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TRIBUTE

TRANSCRIPT

ARTICLES

COMMENTS

CASENOTES

RECENT DEVELOPMENTS

Tribute to Dr. Kaoru Kashiwagi

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In June, 1946, Kaoru Kashiwagi, a former lieutenant in the Japanese Imperial Army, returned to Tokyo from China to discover a country shattered by war.[1] Penniless, the young man soon discovered that his job prospects were further limited by the double whammy of a severe economic depression and the Allied prohibition against graduates of Japan's Imperial University taking positions in either the national or local government. Yet, in spite of these significant disadvantages, through hard work and diligence, Kashiwagi not only managed to build a successful law firm, but also became the first international legal consultant licensed to practice in Hawai'i, helping to facilitate transactions between people who, for a time, regarded each other as enemies. His commitment to deepening the understanding between Japan and the outside world is evidenced in both his generous support of William S. Richardson Law School students and faculty focusing on Japanese law, and in his decision to pursue a Ph.D. in business law despite being well into his seventies.

When Kashiwagi repatriated from China in 1946, Japan was in turmoil —not only was it struggling to deal with a previously unthinkable defeat, but it was also plagued with widespread food shortages and economic chaos. Moreover, because his father had been killed in action two years earlier in New Guinea, Kashiwagi now bore the burden of caring for his mother and younger sister. The following year, he decided to enroll in the University of Tokyo's Law Department,[2] becoming part of that school's second post-war graduating class. Just getting admitted into the school was a remarkable accomplishment because here too, the General Headquarters of the occupation allied forces, or GHQ, had put a restriction on ex-military officers, decreeing that they could not comprise more than ten percent of the school's entering

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[1] The bulk of the information for this Tribute comes from an interview with Dr. Kaoru Kashiwagi and Mrs. Michiko Kashiwagi conducted in Honolulu, Hawai'i on May 17, 2005. A recording of the interview, which was conducted in Japanese, is preserved at the William S. Richardson School of Law Library. The authors would like to send a special thanks to Dr. and Mrs. Kashiwagi for sitting down with them, and to Moon-Ki Chai, David Kuriyama, and Iris Okawa for their assistance in reviewing the writing.

[2] *See generally* Mark Levin, *Legal Education for the Next Generation: Ideas from America*, ASIAN-PAC. L. & POL'Y J. (Feb. 2000), http://www.hawaii.edu/aplpj/pdfs/03-levin.pdf (explaining the history of Japanese legal education and the University of Tokyo's Law Department).

class. Thus, not only did Kashiwagi have to pass the entrance exam, but he also had to beat out the droves of other ex-servicemen who were competing for the same precious few spots that had been allotted to them.

Kashiwagi began his legal studies at a unique point in Japan's history because its new Constitution had just taken effect on May 3rd of that year. In fact, Kashiwagi learned constitutional law from Professor Toshiyoshi Miyazawa, a prominent participant in the deliberations on the Constitution who would later become its foremost interpreter in the early post-war years. For Americans, this would be as if one could have studied constitutional law from James Madison in Philadelphia immediately following our 1787 Constitutional Convention.[3]

One of Kashiwagi's most memorable experiences as a law student was that of sitting in on the trial sessions for the Tokyo tribunal[4] while studying criminal law. He was particularly impressed by the sincere efforts of the American attorneys who had been assigned to defend people who had only recently been viewed as utter enemies, such as General Hideki Tojo and other suspects accused of "Class A" war crimes. Given the heated emotions that had run on both sides of the Pacific, those attorneys from the U.S. demonstrated to Kashiwagi in no uncertain terms that lawyers really could transcend their own personal feelings and serve as impartial officers of the court. After witnessing their obvious commitment to justice, Kashiwagi became convinced that he had made the right choice in deciding to pursue a career in law. Years later in his own practice Kashiwagi would have the opportunity to work side-by-side with one of the U.S. defense attorneys at the Tokyo tribunal, Mr. Ben Blakeney, who had decided to remain in Tokyo as a practicing foreign lawyer.

To support his family while attending school, Kashiwagi also worked part-time in the law office of Sadayoshi Hitotsumatsu, who at various times in his career served as a public prosecutor, a Representative in Japan's Lower House, and a cabinet member for three different Prime Ministers. Following his graduation from Tokyo University in 1950, Kashiwagi furthered his legal training at the Supreme Court of Japan's Judicial Research and Training Institute while continuing to work for Hitotsumatsu, spending the first nine years of his legal career working as an associate in that office.[5] During this period, Kashiwagi had the opportunity to work on several high-profile cases

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[3] In fact, a few eighteenth century Americans had a somewhat comparable chance, studying law from Virginia delegate George Wythe, who was a respected law professor at the College of William and Mary.

[4] The International Military Tribunal for the Far East. *See generally* RICHARD H. MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL (University of Michigan, Center for Japanese Studies 2001) (1971).

[5] In Japan, working for many years as an associate is not uncommon.

involving powerful Japanese political figures such as former Prime Minister Hitoshi Ashida.

Through his work with Hitotsumatsu, Kashiwagi became acquainted with several Japanese-Americans from Hawai'i who had served in World War II's highly decorated 442nd Regimental Combat Team and gone on to work for companies in Japan. For example, one of Hitotsumatsu's clients was the Daiei Motion Picture Company, which owned movie theatres in Hawai'i. It was in this connection that Kashiwagi first met Matsuo Takabuki—an accomplished businessman and future Bishop Estate trustee with whom Kashiwagi would form a lasting friendship that would span over half a century.[6] Although Kashiwagi himself would not be able to travel to Hawai'i until several years later, his affection for Hawai'i grew out of many friendships with people who called these islands home.

In 1959, Kashiwagi left Hitotsumatsu's law office to hang up his own shingle in the Yurakucho area of central Tokyo. Kashiwagi Law Offices[7] quickly became one of the most successful law firms in Japan with Kashiwagi serving as chief outside legal counsel for a number of leading Japanese companies. One such client was Mitsui and Company, Ltd., a trading company that descended from one of the four main *zaibatsu* technically dissolved during the Allied Occupation.[8] As Mitsui's business relations with the U.S. grew, so did Kashiwagi's international law practice.

Another major client was the Obayashi Group, one of Japan's largest construction companies, which built and operated many condominiums and hotels in Hawai'i such as the Sheraton Kauai Hotel. Beginning in the 1970s, working closely with Genro Kashiwa, who like Matsuo Takabuki was a veteran of the 442nd, Kashiwagi was instrumental in facilitating the Obayashi Group's expansion into Hawai'i.

Today, the Kashiwagi Sogo Law Offices has fourteen attorneys who serve Japanese clients with investments and businesses all around the globe, as well as many non-Japanese clients doing business in Japan. Moreover, the firm has hired several Richardson Law School graduates as foreign law associates.

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[6] *See* MATSUO TAKABUKI, AN UNLIKELY REVOLUTIONARY: MATSUO TAKABUKI AND THE MAKING OF MODERN HAWAI'I (University of Hawai'i Press 1998).

[7] Over the years Kashiwagi Law Offices has changed names a few times as Kashiwagi entered into partnerships with other attorneys. Its current name is "Kashiwagi Sogo Law Offices."

[8] During the Allied Occupation of Japan, reformers dissolved the *zaibatsu*—large family-owned banking and industrial combines that controlled much of the Japanese economy prior to WWII. In the 1950s and 1960s, these efforts were undone, to a degree, when groups based on the old *zaibatsu* reemerged as *keiretsu* industrial associations. *See* Lawrence Repeta, *Declining Public Ownership of Japanese Industry: A Case of Regulatory Failure?*, 17 LAW IN JAPAN 153 (1984).

For many, the coda to an accomplished career in international business law would be a restful retirement, but Kashiwagi never lost the inquisitiveness to learn and a thirst for more law studies. For over forty-five years, work and family obligations postponed that dream. But good news came when he learned of a Tokyo-based night school program being offered by Tsukuba University's law department.

In 1999, Kashiwagi moved just a few pieces of his practice to younger attorneys at the Kashiwagi law firm and enrolled in a rigorous, two-year LL.M. night school program. Kashiwagi—who was not only substantially older than his classmates, but his professors as well—demonstrated himself to be an outstanding legal scholar. After graduating with an LL.M. in Business Law in 2001, he went on to earn a Ph.D. in 2004, by completing both a comprehensive course load and a full-scale research dissertation.[9]

Kashiwagi's research extensively analyzed corporate governance reforms in England. This was a strategically idealistic topic choice: Kashiwagi had been dismayed by Japan's post-bubble economic malaise and the rash of corporate scandals occurring there, and felt strongly that comparative research could introduce to Japan wise methods adopted in England and present a beneficial model for change.

Beginning with the establishment of the English Financial Reporting Council in 1990 and culminating in the promulgation of the "Combined Code"—a new standard for corporate governance adopted by the London Stock Exchange as part of its Listing Rules—the private sector was able to successfully establish and implement this new standard without the impetus of any new statutes in a relatively short time-span. To Kashiwagi, this accomplishment was even more remarkable because the approach adopted by the British was so different from the way the Japanese would have handled the situation. In Japan, implementing industry-wide reforms typically demands extensive deliberation by the legislature, which eventually leads to the passing of new laws. After researching the history of the Combined Code, however, Kashiwagi realized that it presented the Japanese with an invaluable lesson—that it is possible for private industry to reform itself autonomously and with minimal outside input from attorneys or the legislature.

As noted above, Kashiwagi became the first foreign law consultant licensed to practice in Hawai'i in 1989. That same year, he and his wife Michiko generously provided the William S. Richardson School of Law with an

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[9] KAORU KASHIWAGI, EIKOKUNIOKERU JYOJYOUKIGYOU KANTOKUKIKOUNO ARIKATATO TORISHIMARIYAKU HOUSHUUNO KAIJI: DOUKOKUNO CORPORATE GOVERNANCE KAIKAKUWO CHUUSHINTOSHITE [Management/Supervision Systems and Directors' Remuneration Disclosure for Listed English Companies: Focusing on the Reform of Corporate Governance in England] (2003). A copy of this doctoral dissertation is preserved at the William S. Richardson School of Law Library along with an English summary.

endowment for Japanese law studies. As of this writing, this endowment has already helped to send nineteen law students to study in Japan and has been used to vastly expand the law library's Japan collection. Since 1997, the Kashiwagi Endowment has also provided substantial funding support for the Law School's Japanese law specialist, Professor Mark Levin's teaching and numerous articles on legal education reform, tobacco control policy, and race justice issues in Japan. In recent years, Dr. and Mrs. Kashiwagi have regularly visited the Law School, always impressing administration, faculty, and students with their warm and gracious interest in students and our programs.

In recognition of his work as a leading attorney in international business transactions, his committed engagement with legal scholarship exhibited by his Ph.D. accomplishment, the depth of his ties to Hawai'i's legal community, and his financial and personal support of the Law School's mission, the University of Hawai'i's Board of Regents awarded Kashiwagi with a Honorary Doctor of Humane Letters on May 15, 2004. When the Regents conferred the degree during the Law School's 2004 graduation ceremony, Regent Patricia Lee's praise for Kashiwagi included the following: "[G]iven the Richardson Law School's mission to promote justice, ethical responsibility, and public service, and our scholarship with special comparative law emphasis in Pacific and Asian Legal Studies, one can not imagine a more outstanding role model for our graduates seated here today."

