interpretations of *Shaw* have been raised, however, leaving the legitimacy of post-enactment evidence uncertain.[87]

B. The Tenth Circuit Opinions

Amidst uncertainty concerning what factual predicate is necessary to constitute a strong basis in evidence that discrimination existed or still exists, the Tenth Circuit recently upheld two affirmative action programs, one federal and one local.[88] Both decisions found that the governmental actor had a strong basis in evidence of discrimination sufficient to implement its modest affirma-

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[83] *Eng'g Contractors Ass'n*, 122 F.3d at 911 (quoting NAACP v. Seibels, 31 F.3d 1548, 1565 (11th Cir. 1994)). *See, e.g.*, *Adarand VII*, 228 F.3d at 1166; *Concrete Works I*, 36 F.3d at 1521; *Contractors Ass'n.*, 6 F.3d at 1004; Harrison & Burrowes Bridge Constructors, Inc. v. Cuomo, 981 F.2d 50, 60 (2d Cir. 1992); *Coral Constr.*, 941 F.2d at 920.

[84] *See, e.g.*, Rothe Dev. Corp. v. United States Dept. of Defense, 262 F.3d 1306, 1327-29 (Fed. Cir. 2001); Associated Gen. Contractors of Ohio, Inc. v. Drabik, 214 F.3d 730, 738 (6th Cir. 2000); Associated Util. Contractors of Md., Inc. v. Mayor of Balt., 83 F. Supp. 2d 613, 621 n.6 (D. Md. 2000).

[85] 517 U.S. 899 (1996). *Shaw* was a 5-4 decision, with Chief Justice Rehnquist delivering the opinion for the Court.

[86] The courts that reject the use of post-enactment evidence tend to rely on the following language in *Shaw*: "[T]he institution that makes the racial distinction must have had a 'strong basis in evidence' to conclude that remedial action was necessary, '*before* it embarks on an affirmative-action program.'" *Id.* at 910 (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277 (1986) (Powell, J., plurality opinion)).

[87] *See, e.g.*, W. Tenn. Chapter of Associated Builders and Contractors, Inc. v. City of Memphis, 138 F. Supp. 2d 1015 (W.D. Tenn. 2000):

> Despite the import of *Shaw*'s plain language, the Court does acknowledge that a colorable argument can be advanced that *Shaw* does not preclude post-enactment evidence if the governmental entity can proffer some degree of pre-enactment evidence. Although *Shaw* holds that post-enactment evidence alone is insufficient to justify remedial legislation, it may fairly be interpreted to leave open the possibility that other evidence may supplement a plan's "proper factual basis." *Shaw* may stand for the proposition that a "strong basis" in pre-enactment evidence does not constitute the "only basis"—requiring a minimum level of pre-enactment evidence does not foreclose supplementation of the legislative record with post-enactment evidence.

Id. at 1021-22 (footnotes and citations omitted). *See also* Alphran, *supra* note 59, at 920 (noting that the legitimacy of post-enactment evidence is another "muddled area" regarding the establishment of a strong basis in evidence of discrimination).

[88] *See infra* Part III.B.1-2.

tive action program.[89] The Tenth Circuit's opinions add clarity and substance to the strong basis in evidence standard. This Comment now turns to the factual background and subsequent holdings of the two Tenth Circuit decisions, *Adarand VII* and *Concrete Works III*.

1. Adarand VII[90]

Adarand VII's complex history spanned over ten years of litigation, including direct involvement by the Supreme Court on several occasions.[91] The facts pertaining to the case, however, are relatively straightforward. At issue in *Adarand VII* was the constitutionality of the use of the Subcontractor Compensation Clause ("SCC") in federal subcontracting procurement.[92] The case arose when in 1989, DOT awarded a prime contractor a highway construction project in Colorado.[93] The prime contractor "then solicited bids from subcontractors for the guardrail portion of the contract."[94] Adarand, a highway construction company concentrating in guardrail work, submitted the lowest bid.[95] The prime contractor, however, hired a certified DBE instead.[96] The SCC was included in the DOT contract with the prime contractor, which "provided that [the prime contractor] would receive additional compensation if it hired subcontractors certified as small businesses controlled by 'socially and economically disadvantaged individuals.'"[97] Thereafter, Adarand filed its reverse discrimination lawsuit.[98]

Upon remand in 2000, the Tenth Circuit held that DOT had established a strong basis in evidence that the SCC program was narrowly tailored to serve the government's two compelling interests.[99] The two compelling interests were: (1) ending "the effects of racial discrimination in [DOT's] own distribution of federal funds" and (2) remedying "the effects of past discrimination

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[89] *See infra* Part III.B.1-2.

[90] *Adarand VII* came before Senior Judge McKay, and Judges Lucero and Murphy. Judge Lucero wrote the opinion for the Tenth Circuit panel.

[91] *See* discussion *supra* note 16.

[92] The SCC employed race-conscious presumptions designed to favor MBEs and other "disadvantaged business enterprises" ("DBEs"). Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1155 (10th Cir. 2000) [hereinafter *Adarand VII*]. DBE and MBE will be used interchangeably throughout this section.

[93] *Id.* at 1156.

[94] *Id.*

[95] *Id.*

[96] *Id.* Adarand was not a certified DBE at this time.

[97] *Id.* (citation omitted).

[98] *Id.* For a concise description of *Adarand*'s complex procedural history, see *id.* at 1156-57.

[99] *Id.* at 1155.

in the government contracting markets created by [DOT's] disbursements."[100] In determining whether DOT's interest was indeed compelling, the court considered direct and circumstantial evidence, including anecdotal and post-enactment evidence, and legislative history.[101] More significant, the court paid special attention to DOT's evidence demonstrating the existence of two kinds of discriminatory barriers to MBEs.[102] The court concluded that the evidence "show[ed] a strong link between racial disparities in the [DOT]'s disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination."[103]

2. *Concrete Works III*[104]

Concrete Works III had its own share of protracted litigation, extending over eleven years.[105] At issue in *Concrete Works III* was the constitutionality of Denver's 1990 affirmative action ordinance, which established participation goals for racial minorities and women on certain construction and professional design projects.[106] All contractors bidding on Denver contracts were required to abide with the goals and requirements stated in the ordinance.[107] In 1992, Concrete Works of Colorado, Inc. ("CWC") filed suit in federal district court in Colorado, alleging that the 1990 Ordinance was unconstitutional.[108] CWC alleged that it lost three contracts with Denver because it did not comply with the participation goals or meet the good faith requirements set out in the Ordinance.[109]

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[100] *Id.* at 1165.

[101] *Id.* at 1166.

[102] *Id.* at 1168-73.

[103] *Id.* at 1167-68.

[104] *Concrete Works III* came before Senior Judge McKay and Judges Kelly and Murphy. Judge Murphy wrote the opinion for the Tenth Circuit panel.

[105] The first opinion issued in the *Concrete Works* line of cases also came from the federal district court in Colorado in 1993, written by Chief Judge Finesilver. Concrete Works of Colo., Inc. v. City of Denver, 823 F. Supp. 821 (D. Colo. 1993). The litigation concluded when the Court denied Concrete Works of Colo., Inc. [hereinafter CWC]'s writ of certiorari in 2003. Concrete Works of Colo., Inc. v. City of Denver, 540 U.S. 1027 (2003).

[106] Concrete Works of Colo., Inc. v. City of Denver, 321 F.3d 950, 956 (10th Cir. 2003) [hereinafter *Concrete Works III*]. The 1990 Ordinance was amended twice, once in 1996, and then in 1998. *Id.* at 956-57.

[107] *Id.* at 956. "Bidders could comply with the 1990 Ordinance by meeting the project participation goals or by demonstrating sufficient good faith efforts to meet those goals." *Id.*

[108] *Id.* at 957.

[109] *Id.* A non-minority male owns and operates CWC. *Id.*

In reversing the Colorado District Court for the second time,[110] the Tenth Circuit held that Denver demonstrated a strong basis in evidence that the Ordinances were narrowly tailored to serve the city's compelling interest in remedying racial discrimination in the Denver construction industry.[111] The court gave credence to Denver's historical evidence, disparity studies, anecdotal evidence, and marketplace discrimination evidence, despite CWC's sharp criticism and rebuttal evidence.[112] As in *Adarand VII*, the Tenth Circuit placed considerable weight on the government's evidence of private discrimination resulting in barriers to business formation and fair competition.[113] Based on the wide array of evidence, the Tenth Circuit concluded that Denver satisfied its burden by showing that it was a passive participant in industry discrimination.[114]

IV. ANALYSIS

The governmental actors in *Adarand VII* and *Concrete Works III* departed from traditional methods of attempting to show such a strong basis in evidence that warranted their use of race-conscious relief. The governmental actors did so by embracing the passive participant model suggested in *Croson*. The Tenth Circuit sets a framework to meet the strong basis in evidence requirement for the federal, state, and local governments.

A. The Significance of Croson*'s Passive Participant Model*

Croson's passive participant model directly addresses what has been plaguing the construction industry in recent years: the persistence of *private* discrimination, not public discrimination.[115] As mentioned earlier, the *Croson*

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[110] The Tenth Circuit reversed the Colorado District Court's first ruling in 1994. The Supreme Court denied certiorari then as well. Concrete Works of Colo., Inc. v. City of Denver, 823 F. Supp. 821 (D. Colo. 1993), *rev'd*, 36 F.3d 1513 (10th Cir. 1994), *cert. denied*, 514 U.S. 1004 (1995).

[111] *Concrete Works III*, 321 F.3d at 994. The Tenth Circuit also held that Denver demonstrated an important governmental interest in remediating gender discrimination in its construction industry. *Id.*

[112] *Id.* at 958-60. For further discussion, *see id.* at 960-91. The Tenth Circuit also approved of the use of post-enactment evidence in its first opinion. *See* Concrete Works of Colo., Inc. v. City of Denver, 36 F.3d at 1521 ("The strong weight of authority endorses the admissibility of post-enactment evidence to determine whether an affirmative action contract program complies with *Croson*.") [hereinafter *Concrete Works I*].

[113] *Concrete Works III*, 321 F.3d at 977 (citing Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1168 (10th Cir. 2000)).

[114] *Id.* at 984.

[115] *See* Alphran, *supra* note 59, at 887 (noting that while "[g]overnmental discrimination in favor of awarding public contracts to [non-minorities] may be merely a lingering practice in

Court suggested that if a city shows that it became something akin to a joint tortfeasor, i.e., a "passive participant," in a "system of racial exclusion practiced by elements of the local construction industry,"[116] then the city undoubtedly could take "affirmative steps to dismantle such a system."[117] The Court recognized that any state or federal entity has a compelling interest to ensure that public monies do not abet discrimination faced by minorities in the private sector.[118] The only guideline offered by the Court to state and local governments for satisfying the passive participant model was that they must identify the private discrimination "with some specificity"[119] before they implement race-conscious relief.[120] In determining the meaning of *Croson*'s sole guideline, jurisdictions have differed on the exact meaning of "some specificity."[121] Even several Justices of the Court have differed on the accurate meaning of what a government must do to "identify" such a basis, as the term is used in *Croson*.[122] Despite the apparent difficulty in unearthing the precise workings of the passive participant model, some writers have recognized the potential importance of this model.[123]

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some jurisdictions[,] . . . the underutilization of [minorities in the private sector], as a result of overt and covert disparate treatment by [non-minorities], remains a present day reality"); Ian Ayres et al., *When Does Private Discrimination Justify Public Affirmative Action?*, 98 COLUM. L. REV. 1577, 1583-84 (1998) ("While government discrimination in some procurement markets may be a thing of the past, the same cannot be said of private discrimination. Underutilization of [MBEs] is a much bigger problem in private markets than in public markets.") (footnotes omitted).

[116] City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 492 (1989).

[117] *Id.*

[118] *Id.*

[119] *Id.* at 504.

[120] *Id.*

[121] The Tenth Circuit interpreted the "some specificity" language in *Croson* to refer to the amount of evidence required to sustain a strong basis in evidence of discrimination. *See* Concrete Works of Colo., Inc. v. City of Denver, 36 F.3d 1513, 1521 (10th Cir. 1994) [hereinafter *Concrete Works I*]. A Tennessee district court, on the other hand, interpreted "some specificity" to refer to the "permissible geographical scope of the statistics; i.e., a city cannot rely on a study showing *national* or *state-wide* disparities in the percentage of public contracts awarded to minority business." W. Tenn. Chapter of Associated Builders and Contractors, Inc. v. City of Memphis, 138 F. Supp. 2d 1015, 1025 n.12 (W.D. Tenn. 2000).

[122] *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 291 (1986) (O'Connor, J., concurring in part and concurring in the judgment) (noting that the states are able to take voluntary race-conscious action to achieve compliance with the law even in the absence of a specific finding of past discrimination). *But see* Concrete Works of Colo., Inc. v. City of Denver, 540 U.S. 1027, ___, 124 S. Ct. 556, 558 (2003) (Scalia, J., dissenting) (arguing that "'discrimination . . . identif[ied] with some specificity' is discrimination *that has been shown to have existed*").

[123] *See* Rudley & Hubbard, *supra* note 14, at 93 ("For public entities that cannot present strong evidence of their own direct participation in discrimination because of the success of ongoing affirmative action efforts, [the passive participant] theory may emerge as one of the most viable bases for justifying [MBE] legislation."); *see also* Ayres et al., *supra* note 115, at

Adarand VII provides a framework for the federal government to follow to satisfy the passive participant model in future cases. DOT had identified its compelling interest in its use of racial presumptions as "remedying the effects of racial discrimination and opening up federal contracting opportunities to members of previously excluded minority groups."[124] DOT thus acknowledged the existence of private discrimination which frustrated contracting opportunities for minorities, and offered a linkage between its award of public contracts and private discrimination.[125] It thereby had acted as a passive participant in discrimination. In addition to finding DOT's articulated interest compelling as a theoretical matter, the Tenth Circuit's primary duty was to determine whether the evidence offered by DOT supported the existence of past and present discrimination in the highway subcontracting market.[126] In determining whether the evidence supported the existence of past and present discrimination, the Tenth Circuit reaffirmed the long-standing rule that the "benchmark for judging the adequacy of a government's factual predicate for affirmative action legislation [i]s whether there exists a strong basis in evidence for [the government's] conclusion that remedial action was necessary."[127]

In identifying the variables for such a "strict scrutiny calculus,"[128] the Tenth Circuit noted that both statistical and anecdotal evidence are appropriate, although anecdotal evidence by itself is not.[129] The Tenth Circuit also approved of DOT's use of direct and circumstantial evidence, evidence in the legislative history, and post-enactment evidence as other variables.[130] In addressing the permissible scope of evidence of discrimination, the court found relevant not only the evidence in the specific area of government procurement contracts, but also evidence of discrimination in the entire construction industry.[131] This flexible framework enabled the Tenth Circuit

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1577 (outlining three justifications for remedying private discrimination through public affirmative action programs, relying heavily on *Croson*'s passive participant model).

[124] Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1164 (10th Cir. 2000) [hereinafter *Adarand VII*] (quoting Appellants' Opening Brief at 21).

[125] *Id.* at 1167-68.

[126] *Id.* at 1166.

[127] *Id.* (alterations in original) (citations and internal quotations omitted).

[128] *Id.*

[129] *Id.*

[130] *Id.* The court found post-enactment evidence particularly relevant in this case, because it was gathered specifically in response to the Court's 1995 decision in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), which applied a new compelling interest standard to the federal government's affirmative action programs, i.e., the strict scrutiny standard of review. *Adarand VII*, 228 F.3d at 1167 n.11.

[131] *Adarand VII*, 228 F.3d at 1166-67 ("[A]ny findings Congress has made as to the entire construction industry are relevant.").

to give appropriate weight to DOT's principal evidence, which demonstrated the existence of the two main discriminatory barriers facing MBEs within the construction industry: (1) discriminatory barriers to the formation and development of MBEs as a result of private discrimination; and (2) discriminatory barriers to fair competition between non-minority firms and existing MBEs, again as a result of private discrimination.[132] The court ruled that this key evidence showed "a strong link between racial disparities in [DOT's] disbursements of public funds for construction contracts and the channeling of those funds due to private discrimination."[133] The evidence thus showed that DOT had participated passively in the private construction industry's discriminatory system.[134] Finally, the Tenth Circuit gave credence to DOT's use of local disparity studies of minority subcontracting and studies of local subcontracting markets which assessed the impact of removing affirmative action programs.[135]

Adarand, on the other hand, claimed that the disputed evidence consisted of instances of generalized societal discrimination, and therefore did not rise to the level required to impose a race-conscious remedy.[136] The Tenth Circuit thought otherwise, characterizing DOT's chief evidence as "evidence of *specific* barriers to market entry and fair competition facing actual and potential minority participants in the market for public construction contracts."[137] Based upon the wide array and depth of DOT's evidence, the court held that DOT met its initial burden of presenting a strong basis in evidence sufficient to support its compelling interest of eradicating the effects of private discrimination.[138] The evidence established DOT's participation in awarding contracts to those exhibiting discriminatory behavior.[139]

DOT put forth extensive congressional findings of discrimination in all aspects of the private construction industry, as well as in those industries that

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[132] *Id.* at 1167-68. In fact, the Tenth Circuit took judicial notice of the content of hearings and testimony before the congressional committees and subcommittees, supporting the government's factual predicate. *Id.* at 1168 n.12.

[133] *Id.* at 1167-68.

[134] In interpreting *Croson*'s passive participant model, the Tenth Circuit did not read *Croson* "as requiring the municipality to identify an *exact linkage* between its award of public contracts and private discrimination." *Id.* at 1167 (emphasis added). Rather, the Tenth Circuit found that such evidence of an "exact linkage" would merely enhance the municipality's factual predicate for a race-conscious program, while the absence of such evidence would not render the program unconstitutional. *Id.*

[135] *Id.* at 1168.

[136] *Id.* at 1176 n.18. ("Societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy." (quoting Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 276 (1986) (Powell, J., plurality opinion))).

[137] *Adarand VII*, 228 F.3d at 1176 n.18 (emphasis added).

[138] *Id.* at 1174-75.

[139] *Id.*

support the construction industry.[140] This enabled DOT to overcome the rigorous strong basis in evidence requirement that previously had been nearly impossible to meet. Taking advantage of the passive participant model, DOT did not have to present evidence of its own direct participation in discrimination.

Following *Adarand VII*, the Tenth Circuit, in 2003, also laid out a framework for state and local municipalities to follow to satisfy the passive participant model. In *Concrete Works III*, Denver identified its compelling interest in enacting its affirmative action plan as "remedying racial discrimination within its jurisdiction."[141] The Tenth Circuit, in setting out its standard of review, noted that Denver was not required to "conclusively prov[e] the existence of past or present racial discrimination."[142] The Tenth Circuit also mentioned two possible paths Denver could take to establish its compelling interest: (1) presenting evidence of its own direct participation in racial discrimination or (2) presenting evidence of its passive participation in private discrimination.[143]

Concerning the geographic scope of the evidence, the court earlier ruled that Denver could rely on statistical evidence gathered from the six-county Denver Metropolitan Statistical Area, thus not confining Denver to its own jurisdictional boundaries.[144] The court reasoned that confining the relevant data to a governmental body's strict geographical boundaries would "ignore the economic reality that contracts are often awarded to firms situated in adjacent areas."[145] As in *Adarand VII*, the court set out a flexible standard which could take into consideration a variety of evidence[146] as well as an extensive geographic scope for statistical evidence.

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[140] *Id.* at 1167-72.

[141] Concrete Works of Colo., Inc. v. City of Denver, 321 F.3d 950, 958 (10th Cir. 2003) [hereinafter *Concrete Works III*].

[142] *Id.*

[143] *Id.*

[144] Concrete Works of Colo., Inc. v. City of Denver, 36 F.3d 1513, 1520 (10th Cir. 1994) [hereinafter *Concrete Works I*] ("The relevant area in which to measure discrimination . . . is the local construction market, but that is not necessarily confined by jurisdictional boundaries."). The *Concrete Works III* court summarily approved of the statistical evidence's extended geographic scope. *But see* Milliken v. Bradley, 418 U.S. 717 (1974) (holding that it was improper to impose a multidistrict remedy for single-district de jure segregation in the context of public school education). *Milliken* was a 5-4 decision, with Justices White, Brennan, Douglas, and Marshall dissenting. The dissenters were highly critical of the Court's decision. *See, e.g., id.* at 759 (Douglas, J., dissenting) ("When we rule against the metropolitan area remedy we take a step that will likely put the problems of the blacks and our society back to the period that antedated the 'separate but equal' regime of [*Plessy v. Ferguson*].").

[145] *Concrete Works I*, 36 F.3d at 1520.

[146] *See supra* text accompanying note 112.

During trial, the district court criticized and discounted Denver's evidence because the evidence did not answer six questions the court had posed in its memorandum and order.[147] Under de novo review, the Tenth Circuit found that the district court was under the mistaken impression that Denver was required to *prove* conclusively the existence of discrimination before it could implement race-conscious relief. Denver's initial burden was to demonstrate a strong basis in evidence that remedial action was necessary. "Strong evidence" is evidence only "approaching a prima facie case of a constitutional or statutory violation,"[148] and *not* conclusive proof of discrimination. By strictly adhering to six rigid questions, the district court had failed to consider Denver's case properly, because Denver's case revolved mainly around the passive participant model.

At the conclusion of assessing Denver's evidence, the *Concrete Works III* court found Denver's statistical and anecdotal evidence relevant because it "identifie[d] discrimination in the local construction industry, not simply discrimination in society."[149] Additionally, the court placed significant weight on Denver's evidence of private marketplace discrimination, which played a key role in sustaining Denver's passive participant argument.[150] Denver linked this evidence of discrimination with its disbursement of city funds, confirming

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[147] Concrete Works of Colo., Inc. v. City of Denver, 321 F.3d 950, 970 (10th Cir. 2003) [hereinafter *Concrete Works III*]. The six questions were:

> (1) Is there pervasive race, ethnic and gender discrimination throughout all aspects of the construction and professional design industry in the six county Denver MSA? (2) Does such discrimination equally affect all of the racial and ethnic groups designated for preference by Denver and all women? (3) Does such discrimination result from policies and practices intentionally used by business firms for the purpose of disadvantaging those firms because of race, ethnicity and gender? (4) Would Denver's use of those discriminating firms without requiring them to give work to certified MBEs and WBEs in the required percentages on each project make Denver guilty of prohibited discrimination? (5) Is the compelled use of certified MBEs and WBEs in the prescribed percentages on particular projects likely to change the discriminatory policies and programs that taint the industry? (6) Is the burden of compliance with Denver's preferential program a reasonable one fairly placed on those who are justly accountable for the proven discrimination?

Concrete Works of Colo., Inc. v. City of Denver, 86 F. Supp. 2d 1042, 1066-67 (D. Colo. 2000) [hereinafter *Concrete Works II*].

[148] City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 500 (1989).

[149] *Concrete Works III*, 321 F.3d at 972.

[150] *See id.* at 976. Specifically, Denver

> can demonstrate that it is a "passive participant" in a system of racial exclusion practiced by elements of the local industry by compiling evidence of marketplace discrimination and then linking its spending practices to the private discrimination. Therefore, evidence of marketplace discrimination is not only relevant but, in this case, it is essential to [Denver's] claim that it is an indirect participant in private discrimination.

Id. (internal citation omitted).

that Denver was a passive participant in the racially exclusionary practices of the Denver construction industry.[151]

The Tenth Circuit also dismissed CWC's objections that Denver's lending discrimination and business formation studies, which included extensive anecdotal evidence, were irrelevant.[152] The court ruled that the studies revealed the existence of discriminatory barriers to business formation and competition in the Denver construction industry and the studies were thus relevant to Denver's showing that it passively participated in industry discrimination.[153] After weighing all of Denver's extensive studies and its innovative arguments,[154] the Tenth Circuit concluded that Denver had a strong basis in evidence to presume that action was necessary to remediate private discrimination against MBEs even *before* the city adopted its first ordinance in 1990.[155] The Tenth Circuit thus follows *Shaw*'s holding that the government "must have had a strong basis in evidence to conclude that remedial action was necessary, *before* it embark[ed] on an affirmative action program."[156]

One court has recently questioned the validity of the Tenth Circuit's model. In *Builders Ass'n of Greater Chicago v. City of Chicago*,[157] a federal district court in Illinois compared passive participation with general societal discrimination, finding it difficult to draw the line between the two.[158] In this case, a contractors' association brought suit against the City of Chicago, challenging Chicago's minority set-aside program as unconstitutional.[159] During discovery, Chicago subpoenaed various trade unions and union apprenticeship programs to produce certain documents.[160] The district court assumed that Chicago wanted these documents so that it could develop a passive participant argument, by establishing "a long entrenched pattern of discrimination in the building trade unions that ha[d] adversely affected the ability of minorities .

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[151] *Id.*

[152] *Id.* at 977.

[153] *Id.*

[154] One innovative argument Denver made was in regard to its disparity studies. CWC had argued that Denver's disparity studies were unreliable because they did not control for size and experience. Denver, however, countered that "a construction firm's precise 'capacity' at a given moment in time belies quantification due to the industry's highly elastic nature." Concrete Works of Colo., Inc. v. City of Denver, 36 F.3d 1513, 1528 (10th Cir. 1994) [hereinafter *Concrete Works I*].

[155] *Concrete Works III*, 321 F.3d at 991.

[156] Shaw v. Hunt, 517 U.S. 899, 910 (1996) (citations omitted).

[157] 240 F. Supp. 2d 796 (2002). Senior District Judge Moran issued the memorandum order and opinion.

[158] *Id.* at 798.

[159] *Id.* at 796.

[160] *Id.* at 797.

. . to become contractors capable of bidding on City contracts."[161] In its ruling, the district court held that Chicago could not subpoena these unions to discover such information, for it would support only possible general societal discrimination.[162]

The district court did not appreciate the full scope of the evidence that Chicago sought to discover. If Chicago did find, via the subpoenaed documents, that various local unions discriminatorily barred minorities from joining, those practices would affect MBE formation and development in general. Union membership certainly helps members to foster connections, find new jobs, and provides other benefits, both tangible and intangible.[163] While the Tenth Circuit recognized union discrimination as one possible factor in a government's evidentiary basis, the district court did not.

By using *Croson*'s passive participant model, DOT and Denver were able to show the necessary strong basis in evidence that discrimination had existed or still exists. Each governmental actor presented varied and in-depth evidence to which the Tenth Circuit gave appropriate weight and consideration. The Tenth Circuit was able to review the governments' evidence flexibly while still comporting with *Croson*'s teaching that discrimination must be identified with some specificity before affirmative action programs can be enacted.

B. Two Models Illustrating the Supreme Court's Current Equal Protection Jurisprudence

While specifically abiding with the Supreme Court's teachings in *Croson*, the Tenth Circuit also generally comports with the Court's current equal protection jurisprudence. The Court's strict scrutiny standard is evolving. This is most evident from the Court's recent opinion in *Grutter*.

In *Grutter*, the Court's current strict scrutiny took relevant differences of racial classifications and context into account when reviewing the affirmative action program at issue.[164] Additionally, when reviewing the University of Michigan Law School's remedial-based program, the Court afforded a degree of deference to the Law School's judgment in enacting such a program.[165] The

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[161] *Id.*

[162] *Id.* at 799. The court based its ruling on the fact that, for bidding purposes, Chicago has not required that contractors have any union affiliation or that construction workers be member of a union. Thus, the court concluded that it would not matter whether minorities would be racially excluded from unions. *Id.*

[163] *See infra* Part V.A.

[164] *See supra* Part II.B.

[165] Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

Tenth Circuit applied similar principles when it strictly scrutinized DOT and Denver's remedial-based legislation in the construction industry.[166]

Under strict scrutiny review, the *Adarand VII* court took relevant differences of racial classifications into account. The Tenth Circuit determined that the SCC racial presumptions were designed to promote inclusion, as opposed to exclusion, by attempting to remove deeply-rooted barriers prominent in the construction industry.[167] In terms of context, the Tenth Circuit agreed with DOT that evidence regarding MBE formation and competition in the subcontracting sector, and the kinds of obstacles minorities face, constituted a strong basis for the conclusion that those obstacles dominate the construction industry.[168] Most important, once the Tenth Circuit took these relevant differences and context into account, it considered the broad congressional findings on discrimination in the federal construction contracting market.[169] This deference is especially appropriate when congressional findings are at issue, due to Congress' "co-equal" status with the Court.[170] Furthermore, in response to Adarand's amici curiae's urgings to reject disparity studies because of their allegedly biased or methodologically flawed nature, the Court approved DOT's use of such studies, noting that these studies are, by their very nature, imprecise.[171]

The *Concrete Works III* court also took relevant differences of racial classifications into consideration. The Tenth Circuit determined that Denver's race-based ordinances were enacted as an attempt to eliminate marketplace

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[166] *See supra* Part IV.A.

[167] *See* Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1164 (10th Cir. 2000) [hereinafter *Adarand VII*].

[168] *See id.* at 1172. The court took note of the fact that "Congress repeatedly has considered the issue of discrimination in government construction procurement contracts, finding that racial discrimination and its continuing effects have distorted the market for public contracts—especially construction contracts–necessitating a race-conscious remedy." *Id.* at 1167.

[169] *Id.* at 1167-72.

[170] The *Fullilove* Court made the observation that the Court was "bound to approach [its] task [of reviewing race-based classifications] with *appropriate deference* to the Congress, a co-equal branch charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States' and 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment." Fullilove v. Klutznick, 448 U.S. 448, 472 (1980) (emphasis added) (quoting U.S. CONST. art. I, § 8, cl. 1). *But see* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 235 (1995) (declaring *Fullilove* no longer controlling *only* "to the extent (if any) that *Fullilove* held federal racial classifications to be subject to a less rigorous standard").

[171] *See Adarand VII*, 228 F.3d at 1174 n.14 ("Certainly, the conclusions of virtually all social scientific studies may be cast into question by criticism of their choice of assumptions and methodologies. The very need to make assumptions and to select data sets and relevant variables precludes perfection in empirical social science.").

discrimination and to foster a more equal playing field for MBEs.[172] They were not put in place to perpetuate exclusion as earlier racial classifications had done.[173] The Tenth Circuit also took context into account, giving appropriate weight to Denver's statistical, marketplace, and anecdotal evidence depicting instances of discrimination in Denver's construction industry, differentiating it from general societal discrimination.[174] Although not affording Denver the same level of deference as it did to DOT, the Tenth Circuit still respected Denver's disparity studies. The Tenth Circuit noted that, despite the lack of specific findings, the disparity studies supported the inference that local prime contractors were engaging in racial discrimination.[175]

The Tenth Circuit's opinions in *Adarand VII* and *Concrete Works III* reflect the U.S. Supreme Court's current strict scrutiny standard. Over the past twenty years, the Court's strict scrutiny standard has evolved greatly. By flexibly reviewing DOT and Denver's modest race-conscious programs, the Tenth Circuit carries out the Court's mandate that strict scrutiny may be rigorous but does not have to be fatal to the appropriate MBE programs and ordinances.

V. CURRENT CONDITIONS FACING MINORITIES IN THE CONSTRUCTION INDUSTRY

The barriers faced by minorities in the construction industry today are a function of the continuing patterns and practices of exclusion, as well as the lingering effects of prior discriminatory conduct.[176] Generally, MBEs face two main kinds of discriminatory barriers. The first pertains to the formation and development of qualified MBEs.[177] The second stems from elements of unfair competition between existing MBEs and non-MBEs, resulting from

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[172] Concrete Works of Colo., Inc. v. City of Denver, 321 F.3d 950, 992 (10th Cir. 2003) [hereinafter *Concrete Works III*].

[173] *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967); Korematsu v. United States, 323 U.S. 214 (1944); Plessy v. Ferguson, 163 U.S. 537 (1896).

[174] *Concrete Works III*, 321 F.3d at 972.

[175] *Id.* at 974 (noting that the lower court should not have discounted Denver's disparity studies because they failed to specifically identify the individuals or firms responsible for the discrimination).

[176] *See* Appendix—The Compelling Interest for Affirmative Action in Federal Procurement: A Preliminary Survey, 61 Fed. Reg. 26,042, 26,051 (May 23, 1996) [hereinafter The Compelling Interest] (a Department of Justice study concluding that "discriminatory barriers facing minorit[ies]. . . are not vague and amorphous manifestations of historical societal discrimination").

[177] *Id.* at 26,054.

discriminatory practices by prime contractors, private-sector customers, business networks, suppliers, and bonding providers.[178]

A. Barriers to the Formation and Development of MBEs in the Construction Industry

There are three major barriers impeding the formation and development of MBEs in the construction industry: (1) employer and union discrimination; (2) wealth and lender discrimination; and (3) "old boy" business network discrimination.[179] These barriers often work together, precluding minorities from obtaining the experience and capital needed to form and develop successful businesses.

A long history of discriminatory treatment by employers prevented minorities from rising into the kinds of managerial positions that are most likely to lead to self-employment and business ownership.[180] The various practices by employers are entrenched in the construction industry. In addition, the history of familial participation from which minorities have traditionally been excluded continues today.[181]

A corresponding history of union discrimination effectively blocked minority participation in the construction industry, in which union membership is a key factor for success. Unions, which control training and job placement in many skilled trades, commonly barred minorities from membership.[182] Unions withheld minority membership through numerous

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[178] *Id.*

[179] *Id. See also* MARIA E. ENCHAUTEGUI ET AL., THE URBAN INST., DO MINORITY-OWNED BUSINESSES GET A FAIR SHARE OF GOVERNMENT CONTRACTS? (1997).

[180] The Compelling Interest, *supra* note 176, at 26,056. Discriminatory employment practices include "promoting white employees over more qualified minority employees[,] relying on word-of-mouth recruiting practices that exclude minorities from vacancy announcements[,] and creating promotion systems that lock minorities into inferior positions." *Id.* (footnotes omitted). *See, e.g.*, Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1016 (2d Cir. 1980) (recognizing that "subjective word-of-mouth hiring methods[] [are] suspect because of their propensity for 'masking racial bias'") (citation omitted).

[181] *See* The Compelling Interest, *supra* note 176, at 26,057 n.82 ("'[T]he construction industry is . . . family dominated. Many firms are in their second or third generation operating structures.'" (quoting H.R. REP. NO. 103-870, at 15 n.36 (1994))).