When Kashiwagi repatriated in 1946, he did so under the most inauspicious of circumstances. Not only was he destitute and facing extremely limited job prospects, he also bore the burden of being the head of the household for a grieving family. Fortunately, Kashiwagi chose never to dwell on the hand that fate had dealt him and instead forged ahead, establishing himself as a respected attorney both within and outside his country. When asked to impart some words of wisdom to the future graduates of Richardson Law School, Kashiwagi responded by saying that as long as they work diligently and with integrity, they will find success. Although Dr. Kashiwagi is far too humble to admit it, his life is a testament to the truthfulness of this maxim.

A Public Lecture by Joseph L. Sax,* Environment and Its Mortal Enemy: The Rise and Decline of the Property Rights Movement

I. INTRODUCTION

This public lecture, given by Professor Joseph L. Sax, took place on Wednesday, April 14, 2005, and was sponsored by the *William S. Richardson School of Law's Environmental Law Program.* The Environmental Law Program ("ELP") has hosted several prestigious scholars and environmental law practitioners as distinguished visiting faculty. In addition to enriching the learning experience of students through their teaching and mentoring, visiting faculty share their expertise with Hawai'i's broader legal and public interest communities. In Spring 2005, ELP was honored to host Professor Emeritus Joseph L. Sax, a nationally renowned expert on the public trust doctrine, takings jurisprudence, and public land and water issues.

II. OPENING REMARKS

Professor Denise Antolini:

The Environmental Law Program is truly honored and delighted to have Professor Joseph Sax here tonight as a distinguished visitor and to have his wife Elli back in Hawai'i. Joe was born in Chicago, received his A.B. from Harvard in 1957, and his J.D. from the University of Chicago in 1959. After working for several years at the Department of Justice under the Eisenhower Administration, Joe began his long and distinguished teaching career at the University of Colorado from 1962 to 1966. He moved to the University of Michigan from 1966 to 1986, and then he made the right move and came to Boalt Hall where I was a law student. I was so delighted and thrilled in my third year to have Joe at Boalt and was lucky to be able to take one class from him. Like myself, many of you have had a class with Joe in your lifetime and I think you would share my comment that once you've been a student of Joe Sax, you always treasure that opportunity.

A little bit about Joe's scholarship; it's remarkable, it's prolific, it's profound, it's lively, and sometimes revolutionary. Closer to home, his

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seminal 1970 article on the public trust[1] became the cornerstone of the Waiāhole water rights decision.[2] And for those of us here who are water groupies, we know that *Waiāhole* was an absolutely landmark decision and Joe's scholarship really paved the way for that decision.

Joe's teaching is legendary. He's brilliant yet accessible, challenging but welcoming of student ideas. His commitment to public service is unparalleled. He steadfastly worked for many environmental organizations. He also did a stint in the Clinton Administration working for Bruce Babbitt.

Lastly, I want to share with you a comment that was made at a conference of environmental law professors in San Francisco. Annually we gather, and this year it was in San Francisco. There was one particular panel on the evolution of environmental law and Joe was the featured speaker. And, really, people came because of Joe and his pioneering role in the field. Richard Lazarus[3] from Georgetown called Joe: "Our rock star." And with that please welcome Joe Sax.

III. LECTURE

Professor Joseph L. Sax:

You heard a number of things from tonight's introductory comments about the Environmental Law Program. Of course, these are the comments of insiders. But let me say something from the perspective of an outsider. It is true that the Environmental Law Program here is much admired by people at mainland law schools. It is really a remarkable program and a remarkable faculty. I want to say briefly that it has been a great pleasure for me, and a wonderful opportunity, to be able to teach a course here. I have been enormously impressed by the students, by their knowledge, their involvement, their engagement, and their liveliness. It has been an entirely positive and wonderful experience. If I didn't have to grade an exam it would be perfect.

Let me now turn to the order of business for tonight. Just about 100 years ago, in 1904, the state of New York, in response to the decimation of the beaver population as a result of the fur trade over the previous two centuries, passed a statute that said "[n]o person shall molest or disturb any wild beaver or the dams, houses, homes, or abiding places of the same."[4] Following that, the wildlife program reintroduced a population of beavers into several places

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[1] Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

[2] *See generally In re* Water Use Permit Applications, 94 Hawai'i 97, 9 P.3d 409 (2000).

[3] Professor Lazarus teaches environmental law, natural resources law, Supreme Court advocacy, and torts at Georgetown University Law Center.

[4] *See* Barrett v. State, 116 N.E. 99, 100 (N.Y. 1917) (quoting 1904 N.Y. Laws, c. 674, § 1).

in the state in an effort to restore the population. Not surprisingly, the beavers came out of a particular river where they had been planted and started chewing on some trees that belonged to a man named Barrett who harvested trees for a living. Mr. Barrett was quite distressed, as you might imagine, by the behavior of these beavers. He hired a lawyer who was a fairly imaginative fellow, who said that since the beavers had been planted by the state, they should be viewed as agents of the state of New York. And, in their capacity as agents of the state of New York, they had taken away his trees and for that reason Barrett had to be compensated.

This case went up through the court system in the state of New York and ultimately the court decided against Barrett.[5] The justices wrote an extraordinary opinion, one of the really remarkable and most interesting opinions ever written in this field. I want to quote to you one very brief paragraph from it:

> Wherever protection is accorded, harm may be done to the individual. Deer or moose may browse on his crops; mink or skunks kill his chickens; robins eat his cherries. In certain cases the Legislature may be mistaken in its belief that more good than harm is occasioned. But this is clearly a matter which is confided to its discretion. It exercises a governmental function for the benefit of the public at large, and no one can complain of the incidental injuries that may result. . . . The police power is not to be limited to guarding merely the physical or material interests of the citizen. . . . The eagle is preserved, not for its use, but for its beauty. The same thing may be said of the beaver.[6]

This opinion set out a number of striking and important principles. First, that we as members of the community have certain rights. And, in this case, rights to one of the benefits of nature: the presence of wildlife. Second, that in order to ensure and protect these benefits, the legislature needs to, and is entitled to, protect habitat, and not just the physical creatures that are the subject of the legislation. And third, and most importantly, that affording this protection inevitably imposes some burden on landowners and other property owners since we have to protect wildlife where it is found.

Now, it is interesting that by the time this case was decided, in the period shortly after the first World War, we already had public parks, we had public refuges, we had national forests. And, the court makes clear that for all their importance and their benefits that this, what you might call the enclave theory of protection of environmental resources, cannot do the job in and of itself; that protecting the natural services in the environment implicates a more pervasive form of land management than can be accomplished simply by setting aside certain public areas.

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[5] *Id.* at 101.

[6] *Id.* at 100-01.

In any event, as we have learned in other settings, setting aside public refuges can never be adequate to do the job. It is always a partial solution because of what one might call the frontier problem. And, just as an example, I think of the case of *Christy v. Hodel*,[7] about which I will say a few words in a moment. In that case, a man had obtained a lease to raise sheep on land that happened to be Indian reservation land right on the eastern edge of Glacier National Park, which is a refuge for the grizzly bear. And, to no one's surprise, or should be to no one's surprise, the grizzlies walked over the property line of Glacier Park and started eating the sheep. Of course, if they had moved the boundary of the park another hundred yards or another thousand yards and put the sheep just next to it, the bears would simply have moved down there. So there really is no way to deal with these problems simply by setting artificial boundaries, as important as they are.

Another important implicit teaching of the *Barrett* case is how imperfectly conventional justifications about the nature of ownership and property rights fit with the services that natural systems provide: whether they're benefits arising from wildlife other than as an economic good or the benefits that arise from the bioproductivity of a wetland. These benefits do not fit easily, in fact it seems in many ways that they don't fit at all, with the conventional notions of ownership. For example, the conventional ideas of first possession, or the more well known Lockean notion of ownership being justified by producing a benefit through mixing one's labor with the land. While wildlife and their benefits are inextricably connected to land, they are not attributable in any way to any labor or effort of human possessors on the land. Indeed, one might say the opposite is the case: that they thrive despite the efforts that owners usually put into the land. So there is a poor fit between our conventional notions of ownership, and why and how it's justified, and our concerns about protecting natural systems.

Another striking thing about the *Barrett* case is its provenance and its history as an exemplar of what Justice Scalia in the famous *Lucas* case called the "background principles" of property law.[8] The *Barrett* case itself, as I mentioned when I started, goes back nearly a century and it cites in its support New York wildlife protection laws going back to 1705.[9] So it would be hard to find a more modern and more full-bodied spelling out of the entitlement of legislatures to recognize public rights in the protection of habitat. Or a more emphatic rejection of the economic losses thereby engendered as a violation of property rights. That's old law and *Barrett* is not an unusual case, but a conventional case of its time.

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[7] 857 F.2d 1324 (9th Cir. 1988).

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

[9] *Barrett*, 116 N.E. 100.

It's out of this history that I devised the title that I gave to my talk tonight: *Environment and Its Mortal Enemy*. For the modern property rights movement has in effect urged the judiciary to repudiate the background principles upon which our law has long rested, and to advance a radically novel version of private property rights and of compensable police power regulation. The *Barrett* case illustrates a foundation precept of modern environmental protection and is a component of the background principles of our legal system. In this respect, one may truly say that the property rights movement—and I don't mean property in general or property rights in general, but I mean this particular movement which has been so active in litigating against environmental protection cases, as it is presently constituted—is a radically revisionist version of American law. And it is in that respect environment's mortal enemy.

For example, while the *Barrett* case along with the property jurisprudence of Justice Holmes recognizes that preservation actions that unduly oppress individuals could call for a different result, and could justify claims for compensation,[10] the current property rights movement has urged that any diminution of value caused by regulation of other than nuisance-like activity is compensable, a position it has promoted through its view of the temporary takings doctrine. Many of you in the audience know the *First English* case[11] and its articulation of that doctrine and of the so-called parcel-as-a-whole or denominator issue, a position that was clearly articulated by the lawyer for the property owner in the recent *Tahoe-Sierra* development moratorium case.[12] Those doctrinal claims assert that any loss of value of property for any period of time, even a very short period of time, or any loss in the value of property even though it is not a loss of the whole property, constitutes a compensable act. This view is entirely at odds with the tradition in American property rights cases.

The same is true of an effort to radically restructure property law relating to the so-called property salvage or property protection theory upon which the grizzly bear case that I mentioned earlier, the case of *Christy v. Hodel*,[13] is based. In that case when the grizzly bears came and started eating the plaintiff's sheep in violation of the law, the plaintiff shot the grizzly bears and argued that even though that was a violation of the statute, that there was a federal constitutional right to protect your property. Since property was being threatened by the grizzly bears, the owners argued they had a constitutional right to shoot the grizzly bears if that was necessary to protect their property.

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

[11] First English Evangelical Lutheran Church v. County of L.A., 482 U.S. 304 (1987).

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

[13] 857 F.2d 1324 (9th Cir. 1988).

Now, as an example of how radically removed that theory was from the background principles of American property law, the claimants were reduced to citing as authority for their constitutional theory a case which in general has been utilized by conservatives to berate activist liberal judges, the case of *Griswold v. Connecticut*,[14] the Connecticut contraceptive case in which the Court relied on an asserted spirit of the Constitution, rather than any constitutional text or historic understanding.[15] My point is only that the claim of the owners in *Christy* was so at odds with any established constitutional doctrine that they had to reach out for the very sort of activist constitutional interpretation they are usually so eager to condemn. Fortunately, their claim was rejected.

Finally, as yet another example of radical revisionism, I would point to a case that has gotten a good deal of attention in recent months, the so-called *Tulare Lake* decision.[16] That was an endangered species case in which agricultural irrigators were required to take less water in order to protect downstream species needs. They argued for compensation on the ground that their water rights had been taken. They were granted compensation by a trial court, the Court of Federal Claims, in a case that is based on a fundamental rewriting of established California water law. In my view, and I think in the view of most other knowledgeable water specialists in California, the decision was entirely at odds with established California water law. Nonetheless a trial judge held that it was a taking of property and made an award of about sixteen million dollars. Despite the request of the state of California, among others, to appeal the case, the Bush Administration decided it would not appeal and is paying the compensation.

Much takings litigation is founded on claims of regulation that imposes oppressive burdens. Let me turn to that question. It should be noted that contemporary law does routinely respond to extreme or oppressive burdens, as the *Barrett* case suggested that it should. I would point perhaps most notably to the use of the habitat conservation plan approach under the Endangered Species Act,[17] which was strongly promoted during the time of Bruce Babbitt's tenure as Interior Secretary. This is a provision of the Act that permits some impact on protected species and seeks to find an economically workable plan of protection that permits both use and development as well as conservation and restoration of habitat in order to prevent oppressive burdens. The idea is to protect the environmental resources as the law mandates, but at the same time to minimize as much as possible the

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[14] 381 U.S. 479 (1965).

[15] *See id.*

[16] *See* Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313 (2001).

[17] *See* 16 U.S.C. § 1539(a)(2)(A) (2005).

economic burdens on landowners. Hundreds of habitat conservation plans designed to protect against oppressive burdens have been put into place with the collaborative effort of property owners in order to avoid reaching the compensable taking boundary suggested long ago by Justice Holmes who regularly cautioned regulators against going "too far."[18]

Another example of 'burden mitigation' is the voluntary policy of compensating stock losses resulting from the reintroduction of wolf populations in the Northern Rockies Ecosystem, funded by conservation organizations and private communities to reduce the economic burdens on ranchers of wildlife restoration programs. Similarly—using the Endangered Species Act as an illustrative case since it has been the most controversial of all these laws—there are provisions in the Endangered Species Act immunizing individuals from liability if they are acting to protect human safety.[19]

In addition, one can find a variety of instances in which the public has shown itself willing to share the burdens imposed by environmental protection. A famous example is our primary modern public trust case, the *Mono Lake* case, in which the city of Los Angeles, which had been taking water for the purpose of meeting municipal water needs, was required to cut back very sharply its diversions out of Mono Lake.[20] The state appropriated some eighty million dollars to be made available if and when Los Angeles would use that money to institute water conservation policies to substitute for the water that it lost from the Mono system. The state was willing to tax itself as well as the citizens of Los Angeles, but to do it in a way that would assure that Los Angeles did not just go to some other place to get its water, where it would do as much or more environmental damage. That is another response to the oppressive burden problem.

More recently, California has made money available for restoration efforts in the Salton Sea, in the southernmost part of the state. In order to reduce agricultural irrigation use of water and make some water available for transfer to growing urban areas in southern coastal California, the state is willing to bear part of the burden of protecting listed species in the Sea, rather than putting the economic burden all on irrigators.

Having said that there is a long tradition of protecting wildlife and wildlife habitat, and that this tradition rests on the same principles that are needed for modern environmental protection of endangered habitat, one may ask why we find ourselves embroiled in so much controversy over modern environmental laws, and in particular the Endangered Species Act? I think there are several

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

[19] *See* 16 U.S.C. § 1540(a)(3), b(3) (2005).

[20] Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709 (Cal. 1983).

explanations. First and most importantly, there has been a huge increase in land development, sharply reducing habitat. Most of the coastal development has been a product of post-World War II activity and much of it of post-1960 development so that much, but not all, of the intense pressure on wetlands has been the result of this tremendous desire of people to develop on and to live on the coast.

A related development is that people have shown a very strong desire to move into quite remote places, such as rural forested areas. People move into these areas, but they bring urban values and urban demands with them and they create a very bad fit with nature.

Third, our knowledge of the value of biological diversity has considerably increased the ambit of desire for protection. We've gone far beyond traditional species like the eagle, the grizzly bear, the peregrine falcon, and the beaver, to many species that are highly important from a biodiversity perspective but are not charismatic and thus generate less public sympathy and understanding.

I want to conclude with some comments about the last aspect of my title. It says *The Rise and Decline of the Property Rights Movement*, and I am sure some people looked at the title and said, 'the property rights movement is declining, really?' It certainly is not acting like it's declining. It's pretty vigorous and it has in recent years had a number of very important victories, most recently in the *Tulare Lake* case[21] and in a number of important cases in the United States Supreme Court that are very familiar to virtually everybody in this room: the *Nollan*[22] and *Dolan*[23] cases, the *Lucas*[24] case, the *Loretto*[25] case, *Palazzolo*,[26] and *First English*,[27] to name only some of a fairly long list of cases that we have seen since the early 1980s.

But I believe that there has now been a major turn taken in the United States Supreme Court and what I am about to say rests on my reading of the very interesting opinion of Justice Stevens for a six to three majority in the recent *Tahoe-Sierra* case.[28] On its specific facts the case was not very hard. It involved a planning moratorium for Lake Tahoe. The Court only looked at a relatively brief moratorium and the argument in the case made by the property

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[21] *Tulare Lake*, 49 Fed. Cl. 313.

[22] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

[23] Dolan v. City of Tigard, 512 U.S. 374 (1994).

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

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

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

[27] First English Evangelical Lutheran Church v. County of L.A., 482 U.S. 304 (1987).

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

owners was that any moratorium was an unconstitutional taking of property.[29] That's a loser.

But what was interesting and important about the case is not simply that planning moratoria were upheld, but that Justice Stevens's opinion went far beyond merely upholding the moratorium, and that he got not only a concurrence but built an alliance with both Justice O'Connor and Justice Kennedy—but most particularly with Justice O'Connor who tends to be the crucial justice in many of these cases. If you go back and look at the case, I think you'll see that Justice Stevens cited Justice O'Connor on at least seven different occasions in his opinion. I believe the case really marks a kind of watershed in the Court's modern takings doctrine. I think the majority of the Court, and not just a mere majority, has finally given up on the leadership that Justice Scalia was exercising in trying to develop a categorical approach, trying to find some relatively hard and fast rules to govern constitutional property rights cases. I think there was a strong willingness on the part of both Justice Kennedy and Justice O'Connor, who are really quite strong advocates of private property rights, to let Justice Scalia take the lead in these cases to see where things would go, and to see if he could bring a degree of rationality and clarity to an area that everybody from one end of the spectrum to the other has viewed as complicated, puzzling, and confusing. When you read carefully the *Tahoe-Sierra* case you can see that on one issue after the other they've effectively given up.

Prior to the list of cases that I mentioned earlier where the property rights folks have prevailed, the leading case was the *Penn Central* case of 1978, the historic preservation case in which the Court said you have to look at a variety of factors, you have to look at these cases in a very fact specific way, you have to decide whether the owner's reasonable expectations have been disappointed, what the government was trying to do, and so forth.[30] That's a test that turns out to be in fact quite deferential toward legislative decisions.

The Court hadn't talked much about *Penn Central* in recent takings cases but *Tahoe-Sierra* over and over and over again comes back to trying to revive Penn Central as the leading regulatory takings precedent. I think that development foreshadows a more deferential case-by-case analysis. Also, the Court expressly affirmed the property-as-a-whole rule. This is a major defeat for the property rights movement. *Tahoe-Sierra* also represents a very strong defeat on the temporary takings issue, the so-called *First English* issue, in which the position that has been taken by property rights movement advocates had been that a temporary taking means a loss of value for any period of time even a short period of time. The Court in *Tahoe-Sierra* said that is not what

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[29] *Id.*

[30] Penn Cent. Transp. Co. v. City of N.Y., 438 U.S. 104 (1978).

First English means; *First English* is a remedy case. First, you have to decide if there was a taking according to *Penn Central* standards, or the physical invasion standard.[31] First you decide that. Then, if you find there is a taking by that standard, and only then, do you look to *First English* and say you have to compensate for that period of time. So it is purely a remedial case.

In any event, the major point is that the so-called *First English* standard and the property-as-a-whole doctrine were two major issues for the property rights movement and they were soundly rejected in this six to three opinion, while there was a revival of the *Penn Central* standard. So I think that we are going to see quite a different approach by the Court except in what I would call the 'abuse cases,' cases like the *Monterey* case where somebody wants to develop their land and keeps coming back to the local government, and the local government says we don't like that plan, come back again.[32] And after repeated delays, you say to yourself 'they're never going to let this guy do anything.' The Court does not like that and they are not going to like that whatever the numbers are. But other than what I would call these abuse cases, or what you would think of as government expropriation cases, I think the Court is really taking a turn.[33]

So now I am really going to go out on a limb and I am going to tell you what I think the Court is going to do with the takings cases that they have before them this term. They have two really important takings cases, one from Hawai'i as I am sure all of you know. But they actually have four cases before them. I predict that the property rights people are going to lose all four cases. That's not to say they're going to lose everything on every possible issue. In the Hawai'i case, *Lingle v. Chevron*,[34] I feel quite confident that the majority will disavow the so-called *Agins'* test,[35] the substantially advance test, which has been much talked about, much cited in cases but not applied. It's a test that invites the court to do more, to look more closely, to be more evaluative of legislative decisions, to be less deferential, to look at how effective they are, how much of a public interest they are. I think it is going to go bye-bye.

Okay. Case number two. I am equally confident that the Court will not give a newly expansive reading to the public use doctrine in the *Kelo* case, the Connecticut public use doctrine case.[36] They may say some things like you cannot really do terrible things but the notion that they are going to open up

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

[32] *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999).

[33] The decision in *Lingle v. Chevron U.S.A. Inc.*, handed down shortly after this speech was delivered, is consistent with the views expressed here. *See* 544 U.S. 528 (2005).

[34] *Id.*

[35] Agins v. City of Tiburon, 447 U.S. 255 (1980).