[182] *Id.* at 26,055. *See* United Steelworkers of Am. v. Weber, 443 U.S. 193, 199 n.1 (1979) (recognizing that judicial findings of exclusion from craft unions "on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice"); City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 542 (1989) (Marshall, J., dissenting) ("[M]embership in the trade associations whose members presumably train apprentices and help them procure subcontracting assignments is . . . grossly dominated by nonminorities.").

policies.[183] As a result of these policies, minorities lacked the skills and knowledge necessary to develop their own businesses within the construction industry.[184]

Lack of financial capital is a key obstacle facing minorities who want to develop their own businesses.[185] Many business owners begin with little or no capital or use their own savings as start-up capital.[186] Minorities' relatively low wealth often is at least an indirect result of discrimination.[187] As a result of their low wealth, minorities are more dependent on bank lending.[188] But, lending discrimination plays a significant role in the inability of minorities to secure capital.[189] The presence of lending discrimination supports the view that the formation and development of MBEs have been obstructed.[190]

Access to business networks also plays an important role in successfully developing a new business. These networks, "which commonly involve

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[183] Such policies included the use of:

> "tests and admissions criteria which [have] no relation to on-the-job skills and which [have] a differential impact" on minorities[,] discriminating in the application of admission criteria[,] and imposing admission conditions, such as requiring that new members have a family relationship with an existing member, that locked minorities out of membership opportunities.

The Compelling Interest, *supra* note 176, at 26,055 (citation and footnotes omitted).

[184] Despite abundant evidence that overt discrimination played a key role in precluding minorities from effectively forming and developing their own businesses, some alternative theories have attempted to explain the low levels of minority entrepreneurship. One common theory is that "Latinos' and African Americans' cultures are not conducive to entrepreneurship." ENCHAUTEGUI ET AL., *supra* note 179, at 34. There is, however, very little empirical and statistical support for this theory. *Id.* at 39-40.

[185] *See* The Compelling Interest, *supra* note 176, at 26,057 n.85 ("'One of the most formidable stumbling blocks to the formation and development of minority businesses is the lack of access to capital.'" (quoting United States Commission on Minority Business Development, Final Report 12 (1992))).

[186] ENCHAUTEGUI ET AL., *supra* note 179, at 35.

[187] Specifically, African Americans have been excluded from higher education opportunities, "received inferior education, been denied employment opportunities, received lower wages, and been denied mortgages to buy homes." *Id.* at 35-36 (citations omitted).

[188] The Compelling Interest, *supra* note 176, at 26,057.

[189] *Id.* For example, a recent study surveyed 407 business owners in the Denver area. The study found that "African Americans were [three] times more likely to be rejected for business loans than whites. The denial rate for Hispanic owners was [one and a half] times as high as white owners." *Id.* (citing The Colorado Center for Community Development, University of Colorado at Denver, *Survey of Small Business Lending in Denver* v (1996)). The survey controlled for other factors that may affect the lending rate, such as the size and net worth of the business. *Id.*

[190] *See* Adarand Constructors, Inc. v. Slater, 228 F.3d 1147, 1170 n.13 (2000) [hereinafter *Adarand VII*] (noting that the presence of lender discrimination, which violates federal law, "supports the assertion that the formation, as well as utilization, of minority-owned construction enterprises have been impeded").

membership in formal trade and business organizations"[191] or "informal relationships with other successful business owners,"[192] can lead to "new clients and suppliers, information on upcoming projects and information on technical development and the like."[193] Minorities have been historically excluded from these networks, especially by construction unions—which are an important source of networking[194]—and in part by the "old-boys" who dominate the private sector of the construction industry.[195] Unless minorities are able to penetrate these networks, MBEs will continue to be excluded from significant job opportunities.

B. Barriers in Access and Competition in Contracting Markets

The minorities who are able to develop their own businesses face another set of barriers. Discrimination by prime contractors, private sector consumers, and bonding and supplier companies combine to produce an unequal playing field, again making it difficult for minorities to compete with non-minorities.[196]

Minorities continue to be outsiders in the established construction industry due to ongoing discrimination by prime contractors. Contracting essentially "remains a closed network, with prime contractors maintaining long-standing relationships with subcontractors with whom they prefer to work."[197] Not surprisingly, MBEs seldom receive invitations to bid for subcontracts on projects, absent affirmative action programs.[198] When MBEs do have an opportunity "to bid for subcontracts, prime contractors often resist working

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[191] ENCHAUTEGUI ET AL., *supra* note 179, at 36.

[192] *Id. See Adarand VII*, 228 F.3d at 1168 (citing *Minority Business Development Program Reform Act of 1987: Hearings on S. 1993 and H.R. 1807 Before the Senate Comm. on Small Bus.*, 100th Cong. 127 (1988) (statement of Parren Mitchell, Chairman, Minority Business Enterprise Legal Defense and Education Fund) ("noting the 'harsh reality' of the 'old-boy network' that prevents minority-owned firms from breaking into the private sector")).

[193] ENCHAUTEGUI ET AL., *supra* note 179, at 36.

[194] *Id.*

[195] *See Adarand VII*, 228 F.3d at 1168 (finding the evidence demonstrated that "prime contractors in the construction industry often refuse to employ minority subcontractors due to 'old-boy' networks"); Associated Gen. Contractors of Cal., Inc. v. Coalition for Econ. Equity, 950 F.2d 1401, 1415 (9th Cir. 1991) (numerous individual accounts confirming that an "old boy network" still exists in the San Francisco construction industry).

[196] The Compelling Interest, *supra* note 176, at 26,058.

[197] *Id.* (footnote omitted).

[198] *Id.*

with them."[199] Exclusionary practices thus shut minorities out of the experience and work needed to develop their companies.

Private-sector consumers often discriminate against MBEs. Some unsettling examples include:

> African American business owners . . . arriving at job cites to find signs saying "No Niggers allowed," and "Nigger get out of here." Other potential customers have simply refused to work with a business after discovering that its owner is a minority. In a recent encounter, a black business owner arriving at a home-site was told to leave by a white customer, who commented "you didn't tell me you were black and you don't sound black."[200]

The outright racism of some private sector consumers thus fosters the systematic exclusion of existing MBEs from greater growth opportunities.

Access to the government contracting sector[201] of the construction industry also depends to a significant extent on the MBE's ability "to obtain quality services from bonding companies and suppliers at a fair price."[202] Traditional discriminatory practices make it harder for MBEs to obtain bonding for federal contracts.[203] To obtain bonding, contractors typically present to the surety or bonding companies a record of experience demonstrating their ability to perform the contract.[204] Minorities often face a "vicious circle" in which minority subcontractors cannot obtain bonding due to a lack of exper-

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[199] *Id.* at 26,059. One type of resistance occurs when "white firms refus[e] to accept low minority bids or [share] low minority bids with another subcontractor . . . to allow that business to beat the bid (a practice known as 'bid shopping')". *Id. See, e.g.*, Eng'g Contractors Ass'n of S. Fla., Inc. v. Metro. Dade County, 122 F.3d 895, 925 (11th Cir. 1997) (noting testimony describing instances "in which an [MBE] subcontractor was hired by a prime contractor, but subsequently was replaced with a non-[MBE] subcontractor within days of starting work on the project"); Coral Constr. Co. v. King County, 941 F.2d 910, 917 (9th Cir. 1991) (noting testimony of MBE owners that MBEs are often bypassed for a non-minority firm when there are no minority requirement on the project).

[200] The Compelling Interest, *supra* note 176, at 26,059 (footnotes omitted). An Urban Institute study also notes that some white customers refuse to hire MBEs or are only willing to do so if the price charged is less than that charged by a non-minority owner. ENCHAUTEGUI ET AL., *supra* note 179, at 39.

[201] ENCHAUTEGUI ET AL., *supra* note 179, at vii. Government contracting, or procurement, comprises a large portion of the nation's economy. "In 1990, procurement at all levels of government represented approximately $450 billion, or almost 10 percent of [the gross national product]." *Id.* It is not surprising that there is heightened competition for these lucrative contracts. *Id.*

[202] The Compelling Interest, *supra* note 176, at 26,060.

[203] *See* 40 U.S.C. § 3131 (2002). Under Title 40, section 3131 of the U.S. Code, all contractors on federal construction, alteration, or repair contracts valued at more than $100,000 must secure a surety bond guaranteeing performance of the contract. *See id.*

[204] The Compelling Interest, *supra* note 176, at 26,060.

ience (resulting from past and present discrimination) "[a]nd since they cannot get bonding, they cannot get experience."[205]

Another factor limiting the ability of MBEs to compete in both public and private contracting is supplier discrimination. Evidence suggests that "[n]on-minority sub-contractors and contractors [get] special prices and discounts from suppliers which [are] unavailable to MBE purchasers."[206] Such supplier discrimination "driv[es] up anticipated costs, and therefore the bid, for [MBEs]."[207] As a result, the tactics of these suppliers of goods needed to satisfy job requirements disadvantage minority contractors.

Federal, state, and local governments have attempted to address the obstacles faced by MBEs in business formation and competition by enacting a wide range of affirmative action programs. Reverse discrimination lawsuits, in which non-minority contractors object to the use of race-conscious relief for minority contractors, soon challenged these programs. The U.S. Supreme Court has sought to define the constitutionality of these affirmative action programs, most notably in *Croson* and *Adarand III*. The Court's actions, however, have placed the future of affirmative action with the construction industry in doubt.

VI. CONCLUSION

Unlike any other circuit, the Tenth Circuit was able to breathe life into *Croson*'s largely neglected passive participant model. Embracing the model, the Tenth Circuit in *Adarand VII* and *Concrete Works III* set guidelines to determine what constitutes a strong basis in evidence necessitating remedial action. In establishing a detailed framework for the passive participant model, the Tenth Circuit declared what types of evidence may be used by the governmental actor, and also offered guidelines as to the scope of such evidence.[208]

The Tenth Circuit's passive participant model appears to comport with the Court's currently evolving equal protection jurisprudence. The Tenth Circuit flexibly reviewed the affirmative programs at issue and took special note of the context involved in each use of the program.[209] Although affirmative

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[205] *Id.* Besides a lack of experience, other factors contribute to the inability of MBEs to obtain bonding. *See, e.g.*, Associated Gen. Contractors of Ohio, Inc. v. Drabik, 50 F. Supp. 2d 741, 758 (S.D. Ohio 1999) (citing a study noting four reasons which contribute to the inability of MBEs to secure bonding: (1) "unsatisfactory financial statements"; (2) "improper estimating techniques"; (3) "creditor liens"; and (4) unfamiliarity with the entire bonding process).

[206] Cone Corp. v. Hillsborough County, 908 F.2d 908, 916 (11th Cir. 1990).

[207] The Compelling Interest, *supra* note 176, at 26,061.

[208] *See supra* Part IV.A.

[209] *See supra* Part IV.B.

action programs will not erase the "sorry history"[210] of public and private discrimination in this country, they are instrumental in counteracting the barriers erected as a result of institutionalized racism. Accordingly, courts should end the vicious cycle of discrimination against MBEs by not automatically rendering review of affirmative action programs fatal under strict scrutiny. Perhaps then the sorry history of discrimination will indeed remain history and will not continue to be an "unfortunate reality"[211] for minorities today and tomorrow.

Karen M Winter[212]

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[210] City of Richmond v. J.A. Croson, Co., 488 U.S. 469, 499 (1989).

[211] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995).

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Prudent Use of Judicial Minimalism: Why Minimalism May Not be Appropriate in the Context of Same-Sex Marriage

I. INTRODUCTION

Same-sex marriage became legal in the United States on Monday, May 17, 2004. The right has only been granted in Massachusetts to its residents, and if conservative religious groups get their way, same-sex marriage could be short-lived. Nevertheless, extending marriage to gay and lesbian couples represents a huge milestone in our nation's social, legal and political history, and the surrounding debate reveals the way in which our country deals with change. Many groups disapprovingly describe the Massachusetts Supreme Judicial Court's decision in *Goodridge v. Department of Health*,[1] which held that a same-sex marriage ban violated Massachusetts' Constitution, as an activist, countermajoritarian usurpation of legislative power.[2] Opponents of "activism" advocate a minimalist approach to deciding cases, an approach where the court says "no more than necessary to justify an outcome, and leav[es] as much as possible undecided."[3] However, even minimalism's most recent advocate, Professor Cass Sunstein, admits that such a narrow approach to adjudication has its limits.[4] Minimalism is not applicable in all circumstances; the key to its utility is knowing when to apply and when to reject it.

This Comment illustrates minimalism's inapplicability to state court same-sex marriage decisions by comparing them to the justifiably non-minimalist case *Brown v. Board of Education*,[5] which ended racial segregation in public schools.[6] Part II begins with an explanation of Professor Sunstein's

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[1] 798 N.E.2d 941 (Mass. 2003).

[2] *See, e.g.*, Press Release, Alliance for Marriage, *Multicultural Coalition Reintroduces AFM Marriage Amendment in Congress* (May 21, 2003), *at* http://www.allianceformarriage.org/site/PageServer?pagename=mac_FederalMarriageAmendment (last visited Feb. 18, 2005); Press Release, The White House, *President Calls for Constitutional Amendment Protecting Marriage* (Feb. 24, 2004), *at* http://www.whitehouse.gov/news/releases/2004/02.html (last visited Feb. 18, 2005). President Bush renewed the call for an amendment banning same-sex marriage in his 2005 State of the Union Address. Press Release, The White House, *State of the Union Address*, *at* http://www.whitehouse.gov/ news/releases/2005/02.html (last visited Feb. 18, 2005).

[3] Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6-7 (1996).

[4] *See id.* at 28.

[5] 347 U.S. 483 (1954).

[6] *Id.* at 495 ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

minimalist theory and discusses factors to consider when applying or rejecting minimalism. Part III describes the legal, social, and political atmosphere surrounding *Brown* and explains why the Court was justified in issuing a broad, decisive ruling. Part IV applies the factors that made *Brown* an appropriate candidate for a non-minimalist decision to the present-day equal protection debate over same-sex marriage. Part V concludes that in the context of same-sex marriage, state courts are justified in making decisive, non-minimalist decisions regarding same-sex marriage. When the equal rights of a politically disadvantaged minority are at stake and the usual legislative debate forecloses vindication of those rights, correct principle must trump overly cautious prudence.

II. PROFESSOR SUNSTEIN'S MINIMALIST THEORY: "LEAVING THINGS UNDECIDED"[7]

Professor Sunstein's advocacy of prudence and silence expands upon Alexander Bickel's "passive virtues" approach.[8] In his book THE LEAST DANGEROUS BRANCH,[9] Professor Bickel explains the value of exercising the "passive virtues" through use of justiciability doctrines, such as standing, ripeness, mootness, and political questions, which allow the court to decline jurisdiction.[10] Doing so allows a court to avoid political backlash and stimulates democratic discussion in the legislative branch, which more appropriately addresses the issue and its policy implications.

Professor Sunstein's theory incorporates denial of certiorari as just one form of minimalism[11] and advocates a minimalist approach through the writing of the actual opinion.[12] Minimalism is the practice of judges "decid[ing] no more than they have to decide,"[13] which means "saying no more than necessary to justify an outcome, and leaving as much as possible undecided."[14] Minimalists avoid constitutional questions, investigate the actual but not hypothetical purpose of statutes, respect prior holdings but not dicta, and exercise Professor Bickel's passive virtues.[15] In contrast to

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[7] *See generally* Sunstein, *supra* note 3.

[8] *See id.* at 8 n.8.

[9] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH (1962).

[10] Michael Heise, *Preliminary Thoughts on the Virtues of Passive Dialogue*, 34 AKRON L. REV. 73, 76-77 (2000).

[11] Sunstein, *supra* note 3, at 51.

[12] *Id.* at 8 n.8. While Professor Bickel argues that once a court assumes jurisdiction over a case, a most principled and full opinion should result, Professor Sunstein advocates use of narrow and shallow opinions—even after a case overcomes the jurisdictional hurdle. *Id.*

[13] *Id.* at 6.

[14] *Id.*

[15] *Id.* at 7.

maximalists, who favor broad rules and deep theoretical justifications for outcomes, minimalists seek "to deal only with the closest of precedents and the most obvious of hypotheticals[,] . . . avoid dicta[, and] try to find grounds on which people can converge from diverse theoretical positions."[16]

Two characteristics are vital to a minimalist decision: narrowness and shallowness, both used by Professor Sunstein as praise.[17] Minimalist decisions decide cases on the narrowest possible grounds,[18] and by avoiding broad, sweeping rules, a minimalist decision reduces the dangers of an erroneous decision due to a court's lack of information.[19] It allows the "democratic process room to adapt to future developments, to produce mutually advantageous compromises, and to add new information and perspectives to legal problems."[20] The other characteristic, shallowness, means avoiding issues of basic foundational principle and attempting to reach only modestly theorized agreements.[21] Shallowness is most important when disagreement is hard to resolve, because shallowness "make[s] it possible for people to agree when agreement is necessary, . . . [and makes] it unnecessary for people to agree when agreement is impossible."[22]

Although minimalism often promotes democratic deliberation and agreement on difficult issues, even Professor Sunstein recognizes that it is only appropriate in certain contexts.[23] It is impossible to "decide in the abstract whether and how much minimalism is appropriate."[24] Inappropriately applied, minimalism can set off a multitude of problems, which unnecessarily drain judicial resources. Sometimes a narrow, shallow decision simply exports decision costs to lower courts as they try, likely unsuccessfully, to make sense of the high court's incompletely theorized decision.[25] Diverse situations subject to inconsistent lower court decisions could "produce unfairness through dissimilar treatment of the similarly situated."[26] At other times, a minimalist decision could impede legislative and agency planning by failing to give sufficient guidance for crafting future rules.[27] Furthermore, minimalism may not always facilitate "democratic legitimacy."[28] Even if it does,

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[16] *Id.* at 15.
[17] *Id.* at 15-21.
[18] *Id.* at 16.
[19] *Id.* at 8.
[20] *Id.* at 19.
[21] *Id.* at 20.
[22] *Id.* at 21.
[23] *Id.* at 28.
[24] *Id.* at 30.
[25] *Id.* at 28-29.
[26] *Id.* at 29.
[27] *Id.*
[28] *Id.*

increased democratic capacity may be undesirable if deliberative processes are not functioning well enough to protect the rights of a socially unpopular minority.[29] Professor Sunstein notes that this last phenomenon is especially relevant to constitutional issues relating to homosexual rights:

> [I]n all these contexts, powerful groups may be producing unreasonable legislation or blocking desirable change. And if we are concerned only about the substance—about getting things right—minimalism may be a mistake; it is possible that participants in democratic processes will merely stumble their way toward the rule that courts could have adopted long ago, in some instances never arriving at the correct rule at all. The argument that minimalism is preferable when it promotes democratic deliberation is weakened if the deliberative process delays realization of desirable rules, or precludes those rules altogether.[30]

It follows that courts must apply minimalism carefully, if at all. In sum,

> [t]he case for minimalism is strongest when courts lack information that would justify confidence in a comprehensive ruling; when the need for planning is not especially insistent; when the decision costs of an incremental approach do not seem high; and when minimalist judgments do not create a serious risk of unequal treatment.[31]

By considering these factors, courts reduce the chance of wasting time and creating confusion that may deprive citizens of constitutional rights.

Professor Sunstein points to *United States v. Virginia*[32] ("*VMI*") as an example of a justifiably deep and narrow decision. In that case, the Supreme Court struck down the Virginia Military Institute's single-sex organization as a violation of equal protection, holding that the state cannot deny substantial equal educational opportunities based on gender.[33] According to Professor Sunstein, *VMI*'s depth was justified because the Justices were able to agree on a deep understanding of equal protection.[34] The decision was simultaneously narrow because it did not decide questions about same-sex policies in other contexts. The Justices also had good reason to believe their rationale would be correct because the Court had previous encounters with constitutional cases involving sex discrimination.[35]

As an example of a narrow and shallow decision, Professor Sunstein offers *Romer v. Evans*,[36] where the Court invalidated an anti-gay amendment to the

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[29] *Id.* at 29-30.

[30] *Id.*

[31] *Id.* at 99-100.

[32] 518 U.S. 515 (1996).

[33] Sunstein, *supra* note 3, at 72-73; *VMI*, 518 U.S. at 554.

[34] Sunstein, *supra* note 3, at 76.

[35] *Id.* at 77.

[36] 517 U.S. 620 (1996).

Colorado constitution.[37] Professor Sunstein considers *Romer* to be a minimalist decision because it was not clearly or deeply explained, and notably declined to discuss the entirely relevant case *Bowers v. Hardwick*.[38] In contrast to these decisions is *Brown*, a wide and deep case that was justifiably ambitious.[39] What made *Brown* so special? A discussion of the circumstances that favor an exception to the general presumption of minimalism follows.

III. *BROWN V. BOARD OF EDUCATION*: A JUSTIFIED REJECTION OF MINIMALISM

Brown was a consolidated class action originating in Kansas, South Carolina, Virginia, and Delaware.[40] In each case, African American children applied for but were denied admission to public schools pursuant to laws requiring or permitting segregation according to race.[41] In one of the most revered opinions ever delivered by the U.S. Supreme Court, the Court reasoned that "[s]eparate educational facilities are inherently unequal,"[42] and held that segregation in public education is a denial of the equal protection of the laws under the Fourteenth Amendment.[43] Although the Court did not immediately specify a method of implementation,[44] its decree effectively mandated affirmative integration.

Application of Professor Sunstein's factors makes *Brown* a prime candidate for minimalism, but this author suggests that that the court was actually justified in rejecting minimalism. As stated previously, minimalism is particularly appropriate where "courts lack information that would justify confidence in a comprehensive ruling; when the need for planning is not especially insistent; when the decision costs of an incremental approach do not seem high; and when minimalist judgments do not create a serious risk of unequal treatment."[45] Although Professor Sunstein classifies *Brown* as a wide, broad decision, *Brown* is an exception that "may require the thesis to be qualified, perhaps for the most compelling cases in which the underlying judgment of constitutionally relevant political morality is insistent."[46] A

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[37] *Id.* at 635-36.

[38] 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003). *Bowers* upheld the constitutionality of a Georgia sodomy statute. *Bowers*, 478 U.S. at 189.

[39] Sunstein, *supra* note 3, at 48-51.

[40] Brown v. Bd. of Educ., 347 U.S. 483, 486 (1954).

[41] *Id.* at 487-88.

[42] *Id.* at 495.

[43] *Id.*

[44] *See* Sunstein, *supra* note 3, at 50.

[45] *Id.* at 99-100.

[46] *Id.* at 50.

closer look at the application of Professor Sunstein's factors to *Brown* reveals that deviation from the normal minimalist presumption is in fact warranted.

A. Risk of Unequal Treatment and Faulty Democratic Deliberation

An insistent need for a judgment by the Supreme Court on the morality of segregation provided a compelling reason for rejecting minimalism in *Brown*. A weak decision would perpetuate grossly disparate treatment of blacks, especially in the South, where there existed an unquestioned caste system. As one constitutional scholar recalled, segregation was just a fact about the universe, so ingrained in the social structure that "it seemed no more 'right' or 'wrong' than the placement of the planets in the solar system. It simply was."[47] Before *Brown*, twenty-one states required segregation, and black children were required to attend all-black schools everywhere in the South.[48] Had black and white schools been of comparable quality, segregation might not have seemed so objectionable. But in reality, any claim of "separate but equal" was a slap in the face to the black children who were shunted to inferior, underfunded schools. The system "was not only segregated; it also featured glaring inequalities in spending per pupil, facilities, and the training of teachers—indeed, in every way."[49] In 1954, spending per student in southern black schools amounted to only sixty percent of that in southern white schools.[50] While white schools typically had gyms, libraries, and adequate classrooms, black children had to do without many of the basic necessities that white students enjoyed.[51]

Perhaps even more important than the inequality itself was the psychological effect segregation had on blacks.[52] The mere fact of separation suggested to black children that they were somehow unworthy of competition with white children. Absent interaction with whites, blacks could never really be sure whether they actually *were* inferior as whites claimed.[53] Any court decision short of a total ban on segregation would be a virtual declaration by the nation's highest Court that black children were not peers worthy of being in the same classroom as superior white children. Issuing a minimalist decision, as an attempt to prompt state legislatures to ban segregation on their own, would have been futile. Democratic deliberation in the legislature would

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[47] JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION xvi (David H. Fischer & James M. McPherson eds., 2001) (quoting the recollections of constitutional scholar David Dellinger).

[48] *Id.* at 9.

[49] *Id.*

[50] *Id.* at xvii.

[51] *See generally id.*

[52] *Id.*

[53] *Id.*

have only foreclosed the possibility of integration. Blacks in the South had weak political power and even assuming the entire black population voted, they represented a substantial minority at most.[54] Thus, it was up to the judiciary to protect the equal rights of a politically weak minority group by issuing a strong, decisive opinion.

B. Legislation and Popular Majority Sentiment

Protection of minority rights is a strong factor against minimalism, but the argument for it becomes stronger if courts lack information about how the legislature and popular majority views the particular issue. The *Brown* Court received ample but admittedly conflicting information on this point. On one hand, by 1954, most states did not require racial segregation of public schools, and it was mainly limited to the South.[55] On the other hand, white majority sentiment did not favor abolishment of segregation, especially in the South.[56] In 1942, a poll showed that overall, only forty percent of whites in the North (including only two percent of white southerners) thought that "'White students and Negro students should go to the same schools.'"[57] By 1956, that number had risen to sixty-one percent (but only fifteen percent of white southerners).[58]

Some anti-integration whites expressed extreme views.[59] For example, a common fear amongst whites was that desegregation would lead to interaction between whites and blacks in the classroom, which would lead to interaction outside the classroom, interracial dating and marriage, and "'the mongrelization of the races.'"[60] Those whites were adamant in their belief that blacks were inferior to the superior white race.[61] To them, it was an unquestionable fact, much like asserting the sky was blue. In this uncertain atmosphere, the Court faced the possibility of immense backlash against an anti-segregation decision.[62] Admittedly, a minimalist decision would probably decrease the

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[54] Louisiana, Mississippi, Alabama, Georgia, and South Carolina had the largest black populations in 1950. *Id.* at 22. But even in Mississippi, the state with the highest percentage at 45.3 percent, blacks were still not a majority. *Id.* In the remainder of the states outside the South, blacks made up no more than ten percent of the population. *Id.*

[55] In 1954, seventeen states, mostly in the South, required pubic school segregation, and four others (Arizona, Kansas, New Mexico, and Wyoming) permitted it. *Id.* at xiv-xvi.

[56] *Id.* at 7.

[57] *Id.* at 7.

[58] *Id.*

[59] *Id.* at xix.

[60] *Id.* (quoting Herman Talmadge, Governor of Georgia).

[61] *Id.* at 5.

[62] After the decision in *Brown*, Bryant Bowles founded the National Association for the Advancement of White People ("NAAWP"), a pro-segregation group that called for whites to

likelihood of an extreme response. Public opinion on a controversial topic is rarely consistent, however. Because there existed much information—both in favor of and against segregation—for the Court to evaluate, it could choose a position and have enough faith in its interpretation to render a comprehensive decision abolishing segregation.[63]

C. Prior Precedent

While public sentiment arguably favored a minimalist decision in *Brown*, prior precedent provided compelling reason for the Court to decide otherwise. When a court has had prior experience dealing with a particular issue, it can be more confident of its decision and thus may be justified in issuing a non-minimalist opinion. This was the case in *Brown* because it did not come "like a thunderbolt from the sky."[64] Instead, *Brown* "had been presaged by a long series of cases testing the proposition that 'separate' was 'equal,' and testing that proposition in such a way as to lead inevitably to the suggestion that 'separate' could not be 'equal.'"[65]

Thurgood Marshall, who later became a Supreme Court Justice, spear-headed the challenge to segregation.[66] With the help of the National Association for the Advancement of Colored People ("NAACP"), Marshall first focused his efforts on attacking the "equal" part of "separate-but-equal."[67] From 1936 to 1938, Marshall and the NAACP fought in favor of Lloyd Gaines, who had applied to the University of Missouri Law School and was rejected solely because he was black.[68] The Supreme Court ruled in favor of Gaines, holding that Gaines was "entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race."[69] *Missouri ex rel. Gaines v. Canada*[70] seemed to

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boycott newly integrated schools. *Id.* at 73. After whites boycotted southern Delaware schools, the school board gave into Bowles' threats. *Id.* While the Delaware Supreme Court did affirm that *Brown* nullified state segregation laws, it also pointed out that the court had not instructed how or when the schools were required to integrate. *Id.* at 75. Thus the NAAWP's actions made desegregation in reality very difficult. *Id.* Integration did not come instantaneously. *Id.* at 74-75.

[63] The Court likely evaluated anti-integration sentiment and motives, and found such sentiment to be an invalid basis upon which to support continuing segregation.

[64] Sunstein, *supra* note 3, at 50.

[65] *Id.*

[66] PATTERSON, *supra* note 47, at 12.

[67] *Id.* at 15.

[68] *Id.*

[69] State of Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 351 (1938).

[70] 305 U.S. 337.

be an encouraging victory, but states began setting up grossly inferior law schools for black people.[71] By asserting that the inferior schools were substantially equal, white schools could reject black applicants without technically violating *Gaines*.

Marshall continued to challenge the validity of the so-called "equal" accommodations, and won two significant victories in 1950. In *Sweatt v. Painter*,[72] the Court unanimously ordered the University of Texas Law School to admit black plaintiff Heman Sweatt because it could not "find substantial equality in the educational opportunities offered white and Negro law students."[73] In *McLaurin v. Oklahoma State Regents for Higher Education*,[74] plaintiff George McLaurin applied to the University of Oklahoma to pursue his doctorate and was reluctantly admitted.[75] The university, however, segregated McLaurin from the white students and forced him to sit at a segregated desk and eat in a separate area in the cafeteria and at a different time than other students.[76] Striking down this practice, the Court remarked that "[s]uch restrictions impair and inhibit [McLaurin's] ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."[77] Removing mandatory barriers between black and white students would allow a black student "the opportunity to secure acceptance by his fellow students on his own merits."[78] Such language implied that state-imposed racial segregation *could not be equal*.

Thus, when the Court finally addressed *Brown*, it had prior experience striking down the "equal" in "separate-but-equal." Such precedent justified the *Brown* Court's holding that separate is inherently unequal, which could logically be seen as the next step in the progression of segregation cases. Taking the next step cannot be considered minimalist, but neither can it be seen as unjustified.

D. Need for Planning

Professor Sunstein asserts that the case for minimalism is strong when the need for planning is not especially insistent.[79] Here, the Court seemed to embrace minimalism by saying nothing about a remedy: "the Court did not

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[71] Patterson, *supra* note 47, at 16.
[72] 339 U.S. 629 (1950).
[73] *Id.* at 633.
[74] 339 U.S. 637 (1950).
[75] *Id.* at 639-40.
[76] *Id.* at 640.
[77] *Id.* at 641.
[78] *Id.* at 641-42.
[79] Sunstein, *supra* note 3, at 30.

impose its principle all at once, . . . [but instead] allowed room for other branches to discuss the mandate and to adapt themselves to it."[80] Even though it did not actually reject minimalism and detail a method of implementation, the Court would have been justified in doing so because the need for uniform planning *was* in fact particularly important. Valuable as democratic deliberation is, the integration efforts would have likely benefited greatly from additional guidance from the Court. By issuing a broad, sweeping rule abolishing segregation but failing to provide any sort of remedy, the Court invited chaos and inconsistent enforcement of its order.[81] Providing a plan for enforcement would reduce the risk of unequal treatment where rogue school boards defied the desegregation mandate. Had it chosen to implement a specific remedy, this insistent need for planning could have provided the Court with reason to reject minimalism. Therefore, since there was a high risk of unequal treatment, various sources of information on legislation and majority sentiment, adequate prior precedent to support a confident decision, and a need for planning, the Court was justified in issuing a decisive non-minimalist opinion in *Brown*.

IV. SAME-SEX MARRIAGE: A MODERN-DAY JUSTIFIED REJECTION OF MINIMALISM

Just as the U.S. Supreme Court was justified in rejecting minimalism in *Brown*, so are state courts justified in rejecting application of minimalism to same-sex marriage decisions. Although Professor Sunstein supports the underlying principle of same-sex marriage, he asserts that the Court should either do nothing, or start cautiously and proceed incrementally when dealing with gay and lesbian rights.[82] He fears that immediate validation of same-sex marriage could jeopardize gay and lesbian rights in the long run by galvanizing the opposition, weakening the anti-discrimination movement, provoking hostility and violence, jeopardizing the authority of the judiciary, and prompting calls for a constitutional amendment to overturn the Court's

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[80] *Id.* at 51.

[81] *See* MICHAEL J. GERHARDT ET AL., CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES 53 (2000).

[82] Sunstein, *supra* note 3, at 98. For example, the Court might seek to issue narrow rulings regarding whether something other than hostility and animus can be basis for discrimination against homosexuals, rather than tackling the marriage issue right away. *Id.*; *see also* Cass R. Sunstein, *Homosexuality and the Constitution*, 70 IND. L.J. 1, 2 (1994) ("In all likelihood, laws against homosexual orientation and behavior will soon come to be seen as products of unfounded prejudice and hostility, and private prejudice and hostility will themselves recede. Courts should play a limited if perhaps catalytic role in this process.").

decision.[83] In short, he seems to favor prudence over principle. This Part argues that where a minority group's equal rights are in jeopardy and a state court adjudicates the issue, the primary concern must be getting the principle right. Prudence should be an important, but secondary concern, because in the context of same-sex marriage, a non-minimalist opinion does *not* necessarily bring about the results that Professor Sunstein fears. Application of Professor Sunstein's "*Brown* factors" to the same-sex marriage debate indicates that a state court may justifiably issue a maximalist opinion in which principle takes priority over prudence.

What Professor Sunstein could not have foreseen is the dramatic change in attitudes toward homosexuality within the past decade. While religious groups, particularly Roman Catholics,[84] have generally remained opposed to same-sex relationships,[85] the American Psychological Association no longer lists homosexuality as a mental disorder.[86] Today, in many places, especially large cities, gays and lesbians no longer have to "keep their orientation secret

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[83] Sunstein, *supra* note 3, at 97; *see also* Sunstein, *Homosexuality and the Constitution*, *supra* note 82, at 25.

[84] According to the U.S. Census Bureau, of the American residential households that responded to a random telephone survey in 2001, approximately twenty-four percent were self-described Roman Catholics. UNITED STATES CENSUS BUREAU, *Statistical Abstract of the United States: 2004-2005*, http://www.census.gov/prod/2004pubs/04statab/pop.pdf (last visited Feb. 18, 2005). The Southern Baptist Church, the largest Protestant body, makes up the next the largest "religious body" after the Roman Catholic Church. *Id.* Southern Baptists believe that "[h]omosexuality is not a 'valid alternative lifestyle.'" SOUTHERN BAPTIST CONVENTION, *Official Website of the Southern Baptist Convention: Position Statement*, *at* http://www.sbc.net/aboutus/pssexuality.asp (last visited Feb. 18, 2005).