[36] Kelo v. City of New London, ___ U.S. ___, 125 S. Ct. 2655 (2005).

the public use issue for substantial inquiry—don't believe it for a moment. They took a strong view about it in another Hawai'i case, *Midkiff*.[37] The issue was powerfully raised in the World Trade Center case some years earlier.[38] And despite the problems with the public use doctrine, as in the *Poletown* case in Detroit,[39] they are not going to touch it in any significant way in my view.[40]

The third case, I feel almost as confident that they will not permit the property owners a second bite at the apple. This is the San Francisco hotel case, the *San Remo* case, in which the owners made a takings claim in the state court claiming that under the state constitution their property was taken.[41] They went all the way up to the state supreme court, lost,[42] and now they want to come to federal district court and make a federal constitutional claim.[43] This is what people sometimes call a second bite at the apple type case. They are not going to win that either, I don't think.[44]

Finally, there is another procedural property rights case, the *Orff* case,[45] which is actually sort of a version of the *Tulare Lake* case.[46] You've got farmers who had to reduce their water diversions in order to meet downstream environmental standards, and they are claiming that they have standing to make this claim even though the water is in the name of the water district. This comes up as a third party beneficiary case. I think they are going to lose. The issues before the Court are not important in terms of property doctrine but it is a takings case and the underlying issues are important in terms of the constitutional status of water rights, but I think they are going to lose on standing to sue.[47]

That's what I think the law is in terms of *Tahoe-Sierra*, that's where I think the law is going to go. So I think despite the best efforts of the "mortal enemies," they are gradually losing ground and the property rights

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[37] *See* Haw. Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).

[38] *See* Courtesy Sandwich Shop, Inc. v. Port of N.Y. Authority, 190 N.E.2d 402 (N.Y. 1963), *appeal dismissed*, 375 U.S. 78 (1963).

[39] *See* Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

[40] However, the Court was much more sharply divided than I would have predicted. *See Kelo*, ___ U.S. ___, 125 S. Ct. 2655.

[41] San Remo Hotel L.P. v. City and County of S.F., ___ U.S. ___, 125 S. Ct. 2491 (2005).

[42] *Id.*

[43] San Remo Hotel L.P. v. City and County of S.F., 41 P.3d 87 (Cal. 2002).

[44] San Remo lost in an unanimous decision. *San Remo*, ___ U.S. ___, 125 S. Ct. 2491.

[45] Orff v. United States, ___ U.S. ___, 125 S. Ct. 2606 (2005).

[46] Tulare Lake Basin Water Storage Dist. v. United States, 49 Fed. Cl. 313 (2001).

[47] The Court unanimously denied them standing-to-sue. *Orff*, ___ U.S. ___, 125 S. Ct. 2606.

movement's fortunes are declining although they are far from exhausted. Anyway, that's the way I see it. Thanks very much.

IV. QUESTION AND ANSWER SESSION

Professor Arnold Lum:

Let me take you away from takings and property rights and back to the public trust doctrine. In my view, the doctrine is amongst those background principles of property law. Recently in *In re Wai'ola O Moloka`i*, the Hawai'i Supreme Court adopted an APA standard of review.[48] In my view, challenges under the public trust doctrine should be reviewed de novo and I cite to you *Greylock*.[49] How can those of us who wish to correct the situation get the courts to adopt a *de novo* review standard?

Professor Joseph L. Sax:

The last thing I want to do is comment about the administration of Hawai'i law and particularly about cases that I have not read. Let me just say it this way. As you probably know, I wrote about the *Mount Greylock* case[50] in my article back in 1970, so I do think it is an important case and I think it is a good model of public trust administration. How it exactly applies to the case you are referring to, I don't know. My own view about the trust, and I think that this is the position that your court took in the first *Waiāhole Ditch* case,[51] is that the public trust is not only authority for development administrators to act but that it creates a positive duty, and a strong duty, and the effective question the court has to ask itself is: Did the agency in question act affirmatively to implement the duty that it had? I believe in the *Waiāhole* case that the court quoted the statement from the *Hudson River* case that you can't stand by as an "umpire passively calling balls and strikes."[52] That's one of the famous statements in early environmental cases. I think that's right and I think it does suggest a more affirmative approach to administrative action than is the usual highly deferential position. I don't know if that makes you happy or unhappy.

Professor David Callies:

Joe, I have to ask. Was *Lucas* an abuse case?

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[48] *In re* Wai'ola O Moloka`i, Inc., 103 Hawai'i 401, 83 P.3d 669 (2004).

[49] Gould v. Greylock Reservation Comm'n., 215 N.E.2d 114 (Mass. 1966).

[50] *Id.*

[51] *In re* Water Use Permit Applications, 94 Hawai'i 97, 9 P.3d 409 (2000).

[52] *Id.* at 143, 9 P.3d at 455 (citations and quotation marks omitted).

Professor Joseph L. Sax:

That's a really good question. It is not an abuse case of the type I was focusing on. I think that the Court, because the whole area had been developed and this was the last remaining piece of property, just couldn't see the merit of it. In that sense at least, I think it was a very weak case and of course as you know very well, when it was all over the state got rid of the restriction. So it was a pretty weak case. But I agree that it was not the kind of case that I think is at the heart of things. I would say that *Lucas* was sort of the highpoint of Justice Scalia's influence on the Court. And I think it is such a puzzling case for people because there was said to be a total loss of value and that was not a contested fact although it probably wasn't true. And then the question is what if it was 95%? It is such an odd case, this 'total loss of value.' So I never understood quite where to fit it doctrinally. I wrote a long piece in the Stanford Law Review about the case and what I thought.[53] I view the case as one that showed how little appreciation the Court has for what environmental protection is really about.

Professor David Callies:

Without question the Court is not very sympathetic to environmental issues most of the time. But the Court in *Lucas* mostly uses the term "economically beneficial use" rather than "value" in the context of *per se* takings. Granted, as the Court said, the regulatory taking battleground will primarily be over partial takings, where *Penn Central* applies. We nevertheless in Hawai'i have classifications like the state Conservation District which effectively prohibit virtually all use of land. What about these?

Professor Joseph L. Sax:

I am really glad you raised this. I take your point. That is, I think it is partly why I focused on the oppressive burden issue in the *Barrett* case. I think if you get a case in which someone is pretty much wiped out, I think those kinds of cases will continue to be troublesome to the Court. If you came back to the Holmesian standard which is how much is too much, I personally feel that those of us who see ourselves as being strong supporters of environmental protection could live with that. That is, that you want to give a message to the regulatory community that we don't want to put people out of business, we don't want to wipe people out, we don't want to create these very unfavorable economic situations. That is why I gave the list of mitigation examples. I give Babbitt a lot of credit. His notion was that we are under attack; the Act is under attack. It was the Gingrich era. They were really

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[53] *See* Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433 (1993).

going after the environment, among other things. And the question was: How do you save the Endangered Species Act? And Babbitt said, look we've got to take this habitat conservation plan process, which was essentially a dead letter, and sit down with these people and say, you've got to do something to satisfy the Fish and Wildlife Service or the National Marine Fisheries Service or whatever, that you are not going to wipe out this species, and that we're going to work with you and try to figure out how you can carry on your business in some effective way and still meet the legal requirements. And they did it in case after case after case. So, in my view, that is the right way to do it. And the more you move to this edge of just wiping people out, the more the Court is going to get down on you. I know it is a very undoctrinal way of talking about it. But if you stand back from all these cases, I think that is where you come out. I understand what you are saying, if it is abuse cases plus these economically overwhelming cases, that is another category that the Court is probably going to be very sympathetic to the property owner. I would strongly agree with that and I think it's a good message to give to the regulatory community.

William Tam:

I'm glad to hear that we are getting back toward a regression toward the medium. What advice would you give to the government and people in the government about giving notice about conduct to avoid abuse cases? It seems to me that the lessons are not learned by a lot of the regulators and if they just went back and read a little history they'd know not to go too far sometimes and would save us the trouble of these educators.

Professor Joseph L. Sax:

Well, I think you've said it. I think that is the right advice. I think that sometimes you get people in the regulatory community who are overzealous and who don't understand that there has to be some kind of moderation or some kind of search for accommodation. The great challenge is that we are trying to restore these environmental services that natural systems provide for us and figure out a way to do that and still promote the real needs of human communities. And there are lots of ways to do that. Sometimes they're pretty simply. You get these turtle egg cases, do you have those in Hawai'i? I mean turn out the damn lights. Or you get cluster things like you don't have to build in the wetlands, you don't have to cut down all the trees, sometimes you make more money to do it that way, leave some open space. There are a lot of things where with a little imagination these problems can be dealt with. As I said, I thought Babbitt understood that. He was very strong in promoting environmental resources; he never tried to put pressure on the Fish and

Wildlife Service or anything. It was always 'let's see if we can find some way to resolve this problem.'

Diane Drigot:

As a non-lawyer but as a seasoned land use and natural resource program manager at a military installation, I wanted to know your opinion. Do you think there is a link between the trend towards outsourcing in the federal government and this property rights movement? From where I sit, so far the argument has held up that management of public trust resources are inherently governmental functions built into laws saying that you cannot outsource the positions that manage these resources. But there are trends, like there are whole military bases being run by corporations. My point is, do you see any sort of parallel between this outsourcing tendency and the property rights movement and any reason for optimism on the benefit of resources?

Professor Joseph L. Sax:

That is an interesting problem. It's not one that I've ever encountered. It is true that a lot of laws are sort of focused on the assumption that you are going to have public officials managing these things and they are focused on obligations of public officials. And I can see the possibility of some of these obligations sort of slipping through the net when you turn to private people doing things that traditionally you never thought private people would do, like run prisons. I have to tell you that I've never encountered it so I don't really think I have light to shed on it.

Professor Carl Christensen:

The Endangered Species Act is also under attack from a different direction, from the Commerce Clause challenges. We in Hawai'i, something like 90-95% of our plants and animals are endemic to the state. Do you have any thoughts on where that is going?

Professor Joseph L. Sax:

I'm glad you raised that because it is another piece. The Commerce Clause approach is another line of attack that the property rights folks have been using and have had some success. I guess all I can say is that I'm not as focused on those issues as I probably should be and I am not as focused on those issues as I am on the more direct property rights issues but my sense is that the Court is narrowing the traditional scope of the Commerce Clause and there is a kind of warning sign out there that you better think about Commerce Clause implications in a way that people did not traditionally have to do.

The Recognition of Same-Sex Relationships: Comparative Institutional Analysis, Contested Social Goals, and Strategic Institutional Choice

Nancy J. Knauer*

I. INTRODUCTION

Comparative institutional analysis ("CIA") begins with the simple observation that our primary decision-making processes—institutions, such as the market, the courts, and the political process—are each subject to certain structural constraints that necessarily effect an institution's ability to provide the desired relief or to further an agreed upon social goal.[1] Each institution is limited by its design.[2] Beyond the pages of law review articles, there are no frictionless institutional choices, only "imperfect alternatives"[3] that all groan

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[1] As discussed in this Essay, CIA refers to the method of public policy analysis outlined principally by Neil Komesar. NEIL K. KOMESAR, LAW'S LIMITS: THE RULE OF LAW AND THE SUPPLY AND DEMAND OF RIGHTS 9 (2001) (asserting "law and rights are the product of tough institutional choices impacted by systemic variables such as the costs of participation and numbers and complexity"). Komesar's use of the term "institution" differs from that of institutional economists, such as Douglas North, who use the term to signify "laws, rules, and customs." *Id.* at 31; *see also* Daniel H. Cole, *Taking Coase Seriously: Neil Komesar on Law's Limits*, 29 LAW & SOC. INQUIRY 261, 263-64 (2004) (describing divergence between Komesar's terminology and that used by institutional economists). Komesar defines institutions as "large-scale social decision-making processes—markets, communities, political processes, and the courts." KOMESAR, *supra*, at 31. For a discussion of CIA's debt to Ronald Coase, see Cole, *supra*, at 262 (noting Coase had "championed" comparative institutional analysis).

[2] Institutional behavior is a function of design and participation. *See* KOMESAR, *supra* note 1, at 29-31 (discussing Komesar's "participation-based" approach). Participation is, in turn, a function of the average per capita stakes, information costs, and the costs associated with collective action. *Id.* Important design features include the extent to which an institution is insulated from bottom-up atomistic forces or is designed primary for top-down or bottom-up decision making. *See* Neil K. Komesar, Basic Instincts: Participation, Economics and Institutional Choice, Comparative Institutional Analysis Conference, at 5, July 8, 2004, http://www.law.wisc.edu/ils/CIA-Conference-Papers.htm (stating "degree to which an institution is characterized by bottom-up versus top-down decision-making can be an important design feature").

[3] Komesar uses the term "imperfect alternatives" to describe the inevitable result of comparative institutional analysis. NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING

and deteriorate under the weight of increasing numbers and increasing complexity.[4]

This dose of structural realism exposes a basic flaw that pervades contemporary legal analysis across the ideological spectrum: the conceit of single institutionalism.[5] Because all institutions are irretrievably flawed and limited, every inquiry regarding the competency of a particular target institution will find the target experiencing some form of failure.[6] The identification of failure invites the analyst to propose the substitution of an idealized rescue institution.[7] Without a rigorous comparative analysis of the institutions' relative strengths and weaknesses, the rejection of the target is a foregone conclusion and the identity of the rescue institution is most likely determined by ideology or intuition, reflecting our strong tendency to conflate certain social goals with particular institutions.[8]

By examining the movement for the equal recognition of same-sex relationships, this Essay builds on these basic observations and introduces a new dimension to CIA, namely the dynamic process through which social goals are articulated and social change is realized. Despite its expressed concern with the "real world,"[9] CIA's failure to interrogate the nature of social goals creates a frictionless blind spot in its analytic frame where social goals are expressed as vague exogenous conceptions of the good, such as equality,

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INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 271 (1994). No single institutional choice will produce an optimal result. *Id.*

[4] Central to Komesar's articulation of CIA is the observation that "institutions tend to move together." KOMESAR, *supra* note 1, at 23 (emphasis omitted). In particular, Komesar identifies a clear "link between institutional performance and variation in numbers and complexity." *Id.*

[5] *Id.* at 20-21. Given that all institutions feel the weight of increasing numbers and complexity, it is not sufficient to identify the shortcomings of a particular institution because all institutions have shortcomings. *Id.* at 23 (stating "[a]ll institutions are imperfect and choices between alternatives can be sensibly made only by considering their relative merits"). Single institutionalism refers to an instance where an analyst details the deficiencies of an institution, but fails to interrogate the alternative institutional settings with the same vigor. *See, e.g., id.* at 21 (discussing recommendation for "a greater role for the judiciary" without "consideration of variation in the ability of the judiciary").

[6] As Komesar notes, "market failure is a trivial necessary condition with little analytic value. It is always fulfilled and, in the complex world in which we live, always significantly fulfilled." Komesar, *supra* note 2, at 2.

[7] Komesar observes that "the implicit assumption" of single institutionalism "is that a perfect or idealized institution is waiting in the wings." KOMESAR, *supra* note 1, at 24.

[8] Komesar explains the frequency with which certain goals are associated with certain institutions by reference to a tendency on the part of commentators to "hardwire" institutions to goals. *Id.* at 174.

[9] *See id.* at 22 (discussing "real-world institutions").

strong property rights, or resource allocation efficiency.[10] The relatively specific and highly polarizing goal of equal recognition of same-sex relationships is more emblematic of the type of contested social goals that command center stage in today's "culture wars."[11] The acknowledgment that the production of social goals involves institutional behavior, as well as multiple sites of contestation, will enhance the analytic power of CIA and offer a comparative institutional approach to social movement theory.[12] Other similarly divisive struggles over the proper iteration of the good, such as abortion rights or gun control, could produce an equally productive discussion of CIA and its application to social movements.[13]

The debate over same-sex relationships offers a rich context for an examination of the atomistic forces that shape participation in alternative decision-making processes and thereby determine institutional behavior. Indeed, when viewed through the lens of CIA, the debate appears to be a long exercise in strategic institutional analysis where advocates on either side evaluate institutions in terms of competency to supply the desired rights or status, responsiveness to demands for such rights or status, and resilience against attempts by opponents to subvert the process or to reverse gains. This "strategic" analysis does not identify the optimal institution, but rather informs the allocation of resources among institutions as advocates simultaneously pursue their goal in a variety of complementary institutional settings.[14] Not surprisingly, grass roots advocates do not suffer from the academic shortcoming of single institutionalism nor do they "hardwire" goals to certain

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[10] *See* William W. Buzbee, *Sprawl's Dynamics: A Comparative Institutional Analysis Critique*, 35 WAKE FOREST L. REV. 509, 514 (2000) (noting that "comparative institutionalism cannot neglect the importance of scrutiny of goal choice"); *See also* Howard S. Erlanger & Thomas W. Merrill, *Institutional Choice and Political Faith*, 22 L. & SOC. INQUIRY 959, 988 (1997) (discussing influence of goal choice on CIA).

[11] The traditional values movement began using the term "culture war" as a "catch-phrase" for the debate over homosexuality in 1992. DIDI HERMAN, THE ANTIGAY AGENDA: ORTHODOX VISION AND THE CHRISTIAN RIGHT 55 (1997) (defining "culture wars" as "struggles over ideas and values, rights and responsibilities"); *see infra* note 16 (defining "traditional values movement"). The term is now issued to describe a number of polarizing public policy disputes regarding family and individual rights. *See generally* Wikipedia: The Free Encyclopedia, Culture Wars, http://en.wikipedia.org/wiki/Culture_war (last visited Aug. 24, 2005).

[12] For a description of the evolution of social movement theory and scholarship, see Edward L. Rubin, *Passing Through The Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1 (2001) (describing development of social movement theory and social movement scholarship).

[13] *See, e.g.*, Timothy D. Lytton, *Lawsuits Against the Gun Industry: A Comparative Institutional Analysis*, 32 CONN. L. REV. 1247, 1248 (2000) (arguing "tort system is an imperfect policymaking institution, but it can enhance the policymaking process").

[14] As such, this analysis does not identify the singular least imperfect alternative. KOMESAR, *supra* note 3, at 271.

institutions.[15] Arguably, some of the greatest gains in the recognition of same-sex relationships have come from the market, which many might assume to be an unlikely place for progressive social change.

In a world with contested social goals, institutions can not only secure desired rights or status, they can also blunt or reverse gains secured by the opposing side in other institutional settings. This has led to a creative and combative program of institutional one-upmanship where gains secured by pro-gay advocates through the market or courts are frequently reversed by the proponents of "traditional values" through the political process.[16] Moreover, it is important to remember that battles over contested social goals take place within a democratic frame where a motivated majority can choose to rewrite the rules that define institutions and their decision-making authority. This observation has not been lost on the advocates of traditional values who have increasingly looked to the constitutional amendment process, on both the state and federal levels, as a means to exercise the ultimate majoritarian prerogative.[17] The ability of the majority to rewrite the rules has obvious implications for social movements designed to secure minority rights, but it also underscores the ultimately contingent nature of CIA.

In short, this Essay challenges CIA to contextualize its application to contested social goals and suggests that CIA could enrich social movement theory. It also confirms the suspicion of Neil Komesar, the chief architect of CIA, that atomistic forces, in this case individuals with strongly held values working for social change, understand comparative analysis and practice it instinctively.[18] Part II of this Essay examines CIA's failure to consider the production of social goals, the single institutionalism practiced by social movement theory, and the nature of strategic institutional choice. Part III describes the forces aligned on either side of the struggle over the recognition

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[15] KOMESAR, *supra* note 1, at 174-75 (noting "you cannot hardwire goals and institutions and, therefore, no program of law and public policy follows from goal choice").

[16] For purposes of this Essay, I refer to the social movement opposing the recognition of same-sex couples as the traditional values movement. Eskridge refers to this as the "traditional family values" ("TFV") "countermovement." William N. Eskridge, Jr, *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2161 (2002). The traditional values movement is often characterized as a backlash against the recent successes of the Lesbian Gay Bisexual and Transgender (LGBT) movement. Didi Herman, who has conducted a comprehensive study of the anti-gay policies and activities of pro-family organizations, rejects that these activities represent a "backlash." HERMAN, *supra* note 11, at 195. Instead, Herman describes the traditional values movement as a "paradigmatic movement for social change." *Id.*

[17] *See* Jeffrey Rosen, *How to Reignite the Culture Wars*, N.Y. TIMES MAG., Sept. 7, 2003, at 48 (noting that federal marriage amendment has potential to "provoke a mini-culture war in each of the 50 state legislatures").

[18] Komesar writes: "[e]ven if scholars and public officials will not do comparative institutional analysis, atomistic actors will." Komesar, *supra* note 2, at 14.

of same-sex relationships and outlines the costs and benefits associated with participation. Part IV evaluates the pro-recognition gains made in various institutional settings in terms of the three core components of strategic institutional choice: competency, responsiveness, and resilience. Part V offers some final thoughts on the constitutional amendment process and the potential transitory nature of minority gains.

II. CONTESTED SOCIAL GOALS AND THE NATURE OF CHOICE

CIA urges existing approaches to law and public policy to engage in a comparative analysis and to reject the ingrained notion that certain social goals are "hardwired" to certain institutions (e.g., resource allocation efficiency and the market).[19] Indeed, a growing number of legal analysts have eschewed the tidiness of single institutionalism in favor of the imprecise and messy enterprise of comparative analysis.[20] This has produced a rich and nuanced literature that explores institutional behavior as a function of design and participation.[21] However, this literature is necessarily unidirectional, focusing on the best implementation of a received social goal, because the analysis takes place under the artificial constraint of consensus.[22] As a result, CIA is

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[19] Komesar decries this tendency to "hardwire" certain goals to certain institutions as it forms the starting point for single institutionalism. *See* KOMESAR, *supra* note 1, at 174 (pointing to "Richard Epstein's aversion to the rent-seeking, welfare state and Margaret's Radin's aversion to the callous, atomistic market").

[20] CIA has been applied in a wide variety of disciplines, including: criminal law, cyberlaw, environmental law, federalism, international law, land use planning, regulation of the legal profession, product liability law, and tort litigation. *See id.* at 177 (discussing areas where CIA applied).