[85] *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons*, *at* http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html (last visited Jan. 24, 2005). This doctrinal document disseminated by the Vatican instructs that "[w]hen legislation in favour of the recognition of homosexual unions is proposed for the first time in a legislative assembly, the Catholic law-maker has a moral duty to express his opposition clearly and publicly and to vote against it. To vote in favour of a law so harmful to the common good is gravely immoral." *Id.*; *see also Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons*, *at* http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19861001_homosexual-persons_en.html (last visited Jan. 24, 2005) (explaining that although the particular inclination of the homosexual person is not a sin, it is a more or less strong tendency ordered toward an intrinsic moral evil; and thus the inclination itself must be seen as an objective disorder).

[86] 86 AMERICAN PSYCHOLOGICAL ASSOCIATION, *Resolution on Appropriate Therapeutic Responses to Sexual Orientation*, *at* http://www.apa.org/pi/sexual.html (last visited Feb. 18, 2005). The American Psychological Association, the largest association of psychologists worldwide, affirmed the American Psychiatric Association's 1973 stance that "homosexuality is not a mental disorder." The American Psychological Association Council of Representatives adopted the resolution on August 14, 1997. *Id.*

in order to be free from discrimination and even violence."[87] Admittedly, gays and lesbians suffer overt discrimination in some areas, but in most urban areas, gay pride celebrations, coming out week, and other expressions of pride are commonplace. This attitude change has been fostered in large part by an astounding evolution of gay and lesbian rights in the legal arena.

A. Prior Precedent

A court is more justified in rejecting minimalism if it has had prior experience dealing with the issue, and precedent does exist regarding gay and lesbian rights. Although the issue of same sex marriage and gay and lesbian rights has not been litigated numerous times in the same state court, the nation as a whole has had experience dealing with the issue. These cases demonstrate an increased realization that a denial of rights and benefits solely on the basis of sexual orientation is an unconstitutional denial of the equal protection of the laws—and an unconstitutional perpetuation of a twenty-first century caste system.

Under the U.S. Constitution, "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival," and the decision to marry or not to marry "cannot be infringed by the State."[88] Just a little more than a decade ago, "no court [had] taken the position that state prohibition of homosexual marriage is unconstitutional."[89] *Bowers*, which hindered "gay litigants asserting civil rights violations [because they] struggled against the inference that is often made from their homosexual status to illegal sexual conduct,"[90] was still good law. In recent years, *Bowers* has been dramatically overruled,[91] and state courts have actually ruled that bans on same-sex marriage violate the state constitution.[92] Since the Court's 1996 decision in *Romer*, courts have shown an increasing reluctance to deny gays and lesbians

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[87] Sunstein, *Homosexuality and the Constitution*, *supra* note 82, at 8.

[88] Loving v. Virginia, 388 U.S. 1, 12 (1967).

[89] Comment, *Homosexuals' Right to Marry: A Constitutional Test and a Legislative Solution*, 128 U. PA. L. REV. 193 (1979). Although this article was written in 1979, its assertion rang true until the Hawai'i Supreme Court's decision in *Baehr v. Lewin*. *See* Baehr v. Lewin, 74 Haw. 530, 580, 852 P.2d 44, 67 (1993); Lynn Marie Kohm, *The Homosexual "Union": Should Gay and Lesbian Partnerships Be Granted the Same Status as Marriage?*, 22 J. CONTEMP. L. 51 (1996). Kohm noted that restriction of marriage to opposite-sex couples "has continued in American jurisprudence today." *Id.* at 53.

[90] Sherene D. Hannon, *License to Oppress: The Aftermath of* Bowers v. Hardwick *Is Still Felt Today:* Shahar v. Bowers, 19 PACE L. REV. 507, 507 (1999).

[91] *See* Lawrence v. Texas, 539 U.S. 558 (2003).

[92] *See* Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941 (2003); Baehr v. Miike, CIV. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996); *Baehr*, 74 Haw. 530, 852 P.2d 44.

the same rights and benefits to which every straight American is already entitled.

The Supreme Court's *Bowers* decision, which upheld the constitutionality of a Georgia law banning homosexual sodomy,[93] has been accurately described as "one of the few genuinely humiliating decisions in American constitutional law."[94] The humiliation was mitigated slightly when the Court held in *Romer* that animus toward homosexual persons could not constitute a legitimate government interest.[95] Beyond mere invalidation of a state provision, the Court's decision signaled a retreat from *Bowers* and made a statement about the very place of gays and lesbians in society. Quoting *Plessy v. Ferguson*,[96] which *Brown* had overruled in 1954, the *Romer* Court reminded America that "the Constitution 'neither knows nor tolerates classes among citizens,'"[97] and that gays and lesbians "are citizens like everyone else."[98]

The same year the U.S. Supreme Court decided *Romer*, the Hawai'i Supreme Court held, in *Baehr v. Lewin*,[99] that barring same-sex couples from marriage presumptively violated the Equal Protection Clause in Article I, Section 5 of the Hawai'i Constitution.[100] The court opined that the statute restricting marriage to opposite-sex couples constituted sex discrimination subject to strict scrutiny. On remand, the circuit court found no compelling state justification for the restriction and enjoined the state from denying a marriage license to couples solely on the basis of their sex.[101] Such a decision, though later made effectively moot by an amendment to the Hawai'i Constitution,[102] demonstrated an unprecedented receptiveness to the prospect of same-sex marriage.

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[93] Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

[94] Sunstein, *supra* note 3, at 70-71.

[95] Romer v. Evans, 517 U.S. 620, 634 (1996). In striking down a provision of Colorado's state constitution that deprived gay people of various protections, the Court remarked, "[i]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Id.* (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

[96] 163 U.S. 537 (1896). *Plessy*, now one of the most scorned Supreme Court decisions in this nation's constitutional history, upheld the constitutionality of "separate but equal." *See generally id.* at 548. By doing so, it legitimated state-imposed segregation and effectively reinforced whites' assertions that blacks were inferior.

[97] *Romer*, 517 U.S. at 623 (quoting *Plessy*, 163 U.S. at 559 (Harlan, J., dissenting)).

[98] Sunstein, *supra* note 3, at 71.

[99] 74 Haw. 530, 852 P.2d 44 (1993).

[100] *Id.* at 580, 852 P.2d at 67.

[101] Baehr v. Miike, CIV. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996).

[102] *See* HAW. CONST. art. 1, § 23 ("The legislature shall have the power to reserve marriage to opposite-sex couples.").

Six years after *Baehr*, the Vermont Supreme Court indicated that Vermont's opposite-sex marriage restriction could also be in jeopardy. In *Baker v. State*,[103] the court focused on the common benefits and protections afforded to all Vermont citizens instead of basing its ruling on sex discrimination: "the State is constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law."[104] The court further explained that "[w]hether this ultimately takes the form of inclusion within the marriage laws themselves or a parallel 'domestic partnership' system or some equivalent statutory alternative, rests with the Legislature."[105] Although it did not constitute a full marriage mandate, the decision effectively directed the legislature to construct civil unions for same-sex partnership recognition. The Vermont court seemed to say that separate may be permissible, provided that the different partnership status for same-sex couples afforded *truly equal* benefits.[106] This holding represented a somewhat minimalist compromise between being effective and being "right".[107] While the court mandated benefits and protections of marriage for committed same-sex couples, it also left room for democratic discussion on how that was to be accomplished.[108]

Considering that *Bowers* was still good law when the Vermont Supreme Court decided *Baker*, *Baker* can also be seen as a maximalist decision. *Bowers* effectively declared same-sex relationships inferior because people assumed that commonly prohibited criminal conduct was necessarily tied to gay male relationships.[109] Before any other court would take a step further

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[103] 744 A.2d 864 (Vt. 1999).

[104] *Id.* at 867. The Vermont Common Benefits Clause states:

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.

VT. CONST. ch. I, art. 7.

[105] *Baker*, 744 A.2d at 867.

[106] *Id.*

[107] *See* Gil Kujovich, *An Essay on the Passive Virtue of* Baker v. State, 25 VT. L. REV. 93 (2000).

[108] Eventually, the Vermont legislature crafted civil unions for same-sex couples. These partnerships include "all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage." VT. STAT. ANN. tit. 15, § 1204(a) (2001). Section 1204 further specifies, among other things, that the laws of domestic relations apply to civil unions and sets out "a nonexclusive list of legal benefits, protections and responsibilities of spouses, which shall apply in like manner to parties to a civil union." *See id.* § 1204(b)–(e).

[109] *See* Bowers v. Hardwick, 478 U.S. 186, 192-94 (1986).

toward recognizing same-sex relationships, and especially marriage, *Bowers* had to be overturned, or at least qualified.[110]

With *Lawrence v. Texas*,[111] the U.S. Supreme Court relegated *Bowers* to derided *Plessy* status. After an exhaustive examination of *Bowers*' shortcomings,[112] the Court held that "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."[113] Instead of relying on the Equal Protection Clause to resolve the case, which arguably would have allowed state anti-sodomy laws to stand,[114] the Court relied on the right to liberty under the Due Process Clause.[115] Finding the Texas anti-sodomy law unconstitutional on its face rendered anti-sodomy laws throughout the nation henceforth invalid. The Court expressed no approval or disapproval of same-sex marriage, but the opinion performed a powerful expressive function by supporting the legitimacy of gay and lesbian relationships.[116]

Armed with this precedent, the Massachusetts Supreme Judicial Court in *Goodridge* wrestled with a same-sex marriage issue that the *Baker* court had faced a few years earlier. Building on the new legitimacy *Lawrence* bestowed upon same-sex relationships, the *Goodridge* court interpreted the

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[110] *See* John P. Safranek & Stephen J. Safranek, *Can Homosexual Equal Protection Claims Withstand the Implications of* Bowers v. Hardwick?, 50 CATH. U. L. REV. 703, 704 (2001) (arguing that federal homosexual equal protection rights cannot be sustained until the U.S. Supreme Court rejects Bowers v. Hardwick); *Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004 (2003) (suggesting that a decision overturning *Bowers* would remove a critical weapon from the arsenal of those who reject civil rights and marriage equality for gays and lesbians).

[111] 539 U.S. 558 (2003).

[112] For example, the Court pointed out, *Bowers*' "continuance as precedent demeans the lives of homosexual persons." *Id.* at 575.

[113] *Id.* at 578.

[114] The Court explained that "[w]ere we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants." *Id.* at 575.

[115] *See id.* at 578-79. Justice O'Connor advocated resolution under the Equal Protection Clause. Her view did not prevail, but she did agree with the outcome of the case. *See id.* at 579 (O'Connor, J., concurring).

[116] Justice Scalia, on the other hand, wrote a fiery dissent lamenting the end of morals-based legislation and attacked same-sex marriage, saying:

> At the end of its opinion—after having laid waste the foundations of our rational-basis jurisprudence—the Court says that the present case "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." Do not believe it . . . . Today's opinion dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition in marriage is concerned.

Id. at 604 (Scalia, J., dissenting) (quoting *id.* at 578 (Kennedy, J.)).

Massachusetts Constitution and took *Baker* one logical step further. Just as *Brown* took the "equal" argument one step further to say separate could not be equal, the *Goodridge* court rejected a separate partnership system for same-sex couples and declared "that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution."[117] In holding that "civil marriage [means] the voluntary union of two persons as spouses, to the exclusion of all others,"[118] the court essentially directed the legislature to include same-sex unions *within* the Massachusetts marriage laws—not create a separate system of civil unions as the Vermont legislature had done.

This line of cases reflects an increased realization that denial of gay and lesbian rights is an unconstitutional denial based on fear of the unfamiliar. Thus, the *Goodridge* court was justified in issuing a decisive, well-reasoned non-minimalist opinion. If anything, courts facing a same-sex marriage ban have *more* precedent upon which to rely than the Supreme Court did in the 1950s when deciding *Brown*. The mere existence of relevant past cases is valuable, because each decision must be explained in relative detail. Such language gives later courts various theories and ideas upon which to draw. Even when issuing a controversial decision, a court under these circumstances cannot be faulted for rejecting minimalism and logically expanding upon ideas gleaned from past precedent.

B. Legislation and Popular Majority Sentiment

State and federal legislation, as well as majority sentiment, consistently disfavor same-sex marriage.[119] Seventeen states have amended their constitution to preclude same-sex marriage, and thirty-nine states have legislation banning it.[120] While popular support for same-sex marriage increased in the months following *Goodridge*, it remains disfavored.[121] Nevertheless, that fact

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[117] Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).

[118] *Id.*

[119] Stateline.org, *50-State rundown on gay marriage laws* (Nov. 3, 2004), *at* http://www.stateline.org/stateline/?pa=story&sa=showStoryInfo&id=353058 (last visited Feb. 18, 2005).

[120] *Id.* The first four states with constitutional amendments that address same-sex marriage were Nebraska, Nevada, Hawai'i, and Alaska. *Id.* Since the *Goodridge* decision, Georgia, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, Utah, Arkansas, Michigan, Montana, North Dakota, Ohio and Oregon have approved constitutional amendments reserving marriage for heterosexual couples. *Id.*

[121] The Gallup Organization, *Gay Rights: U.S. More Conservative Than Britain, Canada* (Oct. 12, 2004), *available at* http://gallup.com/poll/content/default.aspx?ci=13561. A Gallup poll published in October 2004 found that sixty-two percent of Americans think that "marriages

does not necessarily mandate use of minimalism in the context of same-sex marriage. Under certain specific, novel circumstances, minimalism's very goal of democratic deliberation involves overriding legislation in order to protect equal rights. Same-sex marriage is that case.

Professor Sunstein states that the case for minimalism is especially strong "if the area involves a highly contentious question that is currently receiving sustained democratic attention."[122] It is true that same-sex marriage is a highly contentious issue, but before *Lawrence*, gay and lesbian rights were *not* receiving sustained democratic attention. The Supreme Court's overruling of *Bowers* in June 2003, was a highly publicized landmark decision. Because the Massachusetts *Goodridge* decision came only five months later, it received a relatively higher level of publicity and fueled the fire of popular discussion as outraged conservatives derided the decision as activist and countermajoritarian.[123] Once President Bush publicly pledged his support for the amend ment on February 24, 2004,[124] the media became inundated with the issue. The court decisions and media frenzy also prompted thirty-five states to introduce legislation to preserve the traditional opposite-sex definition of marriage.[125] Essentially, the non-minimalist *Goodridge* decision promoted sustained democratic discussion of same-sex marriage across the nation. According to Professor Sunstein, such a favorable outcome usually results from minimalist decisions, but as shown here, the same-sex marriage debate is a special exception. Although the President may criticize activist judges and local officials seeking to "change the most fundamental institution of

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between homosexuals . . . should not be recognized by the law as valid, with the same rights as traditional marriages." *Id.* However, Americans are increasingly receptive to recognition of civil unions. Gallup poll results published in May 2004 showed there was a "'real' increase in public support for gay civil unions over last year." The Gallup Organization, *Revisiting Gay Marriage vs. Civil Unions* (May 11, 2004), *available at* http://gallup.com/poll/content/default.aspx?ci=11662. This increased level of support may have been affected by the widespread publicity of gay weddings performed in early 2004 in San Francisco (California), Sandoval County (New Mexico), Asbury Park (New Jersey), New Paltz (New York), and Multnomah County (Oregon). John Cloud, *How Oregon Eloped*, TIME MAGAZINE, May 17, 2004, at 56. Though the validity of these marriages is tenuous, they were publicly celebrated, put human faces to the "gay rights movement," and generally only received strong backlash from conservative religious groups. *See id.*

[122] Sunstein, *supra* note 3, at 32.

[123] President George W. Bush is a prominent critic. *See, e.g.*, President George W. Bush, President Calls for Constitutional Amendment Protecting Marriage (Feb. 24, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/02/20040224-2.html (last visited Feb. 18, 2005) ("[S]ome activist judges and local officials have made an aggressive attempt to redefine marriage. . . . If we are to prevent the meaning of marriage from being changed forever, our nation must enact a constitutional amendment to protect marriage in America.").

[124] *Id.*

[125] Stateline.org, *supra* note 119.

civilization,"[126] courts *can* issue non-minimalist decisions and simultaneously stimulate the democratic process.

One characteristic affecting the democratic process is that state courts differ greatly from Article III courts in a way that mitigates criticism of allegedly oppressive, activist state court participation. Unlike Article III judges, state court judges do not have life tenure, and a vast majority of the state court judges face some sort of retention election.[127] Susceptibility to the electoral process makes state judges more representative of their electorate and more attentive to majority sentiment. Thus, a maximalist decision from a state court is more likely consistent with popular opinion. Even if it is not, citizens are unfit to complain, as they are the very group that elected the judges. Furthermore, a reasonable assumption is that the court had special confidence in its legal analysis (legal issues not considered by the general public) that justifies a countermajoritarian opinion.

Another difference between state courts and Article III courts is that a state court's decisions can be more easily overridden by constitutional amendment. In the entire history of the United States, more than 11,000 amendments to the U.S. Constitution have been proposed, and only twenty-seven have been ratified by the states.[128] Of those twenty-seven ratified amendments, only four were enacted to overrule Supreme Court decisions.[129] By contrast, the fifty state constitutions have been amended a total of nearly 6,000 times.[130] As a result, a state legislature's relative ease in amending a state's constitution preserves the majority's power to restrict (what the majority considers) a particularly egregious maximalist decision by a state court.[131] Unlike the U.S. Supreme Court, a state court may more freely issue comprehensive opinions because it need not worry about imposing a "bad" decision on the entire

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[126] President George W. Bush, *supra* note 123.

[127] *See* Michael Heise, *Preliminary Thoughts on the Virtues of Passive Dialogue*, 34 AKRON L. REV. 73, 88-89 (2000). According to Heise, "[a]pproximately 80 percent of state supreme court justices must face some form of electoral process for retention." *Id.* at 89. Vermont Supreme Court justices are appointed by the Governor, with the Senate's consent, to terms of only six years. Kujovich, *supra* note 107, at 105. At the end of a term, a justice's tenure may be terminated by a majority vote of the General Assembly. *Id.*

[128] Kathleen M. Sullivan, *Constitutional Amendmentitis*, THE AMERICAN PROSPECT vol. 6 no. 23, Sept. 21, 1995, *available at* http://www.prospect.org/print/V6/23/sullivan-k.html (last visited Mar. 17, 2005).

[129] *Id.*

[130] *Id.*

[131] Typically, a proposed state constitutional amendment must be passed in the state house and senate. It is then put on the ballot for a vote by the citizens of that state. *See, e.g.*, HAW. CONST. art. 17, § 3.

nation. State court decisions are only binding within that state, and other states can benefit by adopting only those opinions that make the most sense.

The legislative reaction to court decisions regarding same-sex marriage demonstrates how those decisions have set the democratic system in motion. Even if a court issues a deeply-reasoned non-minimalist decision as the Hawai'i Supreme Court did in *Baehr*, there are democratic tools on hand to mitigate the "damage" (depending on the point of view from which one looks). The Hawai'i Supreme Court could have issued a minimalist decision, stayed away from the sex discrimination issue, and simply held that there was no right to same-sex marriage under the Hawai'i Constitution's privacy clause. But this would have cut off same-sex couples' last avenue of redress and delayed resolution of the issue until some undetermined time in the future. Such an action would likely *discourage* democratic discussion, because the status quo would be unchanged. Instead, as a non-minimalist decision,[132] *Baehr* prompted the legislature to amend the state constitution, reserving the right to define marriage to the legislature. Also in response to *Baehr*, the U.S. Congress passed the Defense of Marriage Act ("DOMA"), a federal enactment that allows states the right to refuse recognition of same-sex marriages performed in other states.[133] Once same-sex marriage is recognized by a state,[134] this federal law could eventually be the basis of a federal court challenge to the same-sex marriage ban—one that could ultimately reach the U.S. Supreme Court.

In response to *Goodridge*, other state legislatures proposed state constitutional amendments barring same-sex marriage.[135] Conservative groups also sought to amend the U.S. Constitution to unambiguously preclude same-sex marriage with the Federal Marriage Amendment. This amendment was drafted by the Alliance for Marriage[136] and introduced in the U.S. House of

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[132] The Hawai'i Supreme Court reached its decision using the novel sex discrimination approach, which no court had ever relied upon previously. Professor Sunstein would probably classify such reasoning as non-minimalist because of the court's lack of previous experience with the issue. *See* Sunstein, *supra* note 3, at 31.

[133] 1 U.S.C.A. § 7 (1996).

[134] Same-sex couples in Massachusetts were allowed to obtain valid state-issued marriage licenses as of May 17, 2004. Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. TIMES, May 17, 2004, at A16.

[135] *See supra* note 120.

[136] The Alliance for Marriage is a "non-profit research and education organization dedicated to promoting marriage and addressing the epidemic of fatherless families in the United States . . . [and] also exists to promote reforms designed to strengthen the institution of marriage and restore a culture of married fatherhood in American society." ALLIANCE FOR MARRIAGE, *Mission Statement and Agenda, at* http://www.allianceformarriage.org/site/PageServer?pagename=mic_mission (last visited Jan. 24, 2005).

Representatives[137] and the U.S. Senate[138] in 2004, but it failed.[139] These actions, though at times detrimental to gay and lesbian rights, demonstrate that the democratic processes can be stimulated just as effectively with a maximalist opinion as with a minimalist one—and in the case of same-sex marriage, it seems that maximalist opinions are even more effective triggers.

C. Risk of Unequal Treatment and Faulty Democratic Deliberation

Professor Sunstein admits that minimalism may not be appropriate if there is a high risk of unequal treatment or the democratic process is not working well.[140] A very high risk of unequal treatment exists in the case of same-sex marriage because claims challenging same-sex marriage bans are *Equal Protection Clause* ("EPC") claims, which typically receive a higher level of protection under state law. Protection of equal rights differs from other constitutional rights in several significant respects, making EPC claims worthy candidates for heightened protection.[141] In contrast to the Due Process Clause, which looks backward and protects traditional rights, "the Equal Protection Clause looks forward, serving to invalidate practices that were widespread at the time of its ratification and that were expected to endure."[142] Specifically, "the function of the Equal Protection Clause is to protect disadvantaged groups . . . against the effects of past and present discrimination by political majorities."[143] Thus, foreclosure of legislative remedies is inherent in EPC claims because its typical proponents are politically weak minorities. Although gay and lesbians have powerful support, such as Lambda Legal, they are a minority when it comes to popular voting.[144] Such groups have no choice but to resort to the judiciary. If the court chooses a minimalist path and

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[137] *See* H.R.J. Res. 106, 108th Cong. (2004).

[138] *See* S.J. Res. 30, 108th Cong. (2004).

[139] John M. Broder, *Groups Debate Slower Strategy on Gay Rights*, N.Y. TIMES, Dec. 9, 2004, at A1.

[140] Sunstein, *supra* note 3, at 29.

[141] *See generally* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988) (explaining how laws unaffected by the U.S. Constitution's Due Process Clause may nevertheless violate the Equal Protection Clause).

[142] *Id.* at 1163.

[143] *Id.* at 1174.

[144] Even assuming gays and lesbians are not politically weak, the legislative process may be skewed because religion greatly influences the argument against same-sex marriage. Instead of an open-minded exchange of ideas, legislators may blindly follow the tenets of their religion, without regard to legal secular arguments in favor of protecting rights for all people no matter what their sexual orientation.

says as little as possible, it effectively bars remedy by leaving those with valid claims no other way to protect their rights.[145]

Beyond its direct effect on the law, a judicial opinion can have significant effects "in communicating certain messages containing national judgments about what is and is not legitimate."[146] In the context of EPC claims, the expressive function of a court's decision can be particularly valuable because it fosters the self-esteem and self-respect of the protected minority group. For example, when the Supreme Court decided *Brown*, "it had an immediate impact on the attitude of black Americans toward the nation and their role in it."[147] Similarly, the Court in *Romer* admonished Americans that the Constitution "neither knows nor tolerates classes among citizens."[148] The *Goodridge* court, echoing these sentiments, forcefully stated that:

> [T]he marriage restriction is rooted in persistent prejudices against persons who are (or who are believed to be) homosexual. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.[149]

In this way, the language of court decisions fosters acceptance of the minority group's rights as a socially tolerable, even acceptable, norm. Though minimalist opinions can express strong support of minority rights, deeper maximalist opinions are much more suited to performing the expressive function so vital to EPC decisions.

D. Need for Planning

Professor Sunstein asserts that the case for minimalism is strong when the need for planning is not especially insistent.[150] The need for a uniform system for gay and lesbian relationships *is* insistent, which favors non-minimalism. Admittedly, the scope of enforcement in *Brown*—integrating thousands of public schools—was much wider than the scope of implementing same-sex marriage would be, which would simply require states to issue marriage licenses to same-sex couples. The scale of implementation, however, does not

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[145] Marc A. Fajer, *With All Deliberate Speed? A Reply to Professor Sunstein*, 70 IND. L.J. 39, 41 (1994). Fajer explains that "[i]f, in trying to determine the scope of equal protection, a court defers to the majority or waits for popular approval, it stands the [Equal Protection Clause] on its head." *Id.*

[146] Sunstein, *supra* note 3, at 69.

[147] *Id.* at 70.

[148] Romer v. Evans, 517 U.S. 620, 623 (1996) (quoting Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)).

[149] Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941, 968 (Mass. 2003) (quoting Palmore v. Sidoti, 466 U.S. 429, 433 (1984)) (quotations omitted).

[150] Sunstein, *supra* note 3, at 99.

necessarily correspond to its importance. Without a decisive opinion by state courts, the legal status of gay and lesbian relationships remain subject to a chaotic patchwork of rules. Navigating the legal system is difficult enough when the rules are clear; inconsistency makes that impossible.[151] Not only are there different types of legal relationships—domestic partnerships, civil unions, and marriage, to name a few—but each state has a different policy regarding which type of relationship it will recognize. This situation only perpetuates confusion when, for example, gay or lesbian couples try to jointly purchase property, create a will, or adopt a child. All Americans, gay or straight, deserve to be secure in their knowledge that a particular law will consistently protect what it promises to protect. Thus, a non-minimalist decision will provide clearer guidance to legislatures on how a state must treat same-sex relationships under the law.

V. CONCLUSION

In the appropriate context, decisional minimalism is an invaluable guide for courts deciding cases that will have widespread effects. Minimalism is appropriate where a court lacks prior precedent dealing with a particular issue, where a court lacks information regarding legislation and majority sentiment, where the risk of unequal treatment or faulty democratic deliberation is low, and where the need for planning is not especially insistent. As demonstrated in the foregoing discussion, however, minimalism applied to the same-sex marriage debate only promotes the chaos and injustice that minimalism tries to discourage. Because of the unique nature of gay and lesbian rights and the unpredictable sentiment of the American public, maximalist opinions are the most effective means of vindicating minority rights, stimulating the democratic process, and providing clear guidance for future planning. Correct principle must win out. This means that courts, as a vital component of a properly-functioning democracy, cannot withhold deep, broad reasoning that it feels is justified, because maximalist opinions set the democratic process in motion. As Justice Harlan commented in *Poe v. Ullman*,[152] "[a] decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound."[153] Courts

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[151] *See* Jes Kraus, Note, *Monkey See, Monkey Do: On* Baker, Goodridge, *and the Need for Consistency in Same-Sex Alternatives to Marriage*, 26 VT. L. REV. 959, 961-62 (2002) ("[S]tate uniformity in the alternate statuses is imperative if same-sex couples hope to achieve full social recognition of their relationships.").

[152] 367 U.S. 497 (1961).

[153] *Id.* at 542 (Harlan, J., dissenting).

must give their citizens an opportunity to test those decisions, and through the exercise of democracy, only the most just and fair laws will remain standing.

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[154] J.D. Candidate Spring 2005, William S. Richardson School of Law, University of Hawai'i at Manoa. Thank you to Professor Iijima for your guidance and thought-provoking SYS discussions. Thanks also to the members of the University of Hawai'i Law Review for all your help and hard work.

Global Warming: Attorneys General Declare Public Nuisance

I. INTRODUCTION

On July 21, 2004, attorneys general from eight states, joined by the City of New York's corporation counsel, filed a public nuisance action against five of the United States's largest electric-utility companies for their contribution to global warming.[1] The attorneys general claim that global warming is already "altering the natural world"[2] and gravely threatens the health and well-being of their citizens and residents as well as the natural resources of their states.[3] The lawsuit maintains that these risks amount to a public nuisance.[4] Moreover, the attorneys general argue that the defendants should be held accountable for this nuisance because they "are substantial contributors to elevated levels of carbon dioxide and global warming."[5] As such, the lawsuit seeks an injunction that would require the defendants to reduce their rate of carbon dioxide emissions.[6]

Industry lawyers and lobbyists assert that the lawsuit is a "misguided way to approach climate change"[7] and that forced reduction of carbon dioxide "would cause electricity prices to skyrocket for every business and homeowner in America."[8] In like manner, the administration of President

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[1] Complaint, Connecticut v. Am. Elec. Power Co., No. 04-05669 (S.D.N.Y. filed July 21, 2004). The following states are plaintiffs in the lawsuit: Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, and Wisconsin. *Id.* The following companies are named as defendants in the lawsuit: American Electric Power Company, Inc., American Electric Power Service Corporation, The Southern Company, Tennessee Valley Authority, Xcel Energy Inc., and Cinergy Corporation. *Id.*

[2] *Id.* at 1.

[3] *Id.* at 1-2.

[4] *Id.* at 2.

[5] *Id.* at 1 (claiming that the defendants' contribution accounts for twenty-five percent of all electric-utility carbon dioxide emissions in the United States and "approximately ten percent of all carbon dioxide emissions from human activities in the United States").

[6] *Id.*

[7] Ron Scherer & Alexandra Marks, *New Environmental Cops: State Attorneys General*, CHRISTIAN SCI. MONITOR, July 22, 2004, at 3, *available at* 2004 WL 58695785 (quoting Jim Owen of the Edison Electric Institute, an industry group); *see also* Joe Truini, *Utilities Move to Dismiss Suit*, WASTE NEWS, Oct. 11, 2004, at 3, *available at* 2004 WL 63051202. Michael G. Morris, chairman, president and CEO of American Electric Power stated that "filing lawsuits is not a constructive way to deal with the issue of climate change." *Id.* Cinergy's chief legal officer also charged that the "lawsuit was a publicity stunt by the plaintiffs, and the issues raised are not ones to be resolved through litigation." *Id.*

[8] Chris Bowman, *Are Power Plants Crying Wolf Over Lawsuit?*, THE SACRAMENTO BEE, Aug. 2, 2004, at A1, *available at* 2004 WL 86981289 (quoting Jeffrey Marks, spokesman for

George W. Bush has repeatedly expressed its concern that mandatory reductions of carbon dioxide would cripple the nation's economy.[9] As a result, the Bush administration has put forth a voluntary carbon dioxide emissions reduction program.[10] Notably, this position represents a sharp turnabout from President Bush's 2000 campaign assurances that he would establish mandatory reduction targets for carbon dioxide.[11]

The attorneys general and their supporters assert that the federal government's inaction has forced states to take an adversarial and piecemeal approach to greenhouse gas regulation.[12] Moreover, supporters contend that the lawsuit "is only one tiny trumpet note in a growing bipartisan call to arms."[13] In fact, the overwhelming scientific consensus that carbon dioxide accelerates global warming has prompted an influx of Congressional initiatives aimed at reducing carbon dioxide emissions in the United States.[14] More significantly, the Kyoto Protocol, a treaty ratified by 141 nations which

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the National Association of Manufacturers, which represents American Electric Power, The Southern Company, and Cinergy).

[9] John Carey & Sarah R. Shapiro, *Global Warming; Consensus is Growing Among Scientists, Governments, and Business That They Must Act Fast to Combat Climate Change*, BUS. WK., Aug. 16, 2004, at 60, *available at* 2004 WL 631035573 (referring to statements made by former Energy Secretary Spencer Abraham).

[10] *Climate VISION—Voluntary Innovative Sector Initiatives: Opportunities Now*, Climate VISION, *at* http://www.climatevision.gov (last visited Feb. 16, 2005).

[11] Amy Goldstein & Eric Pianin, *Hill Pressure Fueled Bush's Emissions Shift*, WASH. POST, Mar. 15, 2001, at A1, *available at* 2001 WL 2551257.

[12] Letter from State Attorneys General of Alaska, California, Connecticut, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont, to President George W. Bush (July 17, 2002) [hereinafter "Letter from State Attorneys General"] (explaining that the regulatory void has forced states and others to rely on available legal mechanisms) (copy on file with author); *Eight States, NYC Sue Utilities to Stop Global Warming*, 16 No. 3 ANDREWS UTIL. INDUS. LITIG. REP. 8 (2004) (citing statements made by the Sierra Club); J. Kevin Healy & Jeffrey M. Tapick, *Climate Change: It's Not Just a Policy Issue for Corporate Counsel—It's a Legal Problem*, 29 COLUM. J. ENVTL. L. 89, 98 (2004) (reporting that "[m]ore than half of the states either have already implemented or are in the process of implementing policies and programs to reduce [greenhouse gas] emissions"); Miguel Bustillo, *The State; States to Sue Over Global Warming, California and Seven Others Unhappy with U.S. Policies, say the Carbon Dioxide from Five Energy Producers is a 'Public Nuisance'*, LOS ANGELES TIMES, July 21, 2004, at B8, *available at* 2004 WL 55926420. Frank O'Donnell, executive director of the Clean Air Trust argues that because "[t]he Bush administration has buried its head in the sand[;] . . . the only way to achieve any progress on this issue is for the states to take the initiative." *Id.*

[13] Carey & Shapiro, *supra* note 9.

[14] Clean Air Planning Act, S. 843, 108th Cong. (2003); Clean Power Act, S. 366, 108th Cong. (2003); Climate Stewardship Act, S. 139, 108th Cong. (2003).

binds thirty-five industrialized countries to reduce their carbon dioxide emissions, took effect on February 16, 2005.[15]

It is in the context of this mounting support for mandatory reductions of carbon dioxide emissions that this article will analyze the attorneys general's public nuisance complaint. Part II.A of this article defines public nuisance and articulates the elements needed to state a claim. Part II.B evaluates the current complaint brought against the electric-utility industry, and Part II.C summarizes the viability of the attorneys general's public nuisance action.

Part III suggests that the lawsuit is part of a larger strategy focused on redefining the carbon dioxide debate. This strategy aims to undermine the argument that mandatory carbon dioxide emissions reductions are cost prohibitive and to bolster the argument that a comprehensive regulatory plan could significantly reduce the United States's carbon dioxide emissions "with minimal disruption of energy supply and at modest cost."[16] In this regard, Part III.A discusses how attorneys general used litigation in the 1990s to redefine the harms caused by the tobacco industry. In light of the unprecedented success of the tobacco litigation, Part III.B discusses how attorneys general are currently using litigation aimed at the electric-utility industry: (1) to publicize the ineffectiveness of the United States's current carbon dioxide emissions policy; (2) to redefine mandatory carbon dioxide emissions reductions as a responsible and cost-efficient regulatory policy; (3) to motivate interest groups to pressure the federal government; and (4) to create uncertainty for industry executives and investors. If the attorneys general can accomplish these goals, the lawsuit—even without a favorable verdict—may catalyze the federal government to take a more committed approach to climate change policy.[17] Part IV addresses the contention that climate change policy falls outside the attorneys general's domain and suggests that the attorneys general have not overstepped their authority in light of the Bush administration's reluctance to regulate carbon dioxide emissions. Part V concludes that the attorneys general's public nuisance lawsuit effectuates a more balanced debate on whether the United States should implement mandatory carbon dioxide emissions reductions as a part of its climate change policy.

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[15] Shankar Vedantam, *Kyoto Global Warming Pact Takes Effect*, S. FLA. SUN-SENTINEL, Feb. 16, 2005, at 24A, 2005 WL 72054660. *See also* Carey & Shapiro, *supra* note 9 (describing Britain's commitment to reducing carbon dioxide emissions by 60% by 2050 and the European Union's imposition of mandatory caps and ensuing use of a market-based system for trading the right to emit carbon).

[16] Letter from State Attorneys General, *supra* note 12 (referring to a Department of Energy Report to support their stance).

[17] *See generally* Lynn Mather, *Theorizing About Trial Courts: Lawyers, Policymaking, and Tobacco Litigation*, 23 LAW & SOC. INQUIRY 897, 914 (1998) (listing ways in which litigation can influence and effectuate policymaking).

II. COMMON LAW OF PUBLIC NUISANCE

Over the years, nuisance law has given rise to immense confusion both in application and in legal jurisprudence.[18] The existence of three distinct types of nuisance actions—private nuisance, public nuisance, and private action on a public nuisance—contributes significantly to this confusion.[19] Notably, each branch of nuisance is triggered by an "injury from some use of property."[20] Aside from this commonality, however, it is important to appreciate that each cause of action has its own elements and applications.[21]

A. Elements Necessary to Maintain a Public Nuisance Action

A common law claim of public nuisance arises when there is an interference "with a public right, usually relating to public health and safety or substantial inconvenience or annoyance to the public."[22] Significantly, unlike private nuisance actions which protect "rights in land,"[23] public nuisance actions protect the rights of the general public.[24] To establish a public nuisance claim,

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[18] *See, e.g.*, W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 86, at 616-17 (5th ed. 1984) (stating that "nuisance" is an excellent "illustration of the familiar tendency of the courts to seize upon a catchword as a substitute for any analysis of a problem"); Robert Abrams & Val Washington, *The Misunderstood Law of Public Nuisance: A Comparison With Private Nuisance Twenty Years After Boomer*, 54 ALB. L. REV. 359, 359 (1990) (asserting that the rules governing nuisance actions are extremely elusive); Louise A. Halper, *Untangling the Nuisance Knot*, 26 B.C. ENVTL. AFF. L. REV. 89, 119 (1998) (suggesting that the Restatement (Second) of Torts has exacerbated the confusion).

[19] *See* Abrams & Washington, *supra* note 18, at 362 (defining a private nuisance as an action in tort arising from "an interference with the use and enjoyment of land"); John G. Culhane & Jean Macchiaroli Eggen, *Defining a Proper Role for Public Nuisance in Municipal Suits Against Gun Sellers: Beyond Rhetoric and Expedience*, 52 S.C. L. REV. 287, 295 (2001) (explaining that a private action on a public nuisance exists when private plaintiffs "have suffered a distinct injury from any proper subject of a state action for public nuisance"); Louise A. Halper, *Public Nuisance and Public Plaintiffs: Rediscovering the Common Law (Part I)*, 16 E.L.R. 10292 (1986) (defining public nuisance as "an offense against the state [which] may be criminally prosecuted, and may be . . . the subject of an equitable abatement action by the sovereign") [hereinafter Halper *(Part I)*].

[20] Halper, *supra* note 18, at 97.

[21] Abrams & Washington, *supra* note 18, at 363-64 (accusing courts and scholars of superimposing "wrongly . . . the elements of a cause of action in private nuisance on the law of public nuisance").

[22] *Id.* at 364.

[23] *E.g.*, KEETON ET AL., *supra* note 18, § 86, at 617-19.

[24] *Id.*

a plaintiff must show that: the defendant's activity interferes with a public right, the interference is substantial, and the interference is unreasonable.[25]

1. Public rights

A public nuisance complaint must allege that an activity interferes with a public right.[26] Over the years, courts have interpreted the public rights doctrine very broadly, upholding challenges to a variety of activities that interfere with the interests of the community at large.[27] For example, the public nuisance action has often been used to protect the public from "injury to common pool resources, like silence, clean air or water, or species diversity."[28] A state actor's authority to challenge a public nuisance derives from the sovereign's police power which bestows upon the state a duty to protect the health, safety, and welfare of the general public.[29]

2. Substantial interference

The alleged nuisance must *substantially interfere* with a public right.[30] Significantly, to establish causation, a traditional tort test focusing on proximate cause is not required.[31] Rather, "the appropriate causation analysis to be applied to public nuisance [focuses on whether the] defendant's *use* of the land . . . is 'the dominant and relevant fact . . . bearing upon the forces and conditions producing the public nuisance.'"[32] Moreover, while petty anno-

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[25] *See infra* Part II.A.1-3.

[26] Halper (*Part I*), *supra* note 19; KEETON ET AL., *supra* note 18, § 86, at 645; RESTATEMENT (SECOND) OF TORTS § 821B(1)(1979).

[27] RESTATEMENT § 821B cmt. g; KEETON ET AL., *supra* note 18, § 90, at 643-45. *See also* Abrams & Washington, *supra* note 18. The article provided a list of examples where the doctrine has been applied, including:

> digging up a wall of a church, helping a homicidal maniac to escape, being a common scold, keeping a tiger in a pen next to a highway, leaving a mutilated corpse on a doorstep, selling rotten meat, embezzling public funds, keeping treasure trove, and subdividing houses which become hurtful to the place by overpestering it with poor.

Id. at 362 (footnotes omitted).

[28] Halper, *supra* note 18, at 96.

[29] *See* Halper (*Part I*), *supra* note 19.

[30] Abrams & Washington, *supra* note 18, at 374.

[31] Louise A. Halper, *Public Nuisance and Public Plaintiffs: Ownership, Use, and Causation (Part II)*, 17 E.L.R. 10044 (1987) (citing Commonwealth v. Barnes & Tucker Co., 353 A.2d 471, 479 (Pa. Commw. Ct. 1976)) [hereinafter Halper (*Part II*)].

[32] *Id.* (citing *Barnes & Tucker Co.*, 353 A.2d at 479). *See also* People v. Sturm, Ruger & Co., 309 A.D.2d 91, 95 (N.Y. App. Div. 2003) (stating that the causal connection between the alleged interference and the threatened harm must not be too tenuous and remote).

yances and disturbances do not meet the requirement of substantiality, actual harm need not be proven if the threatened harm is severe enough.[33]

3. Unreasonable interference

In addition to substantiality, the plaintiff must prove that the condition created by the challenged activity is unreasonable.[34] Significantly, "a party is liable to the state or appropriate public authorities for a public nuisance *without proof of fault or negligence*, if its use has created the condition injuring or threatening injury to the public."[35] Hence, a condition created by a defendant's activity may be deemed unreasonable in a public nuisance action even if the *manner* in which the defendant conducts the activity is reasonable under traditional tort standards of negligence.[36] Markedly, this juncture in the public nuisance analysis triggers significant confusion because of the tendency of both legal scholars and practitioners to impute traditional fault principles, appropriate in private nuisance actions and private actions on a public nuisance, to public nuisance actions brought by states as an exercise of their police power.[37]

Moreover, determining the reasonableness of the condition created by the challenged activity, in and of itself, confounds the public nuisance analysis. Although the Restatement (Second) of Torts has been criticized for giving short shrift to public nuisance actions,[38] section 821B(2) guides this part of the analysis by providing a non-exclusive list of circumstances in which a public nuisance may be found.[39] These include: conditions that significantly interfere "with the public health, the public safety, the public peace, the public comfort or the public convenience";[40] conditions "proscribed by a

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[33] *See, e.g.*, Halper (*Part I*), *supra* note 19; New York v. Shore Realty Corp., 759 F.2d 1032, 1051 (2d Cir. 1985).

[34] Abrams & Washington, *supra* note 18, at 374.

[35] Halper (*Part I*), *supra* note 19 (emphasis added).

[36] *Id. See also Shore Realty Corp.*, 759 F.2d at 1051; Commonwealth v. Barnes & Tucker Co., 319 A.2d 871 (Pa. 1974). The court concluded that "[t]he absence of facts supporting concepts of negligence, foreseeability or unlawful conduct is not the least fatal to a finding of the existence of a common law public nuisance." *Id.* at 883.

[37] Halper (*Part II*), *supra* note 31. Criticizing, in particular, the Restatement (Second) of Torts' failure to make "explicit that the public nuisance liability which it discusses is for a *private* plaintiff's particular damages, and not applicable in the sovereign's equitable action for abatement or restitution." *Id.* at n.50 (emphasis added). Halper (*Part I*), *supra* note 19; Abrams & Washington, *supra* note 18, at 367 (criticizing the Restatement for perpetuating "the improper imposition of traditional fault concepts on the law of public nuisance").

[38] *See supra* note 37.

[39] RESTATEMENT (SECOND) OF TORTS § 821B(2) (1979).

[40] *See id.* § 821B(2)(a).

statute, ordinance or administrative regulation";[41] and conditions "of a continuing nature or [producing] a permanent or long-lasting effect."[42]

Additionally, the Restatement states that courts may apply the "balancing of utilities test" defined in section 826(a) to determine whether the condition created by the defendant's activity is unreasonable.[43] According to section 826(a), an intentional interference of another's interest is unreasonable if "the gravity of the harm outweighs the utility of the actor's conduct."[44] Opponents of the balancing of utilities approach caution that while the utility of a defendant's conduct may be a viable consideration, especially if the conduct benefits the general public, the resultant public harm is often difficult to quantify.[45] Similarly, it has been suggested that the balancing of utilities test is inappropriate where the denial of an injunction threatens the health and possibly lives of thousands of persons even if the harm might not occur for twenty years or more.[46] Others take a more extreme perspective, asserting that "the investment of a polluter in his polluting activity, no matter how substantial, cannot be said to outweigh the rights of his neighbors."[47]

In sum, a plaintiff in a public nuisance action must demonstrate that the condition created by the challenged activity is unreasonable. Section 821B(2) provides a starting point for establishing unreasonableness. A court may also determine unreasonableness by applying the balancing of utilities test described in section 826. Part B examines the attorneys general's public nuisance claim against the electric-utility industry using both methods of analysis.

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[41] *See id.* § 821B(2)(b).

[42] *See id.* § 821B(2)(c). Abrams & Washington, *supra* note 18. In spite of the instructiveness of section 821B(2)(c), it is criticized for requiring that the defendant "knows or has reason to know" that "the conduct is of a continuing nature or has produced a permanent or long-lasting effect" without distinguishing between private actions on a public nuisance and a public nuisance brought by the state. *Id.* at 376 (citing § 821B(2)(c)). Abrams and Washington point out that "[w]hether the actor has knowledge that the activity in question has an effect on a public right, much less a significant effect, should not be a consideration in a finding of [public] nuisance." *Id.*

[43] RESTATEMENT § 821B cmt. e.

[44] *See id.* § 826(a).

[45] Abrams & Washington, *supra* note 18, at 377-78 (noting that this is especially true in environmental cases).

[46] James D. Lawlor, Annotation, *Federal Common Law of Nuisances as Basis for Relief in Environmental Pollution Cases*, 29 A.L.R. FED. 137 § 2(b) (1976).

[47] *See id.* § 2(a).

B. Carbon Dioxide Emissions as a Public Nuisance

The common law of "public nuisance has the flexibility to provide a remedy when an administrative agency, charged with providing the necessary environmental and health protection pursuant to a comprehensive regulatory scheme, nevertheless allows a serious pollution problem to go unabated."[48] To date, the Environmental Protection Agency, and the federal government as a whole, has failed to take a comprehensive approach to climate change, especially regarding carbon dioxide emissions.[49] Therefore, the public nuisance action filed against the five electric-utility companies may provide the states represented by the attorneys general with otherwise unattainable relief.[50] The remainder of this Part analyzes whether the attorneys general's complaint establishes that a public nuisance may exist and, if so, whether they should be given the opportunity to substantiate their claim in court.

1. Public rights

In their complaint, the attorneys general assert that global warming is already altering the climate of the United States:

> The *threatened injuries* to the plaintiffs and their citizens and residents from *continued* global warming include increased heat deaths due to intensified and prolonged heat waves; increased ground-level smog with concomitant increases in respiratory problems like asthma; beach erosion, inundation of coastal land, and salinization of water supplies from accelerated sea level rise; reduction of the mountain snow pack in California that provides a critical source of water for the State; lowered Great Lakes water levels, which impairs commercial shipping, recreational harbors and marinas, and hydropower generation; more droughts and floods, resulting in property damage and hazard to human safety; and widespread loss of species biodiversity, including the disappearance of hardwood forests from the northern United States.[51]

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[48] Abrams & Washington, *supra* note 18, at 397.

[49] *See U.S. Climate Action Report 2002*, U.S. Dept. of State, Washington, D.C., May 2002, *at* http://yosemite.epa.gov/oar/globalwarming.nsf/content/index.html (stressing the need to re-evaluate the country's current climate change policy). *See generally* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2001: SYNTHESIS REPORT, SUMMARY FOR POLICYMAKERS (2001) [hereinafter IPCC]. A more rapid near-term action towards a less carbon-emitting economy "would increase flexibility in moving towards stabilization, decrease environmental and human risks and the costs associated with projected changes in climate, may stimulate more rapid deployment of existing low-emission technologies, and provide strong near-term incentives to future technological changes." *Id.* at 28.

[50] Abrams & Washington, *supra* note 18, at 391-94.

[51] Complaint at 1-2, Connecticut v. Am. Elec. Power Co., No. 04-05669 (S.D.N.Y. filed July 21, 2004) (emphases added).

Courts have repeatedly held that the public has a right to health, safety, and navigation.[52] Many of the charges asserted above, if true, would interfere with those rights. Therefore, the attorneys general's complaint satisfies the requirement that the alleged activity interferes with a public right.

2. Substantial interference

The attorneys general assert that the defendants' "annual emissions of approximately 650 million tons of carbon dioxide"[53] into the atmosphere constitutes a public nuisance.[54] According to the complaint, these emissions contribute "approximately ten percent of all carbon dioxide emissions from human activities in the United States"[55] and, as the United Nations Intergovernmental Panel on Climate Change ("IPCC") confirmed in 2001: as carbon dioxide continues to rise, so will the Earth's temperature.[56]

To demonstrate the threatening nature of global warming, the attorneys general list some of the effects already reported by scientists, including: vanishing glaciers, hundreds of migrating animal species, melting permafrost, bleaching of coral reefs and rising sea levels.[57] More importantly, the attorneys general rely on the IPCC's 60-90% confidence level that "most of the observed warming over the last 50 years is likely to have been due to the increase in greenhouse gas concentrations"[58] to establish that the causal connection between elevated levels of carbon dioxide emissions and the threatened harms are neither too tenuous nor too remote.[59]

Despite the strong evidence linking carbon dioxide emissions to global warming, the attorneys general will have a difficult time establishing that the defendant electric-utility companies' elevated levels of carbon dioxide emissions "[are] the dominant and relevant fact bearing upon the forces and conditions producing"[60] the interferences listed above.[61] Indeed, on September 30,

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[52] *See* RESTATEMENT (SECOND) OF TORTS § 821B cmt. b (1979). *See, e.g.*, Georgia v. Tenn. Copper Co., 206 U.S. 230 (1907); Commonwealth v. Barnes & Tucker Co., 319 A.2d 871 (Pa. 1974); Wilsonville v. SCA Servs., Inc., 426 N.E.2d 824 (Ill. 1981).

[53] Complaint at 1, *Am. Elec. Power Co.*, No. 04-05669.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 24. *See also* Daniel Glick, *GeoSigns*, NAT'L GEOGRAPHIC, Sept. 2004, at 11; IPCC, *supra* note 49, at 28-29 (referring to projections made by the EPA, the IPCC, and the United States Global Change Research Program).

[57] Complaint at 23, *Am. Elec. Power Co.*, No. 04-05669.

[58] *Id.* at 22. *See also* IPCC, *supra* note 49, at 5-8.

[59] *See* Complaint at 22, *Am. Elec. Power Co.*, No. 04-05669.

[60] *See* Halper (*Part II*), *supra* note 31.

[61] *See id. Cf.* Missouri v. Illinois, 200 U.S. 496 (1906) (denying an injunction because the evidence did not clearly and fully prove that the increase in deaths from typhoid fever was

2004, the defendants filed a motion to dismiss, arguing that the attorneys general cannot establish that the alleged future harms are sufficiently imminent or that the "five utilities singled out in the litigation are the cause of the alleged future harms."[62] Overcoming these challenges will prove extremely difficult for the attorneys general. Arguably, the defendants' carbon dioxide emission rates amount to an insignificant contribution to global warming when compared to the global emissions rate. In addition, although scientists can point to substantial evidence of global warming, they do not "really know the size and consequences of climate change."[63] Whereas some theories suggest that the climate can change rapidly and dramatically, other theories contemplate a more gradual climate shift.[64] Such uncertainty will make it difficult for the attorneys general to demonstrate that the threatened harm will actually occur.

3. Unreasonable interference

Assuming the attorneys general can establish that the defendants' elevated levels of carbon dioxide emissions substantially interfere with public rights, the condition created by this activity should be deemed unreasonable. Section 821B(2)(a) of the Restatement (Second) of Torts states that "a significant interference with the public health, the public safety, the public peace, the public comfort or the public convenience"[65] may sustain a finding of unreasonableness.[66] The harms alleged in the attorneys general's complaint interfere with a number of these rights. Increased heat deaths, increased respiratory problems, and the repercussions of droughts and floods would severely impact the public's health. Likewise, a reduction in the navigability of the Great Lakes may constitute an unreasonable interference with the public's convenience.[67]

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caused by the discharge of Chicago's sewage into the Mississippi River and not from other sources); People v. Sturm, Ruger & Co., 309 A.D.2d 91, 99 n.2 (N.Y. App. Div. 2003) (stating that public nuisance claims have been allowed when the plaintiff's harm is directly attributable to the defendant's activity).

[62] *AEP Files Motion to Dismiss CO2 Lawsuits*, American Electric Power, Sept. 30, 2004, *available at* http://www.aep.com/newsroom (last visited Feb. 16, 2005) (copy on file with author). Brian Stempeck, *Climate Change; States Prepare for Global Warming Lawsuits*, GREENWIRE, Jan. 14, 2005, *available at* 2005 WL 62130842 (reporting that the federal judge had not yet ruled on defendants' motion to dismiss).

[63] Carey & Shapiro, *supra* note 9.

[64] *Id.*

[65] RESTATEMENT (SECOND) OF TORTS § 821B(2)(a) (1979).

[66] *See id.*

[67] *See id.* § 821B(2)(a) cmt. b.

In addition to the circumstances enumerated by the Restatement, courts have upheld public rights in land and natural resources.[68] Thus, beach erosion, the inundation of coastal land, the salinization and reduction of water supplies, the loss of species and biodiversity, and the disappearance of hardwood forests would seriously undermine the public's rights. Similarly, beach erosion, the inundation of coastal land, and any property damage resulting from droughts and floods would constitute an unreasonable interference with the public's property rights.

Despite these precedents, establishing the unreasonableness of the conditions created by the defendants' emissions of carbon dioxide will be more complicated if the court applies the balancing of the utilities test.[69] On the one hand, all of the residents and citizens represented by the attorneys general receive immense benefits from the energy generated by the electric-utility companies. On the other hand, if the threatened harms come to fruition, the health, safety, property, and economic costs to the plaintiffs would be devastating.

However, because the attorneys general seek only a reduction—rather than an outright ban—in the defendants' carbon dioxide emissions,[70] the court should consider the costs to the defendants of using alternative and cleaner technologies in generating energy and weigh those costs against the potential harms not doing so could cause the plaintiffs. The evidence suggests that alternative energy sources are already available, and perhaps more importantly, that mandatory emissions reductions tend to speed up technological advancements.[71] In this regard, the attorneys general have at their disposal

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[68] *See, e.g.*, Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 (1907) (holding that in its capacity as quasi-sovereign, a "state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain"); Texas v. Pankey, 441 F.2d 236 (10th Cir. 1971) (upholding a federal public nuisance cause of action due to one state's impairment of another state's ecological conditions).

[69] *See* RESTATEMENT § 826(a); *see supra* Part II.A.3.

[70] Complaint at 1, Connecticut v. Am. Elec. Power Co., No. 04-05669 (S.D.N.Y. filed July 21, 2004).

[71] Bowman, *supra* note 8. A September 2000 report commissioned by the Northeastern States for Coordinated Air Use Management found that "[c]osts almost always decline substantially once regulatory mandates are introduced and control technologies are commercialized." *Id.* In addition, studies published by public policy scholars at Carnegie Mellon University and the University of California, Berkeley demonstrate that "the past 30 years' experience in controlling other major power plant emissions in the United States, Japan and Western Europe consistently shows costs and performance improving greatly over time as the cleanup technology matures." *Id. See also* Peter N. Spotts, *Stabilizing the Global 'Greenhouse' May Not Be So Hard; Today's Tools Could Cap Emissions That Contribute to Global Warming, Study Finds*, CHRISTIAN SCI. MONITOR, Aug. 13, 2004, at 3, *available at* 2004 WL 58696206 (describing a study published by two Princeton University researchers in August 2004 suggesting that "[h]umanity has the hardware in hand to halt the rise in heat-trapping greenhouse gases

significant evidence that mandatory carbon dioxide emissions reductions provide a cost-effective approach to addressing global warming.[72] If the court takes into account these additional considerations, the attorneys general will have a much better chance of demonstrating the unreasonableness of the defendants' conduct under the balancing of utilities test.

C. Impact of Attorneys General's Lawsuit on Climate Change Policy

Based on the analysis above, the greatest challenge to the attorneys general's public nuisance claim is the substantial interference element. While the defendant electric-utility companies are responsible for a significant percentage of the United States's carbon dioxide emissions, this contribution becomes arguably less substantial when compared to the rate of global carbon dioxide emissions. Moreover, the attorneys general will have a difficult time establishing that the threatened harms are likely to occur if the court does not order the defendants to reduce their carbon dioxide emissions rate.

Given the unlikelihood that the attorneys general will establish the substantial interference element of their public nuisance action, it is important to examine the broader impacts the lawsuit may have on the United States's climate change policy. In a recently published article, J. Kevin Healy and Jeffrey M. Tapick foresaw the possibility that state attorneys general would sue major carbon dioxide emitters for their contribution to global warming.[73] Healy and Tapick also recognized that "such litigation would face enormous hurdles . . . regarding matters such as causation and harm."[74] Despite these obstacles, the article suggested that the "mere commencement" of the electric-utility litigation could negatively impact investor confidence and public relations in electric-utility companies.[75] Drawing comparisons with the tobacco litigation of the 1990s, Healy and Tapick described how these impacts can be an effective way of holding powerful industries accountable for otherwise under-regulated activities.[76] Accordingly, the rest of this article examines how litigation can catalyze policy change even when a favorable courtroom verdict is unlikely.

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it pumps into the atmosphere and forestall the worst effects of global warming projected for the end of this century").

[72] *See supra* note 71.

[73] Healy & Tapick, *supra* note 12, at 101.

[74] *Id.* at 102.

[75] *Id.*

[76] *Id.*

III. ATTORNEYS GENERAL LITIGATION AS A POLICY CATALYST

In 1998, the tobacco industry entered into a landmark settlement with over forty states in which the industry agreed to change its business practices and to pay back $206 billion in state Medicaid expenditures.[77] The settlement came on the heels of over seven-hundred defense victories in lawsuits filed over a period of nearly fifty years.[78] The tobacco industry's immunity came to an end because the attorneys general redefined the harms caused by cigarettes, claiming "that smoking increases costs to society."[79] This definition circumvented the industry's assumption of risk defense and enabled attorneys general, in the name of the public interest, to hold the tobacco industry accountable for withholding information on the hazards of cigarettes.[80]

A. Tobacco Industry's Winning Strategy

The tobacco industry's fifty-year success story was achieved in large part by using its unmatched financial resources and political influence to stymie whatever legal challenges were brought against it.[81] One of the industry's most successful tactics was coined the "king of the mountain"[82] strategy whereby tobacco companies "exploited their financial advantage by taking every deposition, filing every motion, and pursuing every alternative, all in an effort to bankrupt their opponents."[83] More often than not, this tactic forced opponents to abandon their lawsuits before the courts could make the tobacco industry account for the harmful effects of smoking cigarettes.[84]

Exacerbating the industry's lack of accountability was the undeniable influence that the tobacco industry exerted over politicians in Washington, D.C. Studies have shown that the tobacco industry's use of "sophisticated

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[77] Mather, *supra* note 17, at 898.

[78] *Id.* at 904-05 (explaining that more than 700 product liability suits had been filed against the tobacco industry between the 1950s and 1995, without a dime being paid to any smoker who sued the industry).

[79] Wendy E. Wagner, *Rough Justice and the Attorney General Litigation*, 33 GA. L. REV. 935, 957 (1999). "Between 1994 and 1998, forty-one of the fifty states filed suit against the major cigarette manufacturers for the health care costs associated with the smoking-related illnesses of impoverished persons covered under Medicaid." *Id.*

[80] *Id.* at 962-63.

[81] Mather, *supra* note 17, at 903-07.

[82] Bryce Jensen, *From Tobacco to Health Care and Beyond—A Critique of Lawsuits Targeting Unpopular Industries*, 86 CORNELL L. REV. 1334, 1339 (2001).

[83] *Id.*

[84] *Id.*

campaigning and resource-intensive lobbying"[85] deterred legislators from enacting regulatory policies and from raising taxes on tobacco products.[86] Ironically, when legislation was passed in the mid-1960s requiring warning labels on each pack of cigarettes, the legislation provided less protection for consumers and a more lethal assumption of risk defense for the tobacco industry.[87] This regulatory void at the federal level persisted well into the late 1980s and early 1990s even as state and local governments were adopting anti-smoking initiatives.[88]

B. Attorneys General's Tobacco Litigation

In light of such seemingly insurmountable hurdles, state attorneys general needed an entrepreneurial litigation strategy to loosen the tobacco industry's chokehold on the nation's political and judicial processes. Mississippi's Attorney General, Mike Moore, rose to the challenge and, in 1994, filed the first of over forty state cases against the tobacco industry under a "blameless plaintiff" legal theory.[89] This novel theory was crucial to the attorneys general's success because it overcame one of the most detrimental aspects of the private smoker's lawsuit—the smoker's assumption of risk.[90] While juries tended to be unsympathetic to plaintiff smokers who chose to expose themselves to harm, such was not the case in lawsuits seeking to recover state Medicaid expenditures and other costs incurred in treating tobacco-related illnesses.[91]

The blameless plaintiff theory undoubtedly got the attorneys general over one hurdle, but more significant for purposes of this article is how the attorneys general's litigation strategy was able to undermine the tobacco industry's financial strength and political influence. On the one hand, the attorneys general shared their experiences, legal tactics, documents and research through formal organizations and informal networks.[92] This pooling of intellectual and scientific resources made it less likely that the tobacco

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[85] Wagner, *supra* note 79, at 950 (referring to empirical studies which concluded that Congressional behavior was influenced by campaign contributions and lobbying).

[86] *Id.* at 949-50.

[87] *Id.* (explaining that the Cigarette Act of 1965 also limited the states' capacity to regulate tobacco packaging and preempted failure to warn claims).

[88] Mather, *supra* note 17, at 906 (noting that federal policy remained protective of the tobacco industry during this period).

[89] Jensen, *supra* note 82, at 1343-44.

[90] Wagner, *supra* note 79, at 959.

[91] Jensen, *supra* note 82, at 1343-45.

[92] *See generally* Mather, *supra* note 17, at 907 (providing an example of the Tobacco Products Liability Project which "was founded to coordinate antitobacco legal efforts and to share information among scientific researchers and diverse plaintiff lawyers").

industry could silence their opponents by outspending them.[93] Moreover, as this state to state coordination increased, more attention was put on the tobacco industry's conduct and responsibility.[94]

Perhaps more importantly, the attorneys general's lawsuits firmly demonstrated that "litigation provides unusually rich potential for framing an issue and defining a policy problem."[95] Professor Lynn Mather explains that lawyers use litigation as a means of telling a story about a particular event "in ways that affix blame and responsibility to their opponent."[96] For example, in one tobacco case, lawyers attempted to transform the death of a heavy smoker into a narrative about the tobacco industry's fraudulent and deceitful practices.[97] By defining the issue in such broad terms, the attorneys general shifted the inquiry from the individual's health problems to a dispute concerning millions of smokers.[98]

This alternative storyline about an industry which systematically deceived the American public weakened the tobacco industry's narrative which laid blame on consumers for choosing to smoke.[99] Furthermore, the attorneys general's narrative invoked public outrage and incited vulnerability in investors.[100] Both provided the attorneys general with a source of leverage against tobacco industry corporate chief executive officers ("CEOs").[101] In the end, investors, who feared an adverse judgment might hurl the industry into bankruptcy, pressured CEOs to settle their cases.[102] Remarkably, this historical settlement came despite the tobacco industry's half-century long courtroom winning streak.

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[93] Wagner, *supra* note 79, at 963-64.

[94] *See* Mather, *supra* note 17, at 918 (explaining how the state attorneys general's coordination "expanded the political arena for tobacco policymaking from Washington, D.C., to a much wider one, with the resulting transformation of the political conflict and reduction in the influence of the tobacco industry"); Wagner, *supra* note 79, at 965 (suggesting that the attorneys general's coordinated effort was "likely to incite greater public demand for federal legislation . . . to overcome the inertia that has historically plagued congressional action with regard to tobacco regulation").

[95] Mather, *supra* note 17, at 918.

[96] *Id.* at 918-19.

[97] *Id.* at 919.

[98] *Id.*

[99] Jensen, *supra* note 82, at 1340-44.

[100] *See* Mather, *supra* note 17, at 930-32.

[101] Jensen, *supra* note 82, at 1357. The article suggests that public criticism reached a "vitriolic fury" in the months leading up to the settlement. *Id.* It also suggests that "[t]he financial markets provide a source of leverage that may prove even more powerful than politics." *Id.*

[102] Mather, *supra* note 17, at 931-32.

C. Attorneys General Electric-Utility Litigation

The success of the attorneys general tobacco litigation provides a framework for analyzing the lawsuit recently filed against the electric-utility industry. Significantly, the tobacco litigation demonstrated that a favorable courtroom verdict is not necessary for the litigation to yield a positive outcome. More specifically, the tobacco litigation taught attorneys general that even when a win in the legal arena is unlikely, litigation in cases that "are linked to broader social forces . . . can help publicize an issue and keep it on the agenda."[103] As such, the attorneys general electric-utility litigation, like the tobacco litigation that came before it, serves as a means of educating the public, investors, and CEOs about an executive branch that is unwilling to make a substantive commitment to dealing with a pressing policy issue.

1. The electric-utility industry's story

While some skepticism remains over the scientific link between carbon dioxide and global warming,[104] the overwhelming scientific consensus is that elevated levels of carbon dioxide emissions contribute to climate change.[105] As a result, the electric-utility industry has abandoned its 'refute the science' storyline.[106] Instead, a new narrative—mandatory reductions of carbon dioxide emissions will severely damage the economy and drive up costs to American consumers and manufacturers—has taken hold.[107]

Like the tobacco industry, the electric-utility industry is a financial powerhouse in the United States and has considerable political influence in Washington, D.C.[108] Between 1989 and 2004, the electric-utility industry

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[103] *Id.* at 916.

[104] Jack M. Hollander, *Rushing to Judgment*, WILSON Q., Apr. 1, 2003, *available at* 2003 WL 13111739.

[105] *See The Science of Climate Change; Response to Intergovernmental Panel on Climate Change Research*, 292 SCIENCE 1261 (2001). Joint editorial signed by scientific academies from 17 countries stating: "It is now evident that human activities are already contributing adversely to global climate change. Business as usual is no longer a viable option." *Id. See also* Carey & Shapiro, *supra* note 9 (citing Donald Kennedy, editor-in-chief of SCIENCE, who said that while disagreements remain regarding "how much" the temperature will increase, "there is no dispute" that it will continue to rise); Nancy Shute et al., *The Weather Turns Wild Global Warming Could Cause Droughts, Disease, and Political Upheaval*, U.S. NEWS & WORLD REP., Feb. 3, 2001, at 44, *available at* 2004 WL 6319627 (quoting Peter Glecick, president of the Pacific Institute for Studies in Development, Environment, and Security: "The debate is over . . . [n]o matter what we do to reduce greenhouse-gas emissions, we will not be able to avoid some impacts of climate change.").

[106] *See* Bowman, *supra* note 8.

[107] *Id.*

[108] *See infra* text accompanying notes 109-14.

donated over $90 million to political campaigns.[109] In fact, the 2004 election cycle generated over $15 million in campaign contributions.[110] While it is undeniable that these contributions help to ensure that the industry's narrative is heard in Washington, industry groups maintain that the contributions do not directly influence political decisions.[111] A report, however, released in May 2004 by watchdog groups, Public Citizen and the Environmental Integrity Project ("EIP"), suggests otherwise.[112] The report states that since 1999, the largest utility companies in the United States "have poured $6.6 million into the coffers of the [George W.] Bush presidential campaigns and the Republican National Committee."[113] The report suggests that in return for these contributions, industry executives or lobbyists were given unprecedented access to administration decisions regarding energy and pollution policies.[114]

In addition, actions taken by President Bush suggest that the administration subscribes to the industry's negative outlook on mandatory carbon dioxide emissions reductions.[115] Since taking office in 2001, President Bush has not only rejected the Kyoto Protocol,[116] citing domestic interests and an "incomplete state of scientific knowledge,"[117] but has retreated from what was once labeled by environmentalists as a "breakthrough" campaign pledge.[118] As part of the pledge, made in the fall of 2000, Bush promised to "promote separate legislation to establish mandatory reduction targets for emissions of four main

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[109] *Electric Utilities: Long-Term Contribution Trends*, The Center for Responsive Politics, *at* http://www.opensecrets.org/industries/indus.asp?ind=e08 (last visited Feb. 16, 2005) [hereinafter *Electric Utilities*].