[21] *See, e.g.*, Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market?*, 37 GA. L. REV. 1167 (2003) (lawyer regulation); Buzbee, *supra* note 10 (land use planning); Daniel H. Cole, *The Importance of Being Comparative*, 33 IND. L. REV. 921 (2000) (environmental law); Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT'L L. 1 (1999) (international law); Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061 (2000) (corporate law); Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J. LAW & TEC 569 (2001) (cyberlaw); Nancy J. Knauer, *Domestic Partnership and Same-Sex Relationships: A Marketplace Innovation and a Less than Perfect Institutional Choice*, 7 TEMPLE POL. & CIV. RTS. L. REV. 337 (1998) (family law); Lytton, *supra* note 13 (land use planning).

[22] Benjamin H. Barton notes that "[a] further controversy in institutional analysis is the choice of values that underlie the analysis and the criteria for comparison." Barton, *supra* note 21, at 1177. In particular, William W. Buzbee has specifically challenged CIA with regard to the importance of goal choice. Buzbee, *supra* note 10, at 514. Buzbee argues: "The basic point that goal choice cannot be examined to the exclusion of considerations of institutional choice is undoubtedly sound, but an intertwined analysis of policy goals is both necessary and is itself a contested part of the public policy game recognizes the need to consider goal choice." *Id.*

employed halfway through a social conversation regarding any social goal. By ignoring the dynamic role of institutions in the negotiation and production of social goals, CIA remains a one-dimensional model that accepts a prescriptive pronouncement of the good and identifies the best institutional setting for the implementation of that good.

The recognition that social goals are contested also has obvious applicability to social movement theory. As articulated by legal scholars, social movement theory is preoccupied with the courts.[23] Some commentators take political scientists to task for neglecting the role of the courts in social change,[24] whereas others debate whether courts can function as a situs of meaningful social change.[25] In any event, courts remain central to the core inquiry of social movement theory, thereby giving rise to its own particular brand of single institutionalism. An application of CIA to social movement theory would shift the focus to *alternative* institutional settings. Moreover, the rejection of the myth of a common policy goal allows for the development within CIA of a strategic multi-force approach that is more closely reflected by the lived experience of individuals who work for social change.[26] Advocates for social change practice a form of strategic institutional choice where institutions are evaluated in terms of their competency, responsiveness, and resilience. The activity of "institutional choice" informs the rational allocation of resources between multiple complementary institutional

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[23] Of course, many would say that legal scholars, as a class, were preoccupied with the courts. Attempting to explain the relationship between legal scholars and judges, Komesar writes: "Here are people to converse with people like us . . . . [R]eflective judges are the ultimate pen pals." Komesar, *supra* note 2, at 15.

[24] William Eskridge advocates the integration of social movement theory into legal education in light of the influence of social movements on the evolution of the law. William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001). He also notes that legal scholars have a valuable perspective to bring to social movement theory, stating: "The social movements literature does not adequately reflect the importance of the law." *Id.* at 420. Tomiko Brown-Nagin, however, tempers this view with the observation that legal "scholars overstate law's capacity to trigger social movements and undervalue nonlegal, noninstitutional forms of political activism." Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 5 COLUM. L. REV. 1436, 1489 (2005).

[25] Gerald Rosenberg set off a continuing debate over the role of the courts in social change with the 1991 publication of his book: *The Hollow Hope: Can Courts Bring About Social Change?* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1991). Rosenberg concludes, "U.S. courts can almost never be effective producers of significant social reform. At best, they can second the social reform acts of the other branches of government." *Id.* at 338. For a collection of essays concerning the role of the courts in social change, see LEVERAGING THE LAW: USING THE COURTS TO ACHIEVE SOCIAL CHANGE (David A. Schultz, ed. 1999).

[26] *See infra* text accompanying notes 91-102 (discussing multi-force approach).

alternatives. It does not seek to identify the "best" or "least imperfect" alternative to the exclusion of all others.[27]

A. Inside the Black Box of Social Goals

In a time of persistent culture wars, it is difficult to identify a social goal that is not potentially polarizing.[28] The 2004 Presidential election left images of a country ideologically divided between Red states and Blue states.[29] Indeed, many university faculties are divided along ideological lines which are just as sharp, but lack the seeming clarity of partisan color coding.[30] Only the most abstract iterations of the good are capable of commanding anything that approaches consensus, and consensus dissipates rapidly as the parameters of the goals are expressed in greater relief.[31] This breakdown is independent from and precedes any disagreement regarding implementation or institutional placement.

For example, Americans place great importance on the values of liberty and equality.[32] However, the exact contours of these interests will vary significantly from person to person. To one person, the notion of liberty may include the liberty to engage in adult consensual sex with individuals of the

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[27] KOMESAR, *supra* note 3, at 271 (discussing nature of "imperfect alternatives").

[28] In 2005, the national debate over the Terri Schiavo case added a new topic to the culture wars: the right to forego life-sustaining treatment. *See* Howard Kurtz, *Culture War*, WASH. POST, Mar. 25, 2005, *available at* http://www.washingtonpost.com/wp-dyn/articles/A183-2005Mar25.html (describing Schiavo case as "a full-fledged chapter in the culture wars").

[29] The terms "Red state" and "Blue state" emerged as adjectives to describe a presumed set of political and personal values after the 2000 Presidential election. Wikipedia: The Free Encyclopedia, Red State vs. Blue State Divide, http://en.wikipedia.org/wiki/Red_states (last visited Aug. 27, 2005). The designation of the color red or blue reflects the media charting of the outcome of the election where states that went for the Republican candidate for President were coded red and state which voted for the Democratic candidate were indicated in blue. *Id.* The terms have been expanded to represent a host of demographic and ideological differences. *Id.*; *see also* Joyce Purnick, *New York is So Lonely and So Blue*, N.Y. TIMES, Nov. 1, 2004, at B1 (referring to New York as "a bright blue state").

[30] *See* Francis J. Mootz, III, *Between Truth and Provocation: Reclaiming Reason in American Scholarship*, 10 YALE J. L. & HUMAN. 605 (1998) (book review) (discussing split on law faculties regarding critical legal studies scholarship).

[31] Komesar recognizes this when he notes: "Most people share an amorphous definition of the good that is part resource allocation efficiency (the size of the pie) and part equity (the division of the pie)." Komesar, *supra* note 2, at 17.

[32] Liberty and equality are core democratic principles, enshrined in the Declaration of Independence and protected by the U.S. Constitution. *See* Deborah L. Rhode, *Law, Knowledge, and the Academy: Legal Scholarship*, 115 HARV. L. REV. 1327 (2002) (noting law review editor required citation for proposition that "one of the values of American life is equality" (citation and quotation marks omitted)).

same sex.[33] Thus, a weak version of the social goal of liberty would include, at a minimum, the eradication of criminal sanctions against consensual sodomy.[34] A stronger version of this social goal would include uniform age of consent laws,[35] consistent pro-gay sex education,[36] and positive media portrayals.[37] To the contrary, some individuals may conclude that homosexual

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[33] The influential Wolfenden Report issued in Great Britain in 1957 is an example of the application of liberty principles to the criminalization of same-sex sexuality. THE WOLFENDEN REPORT: THE REPORT OF THE DEPARTMENTAL COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION (1963). The report recommended the de-criminalization of consensual same-sex activity based on the premise that the activity was not sufficiently other-regarding to merit interference by the law. *Id.*

[34] The 1986 U.S. Supreme Court decision in *Bowers v. Hardwick* held that the criminalization of same-sex sexuality did not violate the U.S. Constitution. 478 U.S. 186, 195-96 (1986). *Lawrence v. Texas* overruled *Bowers* in 2003. 537 U.S. 558, 578 (2003).

[35] Some states impose higher ages of consent for same-sex sexuality. *See, e.g.*, KAN. STAT. ANN. § 21-3522(a) (2005) (restricting to opposite-sex couples a so-called "Romeo & Juliet" exception for children over fourteen years of age and partners less than nineteen years of age). The application of this disparate age of consent was widely publicized when eighteen-year-old Matthew Limon was sentenced to seventeen years in jail for engaging in oral sex with a fourteen-year-old boy. State v. Limon, 41 P.3d 303 (Kan. App. 2002). If Limon and the boy had been of opposite sexes, Limon would have qualified for the "Romeo & Juliet" exception under which the maximum penalty would have been thirteen to fifteen months, instead of the 206 months (seventeen years and two months) Limon received. State v. Limon, 83 P.3d 229, 243 (Kan. 2004) (Pierron, J., dissenting). Immediately following *Lawrence*, the U.S. Supreme Court voted unanimously to vacate the judgment and remand the case for re-consideration in light of the new precedent. Limon v. Kansas, 539 U.S. 955 (2003). On remand, the conviction was affirmed by the Court of Appeals of Kansas. *Limon*, 83 P.3d 229. The Kansas Supreme Court unanimously overturned the conviction. State v. Limon, 2005 Kan. LEXIS 715 (2005).

[36] Six states have statues that expressly require homosexuality to be taught in the public schools in a negative light. ALA. CODE § 16-40A-2(c)(8)(2005); ARIZ. REV. STAT. § 15-716(c)(1-3) (2004); LOUIS. REV. STAT. § 17:281(3) (2004); MISS. CODE ANN. § 37-13-171(1)(e) (2004); S.C. CODE ANN. § 59-32-30(A)(5) (2004); TEX. HEALTH & SAFETY CODE § 163.002(8) (2004). Alabama and Texas require an emphasis that "homosexuality is not a lifestyle acceptable to the general public," and Arizona bans any promotion of "a homosexual life-style." ALA. CODE § 16-40A-2 (2005); ARIZ. REV. STAT. § 15-716(c)(1-3) (2004); TEX. HEALTH & SAFETY CODE § 163.002 (2004). In addition, North Carolina provides that the basic education program must promote heterosexual marriage. N.C. GEN. STAT. § 115C-81 (2004). The South Carolina statute provides: "The program for instruction . . . may not include a discussion of alternate sexual lifestyles from heterosexual relationships, including, but not limited to, homosexual relationships except in the context of instruction concerning sexually transmitted diseases." S.C. CODE ANN. § 59-32-30(A)(5) (2004).

[37] The Gay & Lesbian Alliance Against Defamation ("GLAAD") was founded in 1985. GLAAD, Our History, http://www.glaad.org/about/history.php (last visited Aug. 27, 2005). It was originally organized to protest the media coverage of the first wave of the HIV/AIDS epidemic in New York City. *Id.* GLAAD is now a national organization dedicated to "promoting and ensuring fair, accurate and inclusive representation of people and events in the media as a means of eliminating homophobia and discrimination based on gender identity and sexual orientation." GLAAD, Our Mission, http://www.glaad.org/about/mission.php (last visited Aug. 27, 2005).

sex is more analogous to alcoholism or drug abuse and, therefore, is not encompassed in views of liberty.[38]

A similar problem arises with the social goal of equality. To some individuals who are committed to equality, gay men and lesbians should be granted workplace protections from discrimination.[39] A stronger version of that view would include equal marriage rights and full recognition of same-sex partners.[40] However, others individuals who share an abstract commitment to equality could label such protection or recognition "special rights" and, therefore, the antithesis of equality.[41]

As a theoretical construct, the assumption of consensus is useful to establish the applicability of CIA to public policy proposals beyond those firmly anchored in the goal of resource allocation efficiency.[42] Indeed, much of Neil

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[38] For a discussion of the traditional values movement's construction of same-sex desire as a chosen, immoral, and unhealthy lifestyle analogous of other forms of addiction, see Nancy J. Knauer, *Science, Identity, and the Constructive of the Gay Political Narrative*, 12 LAW & SEX. 1, 46-50 (2003) (noting traditional values movement rejects comparisons of sexual orientation to race and contends "it more appropriate to compare homosexuality to alcoholism"). The traditional values movement advocates therapeutic intervention to liberate individuals who are mired in, what they consider to be, the destructive lifestyle of homosexuality. *Id.* at 24-25 (discussing reparative therapy).