[110] *Id.*

[111] *EEI Disputes Activist Groups Claim that Dirty Electric Utilities Were Allowed to Influence Pollution Policy by Contributing to Bush*, FOSTER ELECTRIC REP., (Foster Associates, Inc., Bethesda, Md.), May 12, 2004, *available at* 2004 WL 75169757 [hereinafter *EEI Disputes*].

[112] *America's Dirtiest Power Plants: Plugged Into the Bush Administration*, Environmental Integrity Project and Public Citizen's Congress Watch (May 2004), *available at* http://www.whitehouseforsale.org/documents/dirtiest_plants2.pdf (last visited Feb. 16, 2005).

[113] *Id.* at 6. *See also EEI Disputes*, *supra* note 111.

[114] *EEI Disputes*, *supra* note 111. Five senior positions responsible for formulating or enforcing clean air policies were filled by industry executives or lobbyists. *Id.* Additionally, power plant owners and representatives of the Edison Electric Institute met with Vice President Dick Cheney's energy task force at least seventeen times. *Id.*

[115] *See infra* notes 116-22.

[116] Seth Mydans & Andrew C. Revkin, *With Russia's Nod, Treaty on Emissions Clears Last Hurdle*, N.Y. TIMES, Oct. 1, 2004, at A1, *available at* 2004 WLNR 4779064. The Kyoto Protocol is the first treaty to require cuts in greenhouse gases including the dominant heat-trapping gas, carbon dioxide. *Id.*

[117] Bustillo, *supra* note 12.

[118] Goldstein & Pianan, *supra* note 11.

pollutants (sulfur dioxide, nitrogen oxide, mercury and carbon dioxide)."[119] In response to criticism that he switched positions because of vigorous industry lobbying, President Bush maintains "that 'an energy crisis' that threatened the nation's economic health caused him to decide not to try to regulate power plants' emissions of carbon dioxide."[120]

The administration has since introduced its Clear Skies Act which requires emissions reductions in nitrogen oxide, sulfur dioxide, and mercury.[121] Pointedly, the Act does not subject carbon dioxide to a binding reduction schedule, but rather encourages voluntary emissions reductions.[122] The administration's actions therefore resonate with the electric-utility industry's narrative—voluntary reductions in lieu of costly mandatory emissions.

Like President Bush, the Environmental Protection Agency ("EPA") has reversed its position on its commitment to carbon dioxide regulation.[123] A complaint filed against the EPA by attorneys general for Massachusetts, Connecticut, and Maine identified three occasions, prior to 2003, in which the EPA declared that carbon dioxide was an air pollutant subject to EPA regulation under the Clean Air Act.[124] Then, in August 2003, the EPA contradicted its earlier statements and announced that it did not have the authority to regulate carbon dioxide under the Act.[125] This announcement came only weeks after *The New York Times* reported on the White House's attempt to downplay global warming by editing an EPA report on the state of the

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[119] *Governor Bush Announces His Own "North American Energy Policy"*, FOSTER NAT. GAS REP., (Foster Associates, Inc., Bethesda, Md.), Oct. 5, 2000, *available at* 2000 WL 8690510.

[120] Douglas Jehl, *Bush Defends Emissions Stance*, N.Y. TIMES, Mar. 15, 2001, at A23, *available at* 2001 WLNR 3418122 (citing President Bush). *But see* Goldstein & Pianan, *supra* note 11 (reporting that others have suggested Bush's turnaround "came in response to a concerted pressure campaign from senior congressional Republicans and lobbyists from the coal and oil industries").

[121] Clear Skies Act of 2003, H.R. 999, 108th Cong. § 403 (2003).

[122] *See id.*

[123] *See infra* text accompanying notes 124-25.

[124] *See* Complaint, Massachusetts v. Whitman, No. 03-1361, at 8 (D. Conn. filed June 4, 2003) (on file with author). *See generally Climate Change (Global Warming)*, The Office of Massachusetts Attorney General Tom Reil, *at* http://www.ago.state.ma.us/sp.cfm?pageid=1234 (last visited Feb. 16, 2005) [hereinafter *Climate Change (Global Warming*]. The attorneys general voluntary dismissed the *Whitman* complaint in order to join a coalition of eleven states in a different lawsuit challenging the EPA's "about-face" on the agency's legal authority to regulate carbon dioxide. *Id.*

[125] *EPA Denies Petition to Regulate Greenhouse Gas Emissions from Motor Vehicles*, U.S. Environmental Protection Agency, Aug. 28, 2003, *available at* http://yosemite.epa.gov/opa/admpress.nsf (stating that Congress has not granted the EPA authority under the Clean Air Act to regulate carbon dioxide or other greenhouse gases) (last visited Feb. 16, 2005).

environment.[126] According to the article, the White House wanted the following items deleted from the climate change section: "references to many studies concluding that warming is at least partly caused by rising concentrations of smokestack and tail-pipe emissions and could threaten health and ecosystems";[127] "the likely human contribution to warming from a 2001 report on climate by the National Research Council";[128] and "a reference to a 1999 study showing that global temperatures had risen sharply in the previous decade compared with the last 1,000 years."[129] These editing suggestions led EPA staff members to delete the entire section rather than submit themselves to charges that they were playing politics with science.[130]

2. The attorneys general's alternative narrative

It has been suggested that the reason for the United States's hesitancy in addressing global warming is "not the science and not the economics,"[131] but "[r]ather it is the lack of public knowledge, the lack of leadership, and the lack of political will."[132] Arguably, it is because of the public's docility and the Bush administration's abdication to the electric-utility industry that the attorneys general decided to enter the debate with an alternative narrative regarding carbon dioxide regulation. Significantly, the attorneys general's public nuisance complaint follows a string of similar cases filed by attorneys general challenging the EPA's reluctance to regulate carbon dioxide.[133] The lawsuit should therefore be seen as part of the attorneys general's larger

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[126] Andrew C. Revkin & Katharine Q. Seelye, *Report By EPA Leaves Out Data On Climate Change*, N.Y. TIMES, June 19, 2003, at A1, *available at* 2003 WLNR 4633275.

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *Id.*

[131] Carey & Shapiro, *supra* note 9 (quoting G. Michael Purdy, director of Lamont-Doherty Earth Observatory).

[132] *Id.*

[133] *See* Petitioners' Amended Petition for Review, Massachusetts v. EPA, No. 03-1361 (D.C. Cir. filed Oct. 30, 2003) (on file with author); Petitioners' Amended Petition for Review, Massachusetts v. EPA, No. 03-1365 (D.C. Cir. filed Oct. 30, 2003) (on file with author). *See generally Climate Change (Global Warming)*, *supra* note 124 (reporting that the attorneys general's appeals before the D.C. Circuit, which challenge the EPA's refusal to regulate carbon dioxide and other GHGs under the Clean Air Act and from new automobiles, were consolidated). *Cf. Eight States and New York City Sue Five Power Producers Over Greenhouse Gas Emissions; Two Environmental Groups Bring Similar Action Against Same Five Utilities*, FOSTER ELECTRIC REP., (Foster Associates, Inc., Bethesda, Md.), July 28, 2004, *available at* 2004 WL 75169933 (reporting that the Audubon Society of New Hampshire and the New York-based Open Space Institute, represented by the Natural Resources Defense Council filed a similar suit against the same five utilities).

strategy of redefining the carbon dioxide narrative into a story of governmental acquiescence to a powerful industry.

The lawsuit "is the first time state and local governments have sued private companies for reductions in the heat-trapping carbon dioxide emissions that scientists say pose serious threats to our health, economy and environment."[134] This is significant because it makes the lawsuit more newsworthy. The complaint asserts that "[t]here is a clear scientific consensus that global warming has begun and that most of the current global warming is caused by emissions of greenhouse gases, primarily carbon dioxide from fossil fuel combustion."[135] The attorneys general support this assertion by pointing to a series of reports issued by the Intergovernmental Panel on Climate Change, the U.S. National Academy of Sciences, and the American Geophysical Union.[136] In so doing, the litigation has given a voice to the scientists who have been marginalized by the industry's clout in Washington.

The lawsuit has also generated discussion in the press on whether mandatory carbon dioxide emissions reductions are a necessary and cost-efficient way of addressing the problem of global warming.[137] Notably, this discussion has undermined the industry's and administration's insistence that such reductions are cost prohibitive.[138] For example, in the weeks leading up to and following the filing of the attorneys general's lawsuit, a number of articles pointed out that "the history of mandated pollution controls . . . suggests that the supposedly prohibitive costs of cutting the climate-altering gases won't materialize."[139]

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[134] Press Release, Office of New Jersey Attorney General, Attorney General Harvey and Attorneys General from Seven Other States Sue Top Five U.S. Global Warming Polluters (July 21, 2004) (on file with author).

[135] Complaint at 22, Connecticut v. Am. Elec. Power Co., No. 04-05669 (S.D.N.Y. filed July 21, 2004).

[136] *Id.*

[137] *See infra* notes 139-42.

[138] *See infra* text accompanying notes 139-42.

[139] Bowman, *supra* note 8. A September 2000 report commissioned by the Northeastern States for Coordinated Air Use Management found that "[c]osts almost always decline substantially once regulatory mandates are introduced and control technologies are commercialized." *Id.* In addition, studies published by public policy scholars at Carnegie Mellon University and the University of California, Berkeley demonstrate that "the past 30 years' experience in controlling other major power plant emissions in the United States, Japan and Western Europe consistently shows costs and performance improving greatly over time as the cleanup technology matures." *Id. See also* Spotts, *supra* note 71 (describing a study published by two Princeton University researchers in August 2004 suggesting that "[h]umanity has the hardware in hand to halt the rise in heat-trapping greenhouse gases it pumps into the atmosphere and forestall the worst effects of global warming projected for the end of this century").

Other articles pointed out that a number of companies have recognized the *cost benefits* of imposing carbon limits.[140] In fact, Michael Northrop, the co-creator of The Climate Group, stated that "[i]t's impossible to find a company that has acted and has not found benefits."[141] Perhaps most noteworthy, however, was the following statement made by Wayne H. Brunetti, the chairman and CEO of Xcel Energy, a defendant in the current lawsuit: "Give us a date, tell us how much we need to cut, give us the flexibility to meet the goals, and we'll get it done."[142]

Also reigniting the debate on mandatory carbon dioxide emissions reductions and assisting in the attorneys general's effort to re-stimulate the public's interest in global warming was the Russian cabinet's endorsement of the Kyoto Protocol[143] and its subsequent implementation.[144] Ratified by 141 nations and imposing carbon dioxide emissions on thirty-five industrialized nations,[145] the Kyoto Protocol has been deemed "a milestone of international environmental diplomacy."[146] It is undeniable, however, that the United States's absence from the global pact severely undermines its effectiveness.[147]

Although the United States Senate shared in President Bush's skepticism of the Kyoto Protocol,[148] Congress has remained committed to passing legislation targeting the reduction of greenhouse gases, including carbon dioxide.[149] In fact, the Pew Center on Global Climate Change reported that nearly seventy climate change-related proposals were introduced in Congress in 2003.[150] The bill receiving the most support, introduced by Senator John McCain and Senator Joe Lieberman, would cap emissions of six major greenhouse gases, including carbon dioxide.[151] After the bill received forty-three votes in the

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[140] Carey & Shapiro, *supra* note 9.

[141] *Id.* The Climate Group is a coalition of companies and governments that are committed to reducing greenhouse gas emissions. *Id.*

[142] *Id.*

[143] Mydans & Revkin, *supra* note 116.

[144] Vedantam, *supra* note 15 (reporting that the Kyoto Protocol took effect on Feb. 16, 2005).

[145] *Id.*

[146] Mydans & Revkin, *supra* note 116.

[147] *See* Vedantam, *supra* note 15.

[148] *See* Byrd-Hagel Resolution, S. Res. 98, 105th Cong. (1997) (opposing imposition of the Kyoto Protocol on the United States, passed 95-0 in the Senate).

[149] *See infra* text accompanying notes 150-52.

[150] *Climate Change Activities in the U.S.: 2004 Update*, Pew Center on Global Climate Change (2004), at 4, *available at* http://www.pewclimate.org/what_s_being_done/us_activities_2004.cfm (last visited Feb. 16, 2005) [hereinafter *Climate Change Activities*].

[151] *Id.* at 5. *See also* Climate Stewardship Act, S. 139, 108th Cong. (2003).

Senate in 2003, the Senators expressed their intention to reintroduce it for another vote.[152]

Presumably, the attorneys general are well aware of Congress's repeated attempts to address global warming with mandatory greenhouse gas emissions reductions. The attorneys general are also presumably aware of the growing number of states that have adopted policies aimed at addressing climate change. The Pew Center on Global Change reports that "[t]wenty-eight states and Puerto Rico have developed or are developing strategies or action plans to reduce net [greenhouse gas] emissions."[153] These efforts suggest that it is only a matter of time before the national government seriously addresses climate change. [154] As such, the attorneys general's litigation may be viewed as an effort to hasten the government's substantive involvement.

The tobacco litigation of the 1990s taught attorneys general that raising awareness and redefining legal disputes provide very effective means of catalyzing government action. More particularly, the tobacco litigation demonstrated the potency of redefining a dispute in a way that undermines an industry's financial security and underscores investors' vulnerability. Recent events attest to the effectiveness of this strategy. Increasingly, electric-utility shareholders are passing resolutions that demand company disclosures on the investment risks posed by climate change and on the company's coping strategies.[155] Equally significant, some companies "are . . . speaking out about climate change and encouraging stronger government efforts to reduce emissions throughout the economy."[156] As this movement strengthens, the executive branch's reluctance to enact mandatory climate policies will undoubtedly weaken. And when the executive branch breaks—favorable verdict or not—the attorneys general litigation will once again be deemed a success.

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[152] *Climate Change Activities*, *supra* note 150, at 5.

[153] *Id.* at 9.

[154] *See* Melita Marie Garza, *States Take Lead in Clean Air Quest; Wetlands, Wildlife Damage Prompting Independent Action*, CHI. TRIB., July 4, 2004, at 1, *available at* 2004 WL 84659378 (reporting that David Doniger, policy director for the National Resources Defense Council Climate Center, stated that "[t]he national government is very close to a tipping point from doing nothing to taking serious action").

[155] *See, e.g.*, Michael Burr, *The Fight for Sustainability*, PUB. UTIL. FORT., June 1, 2004, at 30, *available at* 2004 WL 71331781; Jennifer Alvey, *As Air Pollution Battles Heat Up, Some Companies Cut Deals Without Waiting for Mandatory Controls*, PUB. UTIL. FORT., Mar. 1, 2003, at 40, *available at* 2003 WL 11339723.

[156] *Climate Change Activities*, *supra* note 150, at 21. *See also* Carey & Shapiro, *supra* note 9 (discussing how companies faced with piecemeal state regulations, "helped push for federal Clean Air Act amendments that reduced sulfur dioxide emission through a market-based trading system").

IV. PUBLIC POLICY CONSIDERATIONS

"U.S. energy policy is reminiscent of Mark Twain's quip about the weather: everyone talks about it, but no one does anything."[157]

Opponents of the attorneys general lawsuit against the electric-utility industry assert that climate change is "a global issue . . . not an issue that can be addressed by one company, by one industry, or even one country."[158] This argument evades the criticism that the executive branch of the United States has repeatedly abdicated its leadership role in the global community and here at home to the greenhouse gas emitters. Either the EPA has the authority to regulate carbon dioxide emissions under the Clean Air Act or the states have a right to bring public nuisance claims.[159] The EPA and the Bush administration have made it clear that the former is not the case. As a result, an important void exists in our nation's global warming policy and it is precisely under such circumstances that the "common law retains its vitality and importance."[160]

Furthermore, the critics who accuse the attorneys general litigation of "undermining representative democracy,"[161] misunderstand the role of the attorney general. Attorneys general, as representatives of the public interest, have a duty to redress harm imposed on their citizens and states.[162] Moreover, seven of the eight attorneys general who filed the public nuisance complaint against the electric-utility industry are popularly elected officials.[163] Thus, if the public does not agree with the attorneys general's litigation decisions, in the spirit of "representative democracy," the public has the power to vote them out.

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[157] Timothy E. Wirth et al., *The Future of Energy Policy*, FOREIGN AFF., July 1, 2003, *available at* 2003 WL 57276723.

[158] Leonard Post, *Power Companies Feel the Heat – Eight States and NYC Sue Power Companies Over Global Warming*, 26 NAT'L L.J. 4, Aug. 2, 2004 (quoting statements made by Pat Hemlepp, defendant American Electric Power's director of corporate media relations).

[159] *Id.* (referring to assertions made by Deputy Attorney General of California Brieger).

[160] *Id.* (citing Clifford Rechtschaffen, co-director fo the Environmental Law and Justice Clinic at Golden Gate University, who explained that the common law is "potentially quite potent" in plugging gaps left in federal and state regulatory structures). *See also* Abrams & Washington, *supra* note 18. "Without the law of public nuisance, these gaps in the statutory system could allow unnecessary, offensive and perhaps unhealthy pollution to continue unabated." *Id.* at 393.

[161] David J. Owsiany, *Suits Against Utility Companies are Politics Hiding Behind Health Issues*, COLUMBUS DISPATCH, Aug. 23, 2004, at 11A, *available at* 2004 WL 89367081.

[162] *See* William H. Sorrel, *Stepping in to Curb Pollution When U.S. Government Won't*, 178 N.J. L.J. 23 (2004). William Sorrell is the Attorney General of Vermont.

[163] *See About NAAG*, National Association of Attorneys General, *available at* http://www.naag.org/naag/about_naag.php (last visited Feb. 16, 2005).

V. CONCLUSION

Since the United States backed out of the Kyoto Protocol in 2001, the executive branch's commitment to substantive climate change policies have been tenuous at best. During the same period, numerous states, federal legislators, and nations have demonstrated their commitment to meaningfully address global warming, and in particular, carbon dioxide emissions. These commitments are consistent with the resounding scientific consensus that the Earth is getting warmer and largely because of anthropogenic activities.

The public nuisance action filed against the electric-utility industry provides a mechanism for raising public, investor, and consumer awareness about the threats posed by global warming and rising carbon dioxide emissions. More importantly, the lawsuit empowers states, through their attorneys general, with a means of redefining the climate change debate and underscoring the politically powerful voice of the electric-utility industry. By redefining mandatory carbon dioxide emissions as a responsible and cost-efficient regulatory policy, the lawsuit stimulates a more balanced debate on the appropriate direction of United States climate change policy.

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Price Controls in Paradise: Foreshadowing the Legal and Economic Consequences of Hawai'i's Gasoline Price Cap Law

> The really challenging job is deciding not what the ultimate economically rational equilibrium should look like, but what is economically rational in an irrational world, and how best to get from here to there. That . . . turns out to be a kind of frontier; and life on it is full of excitement.[1]

I. INTRODUCTION

The cost of a gallon of gasoline has been a particularly hot topic around the nation in the past year. Indeed, public outcry and the federal government's response thereto have intensified because of record high gasoline prices.[2] Already, the federal government and fourteen states[3] have either demanded explanations for the recent rise in gasoline prices,[4] threatened lawsuits against the oil companies,[5] conducted investigations into the oil companies' pricing behavior,[6] or are proposing legislation that would authorize the federal government to commence price gouging lawsuits against OPEC.[7] In response, the oil companies have claimed that the recent rise in gasoline prices stems from increased seasonal demand, rising crude-oil prices, new environmentally friendly gasoline standards, and concerns about shortages in future crude oil supplies.[8]

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[1] Alfred E. Kahn, *Applications of Economics to an Imperfect World*, 69 AM. ECON. REV. 1, 1 (1979).

[2] *See* Sean Hao, *Politicians Gird for Gas Wars*, HONOLULU ADVERTISER, Apr. 24, 2004, at C1.

[3] These states include Hawai'i, Arizona, California, Washington, Iowa, Wisconsin, Kansas, Delaware, Indiana, Michigan, New Mexico, Missouri, Nevada, and Florida. *Id.*

[4] *Id.* Democratic governors from several states recently sent a letter to the President seeking an explanation for the recent spike in gasoline prices. *Id.*

[5] *Id.* Following a meeting in March of 2004, with five oil companies along with attorneys general from forty states (including Hawai'i), Florida's Attorney General threatened to commence a lawsuit against the oil companies because he was not satisfied with the oil companies' explanation for the recent spike in gasoline prices. *Id.*

[6] *Id.* California currently has the highest average gasoline prices in the nation, which is attributable, in part, to the volatile nature of California's gasoline market. *Id.* As a result, California's attorney general is conducting investigations into this volatility. *Id.*

[7] *Id.*

[8] *Id.*

In early 2002, Hawai'i became the first state[9] to pass legislation with the primary objective of establishing a maximum wholesale gasoline price cap.[10] This aggressive and unprecedented legislation is arguably warranted considering that the price behavior of Hawai'i's gasoline market is unlike that of any other gasoline market across the country. To illustrate, Hawai'i's motorists have had the dubious distinction of paying for a retail gasoline price that hardly, if ever, fluctuates.[11] In other words, when the price of a gallon of gasoline in Hawai'i rises, the price will generally stay at that higher price irrespective of the price fluctuations occurring on the mainland United States.[12] This occurs, in part, because of the lack of liquidity and transparency within Hawai'i's wholesale gasoline market.[13]

The "upwardly sticky"[14] trend of Hawai'i's retail gasoline prices, however, does not, by itself, form the basis of Hawai'i's gasoline problem. Rather, the problem manifests itself when Hawai'i's "upwardly sticky" price trend is compounded by the fact that the cost of a gallon of gasoline in Hawai'i has been more expensive than any other state between the years 1997 and 2002.[15]

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[9] Frank Cho, *Gas It Up for Less!*, HONOLULU ADVERTISER, Sept. 15, 2002, at F1.

[10] HAW. REV. STAT. § 486H-13 (2002), *amended by* Act of 2004, No. 242, 23rd Leg., Reg. Sess. (2004), *reprinted in* Haw. Sess. Laws 1073.

[11] STILLWATER ASSOCIATES, STUDY OF FUEL PRICES AND LEGISLATIVE INITIATIVES FOR THE STATE OF HAWAII 89 (2003), *available at* http://www.hawaii.gov/dbedt/ert/act77/stillwaterreport.pdf (prepared for the Hawai'i Department of Business Economic, Development, and Tourism, Aug. 5, 2003) (pursuant to Act of 2002, No. 77, § 1, 21st Leg., Reg. Sess. (2002)) (*reprinted in* Haw. Sess. Laws 230) (analyzing Hawai'i's gasoline market in general, and the potential effects of imposing a retail gasoline price cap pursuant to the above cited Act) [hereinafter Stillwater Study]. When compared to the price fluctuations occurring across the United States, Hawai'i's gasoline prices are very stable. For example, gasoline prices are 50% more volatile than Hawai'i's gasoline prices. *Id.*

[12] *Id.* at 89 fig.6.1.

[13] *Id.* at 56. The term "liquidity" is defined as "the relative ease with which buyers and sellers are able to conduct business." *Id.* at 78. Generally, there is a direct correlation between liquidity and transparency in the wholesale gasoline market. *See id.* at 55-56. The more liquid a market is, the more transparent its pricing behavior. For example, in markets that are saturated with liquidity (such as New York, Rotterdam, and Singapore), buyers and sellers compete with each other to such an extent that supply and demand patterns in these markets are in constant flux. *Id.* at 56. These supply and demand fluctuations create, in turn, fluctuations in the wholesale price of gasoline. In markets that are not as saturated with liquidity (such as Los Angeles and San Francisco), these markets tend to be sufficiently liquid enough for buyers and sellers to discover the daily price level corresponding to the current and actual supply and demand levels. *Id.* Hawai'i's wholesale gasoline market is in stark contrast to these liquid wholesale markets to the extent that the total consumption of gasoline in Hawai'i is inadequate to be actively traded on a daily basis. *See id.* at 78.

[14] Sean Hao, *Gas Price Trends Skip Hawai'i*, HONOLULU ADVERTISER, May 16, 2004, at F1.

[15] Stillwater Study, *supra* note 11, at 88 tbl.6.1.

During this five-year period, motorists in Honolulu and in Wailuku, Mau'i paid, on average, $1.69 and $1.91 respectively for a gallon of regular unleaded gasoline.[16] In comparison, motorists in San Francisco and Los Angeles[17] paid, on average, $1.70 and $1.47 per gallon, respectively.[18] This comparatively higher cost is attributable, in part, to the oligopolistic nature of, or the lack of competition within, Hawai'i's wholesale gasoline market.[19]

Due to the lack of competition at the wholesale level, Hawai'i's legislature perceived a need to interpose on the wholesale gasoline market's pricing behavior. Accordingly, Hawai'i's legislature, through the 2004 amendment ("Act 242") to Hawai'i Revised Statutes Section 486H-13 ("Hawai'i's gasoline price cap law"), purported "to enhance the consumer welfare by fostering the opportunity for prices that reflect and correlate with competitive market conditions."[20] In furtherance thereof, Hawai'i's gasoline price cap law mandates capping Hawai'i's wholesale gasoline price to the average regular unleaded gasoline price of three interstate markets.[21] At first glance, Hawai'i's gasoline price cap law appears to be a practical and efficient solution to oligopoly price behavior. There exist, however, several legal and economic problems inherent within Hawai'i's regulatory price cap, and

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[16] *Id.*

[17] *Id.* at 89 fig.6.1. San Francisco and Los Angeles appear to be the only cities that rival Hawai'i's cities for the dubious distinction of having the most expensive gallon of gasoline in the nation at any point in time between the years 1997 and 2002. *See id.*

[18] *Id.* at 88 tbl.6.1. According to the Stillwater Study, gasoline prices are comparatively higher in Hawai'i because of the following reasons: (1) higher taxes; (2) higher cost of living; (3) higher cost of doing business; (4) exercise of market power; (5) higher intrinsic cost refining operations; and (6) higher internal distribution costs. *Id.* at 89.

[19] *Id.* at 1; *see* Chevron USA, Inc. v. Cayetano, 198 F. Supp. 2d 1182, 1184 (D. Haw. 2002), *aff'd sub nom.* Chevron USA, Inc. v. Bronster, 363 F.3d 846 (9th Cir. 2004), *cert. granted sub nom.* Chevron v. Lingle, ___ U.S. ___, 125 S. Ct. 314 (2004).

[20] Act of 2004, No. 242, § 1, 23rd Leg., Reg. Sess. (2004), *reprinted in* Haw. Sess. Laws 1073. When enacted in 2002, the effective date of Hawai'i Revised Statutes Section 486H-13 (2002), was purposefully delayed for two years to allow for the completion of the Stillwater Study. Sean Hao, *Gas Price Cap May Be Delayed*, HONOLULU ADVERTISER, Mar. 20, 2004, at C1. Prior to the passage of Act 242, Hawai'i Revised Statutes section 486H-13 placed a cap on Hawai'i's wholesale gasoline price based on the average spot daily price for regular unleaded gasoline in the Los Angeles, San Francisco and Pacific Northwest markets. Act of 2002, No. 77, § 1, 21st Leg., Reg. Sess. (2002), *reprinted in* Haw. Sess. Laws 230 (codified at HAW. REV. STAT. § 486H-10.4 (2005)).

[21] Act of 2004, No. 242, § 1, 23rd Leg., Reg. Sess. (2004), *reprinted in* Haw. Sess. Laws 1073. The primary differences (for the purposes of this paper) between Hawai'i Revised Statutes Section 486H-13 and Act 242 is that Act 242 repeals Hawai'i Revised Statutes Section 486H-13's price cap on retail gasoline prices, extends the maximum pre-tax wholesale price caps to the mid-grade and premium grade gasoline, and changes the benchmark for the wholesale prices to that of the average spot daily price for regular unleaded gasoline in the New York Harbor, the United States Gulf Coast, and Los Angeles markets. *See id.*

regulatory price caps in general. As such, this paper focuses on the resolution of two general issues: (1) whether Hawai'i's gasoline price cap law is constitutional; and (2) whether Hawai'i's gasoline price cap law represents sound economic policy. Utilizing economic theory as a foundation, this paper proposes that Hawai'i's gasoline price cap law is indifferent to history's regulatory missteps and, as a result, will ultimately cause economic and practical disorder even if it does instill "prices that reflect and correlate with competitive market conditions."[22] Hawai'i's gasoline price cap law is also unconstitutional because it violates the Commerce Clause of the United States Constitution.

Part II discusses the development of Hawai'i's gasoline market in the context of the economic principles of demand and supply. In addition, this Part discusses the State of Hawai'i's historical failures in effectuating legal restrictions against the petroleum industry. Part III critically analyzes the constitutionality of Act 242 under the Due Process, Takings, and Commerce Clauses of the United States Constitution. In light of the seeming lack of precedent guiding a Takings analysis of a regulatory price cap, this Part proposes that because a price cap involves the same economic risks as a rate-of-return regulation, a price cap should be adjudged under the confiscatory test. This paper, however, primarily focuses on whether a price cap, or Hawai'i's gasoline price cap law in particular, is sound economic policy. With the purpose of providing a framework for the policy analysis, Part IV discusses what Act 242 economically attempts to accomplish—the imposition of competitive prices into an oligopolistic market. This Part also highlights the difficulties of obtaining legal relief from an oligopolist's tendency to set prices at a level higher than what is normally experienced within a competitive market ("supracompetitive pricing behavior"[23]). Part V provides an overview of the regulatory means chosen by the State of Hawai'i. More significantly, this Part demonstrates that historical application of a price cap has produced undesirable economic consequences. Part VI discusses a few reasonable alternatives to Hawai'i's gasoline price cap law. In particular, this Part proposes that in lieu of a price cap, the legislature should lower state and local taxes on retail gasoline and/or impose an excess profits tax. As a matter of history, the federal government has, on two occasions, imposed an excess profits tax. Both occasions in which the federal government has enforced an excess profits tax, however, were in times of war. Whether a state may legally implement the same during peacetime is beyond the scope of this paper. Rather, this Part highlights what an excess profits tax is, how it has been employed

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[22] *Id.*

[23] *E.g.*, Andrew M. Rosenfield, *The Use of Economic Analysis in Antitrust Litigation and Counseling*, 1986 COLUM. BUS. L. REV. 49, 55 (1986).

throughout history, and the economic drawbacks observed during its implementation. Finally, Part VII concludes with a brief summary expressing the need for a repeal of Hawai'i's gasoline price cap law.

II. THE ECONOMIC AND LEGAL FRAMEWORK OF HAWAI'I'S GASOLINE MARKET

> [T]here is probably not a single industry nor more than an insignificant number of persons in Hawai[']i whose operations, life and livelihood are not connected in some way with, or affected by, the use of gasoline fuel and . . . other petroleum products . . . and perforce therefore, the cost thereof.[24]

Since 1962, the State of Hawai'i has had a direct influence in shaping the economic landscape of its gasoline market.[25] Through the State's paternal influence, several economic differences and similarities arose between Hawai'i's gasoline market and the general market within the rest of the United States. This economic uniqueness manifests itself, in part, through Hawai'i's island topography and geographical location, which is in the middle of the Pacific Ocean.[26] This uniqueness, however, has adversely impacted Hawai'i's motorists to the extent that Hawai'i's motorists are subject to some of the highest gasoline prices in the nation, and do not benefit from the frequent gasoline price drops experienced throughout the mainland United States.[27] In light of these adverse impacts, the State of Hawai'i has attempted, albeit unsuccessfully, to effectuate legal and regulatory restraints against Hawai'i's oil companies.[28] The culmination of these efforts resulted in the enactment of Hawai'i's gasoline price cap law.

A. The Economics of Hawai'i's Gasoline Market

The general correlation between demand and price appears simple–demand for a product increases as its price falls.[29] The economic dynamics of the general gasoline market, however, presents an exception to this general rule. This is due to the fact that demand in the general gasoline market is inelastic

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[24] Hawai'i v. Standard Oil Co. of California, 301 F. Supp. 982, 987 (D. Haw. 1969), *rev'd*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972).

[25] *See* Stillwater Study, *supra* note 11, at 77 ("The state government of Hawai[']i has had a direct role in shaping the [Hawai'i] petroleum industry for nearly half a century.").

[26] *See infra* Part II.A.

[27] *See supra* Part I.

[28] *See infra* Part II.B.1-3.

[29] *E.g.*, Walter Adams & James W. Brock, *Antitrust, Ideology, and the Arabesques of Economic Theory*, 66 U. COLO. L. REV. 257, 294 & n.181 (1995). This economic principle has withstood the test of time to the extent that "nobody has ever successfully rebutted" it. *Id.*

—in other words, significant changes in price result in small changes in demand.[30] Hawai'i is no exception.

Other than a lagging percentage growth in demand,[31] Hawai'i's seasonal demand for gasoline is the same as that of the rest of the United States (i.e. demand peaks in the summer months and weakens in the winter months).[32] Because Hawai'i's seasonal demand is parallel to that of the rest of the nation, it would seem reasonable to expect that so too would Hawai'i's gasoline prices.[33] This, however, does not occur. Rather than mirror the seasonal pricing trend on the mainland, Hawai'i's seasonal prices have remained nearly constant throughout the year.[34] This unchanging price is consistent with not only the lack of liquidity and transparency in Hawai'i's wholesale gasoline market,[35] but also its supply characteristics.

The supply of Hawai'i's gasoline originates within the wholesale market. Transactions occurring within the wholesale market generally occur between Hawai'i's refiners and non-refining marketers.[36] Only two refiners, ChevronTexaco and Tesoro, serve the Hawai'i market.[37] Accordingly, ChevronTexaco and Tesoro supply the non-refining marketers, consisting of such brands as Aloha, Shell, ConocoPhillips (76 brand), and the BC Oil stations that formerly operated under the ARCO brand.[38] In addition, Tesoro supplies most of the military's and government's needs.[39] In light of the above, it logically follows that the wholesale price of gasoline represents the price that is charged by the refiners to the several non-refining marketers. Once the non-refining marketers purchase gasoline from the refiners, the non-

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[30] Stillwater Study, *supra* note 11, at 22.

[31] *See id.* at 20 tbl.1.7. Hawai'i's growth in demand for gasoline has and still does lag behind that of the national average. *Id.* Projected forecasts of Hawai'i's future demand growth (1.4% per year) also lags behind that of the rest of the United States (2.1% per year). *Id.* Experts cite to the lack of strong state economic growth, stable population growth within the state, and little potential for urban sprawl as the culprits for the apparent lag in the growth of Hawai'i's demand. *Id.*

[32] *Id.* at 21 fig.1.7.

[33] *See id.* at 97 fig.6.10. Typically, seasonal gasoline prices in California peak in the months of April and May. *Id.* Thereafter, gasoline prices steadily decline until it reaches its nadir in the month of February. *Id.*

[34] *See id.* at 96 fig.6.9.

[35] *See supra* note 13.

[36] Stillwater Study, *supra* note 11, at 55.