[39] Based on Gallup polls results beginning in 1977, the public has steadily increased its support for equal workplace access for gay men and lesbians. Ontario Consultants on Religious Tolerance, U.S. Public Opinion Polls on Homosexuality, http://www.religioustolerance.org/hom_poll2.htm (last visited Aug. 27, 2005). In 1977, only 56% of those surveyed thought that homosexuals should have "equal rights in terms of job opportunities," and 33% thought they should not. *Id.* As of 2003, the number in favor of equal workplace rights had risen to 88%, with only 9% advocating unequal employment rights. *Id.*

[40] Although the percentage of respondents in favor of same-sex marriage or some other form of relationship recognition has also increased over time, the numbers lag far behind those in favor of equal workplace rights. Ontario Consultants on Religious Tolerance, Longitudinal U.S. Public Opinion Polls: Same-Sex Marriage and Civil Unions, http://www.religioustolerance.org/hom_poll5.htm (last visited Aug. 27, 2005). In 1996, only 28% were in favor of recognizing same-sex marriage or civil unions, with 67% opposed. *Id.* This number increased to 49% in favor and 49% opposed in May 2003. *Id.* However, after Lawrence was decided in June 2003, there was a considerable backlash and the number in favor decreased to 37%. *Id.* A 2005 CNN/USA/Gallup poll shows a slim majority of 47% in favor of some form of relationship recognition with 45% favoring no relationship recognition. Pollingreport.com, Law and Civil Rights, http://www.pollingreport.com/civil.htm (last visited Aug. 27, 2005).

[41] For a discussion of the campaign by the traditional values movement to characterize anti-discrimination protections as "special rights" see Knauer, *supra* note 38, at 78-83 (describing evolution and deployment of "special rights" rhetoric in legal battles), and HERMAN, *supra* note 11, at 133-36 (explaining development of "special rights strategy").

[42] In *Law's Limits*, after discussing single institutionalism in the economic analysis of law, Komesar notes: "Anyone interested in promoting altruism and equality–like anyone interested in promoting resource allocation efficiency–must seriously address institutional choice or risk undercutting the goals that they seek." KOMESAR, *supra* note 1, at 26.

Komesar's recent work on CIA has been designed to illustrate the applicability of CIA regardless of ideology.[43] In *Law's Limits*, Komesar demonstrates a variety of instances where CIA is an important (and some might agree essential) evaluative tool regardless of whether the social goal in question is resource allocation efficiency, equality, altruism, or liberty.[44] He argues that the focus on participation–the atomistic forces that shape participation in alternative decision-making processes and thereby determine institutional behavior–provides the necessary link that can cross ideological divides as wide as those existing between law and economics and civic republicanism.[45] Participation, in turn, is a function of costs and benefits associated with the participation.[46]

The assumption of consensus also works well with the highly prescriptive nature of legal scholarship.[47] Much legal scholarship is intent on providing detailed accounts of how certain issues of public policy *should* be resolved.[48] The legal scholar's persuasive techniques are typically restricted to the pages of law reviews and rely on argumentation and documentation. CIA allows the legal scholar to consider a full range of institutional options to implement the particular policy proposal, but does not require the legal scholar to assess the

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[43] *See, e.g.*, Neil K. Komesar, *Law and Society & Law and Economics: Common Ground, Irreconcilable Differences, New Directions: Exploring the Darkness: Law, Economics, and Institutional Choice*, 1997 WIS. L. REV. 465 (1997) (explaining his goal to convince "more legal analysts to focus on institutional choice").

[44] KOMESAR, *supra* note 1, at 26.

[45] With regard to the unifying nature of participation, Komesar writes:

> Many seemingly diverse view or philosophies stress the importance of participation and the determinants of inadequate, incomplete or unequal participation. Civic republicans stress greater and more equal participation as the core of the goals they seek. The amount, pattern, and quality of participation define communitarian notions. Resource allocation efficiency, a seemingly quite different societal goal, is also defined in terms of the completeness of participation. . . . The central issues of "externality" and transaction costs are about the extent and quality of participation in the market. . . . Market failures are failures of participation.

Id. at 65.

[46] *Id.* at 30 (noting "[t]he character of institutional participation is determined by the interaction between the benefits of participation and the costs of that participation").

[47] *See* Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1847 (1988) (noting the "most distinctive feature of standard legal scholarship is its prescriptive voice").

[48] Edward Rubin notes: "This prescriptive voice distinguishes legal scholarship from most other academic fields. The natural sciences and the social sciences characteristically adopt a descriptive stance, while literary critics adopt an interpretive one. Only moral philosophers seem to share the legal scholar's penchant for explicit prescription." *Id.* at 1848 (footnotes omitted).

likelihood of such implementation or even the conditions under which implementation would be most feasible.[49]

As discussed below, one of CIA's most important contributions has been its insistence that institutional alternatives for the implementation of public policy measures include the market and are not limited to the familiar three branches of government.[50] This expansive view of institutional options has much to offer social movement theory.

B. Single Institutionalism in Social Movement Theory

CIA considers social goals a priori. Generally, the goals are articulated, identified, and championed by legal analysts independent of any discussion regarding the production of the goals or the social movements responsible for the advancement of the goals.[51] Social movement theory can thus provide much of the back story that is missing from CIA because it focuses on the formation and development of social movements.[52] In particular, the subset of social movement theory that studies questions of resource mobilization has considerable overlap with CIA's emphasis on participation and share a common vocabulary.[53]

In turn, CIA can also offer social movement theory a valuable antidote for its particular brand of single institutionalism.[54] Legal commentators have understandably approached the issue of social movements and social change from the perspective of legal reform.[55] Indeed, the 20th century saw

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[49] Komesar focuses on the market, the courts, and the legislature. KOMESAR, *supra* note 1, at 29 ("I tend to speak of three institutional alternatives–the market, the political process, and the courts or adjudicative process."). However, he also mentions communities. *Id.* at 31. Finally, Komesar notes that the range of institutional options will vary depending upon the subject matter of the social goal. *Id.* at 29 (stating that the range of alternatives will depend on "the subject studied and the inclinations of the investigator").

[50] To the extent that goals are hardwired to institutions, designs for progressive social change do not generally attach to market-based solutions.

[51] As noted earlier, this lack of engagement with goal choice has provoked some comment. *See, e.g.*, Barton, *supra* note 21, at 1177 (noting criticism); Buzbee, *supra* note 10, at 514 (arguing for analysis of goal choice).

[52] William Eskridge argues that this back story should also be included in legal education. Eskridge, *supra* note 24, at 419. Eskridge reasons that law professors should "understand and teach [their] students more about social movement theories" in light of the movements' influence on the evolution of both statutory and constitutional law. *Id.*

[53] *See* Rubin, *supra* note 12, at 28-34 (describing resource mobilization theory).

[54] In the case of social movement theory advanced by legal scholars, the label of single institutionalism could be used to refer to the singular focus on the courts, rather than the failure to interrogate alternative institutional options.

[55] *Id.* at 3 (explaining emphasis by reference to legal scholars' "unity of discourse with the judiciary, which creates a mentality that tends to assimilate the style of legal analysis to arguments before a court").

remarkable changes in terms of both statutory law and Constitutional law that can be traced to the efforts of social movements.[56] William Eskridge argues that social movement theory, as practiced by political scientists and sociologists, trivializes the importance of law, particularly that produced by the courts.[57] In a related debate, legal scholars have actively disputed the competency of the courts to effect meaningful social change.[58]

CIA starts with the assumption that the social goals advanced by a particular social movement could find expression in a variety of institutional settings.[59] Thus, it short circuits the juricentrism endemic among legal scholars. In addition, CIA provides an emphasis on implementation that is arguably lacking in the resource mobilization literature.[60] This focus on alternatives for

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[56] *See* Eskridge, *supra* note 24, at 419 (asserting strong influence of social movements over statutory and Constitutional law).

[57] Eskridge states "[t]he social movements literature does not adequately reflect the importance of law." *Id.* at 420. Although Eskridge discusses the influence of social movements on the evolution of statutory law, his ultimate focus is the "constitutionalization" of social movements. *Id.* at 478.

[58] Gerald Rosenberg's 1991 book *Hollow Hope* challenged the wisdom of the instrumental use of litigation to effect social change. ROSENBERG, *supra* note 25. Rosenberg's argument challenged view that had been popularized by Joel Handler's influential 1978 book titled, *Social Movements and The Legal System: A Theory of Law Reform and Social Change*. JOEL F. HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (1978) (outlining instrumental use of litigation to secure social change). Handler had concluded "use of litigation as an instrument of social reform [has] become so widespread that it can be called a movement." *Id.* Rosenberg's book was critiqued heavily for its methodology. *See, e.g.*, Neal Devines, *Judicial Matters*, 80 CAL. L. REV. 1027 (1992) (book review) (criticizing Rosenberg's claim of "judicial impotence" and his methodology); Peter H. Shuck, *Public Law Litigation and Social Reform*, 102 YALE L. J. 1763 (1993) (book review) (criticizing Rosenberg's methodology). Rosenberg's work has recently been cited by advocates of "popular constitutionalism," which has sparked its own debate. *See* Erwin Chemerinsky, *David C. Baum Memorial Lecture: In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, 676 (2004) (rejecting popular constitutionalism); *but see* MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 154, 169 (1999) (advocating end of most judicial review); Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CAL. L. REV. 959 (2004) (presenting overview of new scholarship on popular constitutionalism).

[59] After discussing various theories of property, Komesar writes:

> Virtually nothing follows from the choice of goal or of a general philosophy of property. You cannot hardwire goals and institutions and, therefore, no program of law and public policy follows from goal choice. The simple correlations between goals and institutions that characterize so many ideological positions simply do not hold. Institutional choice, at least institutional choice at high numbers and complexity, is filled with paradoxes and counterintuitive combinations of goals and institutions.

KOMESAR, *supra* note 1, at 153.