[37] *Id.*

[38] *Id.* Hawai'i's refiners also supply independent distributors known as jobbers with small volumes of sales. *Id.* at 57. Jobbers primarily use their purchases to supply their own truck fleets. *Id.*

[39] *Id.* at 55.

refining marketers sell the purchased gasoline through Hawai'i's retail gasoline stations to Hawai'i's motorists.[40]

The ChevronTexaco refinery commenced operations in 1962, and has a current refining capacity of 55,000 barrels per day ("bpd").[41] With the purpose of introducing competition into Hawai'i's wholesale gasoline market, a second refinery was built in 1970, with assistance from the State of Hawai'i.[42] Today, this second refinery is owned by Tesoro and has a current refining capacity of 95,000 bpd.[43] Unfortunately, the State of Hawai'i's goal of introducing competition through the second refinery ultimately backfired. Instead of introducing competition into the marketplace, the State of Hawai'i unintentionally introduced an oligopoly.[44]

From an economic standpoint, price generally rises in response to a shortage of supply in the market. This economic principle is most apparent in the supply disruptions of California's gasoline market. California's supply disruptions are attributable to the state's mandate of producing cleaner burning gasoline, which was enacted pursuant to the federal Clean Air Act standards.[45] A gasoline supply disruption in California occurs when one or more of the six California refiners are temporarily shutdown.[46] Because of the state mandate, imported gasoline cannot be immediately sold to consumers to alleviate the unsatisfied demand stemming from a temporary shutdown.[47] In 1999, California experienced perhaps its worst supply disruption when one to

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[40] *Id.* at 58-59. Hawai'i's retail market consists of company-operated stations, lessee-dealer stations, and independently owned retail stations. Chevron USA, Inc. v. Cayetano, 198 F. Supp. 2d 1182, 1185 (D. Haw. 2002), *aff'd sub nom.* Chevron USA, Inc. v. Bronster, 363 F.3d 846 (9th Cir. 2004), *cert. granted sub nom.* Chevron v. Lingle, ___ U.S. ___, 125 S. Ct. 314 (2004).

[41] Stillwater Study, *supra* note 11, at 6. A single barrel of crude oil typically yields such petroleum products as gasoline, diesel, jet fuel, and residual fuels. *Id.* at 9. Hawai'i is no different. What separates Hawai'i's supply characteristics from the rest of the nation is the product yield a single barrel of crude oil produces. Of the forty-two gallons of crude oil a single barrel contains, Hawai'i produces 11.7 gallons (27% of a barrel of crude) of residual fuel. *Id.* Residual fuel is considered to be less valuable than gasoline. *See id.* The mainland, however, can minimize production of the less valuable residual fuels to less than two gallons (4%) per barrel because of investments in coking and FCC capacity. *Id.* In addition, each barrel of crude around the United States yields 44% gasoline, which is the most valuable product produced from a barrel of crude, while Hawai'i yields only 19%. *Id.*

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

[43] *Id.* at 6.

[44] *See infra* Part IV.A-B (contrasting perfect competition from the oligopoly market model).

[45] Navid Soleymani, Note, *Legislature Takes Aim at California's Higher Gas Prices: Misguided Measures to Increase Competition in the California Retail Gasoline Market*, 74 S. CAL. L. REV. 1395, 1400 (2001).

[46] *Id.* at 1400-01.

[47] *Id.*

four refiners were temporarily shutdown throughout the entire year.[48] The worst period of the year came in the month of March when four of the six refiners were temporarily shutdown.[49] As a result of this severe supply disruption, the wholesale gasoline price in Los Angeles increased over two hundred percent in fifteen days during March of 1999.[50]

As evidenced by California's supply disruptions, the price of gasoline increases as its supply decreases. Unlike the fragile nature of California's gasoline supply, Hawai'i's in-state supply of gasoline is closely balanced with its demand for several reasons.[51] First, Hawai'i's refiners store between seven to ten days worth of gasoline in-state.[52] Second, Hawai'i's refiners operate at only 90% to 95% maximum operating capacity.[53] Comparatively, the refineries supplying the rest of the United States are unable to keep up with demand.[54] As a result, the rest of the United States must import additional supplies of crude oil to increase supply to such an extent that demand is satisfied.[55] Third, Hawai'i has as much as twenty days worth of supply en route via tanker ships.[56] Finally, Hawai'i does not require unique fuel specifications like California and, as a result, can import additional needs from anywhere throughout the world.[57] Because of this balanced situation, Hawai'i is well insulated from price volatility resulting from supply shortages.[58] Even though Hawai'i's gasoline prices have remained relatively stable throughout any given year, prices have stabilized at a higher than average level when compared to that of the rest of the nation.[59] From a legal perspective, the State of Hawai'i has continuously struggled with solving its in-state puzzle of high gasoline prices.

B. Hawai'i's Legal Struggles In Controlling Gasoline Prices

For the past thirty-five years, the State of Hawai'i has attempted to effectuate legal and regulatory restrictions against the oil companies in order to lower retail gasoline prices. These legal and legislative measures included

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[48] Stillwater Study, *supra* note 11, at 94 fig.6.6.
[49] *Id.*
[50] *See id.* at 95 fig.6.7.
[51] *Id.* at 6.
[52] *Id.* at 17.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *See id.*
[59] *See supra* Part I.

Hawai'i v. Standard Oil Co. of California,[60] Section 486H-10.4 of the Hawai'i Revised Statutes ("the divorcement statute"),[61] and Section 486H-13 of the Hawai'i Revised Statutes,[62] commonly referred to as "Hawai'i's gasoline price cap law."

1. Hawai'i v. Standard Oil Co. of California

In 1969, the State of Hawai'i sued Standard Oil Company of California, Union Oil Company of California, Shell Oil Company, and Chevron Asphalt Company under the Sherman Act,[63] alleging "bid rigging, price fixing, market monopolization, and other acts in restraint of trade."[64] The defendants' motion to dismiss, however, presented the issue of whether an allegation of an injury to a state's economy is sufficient to constitute "'business or property'"[65] under Section 4 of the Clayton Act. More specifically, the State of Hawai'i alleged that it could "bring[] this action by virtue of its duty to protect the general welfare of the State and its citizens."[66] The State of Hawai'i further alleged that protecting its welfare as well as the welfare of its citizens was warranted because the defendants' actions "injured and adversely affected the economy and prosperity of the State of Hawai[']i."[67] The U.S. District Court for the District of Hawai'i observed that in 1969, "there [were] almost 300,000 motor vehicles operating in [Hawai'i] with approximately 800,000

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[60] 301 F. Supp. 982 (D. Haw. 1969), *rev'd*, 431 F.2d 1282 (9th Cir. 1970), *aff'd*, 405 U.S. 251 (1972).

[61] HAW. REV. STAT. § 486H-10.4 (1997), *amended by* Act of 2002, No. 77, § 1, 21st Leg., Reg. Sess. (2002), *reprinted in* Haw. Sess. Laws 230.

[62] HAW. REV. STAT. § 486H-13 (2002), *amended by* Act of 2004, No. 242, 22nd Leg., Reg. Sess. (2004), *reprinted in* Haw. Sess. Laws 1073.

[63] 15 U.S.C. § 1 (2005).

[64] *Standard Oil*, 301 F. Supp. at 983.

[65] *Standard Oil*, 405 U.S. at 261 (citing 15 U.S.C. § 15 (2005)).

[66] *Standard Oil*, 301 F. Supp. at 983.

[67] *Id.* at 983-84 (internal quotations and citation omitted). These injuries, as alleged by the State of Hawai'i, included:

> (a) revenues of its citizens have been wrongfully extracted from the State of Hawai[']i;
> (b) taxes affecting the citizens and commercial entities have been increased to affect such losses of revenues and income;
> (c) opportunity in manufacturing, shipping and commerce have been restricted and curtailed;
> (d) the full and complete utilization of the natural wealth of the State has been prevented;
> (e) the high cost of manufacture in Hawai[']i has precluded goods made there from equal competitive access with those of other States to the national market;
> (f) measures taken by the State to promote the general progress and welfare of its people have been frustrated;
> (g) the Hawai[']i economy has been held in a state of arrested development.

Id. (quotations omitted).

inhabitants."[68] Hence, "in this State where the grass never ceases to grow, gasoline-powered lawn mowers are as thick as the proverbial fleas on a dog."[69] Briefly summarized, the court agreed with the State of Hawai'i and held that the State could seek damages for injuries incurred upon the "general welfare or economy of the state."[70]

The United States Supreme Court, however, affirmed the Ninth Circuit's reversal of the district court's holding because Section 4 of the Clayton Act "does not authorize recovery for economic injuries to the sovereign interests of a State."[71] Drawing upon a distinction between "the sovereign interests of a State"[72] and a state's "proprietary functions,"[73] the Court concluded that the words, business or property, as used in Section 4 of the Clayton Act referred to "commercial interests or enterprises."[74] Even though *Standard Oil* was decided in 1969, it remains good law today. As such, the State of Hawai'i is proscribed from bringing suit against the oil companies for injuries to the general welfare of its citizens under the antitrust laws. Rather, the State of Hawai'i can bring an antitrust lawsuit against the oil companies only if those companies adversely affect its proprietary, or commercial, interests.[75] In light of the Court's holding, it would appear that the State of Hawai'i's only recourse in protecting the welfare of its citizens is through the state's regulatory function.

2. The divorcement statute[76]

In pursuit of reducing gasoline prices for Hawai'i's motorists, and because of concern about the level of business concentration at the wholesale level, the state legislature enacted Section 486H-10.4 of the Hawai'i Revised Statutes in 1997 ("Act 257").[77] Act 257, which is commonly referred to as a "divorcement statute," provides "restrictions on company operated retail service stations and provide[s] certain protection for dealer operated retail service

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[68] *Id.* at 987.

[69] *Id.*

[70] *Id.*

[71] *Standard Oil*, 405 U.S. at 265.

[72] *Id.*

[73] *Id.*

[74] *Id.* at 264.

[75] *Id.*

[76] HAW. REV. STAT. § 486H-10.4 (1997), *amended by* Act of 2002, No. 77, § 1, 21st Leg., Reg. Sess. (2002), *reprinted in* Haw. Sess. Laws 230.

[77] Chevron USA, Inc. v. Cayetano, 198 F. Supp. 2d 1182, 1184 (D. Haw. 2002), *aff'd sub nom.* Chevron USA, Inc. v. Bronster, 363 F.3d 846 (9th Cir. 2004), *cert. granted sub nom.* Chevron v. Lingle, ___ U.S. ___, 125 S. Ct. 314 (2004).

stations."[78] While a divorcement statute can take several forms, a typical divorcement statute prohibits an oil company from vertically integrating into the retail gasoline market.[79] Hawai'i's version of retail divorcement, however, merely prohibits a company-operated station from operating within one-eighth of a mile of an independent dealer operated station in urban areas, and one-quarter of a mile in all other areas.[80] More significantly, Act 257 establishes a rent cap, or the maximum amount of rent an oil company may charge to an independent dealer who leases a gasoline station from the oil company.[81]

In 1997, Chevron U.S.A., Inc. ("Chevron") challenged the constitutionality of the rent cap imposed by Act 257.[82] Specifically, Chevron alleged that Act 257 violated the Takings Clause of the Fifth and Fourteenth Amendments of the United States Constitution,[83] because Act 257 prevented the implementation of Chevron's new nationwide rental program that went into effect on January 1, 1997.[84] On remand, the district court held that Act 257 did not substantially advance Hawai'i's state interest of lowering retail gasoline prices for the following reasons: (1) Hawai'i's refiners "will raise wholesale gasoline prices to offset the reduction in rental income, causing dealers to raise retail gasoline prices in response";[85] (2) retail prices will increase because lessee-dealers will be forced out of the market that is otherwise "uneconomical";[86] and (3) any savings attributable to a decrease in rent would not translate to lower retail prices because "dealers will pocket the savings for themselves."[87]

On appeal to the Ninth Circuit, the State of Hawai'i alleged, among other things, that Act 257 substantially advances a legitimate state interest because it maintains the existence of independent dealer gasoline stations by "preventing oil companies from raising rents to levels that would drive lessee-dealers out of business."[88] The Ninth Circuit, however, was not persuaded by the

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[78] SEN. CONF. COMM. REP. NO. 38, 19th Leg., Reg. Sess. (1997), *reprinted in* 1997 HAW. SEN. J. 864, 864.

[79] Soleymani, *supra* note 45, at 1402. Vertical integration occurs when an oil company, which originally operated at the wholesale level, commences operations at the retail level as well. *See id.* at 1404.

[80] 1997 HAW. SEN. J. at 865.

[81] *Cayetano*, 198 F. Supp. 2d at 1184. Hawai'i's rent cap formula is based on 15% of the dealer's gross margin on actual gasoline sales. *Id.* (citation omitted).

[82] Chevron USA, Inc. v. Cayetano, 57 F. Supp. 2d 1003, 1005 (D. Haw. 1998), *vacated*, 224 F.3d 1030 (9th Cir. 2000), *cert. denied*, 532 U.S. 942 (2001), *aff'd on reh'g*, 198 F. Supp. 2d 1182 (D. Haw. 2002), *aff'd sub nom.* Chevron USA, Inc. v. Bronster, 363 F.3d 846 (9th Cir. 2004), *cert. granted sub nom.* Chevron v. Lingle, ___ U.S. ___, 125 S. Ct. 314 (2004).

[83] *Id.*

[84] *Cayetano*, 198 F. Supp. 2d at 1185-86.

[85] *Id.* at 1192.

[86] *Id.*

[87] *Id.* at 1189.

[88] *Bronster*, 363 F.3d at 855.

State of Hawai'i's assertion because Act 257's legislative findings and declarations stated otherwise.[89] To the extent that Act 257 itself did not support Hawai'i's argument, the Ninth Circuit affirmed the district court's holding because all the evidence did not support the contention that Act 257 "will . . . substantially advance a reduction in the retail price of gasoline."[90]

3. Act 77

In conjunction with *Chevron*, the State of Hawai'i commenced an antitrust lawsuit against the oil companies alleging that these companies conspired to maintain supracompetitive prices.[91] During the antitrust case, the State of Hawai'i found that "the high cost of doing business in Hawai'i has not been and is not the cause of [Hawai'i's] high gasoline prices."[92] Rather, the cause of Hawai'i's high gasoline prices stems from, among other things, the fact that "[t]he major oil companies have been realizing profit margins far in excess of the margins realized in other oligopolistic and equally concentrated markets."[93] The oil companies' overall profit margin, however, is not excessive and is in-line with historical gasoline profits.[94] This is due to the fact that Hawai'i's refiners also sell other lower margin petroleum products such as jet fuel and fuel oil.[95] Hence, high gasoline profit margins are meant to serve as a buffer for the lower margin products.[96]

Because of the legislature's findings in the antitrust lawsuit and of the district court's holding in *Cayetano*, Hawai'i's legislature decided to enact Hawai'i Revised Statutes Section 486H-13 through Act 77, which established wholesale and retail gasoline price caps.[97] While Act 77 also amends the divorcement statute, Act 77 merely makes technical rather than substantive adjustments to the rent cap provision within the statute.[98] In light of the district court's holding in *Chevron*,[99] the legislature's motivation for not amending or repealing the rent cap provision becomes apparent—both a rent

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[89] *See id.* at 855-56.

[90] *Id.* at 857. The constitutionality of the rent cap provision within Hawai'i's divorcement statute is now before the United States. *See* Chevron v. Lingle, ___ U.S. ___, 125 S. Ct. 314 (2004).

[91] *Cayetano*, 198 F. Supp. 2d at 1183.

[92] Act of 2002, No. 77, § 1, 21st Leg., Reg. Sess. (2002), *reprinted in* Haw. Sess. Laws 230.

[93] *Id.*

[94] Stillwater Study, *supra* note 11, at 1.

[95] *Id.*; *see supra* note 41.

[96] Stillwater Study, *supra* note 11, at 1.

[97] Act of 2002, No. 77, §§ 1-2, 21st Leg., Reg. Sess. (2002), *reprinted in* Haw. Sess. Laws 230.

[98] *See id.* § 2.

[99] *See supra* Part II.B.2.

cap and a wholesale gasoline price cap could have the combined effect of substantially advancing Hawai'i's state interest of lowering retail gasoline prices. The combined effect of both statutes, however, will be nullified because Hawai'i's gasoline price cap law is unconstitutional.

III. THE CONSTITUTIONALITY OF ACT 242

In part because of the district court's finding that the retail gasoline market is competitive,[100] the legislature decided to amend Hawai'i's gasoline price cap law by capping only wholesale gasoline prices through Act 242.[101] Price caps have generally been challenged under the Due Process and Takings Clauses of the United States Constitution.[102] The Commerce Clause is also implicated, however, when a state statute attempts to control conduct beyond the state's boundaries.[103]

A. The Due Process Clause[104]

The wisdom, need, or appropriateness of economic legislation is not within the realm of judicial concern under the Fourteenth Amendment of the United States Constitution.[105] In furtherance of this Due Process principle, courts review an economic legislation through a broad deferential lens because, ultimately, it is the legislature rather than the courts that are better suited to make economic policy.[106] The Court's deferential legal standard was employed in *Pennell v. City of San Jose*.[107]

1. The legal framework

In *Pennell*, the rent control statute at issue permitted a hearing officer to consider, among other things, the hardship to a tenant when determining whether to approve a rent increase proposed by a landlord.[108] Pennell and a

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[100] *See* Chevron USA, Inc. v. Cayetano, 198 F. Supp. 2d 1182, 1184, *aff'd sub nom.* Chevron USA, Inc. v. Bronster, 363 F.3d 846 (9th Cir. 2004), *cert. granted sub nom.* Chevron v. Lingle, ___ U.S. ___, 125 S. Ct. 314 (2004).

[101] *See* Act of 2004, No. 242, § 1, 23rd Leg., Reg. Sess. (2004), *reprinted in* Haw. Sess. Laws 1073.

[102] *See, e.g.*, Pennell v. City of San Jose, 485 U.S. 1 (1988).

[103] *See* Healy v. Beer Inst., 491 U.S. 324, 336-37 (1989).

[104] U.S. CONST. amend. XIV, § 1.

[105] Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).

[106] Tenoco Oil Co. v. Dep't of Consumer Affairs, 876 F.2d 1013, 1021 (1st Cir. 1989) (citing *Ferguson*, 372 U.S. at 730).

[107] 485 U.S. 1.

[108] *Id.* at 4.

homeowners association sued the City of San Jose seeking a declaration that the rent control statute was unconstitutional under the Due Process and Takings Clauses of the United States Constitution.[109] The Court observed that even though a rent control statute was at issue in the case at bar, the test as applied under the Due Process Clause "is well established: 'Price control is unconstitutional . . . if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt.'"[110]

The Court observed that pursuant to the Due Process Clause, a "[g]overnment may intervene in the marketplace to regulate rates or prices that are artificially inflated as a result of the existence of a monopoly or near monopoly."[111] Although acknowledging the above observation, the plaintiffs alleged that the statute "is arbitrary, discriminatory, or demonstrably irrelevant."[112] The Court, however, quickly dismissed the plaintiffs' assertion because it has "long recognized that a legitimate and rational goal of price or rate regulation is the protection of consumer welfare."[113] In addition, the Court held that the statute itself was rational because it "attempt[ed] to accommodate the conflicting interests of protecting tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed a fair return on their investment."[114] A rent or price control that is subject to a due process analysis, therefore, requires the following: (1) a rational relationship between the statute itself and a legitimate and rational goal, which includes the protection of consumer welfare;[115] and (2) the impact of the statute must be reasonable to those adversely affected by it.[116] The level of scrutiny under the reasonable impact prong, however, is very low. An impact will be reasonable if it is neither arbitrary nor discriminatory to those adversely affected by it.[117]

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[109] *Id.* The Court's Takings Clause analysis will be discussed later. *See infra* Part III.B.1.

[110] *Pennell*, 485 U.S. at 11 (quoting Permian Basin Area Rate Cases, 390 U.S. 747, 769-70 (1968); Nebbia v. New York, 291 U.S. 502, 539 (1934)).

[111] *Id.* (citing FCC v. Florida Power Corp., 480 U.S. 243, 250-54 (1987)).

[112] *Id.* (internal quotations and citations omitted).

[113] *Id.* at 13.

[114] *Id.* (citing Bowles v. Willingham, 321 U.S. 503, 517 (1944)).

[115] *See Nebbia*, 291 U.S. at 537.

[116] *See Pennell*, 485 U.S. at 13.

[117] *See Nebbia*, 291 U.S. at 537; *see also Pennell*, 485 U.S at 11. In *Nebbia*, the Court stated that:

> So far as the requirement of due process is concerned, . . . a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, *and are neither arbitrary nor discriminatory*, the requirements of due process are satisfied . . . .

Nebbia, 291 U.S. at 537 (emphasis added).

The First,[118] Ninth,[119] and Eleventh Circuits[120] have followed and applied the Court's due process test in *Pennell*. In the Ninth Circuit's opinion of *Schnuck v. City of Santa Monica*,[121] voters of the City of Santa Monica adopted by initiative a citywide rent control statute that controlled some rental units but not others.[122] The system also had in place an eviction clause in which a landlord was authorized to evict a tenant so that the landlord may occupy the controlled unit herself.[123] The plaintiff, Schnuck, asserted that the rent control system was unconstitutional under, among other things, the Due Process and Takings Clauses.[124] Under the first prong of the test noted above, the court held that the City "had a legitimate interest in protecting tenants from . . . unreasonable rent increases."[125] Under the reasonable impact prong, however, the court merely noted that the *Pennell* Court's holding "may be said of the Rent Control Law here."[126]

Despite the lack of a reasonable impact analysis, it is apparent that the state legislature that enacted the rent control statute in *Schnuck* made a rational effort in considering the competing interests of the landlord and the tenant in such a way as to be neither arbitrary nor unreasonable. On one hand, the rent control benefited the tenant by guarding against "unreasonable rent increases."[127] On the other hand, the landlord was protected by the eviction clause. As was the case in *Schnuck*, if the landlord occupied an uncontrolled unit, the landlord could evict a tenant of a controlled unit with the purpose of occupation of that unit while, at the same time, leaving the uncontrolled unit available for rent.[128] The rent control statute in *Schnuck* was, therefore, neither arbitrary nor discriminatory because the eviction clause had the effect of granting a landlord the opportunity to receive greater income under the rent control law.[129]

2. Application to Act 242

In light of the foregoing Due Process framework, even though Act 242 appears to be both contradictory and discriminatory, it is likely to be held

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[118] *See, e.g.*, Gilbert v. Cambridge, 932 F.2d 51 (1st Cir. 1991).
[119] *See, e.g.*, Schnuck v. City of Santa Monica, 935 F.2d 171 (9th Cir. 1991).
[120] *See, e.g.*, Eide v. Sarasota County, 908 F.2d 716 (11th Cir. 1990).
[121] 935 F.2d 171.
[122] *Id.* at 172.
[123] *Id.*
[124] *Id.* at 173.
[125] *Id.* at 175.
[126] *Id.* at 174.
[127] *Id.* at 175.
[128] *Id.* at 172-73.
[129] *See id.*

constitutional under the Due Process Clause. Act 242's "objective . . . is to enhance the consumer welfare by fostering the opportunity for prices that reflect and correlate with competitive market conditions."[130] Through this objective two possible interpretations arise: Hawai'i's gasoline price cap law enhances consumer welfare through either lower prices and/or increased price volatility, much like that experienced on the mainland United States. When reading Act 242 with Act 77, however, it becomes apparent that the legislature's primary objective is to bring about lower gasoline prices.[131] Despite the legislative intent behind Hawai'i's gasoline price cap law, the legislature paradoxically recognized that the wholesale price cap formula under Act 242 might actually cause retail gasoline prices to be set at a higher level than it would have been without the cap.[132] This contradiction of increasing consumer welfare while not guaranteeing lower gasoline prices was also inherent in the price cap formula under Act 77.[133]

It is therefore arguable that Act 242 may in fact decrease consumer welfare. Nevertheless, the Due Process Clause gives broad deference to a state legislature in enacting economic legislation.[134] It merely requires a rational relationship between the statute itself and a legitimate and rational goal,[135] which includes the protection of consumer welfare.[136] While the possibility of higher gasoline prices remains under Act 242, it is likewise possible that gasoline prices may, in fact, be lower as a result.

Pursuant to Act 242's contradictory objective, it would appear that Act 242's impact on Hawai'i's refiners is also reasonable because, ultimately, the refiners would benefit from the price cap during certain periods of time. Shrouded beneath the veil of good intentions, however, are a lurking threat

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[130] Act of 2004, No. 242, § 1, 23rd Leg., Reg. Sess. (2004), *reprinted in* Haw. Sess. Laws 1073.

[131] *Compare* Act of 2002, No. 77, § 1, 21st Leg., Reg. Sess. (2002), *reprinted in* Haw. Sess. Laws 230, *with* H.R. CONF. COMM. REP. NO. 158-04, 23rd Leg., Reg. Sess. (2004), *reprinted in* 2004 HAW. HOUSE J. 2076, 2076.

[132] *See* Act of 2004, No. 242, § 1, 23rd Leg., Reg. Sess. (2004), *reprinted in* Haw. Sess. Laws 1073.

> It should be clearly understood that the objective of this Act is not to guarantee lower gasoline prices. And in this regard, the legislature anticipates that, from time to time, there may indeed be situations where the actual pre-tax wholesale price of gasoline may be less than the maximum pre-tax wholesale prices of gasoline. This phenomenon should be expected, for nothing in this Act compels any manufacturer, wholesaler, or jobber to price up to the maximum pre-tax wholesale prices of gasoline.

Id.

[133] *See* Stillwater Study, *supra* note 11, at 2.

[134] *See* Nebbia v. New York, 291 U.S. 502, 537 (1934); Pennell v. City of San Jose, 485 U.S. 1, 11 (1988).

[135] *See Nebbia*, 291 U.S. at 537; *Pennell*, 485 U.S. at 11.

[136] *See Pennell*, 485 U.S. at 13.

and a possible discriminatory impact. For example, contained with Section 1 of Act 242 is a warning to the oil companies that if they set wholesale prices above what it would have been without the cap, Hawai'i's legislature will take affirmative steps to end the "impair[ment] of consumer welfare."[137] An example of one of the affirmative steps already taken by the legislature is embodied in Section 2 of Act 242. Within this section, the State of Hawai'i has granted the Attorney General power to investigate any gasoline supply shortages.[138] In furtherance of this mandate, the Attorney General "shall"[139] bring all appropriate legal actions against the oil companies.[140]

Act 242 also places an "adjustment factor"[141] on the mid and premium grades of gasoline of $0.05 and $0.09 per gallon, respectively.[142] Pursuant to this adjustment factor, it would initially appear that the State of Hawai'i is rationally considering the oil companies' interest of pricing other grades of gasoline at a higher level than regular unleaded gasoline. This consideration, however, may cross into the unconstitutional boundary of being arbitrary and discriminatory because it is not an adjustment factor, but rather a "maximum pre-tax wholesale price,"[143] or a price cap. The discriminatory overtone to this adjustment price cap becomes apparent within the legislature's findings wherein it stated that the mid-grade and premium gasoline price cap is intended "to guard against unreasonable increases in the wholesale price of these grades of gasoline."[144]

In light of the foregoing, Act 242 appears to be discriminatory as against the competing interests of Hawai'i's refiners. Even though Act 242 contains a veiled threat, however, nothing within Act 242 actually prevents the refiners from pricing their wholesale gasoline at the maximum allowable price pursuant to Act 242's formula. Pursuant to Act 242, Hawai'i's refiners are, in a sense, begrudgingly permitted to price its wholesale gasoline at a level above what it would have been without the price cap. In light of the very broad standard by which a court reviews an economic legislation under the

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[137] *See* Act of 2004, No. 242, § 1, 23rd Leg., Reg. Sess. (2004), *reprinted in* Haw. Sess. Laws 1073.

[138] *See id.* § 2. A supply shortage's effect on price was discussed before, and will be discussed further later. *See supra* Part II.A (discussing California's supply shortages); *see also infra* Part V.B (discussing the supply shortage that occurred during the federal price cap on natural gas).

[139] Act of 2004, No. 242, § 2, 23rd Leg., Reg. Sess. (2004), *reprinted in* Haw. Sess. Laws 1073.

[140] *See id.*

[141] *See id.* § 3(f)-(g).

[142] *See id.*

[143] *See id.* § 1.

[144] *See id.*

Due Process Clause,[145] it is likely that Act 242 will be found to have rationally considered the competing interests of Hawai'i's refiners.[146]

B. The Takings Clause[147]

The Takings Clause of the Fifth Amendment to the United States Constitution requires just compensation if private property is taken for a public use.[148] A regulatory price control is unique to takings jurisprudence to the extent that the inquiry does not involve a traditional regulatory[149] or physical[150] takings analysis. A regulatory price control also does not squarely fit into what has been characterized as an "economic taking."[151] As a matter of fact, neither the Supreme Court nor the federal circuits have ever reviewed a state enforced price cap in the sense that there exists a substantive standard that applies to

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[145] *See* Nebbia v. New York, 291 U.S. 502, 537 (1934); Pennell v. City of San Jose, 485 U.S. 1, 11 (1988).

[146] The legislature should be mindful, however, that Hawai'i's gasoline price cap law, in its present form, is on the constitutional threshold of becoming discriminatory. Should the legislature act upon its threat and, as a result, amend Act 242 in such a way that Hawai'i's gasoline price cap law becomes completely discriminatory, Hawai'i's gasoline price cap law would then become unconstitutional under the Due Process Clause. *See Nebbia*, 291 U.S. at 537.

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

[148] *See id.*

[149] *See, e.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978). As discussed earlier, the Court has held both a rent and price control statute to the same legal standard under the Due Process Clause. *See supra* Part III.A.1. In light of the Court's holding, some may assert that both should also be held to the same legal standard under the Takings Clause, which involves a regulatory takings analysis. *See* Chevron USA, Inc. v. Cayetano, 224 F.3d 1030, 1043 (9th Cir. 2000) (Fletcher, J., concurring), *cert. denied*, 532 U.S. 942 (2001), *aff'd on reh'g*, 198 F. Supp. 2d 1182 (D. Haw. 2002), *aff'd sub nom.* Chevron USA, Inc. v. Bronster, 363 F.3d 846 (9th Cir. 2004), *cert. granted sub nom.* Chevron v. Lingle, ___ U.S. ___, 125 S. Ct. 314 (2004). It should be noted, however, that determining which test applies to a rent control statute is beyond the scope of this paper. Rather, this paper discusses the standard under which the Court has traditionally analyzed a regulatory price control, which involves the "confiscatory" rather than the "substantially advances" test of a regulatory takings analysis. *See infra* Part III.B.1.

[150] *See, e.g.*, Yee v. City of Escondido, 503 U.S. 519 (1992); DAVID L. CALLIES, PRESERVING PARADISE 6 (1994) ("The Court [in *Yee*] decided under what circumstances such as rent control . . . government works a constitutionally protected deprivation of property of the physical taking variety . . . . The Court specifically declined to consider any regulatory taking ramifications." (emphasis omitted)).

[151] *See, e.g.*, Robert H. Freilich & Elizabeth A. Garvin, *Takings after Lucas: Growth Management, Planning, and Regulatory Implementation Will Work Better Than Before*, *in* AFTER LUCAS: LAND USE REGULATION AND THE TAKING OF PROPERTY WITHOUT COMPENSATION 59 (David L. Callies ed., 1993).

Act 242. This is not to say, however, that the issue has never been brought before the Supreme Court or the federal circuits. Indeed, the issue has been brought before the federal courts on a few occasions, but was summarily dismissed because the Takings claim was not yet "ripe."[152] To illustrate, upon review of a price control similar to that of a price cap, the First Circuit determined that the Takings Clause requires just compensation if a rate-of-return regulation imposes "confiscatory" rates.[153] The First Circuit based its holding on the Supreme Court's holding in *Duquesne Light Co. v. Barasch*,[154] which also involved a rate-of-return regulation rather than a regulatory price cap.[155] When the issue of a regulatory price cap was brought before the First Circuit, however, the case was dismissed on ripeness grounds.[156] Despite a seeming lack of precedent guiding a Takings analysis of a regulatory price cap, the economic impact of a rate-of-return regulation and a regulatory price cap is indistinguishable and, therefore, the confiscatory test should apply to both.

1. The confiscatory test applies to price caps

A rate-of-return regulation and a regulatory price cap are merely two regulatory methods by which to achieve the same end. By definition, a regulatory price cap is intended to produce lower prices for consumers through a specific form of regulatory price control.[157] Although discussed in more detail later,[158] the pro-competitive implication of a price cap is to induce a firm to engage in cost-minimizing behavior.[159] Furthermore, the purpose of a price cap is to transfer the cartel enforcement function of an oligopoly from the oligopolist to that of society.[160] It is through this economic transfer that the

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[152] *See, e.g.*, Pennell v. City of San Jose, 485 U.S. 1 (1988); Tenoco Oil Co. v. Dep't of Consumer Affairs, 876 F.2d 1013 (1st Cir. 1989). The Takings Clause's requirement of "ripeness" is discussed in detail later. *See infra* Part III.B.3.

[153] United States Tel. Ass'n v. Fed. Communications Comm'n, 188 F.3d 521, 528 (1st Cir. 1999).

[154] 488 U.S. 299 (1989).

[155] *Fed. Communications Comm'n*, 188 F.3d at 528 (citing *Barasch*, 488 U.S. at 307-08).

[156] *Tenoco Oil*, 876 F.2d at 1028-29.

[157] *See, e.g.*, Act of 2002, No. 77, § 1, 21st Leg., Reg. Sess. (2002), *reprinted in* Haw. Sess. Laws 230.

[158] *See infra* Part V.A.

[159] Ronald R. Braeutigam & John C. Panzar, *Effects of the Change From Rate-Of-Return to Price-Cap Regulation*, 83 AM. ECON. REV. 191, 193 (1993).

[160] *See* Li Way Lee, *A Theory of Just Regulation*, 70 AM. ECON. REV. 848, 848 (1980).

evil of an oligopoly is averted and, as a result, causes a redistribution of income for the benefit of consumers.[161]

By contrast, a rate-of-return regulation regulates the maximum amount of profit a firm may earn, which is based upon a percentage of its total invested capital.[162] Similarly, however, the imposition of a rate-of-return regulation is intended as an incentive for the firm to engage in cost-minimizing behavior.[163] More significantly, rather than directly regulate prices as a price cap does, a rate-of-return regulation is intended to lower prices by controlling a firm's profit-to-capital ratio.[164] A rate-of-return regulation is, therefore, a form of indirect price control, where a price cap is a direct form of price control. Both accordingly involve the same economic risks. Namely, in its zeal of seeking lower prices for the benefit of consumers, a legislature could become overzealous to such an extent that the price control formula under both a price cap and a rate-of-return regulation results in a monetary return to the company that would constitute a confiscatory level. As Justice Scalia observed in his concurring opinion in *Barasch*, "no single ratemaking methodology is mandated by the Constitution, which looks to the consequences a governmental authority produces rather than the techniques it employs."[165] Because a rate-of-return regulation is distinguishable from a price cap only in form, a price cap should be adjudged under the same standard as a rate-of-return regulation, which is the "confiscatory" test.

2. The confiscatory test

In *Barasch*, a Pennsylvania rate-of-return regulation fixed a utility's rates of electricity without regard for the utility's capital expenditures.[166] Because these costs were excluded, the utility companies sought a determination that the price control law was unconstitutional under the Takings Clause.[167]

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[161] *Cf.* Kahn, *supra* note 1, at 1. Although the cited authority states that "the evils of monopoly" include that of using "price . . . as an instrument for the redistribution of income," *id.*, the evil present in a monopoly is also present in an oligopoly. Namely, a characteristic common to both forms of concentrated markets is a firm's supracompetitive pricing behavior. *See infra* Part IV.B.

[162] Braeutigam & Panzar, *supra* note 159, at 192.

[163] *See* Harvey Averch & Leland L. Johnson, *Behavior of the Firm Under Regulatory Constraint*, 52 AM. ECON. REV. 1052, 1061 (1962).

[164] *See id.* at 1052.

[165] Duquesne Light Co. v. Barasch, 488 U.S. 299, 317 (1989) (Scalia, J., concurring) (agreeing with the majority's formulation of the confiscatory test, but adding that the "prudent investment" approach should also be utilized when assessing the consequences of a government action).

[166] *Id.* at 301.

[167] *Id.* at 305.

Relying upon a 1896 decision, the Court held that "the Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory."[168] The confiscatory test essentially requires a determination of whether the mandated rate affords a sufficient level of compensation for the regulated firm.[169] The Court, however, noted that determining what level of compensation constitutes a sufficient level "will always be an embarrassing question."[170]

Rather than define an appropriate level, the Court looked instead at the impact the statutory formula had on the utility companies.[171] If the statutory formula's impact were such that its application would be "unjust"[172] or "unreasonable,"[173] the formula would constitute an unconstitutional taking requiring just compensation.[174] This unjust or unreasonable level occurs when the statutory formula jeopardizes the financial integrity of the company, prevents a company from successfully maintaining its operations, from attracting future capital, or from compensating its investors for the risks assumed from their investment.[175] Because the confiscatory inquiry is extremely fact intensive, a determination of a confiscatory level is made on a case-by-case basis.[176] In *Barasch*, the Court observed that because the plaintiffs did not contend that the statutory formula left them with insufficient operating capital or impeded the utility companies' ability to raise capital in the future, the confiscatory test was not applied.[177] Rather, the Court held that because the regulation permitted amortization of certain costs (benefiting the utility), yet set a lower return on equity (benefiting consumers), the Pennsylvania regulation was "within the constitutional range of reasonableness."[178]

3. Application to Act 242

When applying the foregoing to Act 242, it is difficult to determine whether Act 242 will indeed set prices at confiscatory levels because it has yet to take

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[168] *Id.* at 307 (citing Covington & Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578, 597 (1896)).

[169] *Id.* at 308 ("If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation.").

[170] *Id.* (citing Smyth v. Ames, 169 U.S. 466, 546 (1898)).

[171] *Id.* at 310 (citing Fed. Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 (1944)).

[172] *Id.*

[173] *Id.*

[174] *See id.*

[175] *See Hope Natural Gas Co.*, 320 U.S. at 605; *see also Barasch*, 488 U.S. at 310.

[176] *See Hope Natural Gas Co.*, 320 U.S. at 605-19.

[177] *Barasch*, 488 U.S. at 310.

[178] *Id.* at 312.

effect.[179] A Takings Clause claim against Act 242 is, therefore, not yet ripe. It should be noted, however, that Act 242 itself, while mandating maximum wholesale gasoline prices, does not mandate minimum wholesale gasoline prices. Thus, there exists a distinct possibility that the wholesale price cap formula may, among other possibilities, jeopardize the financial integrity of Hawai'i's refiners.[180]

Assuming that Act 242 does in fact result in a confiscatory price level, a Hawai'i refiner must satisfy two ripeness requirements prior to commencing a Takings action. The first requirement that must be satisfied is that a government must reach "a final decision regarding the application of the regulation[] to the property at issue."[181] The second requirement requires a Hawai'i refiner to "have pursued compensation through state remedies unless doing so would be futile."[182] The rationale for this second requirement has its roots in the language of the Takings Clause itself: In order to seek just compensation under the Takings Clause, one must be denied it first.[183] As set forth in Act 242, the effective date of Hawai'i's gasoline price cap law has been extended to September 1, 2005.[184] A Hawai'i refiner would, therefore, be unable to satisfy the first ripeness requirement because a final decision has yet to be reached on Hawai'i's gasoline price cap law.[185] As to the second requirement, embedded within Act 242 is a section in which a refiner "may petition the [public utilities] commission to adjust the maximum pre-tax wholesale price of"[186] gasoline. Upon a petition, a refiner "bear[s] the burden of proof to establish by clear and convincing evidence the need for and the amount of any adjustment."[187] Pursuant to this section and the second ripeness requirement, should the price cap result in confiscatory price levels, a Hawai'i refiner must first exhaust its statutory remedy and be denied just compensation before commencing a Takings claim. An oil company, however, need not wait for prices to reach a confiscatory level before commencing a legal action against the State of Hawai'i. While a Takings analysis looks to the economic

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[179] Act 242's "effective date" has been extended to September 1, 2005. Act of 2004, No. 242, § 3(k), 23rd Leg., Reg. Sess. (2004), *reprinted in* Haw. Sess. Laws 1073.

[180] *See Barasch*, 488 U.S. at 316.

[181] Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985).

[182] Ventura Mobilehome Cmtys. Owners Ass'n v. City of San Buenaventura, 371 F.3d 1046, 1052 (9th Cir. 2004) (citations and quotations omitted).

[183] *Compare id.*, *with* U.S. CONST. amend. V.

[184] *See supra* note 179.

[185] *See Williamson County Reg'l Planning Comm'n*, 473 U.S. at 186.

[186] Act of 2004, No. 242, § 6(a), 23rd Leg., Reg. Sess. (2004), *reprinted in* Haw. Sess. Laws 1073.

[187] *Id.*

impact of the regulatory formula, a Commerce Clause analysis looks to the constitutionality of the formula itself.

C. The Commerce Clause

Entitled "Power of Congress to regulate commerce," the Commerce Clause of the United States Constitution gives Congress the power "[t]o regulate Commerce . . . among the several States."[188] While a state's action of tying the local price of gasoline to other state markets has not been reviewed by a federal court under the Commerce Clause to date, the Supreme Court has decided two cases under analogous circumstances, both of which originated from Justice Cardozo's 1935 opinion in *Baldwin v. G. A. F. Seelig, Inc.*[189]

1. The legal framework

In *Baldwin*, a New York statute set up a system of minimum milk prices to be paid by milk dealers and producers.[190] The defendant, G. A. F. Seelig, Inc., was a milk dealer in the City of New York who bought its milk from Vermont at prices lower than the minimum payable to producers in New York.[191] The Court affirmed the injunction that proscribed the enforcement of the statute because the statute "would neutralize the economic consequences of free trade among the states."[192] Accordingly, a state "has no power to project its legislation into [another state] by regulating the price to be paid in that state for [a product] acquired there."[193] In so holding, the Court observed that while a state may, through its police power, "exact adherence by an importer to fitting standards of sanitation," a state may not "establish a wage scale or a scale of prices for use in other states . . . unless the scale has been observed."[194] *Baldwin*'s holding and observation had a direct impact on the formulation of the law as it stands today.

In a 1986 decision penned by Justice Marshall, *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,[195] the New York statute at issue mandated that the wholesale price of liquor that a liquor distiller or producer charged within the state be no higher than the lowest price the distiller or

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[188] U.S. CONST. art. I, § 8, cl. 3.
[189] 294 U.S. 511 (1935).
[190] *Id.* at 519.
[191] *Id.* at 518-20.
[192] *Id.* at 526.
[193] *Id.* at 525.
[194] *Id.* at 528.
[195] 476 U.S. 573 (1986).

producer charged anywhere else across the nation.[196] The price that each distiller or producer could charge was determined by a monthly price schedule, which was filed every month with the state by each distiller or producer.[197] The Court struck down the statute as unconstitutional because New York's law "regulates out-of-state transactions in violation of the Commerce Clause."[198] Once a producer has posted its monthly price in New York, it was not free to change, or lower its prices elsewhere throughout the nation during that month.[199] The consequential effect of the statute was such that the monthly price schedule had to be conformed to by the producer not only in New York, but also any other state that the producer conducted business in.[200] While a state regulation seeking lower prices for its own consumers is constitutional, the state "may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess."[201]

The Supreme Court revisited the issue three years after *Brown-Forman* in *Healy v. Beer Institute*.[202] In *Healy*, the State of Connecticut enacted a statute tying the in-state price of beer to that of three bordering states after determining that the domestic retail price of beer was consistently higher than the price of beer in those three bordering states.[203] Because the Court observed that the Constitution preserved the autonomy of each state from one another, the Court, in reaching its determination, stated that "the maintenance of a national economic union"[204] is best left "unfettered by state-imposed limitations on interstate commerce."[205] In accordance with the above statement, the Court struck down the statute as unconstitutional because the statute had "the undeniable effect of controlling commercial activity occurring wholly outside the boundary of the State."[206] More importantly, the Court held that the practical effect of the statute "is to create just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude."[207]

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[196] *Id.* at 575.

[197] *Id.*

[198] *Id.* at 582.

[199] *Id.*

[200] *See id.* ("Forcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce." (citations omitted)).

[201] *Id.* at 580 (citations omitted).

[202] 491 U.S. 324 (1989).

[203] *Id.* at 326.

[204] *Id.* at 335-36.

[205] *Id.* at 336.

[206] *Id.* at 337.

[207] *Id.*

This holding was supported by three principles of Commerce Clause jurisprudence. First, the Court noted that the extent to which a state statute has a commercial effect within the borders of the state is irrelevant to a Commerce Clause inquiry.[208] Instead, such an inquiry looks to the commercial effects that would occur outside the state's borders.[209] As the Court noted in the second principle, "[t]he critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State."[210] This inquiry, as the Court observed in the third principle, requires an examination of the practical effect of the statute "by considering the consequences of the statute itself, . . . how the challenged statute may interact with the legitimate regulatory regimes of other States[,] and what effect would arise if not one, but many or every, State adopted similar legislation."[211] Applying these principles to *Healy*, the Court observed that the statute might have a cumulative effect on the nation if all other states enacted similar legislation.[212] Characterized by the Court as a "price gridlock,"[213] the inevitable national effect of "short-circuiting . . . normal pricing decisions based on local conditions"[214] through a state statute "is reserved by the Commerce Clause to the Federal Government and may not be accomplished piecemeal through the extraterritorial reach of individual state statutes."[215] The Ninth Circuit has followed the Supreme Court's holdings in *Healy* and *Brown-Forman* and,[216] therefore, Act 242 should be adjudged under the *Healy* and *Brown-Forman* tests.

2. Application to Act 242

Act 242's wholesale gasoline price cap is determined through a mandated formula. This formula is based on the weekly average wholesale price for regular unleaded gasoline in Los Angeles, New York Harbor, and the United States Gulf Coast.[217] This was amended from Act 77's formula of tying Hawai'i's gasoline price to the markets of Los Angeles, San Francisco, and

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[208] *Id.* at 336.

[209] *Id.*

[210] *Id.*

[211] *Id.*

[212] *Id.* at 339-40.

[213] *Id.* at 340.

[214] *Id.*

[215] *Id.*

[216] *See, e.g.*, S.D. Myers, Inc. v. City & County of San Francisco, 253 F.3d 461 (9th Cir. 2001); Nat'l Collegiate Athletic Ass'n v. Miller, 10 F.3d 633 (9th Cir. 1993).

[217] Act of 2004, No. 242, § 3(c), 23rd Leg., Reg. Sess. (2004), *reprinted in* Haw. Sess. Laws 1073.

the Pacific Northwest.[218] Because Act 242's price cap formula is based on the average price of three interstate markets, Act 242 has imposed an "interlocking local economic regulation that the Commerce Clause was meant to preclude."[219] In other words, as a result of Act 242, the oil companies operating in Hawai'i will be forced to consider how its pricing decisions in those interstate markets will reflect on the Hawai'i market, or vice versa. If the oil companies in Hawai'i lower their prices in these interstate markets, those same oil companies may have to lower its Hawai'i prices accordingly. Conversely, the oil companies that operate in Hawai'i could decide to raise their prices in those interstate markets to maintain the supracompetitive prices they currently enjoy in Hawai'i. The effect of Act 242 is such that both the oil companies and consumers in those interstate markets "surrender whatever competitive advantages they may possess."[220]

The oil companies' competitive advantages manifests itself in the extraterritorial reach of Act 242 because Act 242 has the effect of "short-circuiting . . . normal pricing decisions based on local conditions."[221] Even though Act 242 contains "location adjustment" and "marketing margin" factors,[222] an oil company that operates in Hawai'i must take these adjustment factors into account when pricing its products in other interstate markets. Indeed, when oil companies attach a price to their products, they necessarily must take into consideration those costs that result from doing business in that particular state. This could be reflected in the economic nature of the local business environment the firm operates in, such as oligopolistic market conditions. Supracompetitive pricing resulting from oligopolistic market conditions, however, is not illegal.[223] It is only when the supracompetitive pricing is the product of an illegal agreement that it becomes illegal.[224]

Furthermore, a firm must take into consideration other costs resulting from its business operations within a particular state. These other costs could include, among other things, higher/lower property taxes or taxes in general; higher/lower transportation costs; supply shortages or surpluses; local regulatory restraints and/or requirements; or the business uncertainties or risks endemic to that particular local market. Forcing a firm to consider costs

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[218] *Id.*

[219] *See Healy*, 491 U.S. at 337.

[220] Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 580 (1986) (citations omitted).

[221] *Healy*, 491 U.S. at 340.

[222] Act of 2004, No. 242, § 3(d)-(e), 23rd Leg., Reg. Sess. (2004), *reprinted in* Haw. Sess. Laws 1073. The location adjustment factor is set at $0.04 per gallon, and the marketing margin factor is set at $0.18 per gallon. *Id.*

[223] *See infra* Part IV.C (discussing the legality of an oligopolist's pricing behavior).

[224] *See id.*

endemic to a particular local market when pricing its products in other interstate markets is the kind of "interlocking local economic regulation that the Commerce Clause was meant to preclude."[225] To illustrate, in light of what happened with California's gasoline market, the price of wholesale gasoline can climb to astronomical levels in a very short period of time as a result of a severe supply shortage.[226] As a direct result of Act 242, should a severe and sudden supply shortage occur in one or all of these interstate markets, Hawai'i's gasoline prices would be interlocked with that of the economically ailing interstate market(s).[227]

As held by the Supreme Court, one must also look to whether the state statute would create a national price gridlock, the effectuation of which is expressly reserved to the federal government by the Commerce Clause.[228] Applying this principle to Act 242 seems to indicate that the cumulative effect of Act 242, if successful, would be the equivalent of a pebble tossed into a pond. The ripples caused by Act 242 would undoubtedly extend to the four corners of this nation in light of the fact that numerous states also have an interest in realizing lower gasoline prices.[229] Accordingly, the end result would be the kind of price gridlock that the Commerce Clause proscribes a state from enacting.[230] This type of government conduct is specifically reserved to the federal government or, more specifically, the Federal Energy Administration, whose express purpose is to "maintain[] . . . fair and reasonable consumer prices for"[231] national energy supplies.[232] Act 242 is, therefore, unconstitutional under the Commerce Clause because it usurps federal power by controlling conduct beyond the boundaries of Hawai'i.[233]

IV. STRUCTURING THE ECONOMIC MARKET

In order to understand the objective of Hawai'i's gasoline price cap law, which is to introduce competitive prices into an oligopolistic market, an economic overview is needed. Among the market models that are relevant to Hawai'i's gasoline market include: (A) perfect competition and (B) the oligopoly. An oligopoly's price behavior harms consumer welfare to the extent that consumers must pay for supracompetitive prices, or a price level

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225 *See Healy*, 491 U.S. at 337.

226 *See supra* Part II.A.

227 *See* Stillwater Study, *supra* note 11, at 96 fig.6.8.

228 *See Healy*, 491 U.S. at 340.

229 *See supra* Part I.

230 *See Healy*, 491 U.S at 340.

231 15 U.S.C. § 761(a) (2005).

232 *See id.*

233 *See Healy*, 491 U.S at 336.

that is higher than what is normally experienced within a competitive market.[234] Obtaining legal relief from a firm's supracompetitive pricing behavior, however, is extremely difficult.[235] In light of this difficulty, governments have opted, instead, for regulatory relief.

A. Perfect Competition and Equality

Perfect competition is recognized as being the ideal market model structure,[236] and is characterized by a multitude of buyers and sellers of an identical product.[237] Market participants in perfect competition are known as "price takers"[238] because "no one seller is individually significant enough to have a measurable impact on the industry supply."[239] In other words, unlike the oligopoly model, a firm operating in perfect competition has no control over price through its output decisions.[240] Because a firm in a competitive market is known as a price taker, a firm may choose to sell or buy at the market price, but cannot influence that price.[241] Rather, economic forces such as the "invisible hand" influences market price by causing price to equal marginal cost, and by promoting "the optimal allocation of resources in all markets."[242]

In a perfectly competitive market, the market price represents the addition to a firm's revenue from the production of another unit.[243] The most profitable output of a good is the point at which marginal cost, or the addition to the firm's total cost caused by the production of an additional unit, equals market price.[244] For example, assume the market price of good X is $14. Further assume that its marginal cost is $13.50. Because the firm can produce good X at a profit of $0.50 for every additional unit produced, the firm would expand its output of good X. In theory, however, diminishing returns will eventually increase marginal cost and, consequently, erode the profitability of further output until such time that marginal cost equals the $14 market

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[234] *See infra* Part IV.B.

[235] *See infra* Part IV.C.

[236] Elizabeth E. Bailey & William J. Baumol, *Deregulation and the Theory of Contestable Markets*, 1 YALE J. ON REG. 111, 112 (1984).

[237] Randall David Marks, *Can Conspiracy Theory Solve the "Oligopoly Problem"?*, 45 MD. L. REV. 387, 392 (1986).

[238] *Id.* at 393.

[239] Chevron USA, Inc. v. Cayetano, 198 F. Supp. 2d 1182, 1184 (D. Haw. 2002), *aff'd sub nom.* Chevron USA, Inc. v. Bronster, 363 F.3d 846 (9th Cir. 2004), *cert. granted sub nom.* Chevron v. Lingle, ___ U.S. ___, 125 S. Ct. 314 (2004).

[240] Bailey & Baumol, *supra* note 236, at 116.

[241] Marks, *supra* note 237, at 393.

[242] *Id.*

[243] Bailey & Baumol, *supra* note 236, at 116.

[244] *Id.*

price.[245] Perfect competition is what drives this erosion in profits and, when equality is attained, economic theory states that this price behavior is what is required to attain resource efficiency for the consumer's benefit;[246] it is this point of efficiency that Hawai'i's gasoline price cap law seeks to achieve.

In economic theory, Hawai'i's gasoline price cap law seeks to achieve equality between consumer and producer price expectations, or a sum of consumer and producer surpluses, which is the point at which price and marginal cost intersect.[247] A "[c]onsumer surplus represents the difference between what consumers are willing to pay for a good and what they have to pay in the market."[248] A "[p]roducer surplus . . . represents the difference between the price that producers are willing to accept and what they receive in the market."[249] In light of the above, it logically follows that the point at which the sum of consumer and producer surpluses intersect is the point in which the consumer's price expectation equates to that of the producer's price expectation of a particular good. Hence, social welfare is maximized.[250]

Perfect competition, however, is merely a pipedream.[251] Its purpose is to serve as an approximation of an ideal market structure,[252] or an unattainable end along a spectrum of market models. Indeed, perfect competition may be destroyed by concentrated economic power.[253] As businesses grow in size, the number of businesses operating in a particular market becomes smaller.[254] From the buyer's perspective, fewer sellers equates to fewer alternatives in business policy.[255] The oligopoly market model represents one form of concentrated economic power.

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[245] *Id.* at n.7.

[246] *Id.* at 116. When the price of a good equals its marginal cost, the consumer pays for what it cost to the producer. *Id.* at n.8. This at-cost price (the true economic price) represents the social cost incurred in providing the consumer with a single unit of a particular good. *Id.* Assuming that customers utilize their money resources in an optimal way (i.e. to meet their individual buying preferences), the economy's resources will be used for the satisfaction of consumer desires as efficiently as is possible because of the true economic price of the good. *Id.*

[247] James C. Lanik, Note, *Stopping the Tailspin: Use of Oligopolistic and Oligopsonistic Power to Produce Profits in the Airline Industry*, 22 TRANSP. L.J. 510, 524 (1995).

[248] Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297, 301 & n.37 (1991) (citation omitted).

[249] *Id.*

[250] *See id.* at 301-02.

[251] *See* Bailey & Baumol, *supra* note 236, at 112.

[252] *Id.*

[253] CORWIN D. EDWARDS, MAINTAINING COMPETITION 91 (1973).

[254] *Id.*

[255] *Id.*

B. The Oligopoly

One of the most prevalent yet under-regulated forms of market control is that of the oligopoly.[256] Since its existence prior to 1890,[257] the oligopoly has been characterized as both an inefficient[258] and highly concentrated market.[259] This is due to the fact that it is in the oligopolists' interests "to keep prices above marginal cost by restricting production,"[260] and the fact that a few sellers control a product's total market share.[261] Other non-price characteristics of an oligopoly include significant barriers to entry, the product sold is homogeneous yet substitutable,[262] perfect information, and many buyers.[263]

More significant, however, is the cartel function of an oligopoly, which is characterized as the supracompetitive parallel pricing behavior that occurs between those firms that make up the oligopoly.[264] Presently, there are a plethora of economic theories that have developed over the years that attempt to explain oligopoly price behavior.[265] So much so that it has drawn the following satirical comment: "[T]o understand oligopoly one needs to understand the rules of war."[266] For simplicity's sake, this section will attempt to explain an oligopolist's supracompetitive pricing behavior through the work

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[256] Michal S. Gal, *Reducing Rivals' Prices: Government-Supported Mavericks as New Solutions for Oligopoly Pricing*, 7 STAN. J.L. BUS. & FIN. 73, 75 (2001).

[257] George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44, 45 (1964).

[258] *See* Robert M. Hardaway, *Transportation Deregulation (1976-1984): Turning the Tide*, 14 Transp. L.J. 101, 109 (1985).

[259] Chevron USA, Inc. v. Cayetano, 198 F. Supp. 2d 1182, 1184 (D. Haw. 2002), *aff'd sub nom.* Chevron USA, Inc. v. Bronster, 363 F.3d 846 (9th Cir. 2004), *cert. granted sub nom.* Chevron v. Lingle, ___ U.S. ___, 125 S. Ct. 314 (2004).

[260] *See* Hardaway, *supra* note 258, at 109.

[261] *Cayetano*, 198 F. Supp. 2d at 1184; Adams & Brock, *supra* note 29, at 298; Hardaway, *supra* note 258, at 109.

[262] From the perspective of the buyer, the term "homogeneous" is defined as the "identity . . . or pairs of products between which the elasticity of substitution is infinite." Stigler, *supra* note 257, at 44. For example, the gasoline from both Chevron's and Tesoro's Hawai'i refineries would be considered "homogeneous" to a wholesale buyer if the buyer is indifferent between all combinations of Chevron and Tesoro gasoline. *See id.* at 44-45. "Full homogeneity" is attained when the seller "is indifferent between all combinations" of two buyers. *Id.* at 45. "Full homogeneity" is attained because there would be homogeneity in both the sellers and the buyers – one is as indifferent to the other as the other is as indifferent to him. *Id.*

[263] Marks, *supra* note 237, at 393; Enrico Adriano Raffaelli, *Oligopolies and Antitrust Law*, 19 FORDHAM INT'L L.J. 915, 915 (1996).

[264] *E.g.*, Rosenfield, *supra* note 23, at 81.

[265] *See* Aubrey Silberston, *Survey of Applied Economics: Price Behaviour of Firms*, 80 ECON. J. 511, 518-26 (1970). These theories include three versions of duopoly, kinked demand curves, theoretical work conducted by such economic scholars as Bain and Sylos-Labini, workable competition, and the theory of games. *See id.*

[266] *Id.* at 518 (citation omitted).

of such well-recognized economists as George Stigler, whose work in particular has been frequently relied upon by the Supreme Court and the federal circuits.[267]

In an oligopoly, because a few sellers control a particular business activity, competition could be eliminated through working alliances.[268] As was shown before, the gasoline market does not follow the general economic rule because demand for gasoline is inelastic.[269] Even though overall demand may remain relatively unchanged in response to a lower price, this economic principle necessarily assumes that all firms that comprise the oligopoly will lower its prices accordingly. When a single firm in the oligopoly decides to lower its price, it is certainly possible that this price reduction will result in an increase in demand for that single firm.[270] It is this distinct threat that will force the other firms to quickly lower their prices to alleviate any demand they may have lost.[271]

Firms in an oligopoly will, therefore, remain ever vigilant of its competitor's pricing behavior. For example, assume that firms A and B each control 50% of the market for a certain product. Firm A anticipates that a price reduction will result in a 10% increase in its market share. In a two-firm oligopoly, if firm A increases its market share by 10%, this will inevitably cause a corresponding decrease in the market share of firm B.[272] Rather than accept such a result, firm B will lower its prices immediately thereafter to circumvent the possibility of lost market share.[273] As a result, a price cut by firm A is unlikely because the benefits derived from the price cut (the additional revenue it would have received) would be less than what it would have received from the higher price it was previously charging (a higher profit margin).[274]

To elaborate, there is "no need [for oligopolistic firms] to cut price in order to increase quantity [because] the incremental marginal revenue of each additional unit produced is precisely the price received for that last unit."[275]

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[267] *See, e.g.*, Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 476 n.22 (1992); Nat'l Broiler Mktg. Ass'n v. United States, 436 U.S. 816, 842 n.4 (1978); Petruzzi's IGA Supermarkets v. Darling-Delaware Co., 998 F.2d 1224, 1233 (3d Cir. 1993); Consol. Metal Prods., Inc. v. Am. Petroleum Inst., 846 F.2d 284, 295 n.42 (5th Cir. 1988).

[268] EDWARDS, *supra* note 253, at 91.

[269] *See supra* Part II.A.

[270] *See* RICHARD A. POSNER, ANTITRUST LAW 56 (2d ed. 2001).

[271] *See id.*; *see also* Stigler, *supra* note 257, at 46 ("It is a well-established proposition that if any member of the agreement can secretly violate it, he will gain larger profits than by conforming to it.").

[272] *See* POSNER, *supra* note 270, at 56.

[273] *See id.*

[274] *See id.*

[275] *See* Hardaway, *supra* note 258, at 109 (internal quotations omitted).

This is due to the fact that an "oligopolist views competition by price as self-destructive,"[276] and would rather keep prices at supracompetitive levels than implement a decision that would not only produce minimal results, but also encourage retaliation.[277] Retaliation can take the form of an innovation or price war.[278] As applied to the hypothetical above, firm B would be compelled to decrease its prices to a lower extent than that of firm A in order to recapture its lost market share. The end result is that both firms A and B charge lower prices and, thus, obtain lower profits than before the price reduction.[279] Firms A and B would, as a result, recognize their mutual interdependence and, in furtherance of this interdependence, "seek to maximize their collective profits by coordinating their pricing and output strategies."[280]

Obtaining a supracompetitive price level, however, is not inevitable and must be achieved. Stigler demonstrated that to achieve the supracompetitive prices that are characteristic of an oligopoly, firms must overcome three problems.[281] First, firms must identify and agree to the terms of the agreement.[282] This agreement consists of the market prices at which the firms will set for each transaction class,[283] and the market share each firm currently possesses.[284] An agreement can be achieved without implicating the antitrust laws if a firm makes its actions known to others through natural and/or obvious means.[285] Reaching an agreement, however, is made complicated by the "almost infinitely numerous price classes."[286]

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[276] Lanik, *supra* note 247, at 515-16.

[277] *Id.* Rather than compete through price, firms comprising an oligopoly "compete with one another through advertising, product differentiation and service." *Id.* at 515; Adams & Brock, *supra* note 29, at 298; Donald S. Clark, *Price-Fixing Without Collusion: An Antitrust Analysis of Facilitating Practices After Ethyl Corp*, 1983 WIS. L. REV. 887, 887 (1983).

[278] *See* Adams & Brock, *supra* note 29, at 299.

[279] *Id.*

[280] Clark, *supra* note 277, at 887. "[E]conomic theory traditionally has taught that oligopolists will tend to recognize the profit-maximizing value of moderating or abandoning their rivalrous instincts – cooperating rather than competing aggressively – in order to maintain the profitability of the group." Adams & Brock, *supra* note 29, at 299.

[281] Willard K. Tom, *Application of Game Theory To Antitrust: Game Theory in the Everyday Life of the Antitrust Practitioner*, 5 GEO. MASON L. REV. 457, 458-59 & n.9 (1997) (interpreting the general scope of Stigler's landmark 1964 article, *A Theory of Oligopoly*).

[282] *Id.* at 459.

[283] Stigler, *supra* note 257, at 45-46.

[284] Jonathan B. Baker, *Mavericks, Mergers, and Exclusion: Proving Coordinated Competitive Effects Under the Antitrust Laws*, 77 N.Y.U. L. REV. 135, 158 (2002).

[285] *Id.* at 161. A firm's action becomes apparent through price leadership; one firm actually raises its market prices for the rest of the firms and the world to see. *See id.* Through price leadership, there may also be some "price jockeying" to the extent that one firm may raise its prices by 5%, and another subsequently raises its prices by 10%. *Id.*

[286] Stigler, *supra* note 257, at 45-46.

Collectively, Stigler refers to both the second and third problems as problems of enforcement.[287] The second problem arises when firms are unable to detect deviations from the terms of the agreement.[288] The third problem arises when firms do not have the capacity to punish those firms who deviate from the terms of the agreement.[289] If enforcement of the agreement upon a deviant is weak, or if a deviation from the agreement is "detected . . . slowly and incompletely,"[290] the firms, through their agreement, "must set prices not much above the competitive level so the inducements to price-cutting is small, or it must restrict the conspiracy to areas in which enforcement can be made efficiently."[291]

Posner, who is considered by some as a pioneer of the law and economics movement, has established several characteristics of a market that make it easier to overcome these three problems identified by Stigler. These characteristics include:

> (a) number of sellers (the fewer the number the lower the costs of coordinating their activities), (b) homogeneity of product, (c) elasticity of demand (the less elastic the demand the larger the profits from acting like a monopoly and the greater the incentive to collude), (d) entry conditions, (e) relative importance of price versus nonprice competition, (f) whether the market is growing, declining or steady over time (a steady or declining market is more favorably disposed to cartelization), and (g) the structure of the buying side of the market (with many buyers and many transactions, [a deviation] is difficult).[292]

When applying Posner's factors to the economics of Hawai'i's wholesale gasoline market, it is apparent that Hawai'i's market has overcome Stigler's three problems. As was mentioned before, Hawai'i's wholesale gasoline market consists of only two sellers,[293] the general gasoline market is considered inelastic,[294] wholesale gasoline is a homogenous product,[295] Hawai'i's wholesale gasoline market is protected by high barriers to entry due to high startup costs,[296] and demand within Hawai'i's gasoline market has stabi-

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[287] *See id.* at 46.

[288] Tom, *supra* note 281, at 459.

[289] *Id.*

[290] Stigler, *supra* note 257, at 46.

[291] *Id.*

[292] Robert F. Lanzillotti, *Coming To Terms With Daubert In Sherman Act Complaints: A Suggested Economic Approach*, 77 NEB. L. REV. 83, 93 n.27 (1998).

[293] *See supra* Part II.A.

[294] *See supra* Part II.A.

[295] *See supra* note 262.

[296] *See* E-mail from Andrew Garrett, Office of Representative Ken Hiraki, to Brandon H. Ito, Student, William S. Richardson School of Law, University of Hawai'i at Manoa (Sept. 22, 2004, 10:39 a.m. HST) (on file with author).

lized.[297] Thus, internal barriers that could prevent Hawai'i's wholesale gasoline prices from achieving supracompetitive levels do not exist. External barriers to supracompetitive pricing, however, may still exist, such as through the antitrust laws.

C. The Legality of the Oligopoly

In light of the fact that Hawai'i's wholesale gasoline market is an oligopoly, antitrust law plays a central role in determining whether improper conduct legally exists within Hawai'i's wholesale gasoline market.[298] Embodied in the Sherman Act,[299] the purpose of the federal antitrust laws is to promote and preserve competition because competition, in and of itself, furthers market efficiency.[300] Additionally, antitrust law has long assumed that "firms seek to maximize profits" because "all firms are rational."[301] As applied, an oligopoly has been declared in violation of the Sherman Act if there is "some form of conspiracy or agreement among competing firms"[302] that has "the purpose or effect of unreasonably restraining competition."[303] Thus, to establish liability under the Sherman Act, a plaintiff must prove the existence of a "concerted activity and an unreasonable effect."[304]

In an antitrust lawsuit against firms that comprise an oligopoly, the difficulty lies in proving the existence of a concerted activity. Concerted activity is proven through the existence of either an express or tacit agreement. An express agreement can exist through either a writing or from a statement made by one of the actors to the agreement.[305] When such an agreement exists, this agreement has been declared in violation of the Sherman Act and is, therefore, illegal.[306] This illegality extends to even those agreements whose prices agreed upon are reasonable.[307] Nevertheless, it is axiomatic that such

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[297] *See* Stillwater Study, *supra* note 11, at 18 fig.1.5.

[298] *See* William E. Kovacic, *Symposium: Designing Antitrust Remedies for Dominant Firm Misconduct*, 31 CONN. L. REV. 1285, 1285 (1999).

[299] 15 U.S.C. § 1 (2005).

[300] Robert G. Harris & Thomas M. Jorde, *Antitrust Market Definition: An Integrated Approach*, 72 CAL. L. REV. 3, 4 (1984). Competition furthers three objectives in maintaining market efficiency: (1) buyers receive a fair price and diversified products and services; (2) sellers obtain entrepreneurial opportunity and a competitive marketplace; and (3) economic, social, and political power are dispersed in a competitive market environment. *Id.*

[301] Michael S. Jacobs, *The New Sophistication in Antitrust*, 79 MINN. L. REV. 1, 2 (1994).

[302] Clark, *supra* note 277, at 911.

[303] *Id.* Specifically, the Sherman Act prohibits every "contract, combination . . . or conspiracy, in restraint of trade." 15 U.S.C. § 1.

[304] Marks, *supra* note 237, at 399.

[305] *Id.*

[306] *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223-24 (1940).

[307] *Id.* at 212-13.

agreements are made in secret and, if made in writing, the writing would be subsequently destroyed to cover up any evidence of the agreement.

As such, circumstantial evidence tending to prove a tacit agreement may frequently be the only means by which an antitrust lawsuit may be brought.[308] In *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*,[309] however, the United States Supreme Court held that circumstantial evidence merely proving parallel business behavior, or "conscious parallelism," does not constitute a violation of the Sherman Act.[310] It is through this holding that the Supreme Court has recognized that even though parallel behavior may produce supracompetitive profits for those firms that comprise the oligopoly, the oligopolists' "shared economic interests and their interdependence with respect to price and output decisions" are not illegal.[311] In light of this holding, distinguishing between legal and illegal parallel behavior requires a difficult determination as to whether the oligopolist's pricing behavior is the result of an independent business decision or a concerted effort; the latter is a violation of the Sherman Act while the former is not.[312]

The United States Courts of Appeals for the Second, Third, Fifth, Seventh, Eighth, Ninth, and D.C. Circuits, however, have refused to interpret the Sherman Act as narrowly as the Supreme Court's holding in *Theatre Enterprises*.[313] Rather, these circuit courts have held that conscious parallelism is sufficient evidence of an illegal agreement only when additional evidence is presented.[314] This additional evidence, or "plus factors," must prove that the parallel behavior amounts to a conspiracy.[315] This can be shown through any of the following methods: (1) parallel practices that are contrary to each firm's apparent self-interest; (2) a high-level of interfirm communications; (3) artificial standardization of products; or (4) price increases during times of low demand.[316] Collectively, however, these "plus factors" merely require distinguishing between legal independent business judgments and an inference

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[308] *See* Theatre Enters., Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 540-41 (1954).

[309] 346 U.S. 537.

[310] *See id.* at 541.

[311] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227 (1993).

[312] *See* Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council, 857 F.2d 55, 70 (2d Cir. 1988). Section 1 of the Sherman Act "is directed only at joint action, and 'does not prohibit independent business actions and decisions.'" *Id.* (citation omitted).

[313] Michael K. Vaska, *Conscious Parallelism and Price Fixing: Defining the Boundary*, 52 U. CHI. L. REV. 508, 520 & nn.81-85 (1985).

[314] *Id.*

[315] Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, Inc., 203 F.3d 1028, 1033 (8th Cir. 2000), *cert. denied*, 531 U.S. 815 (2000).

[316] Vaska, *supra* note 313, at 520.

of an illegal conspiracy.[317] If a defendant can properly show that a decision was the result of an independent business judgment, such a decision is legal even though a plus factor may be shown to exist.[318] Hence, absent evidence of an express agreement, proving an antitrust violation under the Sherman Act is extremely difficult.

In light of the difficulty of obtaining legal relief, governments have alternatively opted for regulatory relief. In particular, the State of Hawai'i's chosen path of regulatory relief is that of a price cap. Academic scholars have observed, however, that a regulatory price cap is, ultimately, a misguided and socially harmful economic policy because it attempts to impose monopoly-like controls on an industry that lacks monopoly characteristics.[319]

V. Of Regulatory Price Caps and Economics

As a legal scholar once observed, "[t]he history of economic regulation reveals a now familiar pattern: a failure to learn from previous mistakes and a constant hope that basic economic laws can be made to disappear if they are only ordered to do so."[320] In enacting economic legislation, "there are those who believe . . . that real prices can be lowered (or raised) by the waving of a regulatory wand."[321] The State of Hawai'i is no exception to this observation.

The concept of a regulatory price cap is not new. It has historically been applied to such commodities as natural gas and oil.[322] While price caps in general are theoretically beneficial to consumer welfare, its implementation throughout history has presented several social and economic problems.[323] The culmination of these problems resulted in the deregulation of these price caps.[324] Unfortunately, these economically catastrophic events are not isolated

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[317] *See Blomkest Fertilizer, Inc.*, 203 F.3d at 1033.

> A plaintiff has the burden to present evidence of consciously paralleled pricing supplemented with one or more plus factors. However, *even if a plaintiff carries its initial burden*, a court must still find, based upon all the evidence before it, that *the plaintiff's evidence tends to exclude the possibility of independent action.*

Id. (citations omitted) (emphases added).

[318] *See id.*

[319] *See* William K. Jones, *Government Price Controls and Inflation – A Prognosis Based on the Impact of Controls in the Regulated Industries*, 65 Cornell L. Rev. 303, 318 (1980).

[320] Hardaway, *supra* note 258, at 107.

[321] *Id.*

[322] *See infra* Part V.A-B.

[323] *See infra* Part V.A-B.

[324] *See infra* Part V.A-B.

in history. The State of Hawai'i, rather than learn from history's mistakes, has chosen to repeat them.[325]

A. The Economic Impact of Price Caps

A price cap is essentially a legal contract between the regulator and the regulated.[326] The regulator mandates a specified price for the regulated firm, while the regulated firm has the choice of setting its price at or below the mandated price.[327] The regulator may then adjust the price through an adjustment factor that is based on factors exogenous to the firm.[328] The price cap is also periodically reviewed in light of the cost, demand, and profit conditions of the firm at the time of review.[329] This particular characteristic of a price cap benefits consumers because the regulator may lower the mandated price to capture the increased profits firms would enjoy as a result of its lower costs.[330]

In economic theory, a price cap's purpose is to transfer the cartel enforcement function of an oligopoly from the oligopolist to society.[331] The ideal impact of a price cap occurs when the price cap is set at a sufficient level above the firm's costs of producing the product while, at the same time, results in a large reduction in price—thereby benefiting both consumers and producers.[332] This ideal scenario occurs because a price cap theoretically induces a firm to engage in cost-minimizing behavior.[333] The incentive to reduce costs in response to a price cap is apparent—the lower a firm's costs, the higher the firm's profit margin. Nevertheless, despite the fact that price caps may promote efficiencies within the regulated firm, price caps can cause economic inefficiencies to the firm's output decisions.[334]

To elaborate, price caps present several economic problems. First, it is axiomatic that if a price cap were set below a firm's cost of producing the regulated product, it would be impossible for the firm to financially break even. Unless the price cap is adjusted, this would have the effect of forcing

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[325] *See infra* Part V.C.

[326] Braeutigam & Panzar, *supra* note 159, at 193.

[327] KENNETH E. TRAIN, OPTIMAL REGULATION: THE ECONOMIC THEORY OF NATURAL MONOPOLY 317 (1991).

[328] *Id.*

[329] *Id.*

[330] *Id.* at 318.

[331] Lee, *supra* note 160, at 848. The cartel enforcement function was discussed in detail before. *See supra* Part IV.B.

[332] *See* TRAIN, *supra* note 327, at 318.

[333] Braeutigam & Panzar, *supra* note 159, at 193. In addition, a firm has an incentive to diversify, if economically efficient, into a competitive market. *Id.*

[334] *Id.*

a regulated firm out of business. Conversely, if a price cap were set too high, the only beneficiary of the price cap would be the firm itself.[335] Indeed, if the capped price results in little or no change in what the price would have been without the cap, the price cap would have the effect of there being no regulation at all.[336]

Second, in a market in which there is more than one firm, the problem of unequal competitive abilities arises.[337] This problem is created when the price cap sets a broad one-size-fits-all price for all firms that produce the regulated product, and manifests itself in the different cost structures of those firms.[338] In other words, a firm with a lower cost structure will profit to a greater extent than a firm with a higher cost structure throughout the implementation of the price cap.[339] As a result of the firms' differing cost structures, the price may be set at a below-cost level for the higher cost firm, while the same price would provide a profit for the lower cost firm.[340] It logically follows, then, that the price cap could have the effect of pricing the higher cost firm out of the market. A broadly imposed price cap could also have a similar effect of preventing the higher cost firm from obtaining a sufficient level of earnings.[341] Consequently, the higher cost firm's investment decisions would become severely restricted, and the quality of its goods or services reduced.[342] This specific problem has plagued the railroad industry ever since it became a regulated industry in the year 1920.[343]

Finally, a periodic review of the price cap could introduce strategic behavior by the firm.[344] Recognized as being the "heart of the issue regarding price caps,"[345] strategic behavior could curtail the price cap's purpose of promoting cost-minimizing behavior.[346] This strategic behavior occurred during the nationwide gasoline price cap of 1971,[347] which established price ceilings on different tiers of oil.[348] Similar in purpose to Hawai'i's gasoline price cap law, the federal gasoline price caps attempted to control the oil producers'

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[335] *See* TRAIN, *supra* note 327, at 318.

[336] *See id.*

[337] Jones, *supra* note 319, at 319.

[338] *See id.*

[339] *Id.*

[340] *Id.*

[341] *Id.*

[342] *Id.*

[343] *Id.* & n.42.

[344] TRAIN, *supra* note 327, at 318.

[345] *Id.*

[346] *See id.*

[347] Stillwater Study, *supra* note 11, at 99.

[348] STEPHEN BREYER, REGULATION AND ITS REFORM 165 (1982). Crude production was divided into two tiers - old oil and new oil. *Id.*

windfall profits resulting from rising gasoline prices, and attempted to provide an incentive for increased gasoline production.[349] Strategic behavior occurred as a result of an additional user cost that accompanies a price control—anticipated decontrol.[350] Depending on the expected date of decontrol, the resulting price increase, and the interest rate, oil can be held underground until the price controls are deregulated.[351] Notwithstanding this rationing effect, producers' oil reserves also began to deplete over time because of the more economically optimal solution of a lower production rate in response to a price cap.[352] As is true with Act 242, an oil company also lacked an incentive to minimize its total costs during the federal price controls.[353] In light of these adverse economic effects, the nationwide gasoline price cap nullified the very purpose of its implementation, which is to encourage cost-minimizing behavior. As a result of the lack of a cost control incentive, total costs eventually exceeded the mandated gasoline price cap.[354] Unwilling or unable to sell its gasoline below-cost, rationing of gasoline supplies occurred because a firm is induced to produce less quantity sold in order to minimize its costs in response to a mandated price that is below the firm's costs of producing the product.[355] The economic reason for doing so is axiomatic: Every unit of product sold below-cost brings the firm that much closer to going out of business.

Even though gasoline shortages were absent throughout the duration of the federal gasoline price cap,[356] the price cap imposed a great inconvenience on consumers because of the fact that producers were inclined to produce less quantity in response to a price cap.[357] This consumer inconvenience manifested itself in long lines and "odd-even" days of gasoline allocation to consumers.[358] While consumers experienced inconvenience in the short-term, consumers also did not benefit over the long-term.[359] Eventually, the federal gasoline price controls were deregulated in 1981.[360] While the federal gaso-

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[349] Rodney T. Smith & Charles E. Phelps, *The Subtle Impact of Price Controls on Domestic Oil Production*, 68 AM. ECON. REV. 428, 428 (1978).

[350] *Id.* at 430.

[351] *Id.*

[352] *See id.*

[353] *See id.*

[354] *See* Stillwater Study, *supra* note 11, at 99.

[355] TRAIN, *supra* note 327, at 320.

[356] BREYER, *supra* note 348, at 165-67. This is contrary to what occurred during the regulation of natural gas producer prices in 1954. *See infra* Part V.B.

[357] Stillwater Study, *supra* note 11, at 99.

[358] *Id.* Enacted by some states, whether a consumer was "odd" or "even" depended on the last digit of their license plate number. *Id.* If it was an "odd" day, those consumers with odd numbers as the last digit on their license plates were permitted to go to the gasoline station to fill-up. *See id.*

[359] *Id.*

[360] *Id.*

line price cap adversely impacted the consumers it was intended to protect, the adverse economic impact of the regulation of natural gas producer prices on society was even more profound.

B. The Regulation of Natural Gas Producer Prices

Among history's worst economic regulatory mistakes, and perhaps foreshadowing the economic impact of Hawai'i's wholesale gasoline price cap law, was the federal cap on natural gas producer prices. Interestingly, this federal price cap did not come into being through a congressional enactment. Rather, it was the United States Supreme Court that initiated this price cap through its interpretation of congressional intent.[361] In *Phillips Petroleum Co. v. Wisconsin*,[362] the issue before the Court was whether the Natural Gas Act in effect at that time granted the Federal Power Commission jurisdiction in controlling the wholesale prices charged by a natural gas producer or gatherer.[363] Prior to the Supreme Court's review, the Federal Power Commission determined that the Phillips Petroleum Company was not a "natural gas company" as used and defined by the Natural Gas Act because the sales made by Phillips Petroleum were "a part of the production and gathering of natural gas to which the Commission's jurisdiction expressly does not extend."[364] Hence, the Federal Power Commission determined that it did not have jurisdiction to set Phillips Petroleum's wholesale price of natural gas.[365] The Court, however, determined that Congress intended to "plug the gap" in the Supreme Court's Commerce Clause jurisprudence, which expressly proscribed the states from regulating wholesale prices of commodities moving in interstate commerce.[366] Because of the Court's determination that Congress intended to protect consumers from the "exploitation" of natural gas companies through the Natural Gas Act, the Court held that regulating Phillips Petroleum's sale of wholesale natural gas was within the Commission's jurisdiction.[367] From that point forward, the nation's natural gas problems began.

Similar to Hawai'i's wholesale gasoline market, natural gas was a highly concentrated industry during the time of the *Phillips Petroleum* decision.[368]

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[361] Martin L. Lindahl, *Federal Regulation of Natural Gas Producers and Gatherers*, 46 AM. ECON. REV. 532, 532-33 (1956).

[362] 347 U.S. 672 (1954).

[363] *Id.* at 674.

[364] *Id.* at 675-77. According to the Act in effect at that time, a "natural gas company" was defined as "a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." *Id.* at 676.

[365] *See id.*

[366] *Id.* at 682-83.

[367] *Id.* at 685.

[368] N. Natural Gas Co. v. Fed. Power Comm'n, 399 F.2d 953, 965 (D.C. Cir. 1968).

In addition, prior to *Phillips Petroleum*, both the economic supply and demand of the natural gas market was inelastic.[369] The federal cap on natural gas producer prices, however, imbalanced supply and demand to such an extent that natural gas was consumed at a much more rapid pace than new supplies could be obtained.[370] Consumers and industries that did not use natural gas as an energy resource began to use it because of its comparatively lower cost.[371] What once was inelastic became, therefore, elastic to the extent that consumer and industrial demand for natural gas substantially increased in response to lower prices.[372]

Because demand ultimately outstripped supply, the increased demand's impact on social and economic life was profound. Industries that were dependent on natural gas had to shut down its operations because their economic demands could not be met.[373] Others moved to other parts of the nation where they could more readily obtain the supply they needed.[374] This resulted in curtailing industrial production and caused the loss of hundreds of thousands of jobs.[375] In addition, residential consumers that used natural gas were forced to endure constant supply interruptions.[376] Over a single winter season in 1976, the national supply of natural gas decreased by almost twenty percent.[377] This sharp decrease in supply caused some states to cut back on natural gas consumption by as much as fifty percent.[378] More significantly, because natural gas was hard to obtain, those industries and consumers who were dependent on natural gas for their energy needs had to turn to other energy sources.[379] Their reliance on these other energy sources, however, created an unforeseen chain reaction to the extent that the supply of these energy sources became strained as well.[380]

Consumers and industries were not the only ones feeling the impact of the federal price cap on natural gas—so too were the federal government and natural gas producers. The producers' current supply and reserves of natural gas were decreasing because of the increased demand throughout the duration

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[369] Placid Oil Co. v. Fed. Power Comm'n, 483 F.2d 880, 900 n.21 (5th Cir. 1973); Joel B. Dirlam, *Natural Gas: Cost, Conservation, and Pricing*, 48 AM. ECON. REV. 491, 492 (1958).

[370] Jones, *supra* note 319, at 318.

[371] *See* Alfred E. Kahn, *Economic Issues in Regulating the Field Price of Natural Gas*, 50 AM. ECON. REV. 506, 508 (1960).

[372] *See id.*

[373] Jones, *supra* note 319, at 318.

[374] BREYER, *supra* note 348, at 246.

[375] *Id.* at 244.

[376] Jones, *supra* note 319, at 318.

[377] BREYER, *supra* note 348, at 244.

[378] *Id.*

[379] Jones, *supra* note 319, at 318.

[380] *Id.*

of the natural gas price cap.[381] During the initial years of the natural gas regulation, the natural gas producers had twenty years of supply in reserve.[382] In 1964, reserves had declined to 9.3 years of natural gas.[383]

Administrative chaos also ensued from the Court's decision in *Phillips Petroleum*. In light of the Court's determination that Congress intended to protect consumers through the Natural Gas Act, the Commission was required to regulate not only wholesale prices, but also retail prices. In order to conform to the Supreme Court's interpretation of Congress' intent, the Commission required producers to file wholesale rate schedules.[384] In less than a year after this requirement was promulgated, the Commission received over ten thousand rate filings.[385] This chaos also manifested itself in the unequal competitive abilities problem inherent in a price cap.[386] Eleven months after the Court's decision in *Phillips Petroleum*, there were over two thousand four hundred applications requesting a rate increase.[387] All of these applications were reviewed, with the majority of them allowed to take effect.[388] Some requests, however, were suspended pending an investigation as to whether the rate requested was reasonable.[389] The end result was that gas sold in interstate commerce was five to six percent higher than gas sold in intrastate commerce because of the administrative costs associated with the natural gas price cap.[390] Eventually, and perhaps fortunately for the Commission, public and industry dissatisfaction led to the deregulation of the natural gas price controls in 1978.[391] This deregulation manifested itself through Congress' determination that market forces, rather than regulators, best determined the market price, the demand, and the supply of natural gas.[392] A price cap is, therefore, ultimately a regulation enacted by regulators who know less about a firm's costs, opportunities, and economic characteristics than the firm itself.[393]

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[381] BREYER, *supra* note 348, at 245.

[382] *Id.*

[383] *Id.* (citation omitted).

[384] Lindahl, *supra* note 361, at 534.

[385] *Id.* at 535.

[386] *See supra* Part V.A (discussing the unequal competitive abilities problem).

[387] Lindahl, *supra* note 361, at 535.

[388] *Id.*

[389] *Id.*

[390] George J. Stigler, *The Theory of Economic Regulation*, *in* CHICAGO STUDIES IN POLITICAL ECONOMY 214 (George J. Stigler ed., 1988).

[391] Jones, *supra* note 319, at 318 & n.41.

[392] Transcon. Gas Pipe Line Corp. v. State Oil & Gas Bd. of Miss., 474 U.S. 409, 422 (1986).

[393] Braeutigam & Panzar, *supra* note 159, at 193.

C. History's Lessons Learned?

As observed by economic scholars, "[t]he essence of industrial power is control over supply."[394] In the case of Hawai'i's gasoline price cap law, a refiner is theoretically induced to minimize its internal costs by investing in technology and innovation. A refiner would also adjust to changes in cost in such a manner that its profits are maximized.[395] This proposition assumes, however, that the price cap imposed will actually result in lower prices. If the price cap does not result in lower prices, there is no reason for the firm to behave in a cost-effective manner.[396] As was discussed before, Act 242's objective does not guarantee lower gasoline prices.[397] Because of this legislative observation, Act 242 would be the equivalent of no regulation at all if the price cap results in a small change in prices.

Assuming that Act 242 does in fact substantially lower gasoline prices, the increased profits resulting from the cost-effective measures a firm undertakes will be absorbed by the firm and not passed on to consumers.[398] More importantly, Act 242 makes an ill-conceived presumption that supply will remain constant throughout the duration of the regulatory price cap.[399] As was exhibited in the federal gasoline price controls of 1971, firms do not, despite any theoretical presumptions to the contrary, have an incentive to minimize its total costs in response to a price cap.[400] Because an incentive to reduce costs is absent, a firm's costs could eventually be greater than that of the maximum price allowable under the price cap.[401] This would cause a chain reaction to the extent that firms will produce less than optimally in order to preserve the vitality of the company. As was illustrated by the federal gasoline price controls, this decrease in production imposes a significant hardship against the consumers, for whom the price cap is intending to protect.[402]

Should firms forego or be proscribed from decreasing gasoline production, the risk of potential shortages remains. As was evident throughout the natural gas price controls, shortages, which caused socially disastrous results, occurred even though the natural gas market was well supplied prior to the

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394 Lee, *supra* note 160, at 849.

395 TRAIN, *supra* note 327, at 318.

396 *Id.*

397 *See supra* Part III.A.2.

398 *See* TRAIN, *supra* note 327, at 318.

399 *See* Act of 2004, No. 242, § 2, 23rd Leg., Reg. Sess. (2004), *reprinted in* Haw. Sess. Laws 1073.

400 *See supra* Part V.A.

401 *See supra* Part V.A.

402 *See supra* Part V.A.

regulation.[403] Thus, while Hawai'i's gasoline market may be currently well supplied,[404] those supplies could dwindle because of an increase in demand during the implementation of Act 242. Alternatively, Hawai'i's refiners may decide to hold oil underground as a strategic maneuver in the hopes of getting Act 242 repealed. Supply shortages in Hawai'i could also occur in other ways. For example, Act 242 does not prevent an oil company from exporting Hawai'i's wholesale gasoline to a higher priced market like California. Presently, it appears that Hawai'i's oil companies are exporting Hawai'i's gasoline from Hawai'i to foreign countries and California in larger quantities than in years past. In 2002, Hawai'i's refiners exported 5.9 million gallons of gasoline to foreign countries and California.[405] In 2003, Hawai'i's refiners exported 12 million gallons of gasoline.[406] In the first half of 2004 alone, Hawai'i's refiners exported 19.3 million gallons of gasoline.[407] Because Act 242 does not proscribe an oil company from exporting gasoline to higher priced markets, exportation of Hawai'i's gasoline may become exacerbated as a direct result of Hawai'i's gasoline price cap.

The preceding impacts are by no means exhaustive of the ways in which a gasoline shortage may occur. Rather, its purpose is to point out that in light of what history has foretold, the presumption of a constant supply is flawed, and will only lead to undesirable and unforeseen consequences. There are, however, several reasonable alternatives that would have a greater beneficial effect than a strict gasoline price cap.

VI. REASONABLE ALTERNATIVES TO COMBAT OLIGOPOLY PRICING

Even though Act 242 will be accompanied by undesirable and unforeseen consequences, there are several other reasonable alternatives to a price cap that would efficiently promote lower, more competitive prices. These alternatives include: (A) lowering state and local gasoline taxes and (B) imposition of an excess profits tax.[408] It should be emphasized, however, that

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[403] *See supra* Part V.B.

[404] *See supra* Part II.A.

[405] Sean Hao, *Hawai'i Gasoline Exports Rise*, HONOLULU ADVERTISER, Sept. 5, 2004, at F1-2.

[406] *Id.*

[407] *Id.*

[408] Other alternatives that are discussed in legal and economic journals include favoring vertical integration of an oil company, while disfavoring divorcement statutes, *see* Soleymani, *supra* note 45, at 1412-17; vertically restraining maximum resale prices through an oil company, *see id.* at 1405-12; government-supported mavericks, Gal, *supra* note 256; mandated disclosure, BREYER, *supra* note 348, at 161, and divestiture. William K. Jones, *Concerted Behavior Under the Antitrust Laws*, 99 HARV. L. REV. 1986, 1988 (1986) (reviewing PHILLIP E. AREEDA, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION (1986)).

these alternatives do not exist independent from one another. Both alternatives could be combined to bring about a greater beneficial effect in the marketplace.

A. Reducing State and Local Gasoline Taxes

The first and most practical alternative available to the State of Hawai'i is the reduction of local gasoline taxes.[409] This alternative appears to be reasonable in light of the fact that Hawai'i has the highest retail gasoline taxes in the nation, which are approximately $0.58 per gallon.[410] Across the mainland United States, the average total tax on gasoline is approximately $0.42 per gallon.[411] The pro-competitive justification of increasing consumer welfare by lowering Hawai'i state and local taxes by $0.16 per gallon is apparent—reducing state and local gasoline taxes brings Hawai'i that much closer to realizing prices that the mainland United States currently enjoys. Whether Hawai'i's retail gasoline price will be comparable to that of the fluctuating mainland United States prices in response to lower taxes depends on whether mainland prices are increasing or decreasing at any point in time. Because Hawai'i's gasoline prices are upwardly sticky,[412] Hawai'i's gasoline prices do not immediately increase or decrease in lockstep with mainland prices. For example, when mainland prices decrease, the gap between Hawai'i's and the mainland's gasoline prices will increase.[413] When mainland prices increase, however, the corresponding gap will become smaller.[414]

Hawai'i's gasoline prices will also be insulated from adverse price volatility that would otherwise be experienced on the mainland. Volatility, by definition, is a double-edged sword. On one hand, Hawai'i's upwardly sticky prices signify that Hawai'i's motorists will not benefit from any decrease in price that would be occurring on the mainland United States.[415] On the other hand, as discussed before, Los Angeles' wholesale gasoline price increased over two hundred percent in fifteen days during the supply disruptions in

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[409] Sean Hao, *State Report Critical of Gas Cap*, HONOLULU ADVERTISER, Sept. 9, 2003, at A1.

[410] Hao, *supra* note 14. Of the $0.58 per gallon, approximately $0.32 goes to Hawai'i state and local taxes, and $0.07 in general excise taxes. *Id.* The remaining amount is attributable to the federal tax on gasoline, which is the same throughout the nation. *Id.*

[411] *Id.* The total $0.42 per gallon is made up of approximately $0.06 of "other state taxes," and $0.18 of state excise taxes. *Id.* The remaining amount is attributable to the federal tax on gasoline. *Id.*

[412] *See supra* Part I.

[413] *See* Stillwater Study, *supra* note 11, at 89 fig.6.1.

[414] *See id.*

[415] *See supra* Part I.

March of 1999.[416] During this period of time, Hawai'i's gasoline prices were actually decreasing at a steady pace.[417] In light of the above, while the absence of price volatility may have its drawbacks, it may also have its benefits.

A more significant drawback to reducing in-state gasoline taxes, however, is the amount of income the State of Hawai'i would forego. In 2003, the State of Hawai'i generated approximately $3.8 billion worth of tax collections.[418] Of the total $3.8 billion, approximately $1.8 billion and $1.07 billion consisted of general excise taxes and withholding taxes on wages, respectively.[419] Subtracting both of these figures from the total $3.8 billion yields a remainder of approximately $930 million. Of the remainder, approximately $154 million, or 16.5% of the remainder, was collected from fuel taxes.[420] Of the $154 million in fuel taxes, almost $138 million was collected from gasoline taxes, or 89.6% of the total collected from fuel taxes.[421] Based on these calculations, and excluding federal taxes on gasoline, the State of Hawai'i would be forfeiting approximately half of its gasoline tax revenues if it decided to lower its taxes to conform to that of the national average.[422] Nevertheless, the economically efficient solution of reducing gasoline taxes, together with the economic benefit to consumers, should outweigh that of its costs—especially when the State of Hawai'i could make up the lost tax revenues through the promotion or creation of other sources, such as an excess profits tax.

B. Imposing an Excess Profits Tax

Unlike a price control, an excess profits tax captures a portion of a firm's profits rather than placing an outright cap on prices or profits.[423] As a result, while lower prices under an excess profits tax are not assured and, therefore,

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[416] *See supra* Part II.A.

[417] *See* Stillwater Study, *supra* note 11, at 96 fig.6.8.

[418] State of Hawai'i Department of Taxation, State Tax Collections and Distribution Year Ending December 31, 2003 (Jan. 28, 2004), *at* http://www.state.hi.us/tax/a5_3txcolrptarchive.htm (last visited Feb. 11, 2005).

[419] *Id.*

[420] *Id.*

[421] State of Hawai'i Department of Taxation, Liquid Fuel Tax Base & Tax Collections – CY Ending December 31, 2003 (Jan. 28, 2004), *at* http://www.state.hi.us/tax/a5_3txcolrptarchive.htm (last visited Feb. 11, 2005).

[422] Of the $0.58 per gallon collected in taxes, approximately $0.32 goes to Hawai'i state and local taxes. *See* Hao, *supra* note 14. Decreasing state and local taxes by $0.16 to meet the national average would result in gasoline tax revenues being cut in half.

[423] *Compare* Part III.B.1 (discussing the characteristics of a regulatory price cap and a rate-of-return regulation), *and* Part V.A (discussing, in depth, what a regulatory price cap is), *with* Part VI.B (discussing what an excess profits tax is).

benefit consumers, it could indirectly benefit consumers through allocative efficiency. An excess profit tax promotes allocative efficiency by transferring industrial wealth to the government, which has the indirect effect of benefiting society.[424]

In 1917, the federal government imposed a flat sixteen percent tax rate on the income of corporations and partnerships that generated profits in excess of eight percent of actual capital invested.[425] The term "capital" was broadly defined as "cash paid in,"[426] "cash value of property,"[427] or "paid in or earned surplus."[428] The act was imposed for the same pro-competitive reason as that of Hawai'i's gasoline price cap law—to control the excessive profits that some industries realized at that time, such as the automobile industry.[429] Seven months after the commencement of the tax, the excess profits tax was changed to a war excess-profits tax, which imposed a tax on "supernormal"[430] income received during the years 1911-1913.[431] Because the new war tax's effect of taxing supernormal income conflicted with the traditional goal of a war tax (taxing profits "due to the war to pay expenses incurred for the war"[432]), the tax was amended to the original excess profits tax.[433]

Under the Excess Profits Tax of 1940, the federal government imposed an excess profits tax on firms if they received abnormally high profits resulting from large expenditures made by the government to the firm for national defense appropriations.[434] The excess profits tax was computed by subtracting a firm's net income from an amount of earnings deemed by Congress as the firm's normal and fair return.[435] Congress made this determination based on one of two methods, whichever resulted in a lower tax.[436] The first method was through a deduction of an amount equal to the firm's average net income

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[424] *See* Richard S. Markovits, *On the Economic Efficiency of Using Law to Increase Research and Development: A Critique of Various Tax, Antitrust, Intellectual Property, and Tort Law Rules and Policy Proposals*, 39 HARV. J. ON LEGIS. 63, 71 (2002) (A "government policy will be said to increase allocative efficiency if it gives its beneficiaries the equivalent of more dollars than it takes away from its victims.").

[425] T.S. Adams, *Federal Taxes Upon Income and Excess Profits*, 8 AM. ECON. REV. 18, 18 (1918); F.W. Taussig, *The War Tax Act of 1917*, 32 Q. J. ECON. 1, 28 (1917).

[426] Taussig, *supra* note 425, at 28.

[427] *Id.*

[428] *Id.*

[429] Adams, *supra* note 425, at 18.

[430] *Id.*

[431] *Id.*

[432] Taussig, *supra* note 425, at 31.

[433] *Id.* at 31-32.

[434] Comm'r v. South Texas Lumber Co., 333 U.S. 496, 497 (1948).

[435] *Id.*

[436] *Id.*

during the years 1936-1939.[437] The second method deducted eight percent of the firm's invested capital for the taxable year.[438] The words "invested capital" were defined as the "accumulated earnings and profits as of the beginning of such taxable year."[439] In light of both of the historical excess profits taxes, it logically follows that a government's income increases by capturing a small percentage of a firm's excess profits through the excess profits tax.

Imposition of a regulatory tax on excess profits, however, is not without its drawbacks. One of the drawbacks to an excess profits tax is that it could have the effect of deterring a firm from making new investments.[440] A second drawback is that enforcement of the tax would require significant government resources.[441] During the Excess Profits Tax of 1917, the federal government had a difficult time settling claims in a timely manner due to the lack of auditors and experts available to the government at that time.[442] In that same vein, employing an excess profits tax that is based on a "fair" return, similar to that of the Excess Profits Tax of 1940, requires a large amount of negotiating and renegotiating between the taxed firm and the government.[443]

Nevertheless, while negotiation has its drawbacks, it also has its benefits. During the Excess Profits Tax of 1940, it was believed that firms made creative price adjustments or adaptations, which would have the effect of avoiding or shifting the tax altogether.[444] Similar to a price control, however, a broad tax imposed on all firms within a market would ultimately create an inequitable burden on firms with higher cost structures.[445] Also similar is that a firm is not motivated to maintain control over its costs in response to an excess profits tax.[446] All of the vices set forth above, however, can be avoided through the process of negotiation and renegotiation.[447]

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[437] *Id.*

[438] *Id.*

[439] *Id.*

[440] Adams, *supra* note 425, at 19.

[441] *See* T.S. Adams, *Immediate Future of the Excess Profits Tax*, 10 AM. ECON. REV. 15, 15 (1920).

[442] *Id.*

[443] J. Fred Weston & Neil H. Jacoby, *Profit Standards*, 66 Q. J. ECON. 224, 224 (1952).

[444] *Id.* at 225.

[445] *Id.*

[446] *Id.*

[447] *See id.*

VII. CONCLUSION

As observed by economic scholars, "[t]he regulation of prices, as most theories describe it, results in winners and losers."[448] Hawai'i has become the first state to enact legislation that establishes a maximum wholesale gasoline price.[449] While this legislation may appear to be a practical and efficient solution to combating oligopoly pricing, it makes one wonder why other states, or even the federal government, have not also adopted similar gasoline price caps. This paper has attempted to answer that very question. States have likely not chosen the regulatory price cap method employed by Hawai'i's legislature because it is unconstitutional under the Commerce Clause of the United States Constitution.[450] More importantly, however, regulatory price caps on commodities have already been implemented in the past with disastrous social and economic results.[451] A price cap, therefore, lacks the legal and economic foundation it needs to be successful.

One cannot critique an economic legislation without reflecting upon the independent political motives and incentives driving the regulation.[452] Leading to its enactment in 2004, Act 242 was given considerable local media attention throughout the months leading up to the 2004 general election. In a state legislature composed of mostly Democrats, it presented a golden opportunity: side with the big oil companies operating in Hawai'i, or with Hawai'i's motorists. Despite whatever political incentives there may be, this author lauds the legislature's recognition of the problem of high gasoline prices in Hawai'i, and its efforts in attempting to come up with a workable solution. At times, however, politics can be blind to what is economically rational, and how best we can get from here to there. Hawai'i's gasoline price cap law is not it, and should thus be repealed.

Brandon H. Ito[453]

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[448] Lee, *supra* note 160, at 848 (citation omitted).

[449] *See supra* Part I.

[450] *See supra* Part III.C.

[451] *See supra* Part V.

[452] *See* Hardaway, *supra* note 258, at 111-12; *see also* Stigler, *supra* note 390, at 209.

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