[60] *See* Rubin, *supra* note 12, at 2-3 (noting that political scientists and legal scholars study "different parts of [the] phenomena" of social movements).

implementation would address the tendency to trivialize law identified by Eskridge without necessarily asserting the primacy of law and the courts.[61] As such, CIA could help advance social movement theory by addressing how social movements effect social change, not simply how social movements form or how social movements effect the law.[62]

The juricentric approach of legal scholars can unintentionally collapse an entire social movement into a platform for legal reform.[63] The current social movement for the recognition of same-sex relationships is a prime example of this. It would be foolish to argue that laws restricting marriage to one man and one woman are not an important and particularly potent source of inequality and oppression.[64] However, the law is not the source of the oppression; it is merely an expression of it.[65] The regulation of same-sex desire has been enforced through a variety of overlapping and mutually reinforcing prohibitions that originate in religion, medicine, and the law.[66] These prohibitions reflect certain social values and goals. Express laws regulating same-sex conduct are relatively new and date from the mid 20th century.[67] Accordingly, legal reform will not be sufficient to achieve equality for and recognition of

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[61] As noted earlier, Eskridge argues that "social movements literature does not adequately reflect the importance of law." Eskridge, *supra* note 24, at 420.

[62] As Edward Rubin explains, political scientists are concerned with the former, whereas legal scholars focus on the latter. Rubin, *supra* note 12, at 2.

[63] Tomiko Brown-Nagin argues persuasively for the need to distinguish campaigns for legal reform from social movements. Brown-Nagin, *supra* note 24, at 1502-03. Brown-Nagin notes that "[t]hose who champion the centrality of law to social movements or advance the concept of legal mobilization wrongly conflate politicized legal campaigns with 'social movements.'" *Id.* at 1501. She attributes the tendency to view campaigns for legal reform as interchangeable with social movements to the wide acceptance of Joel Handler's views on cause lawyering and the efficacy of litigation to achieve social change as outlined in his influential 1978 book, *Social Movements and the Legal System.* HANDLER, *supra* note 58. In an effort to stress the importance of cause-directed litigation, Handler declared that use of such litigation to secure change constituted a "movement." *Id.*

[64] For example, forty-four states now expressly restrict marriage to opposite sex couples. *See infra* note 231 (describing state laws restricting marriage).

[65] *See* Nancy J. Knauer, *Lawrence v. Texas: When "Profound and Deep Convictions" Collide with Liberty Interests*, 10 CARDOZO WOMEN'S. L. J. 325, 336 (2004) (arguing that the "criminal status of homosexual conduct was never the only justification for the social and legal disabilities imposed o[n] gay men and lesbians").

[66] *See* Knauer, *supra* note 38, at 11-12 (discussing "discourse of sin and transgression which stubbornly continues to define same-sex desire").

[67] For example, sodomy laws restricted to same-sex sodomy did not appear until 1969. WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 210 (1999) (referring to such laws as "a novelty, not showing up in state sodomy law until 1969"). The majority in *Lawrence* recognized the relatively recent appearance of same-sex restrictions. Lawrence v. Texas, 539 U.S. 558, 568 (2003) ("[T]here is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter.").

same-sex relationships nor will legal reform occur unless it is preceded by social change.[68] When legal scholars foreground the legal definition and regulation of minority groups, they are only telling part of the story.[69]

Indeed, the early gay liberation movement targeted medicine as the primary institutional source of oppression, not the law.[70] The continued diagnosis of homosexuality as a mental illness was used as a justification for a wide range of legal and social disabilities imposed on homosexuals, not to mention the potential loss of liberty or invasive medical "treatment."[71] Clearly, the declassification of homosexuality as a mental disability by the American Psychiatric Association in 1973 was a necessary step toward equality.[72] Contrary to what some activists believed at the time, however, it was not a sufficient step to secure equality.[73] After declassification, the legal disabilities did not only fail to melt away; they multiplied.[74]

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[68] *See supra* note 65.

[69] Tomiko Brown-Nagin notes that when legal scholarship fails to engage "the formation, organization, evolution, strategies and tactics of social movements[,]" it "simplifies and flattens these movements into static repositories or mirrors of legal epistemologies, norms, and processes." Brown-Nagin, *supra* note 24, at 1492. This failure to engage "overlooks the interactive and temporal dimensions of a social movement's engagement with law." This result is that "law envelops and defines the movements." *Id.*

[70] The primacy of medicine in the definition of gay men and lesbians during the early gay liberation movement challenges the centrality of law to minority identity-based social movements as advocated by Eskridge. *See* Eskridge, *supra* note 24, at 422. Eskridge argues that "[l]egal rules and their enforcers strongly reinforced stigmas and disadvantages that not only provided important incentives and goals for minorities, but helped give concrete meaning to the 'minority group' itself." *Id.* For the purposes of CIA, the primacy of medicine also provides an example of an instance where the appropriate range of institutional options for the implementation of a social goal would diverge from the standard trio of the courts, the legislature, and the market. *See supra* note 49 (discussing variation of institutional options depending on subject matter).

[71] First published in 1952, the Diagnostic and Statistical Manual of Mental Disorders ("DSM-I") included homosexuality as one of the most severe sociopathic personality disorders. Knauer, *supra* note 38, at 20. The classification of homosexuality as a mental illness emerged in the 1930s, a result of the growing popularity of Freudian psychoanalytic theory. *Id.* at 18-22. At that point, "the pathologizing influence of psychiatry and the promise of a cure influenced both the criminal law and public policy regarding homosexuality." *Id.* at 20 (discussing sexual psychopath laws and indeterminate commitments).

[72] *See* RONALD BAYER, HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS 71-88 (1981) (describing early efforts to change diagnosis).

[73] *See* Knauer, *supra* note 38, at 25-27 (discussing slow pace of change after declassification). Of course, this statement in no way is intended to detract from the importance of the declassification. As one newspaper reported: "20 Million Homosexuals Gain Instant Cure." SIMON LEVAY, QUEER SCIENCE: THE USE AND ABUSE OF RESEARCH INTO HOMOSEXUALITY 224 (1996) (quoting headline from Philadelphia newspaper reporting declassification of homosexuality as a mental disease). The continuing stigma of diagnosis was a significant impediment to advancing an agenda for LGBT rights.

[74] In many instances, the restraining force of heteronormativity made specific laws targeting

The 2003 U.S. Supreme Court decision *Lawrence v. Texas*[75] provides a similar lesson. Despite the prognostications of Justice Scalia, the recognition of a protected liberty interest in a choice of an intimate partner of the same-sex has not led to the wholesale recognition of same-sex marriage rights.[76] The criminalization of same-sex sodomy was an important feature of the regulation of same-sex desire, but was not the only source of justification for the continued regulation.[77] Since the decision, the supreme court of one state has cited *Lawrence* as supporting same-sex marriage,[78] whereas the supreme court of a second state found that *Lawrence* did not require equal marriage rights.[79]

Although the legal regimes defining and regulating minority interests can be breathtaking in their totality, law is part of a larger multi-institutional web of regulation that reflects social values and goals.[80] When legal scholars engage in noncontextual or single institutional analysis, they risk a type of

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gay men and lesbians unnecessary. Knauer, *supra* note 38, at 50 (noting "more specifically anti-gay legislation than ever before").

[75] 539 U.S. 558 (2003).

[76] *Id.* at 601 (Scalia, J., dissenting) (stating the concurrence's "reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite couples").

[77] The fact that it was constitutionally permissible to criminalize homosexual conduct under *Bowers v. Hardwick*, 478 U.S. 186 (1996), overruled by *Lawrence v. Texas*, 539 U.S. 558, served as justification for denying equal rights to gay men and lesbians. Justice Scalia explained this reasoning in his dissent in *Romer v. Evans*. 517 U.S. 620, 636 (1996) (Scalia, J., dissenting). Justice Scalia wrote: "If it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct. Indeed, where criminal sanctions are not involved, homosexual 'orientation' is an acceptable stand-in for homosexual conduct." *Id.* at 644. Justice Scalia argued that the Coloradans who had passed Amendment 2 were "*entitled* to be hostile toward homosexual conduct" in light of *Bowers*, even though Colorado had repealed its sodomy statute. *Id.* (emphasis added).

[78] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948-49 (Mass. 2003) (holding that limiting access to protections and benefits of civil marriage violates state constitution and citing *Lawrence* approvingly).

[79] In *Standhardt v. MCSC*, the Arizona Supreme Court let stand an appellate court decision that distinguished *Lawrence v. Texas* and found that it did not require equal marriage rights. Standhardt v. MCSC, No. CV-03-0422-PR, 2004 Ariz. LEXIS 62 (Ariz. May 25, 2004). The intermediate appellate court reasoned that *Lawrence* did not recognize a fundamental right to engage in same-sex sexual activity. Stanhardt v. Superior Court of Ariz., 77 P.3d 451, 457 (Ariz. App. Ct. 2003).

[80] For example, the regulation of same-sex desire can be seen as primarily a morality discourse which distinguishes the stigma attached to homosexuality from other minority groups. Michael Warner explains that "[t]here have always been moral prescriptions about how to be a woman or a worker or an Anglo-Saxon; but not whether to be one." Michael Warner, *Introduction*, *in* FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY at xxi (Michael Warner ed., 1993). The centrality of morality highlights the possibility that religion and communities would be important alternative institutional settings for goal choice implementation. *See supra* note 49 (discussing alternative institutional settings).

formalism that reinforces the power of the regime they are attempting to dismantle.[81] Exclusive focus on legal doctrine can obscure the instrumental nature of discriminatory laws and rules. Without an acknowledgement that law reflects values and social goals, continued inequality can be seen as simply the result of a glitch in accepted legal reasoning that will be resolved with greater clarity as legal doctrines inevitably mature. This conveys a false optimism regarding the natural evolution of the law. It also absolves the atomistic forces whose participation created the demand for the discriminatory laws in the first place. The source of inequality is incorrectly understood to be the faceless autonomous force of law, instead of the family next door and the church down the street.

Finally, when a social movement is collapsed into a program of legal reform, the concept of the law ceases to be what Tomiko Brown-Nagin refers to as "inspirational" and becomes "definitional."[82] Brown argues that this can strip a social movement of its "insurgent value."[83] It effectively cedes the power of self-definition to the very regime that enforced the subjugation.[84] This definitional outcome was apparent when, in the wake of *Bowers v. Hardwick*,[85] LGBT rights litigation increasingly attempted to present a meaningful distinction between the status of being homosexual and the act of engaging in homosexual conduct.[86] Although the bifurcation of status from conduct seemed to be a necessary concession in light of the criminalization of same-sex sexuality,[87] it created an ultimately disempowering image of homosexuals who were completely divorced from expressions of their

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[81] One is reminded of Audre Lorde's admonition that "the master's tools will never dismantle the master's house." AUDRE LORDE, SISTER OUTSIDER: ESSAYS AND SPEECHES 110-13 (1984) (essay entitled "The Master's Tools Will Never Dismantle the Master's House").

[82] Brown-Nagin, *supra* note 24, at 1510-18 (explaining distinction).

[83] Brown-Nagin argues "social movements that make litigation definitional to their agendas threaten their insurgent role in the political process." *Id.* at 1511. She continues: "[w]ithout an insurgent element, social movements lose their agenda-setting ability." *Id.*

[84] Brown-Nagin observes that "[t]he one-dimensional identity that the law of equal protection and interest group politics imposes on 'suspect' racial classes is deeply problematic for claims of distributive justice. . . . It limits the goals of political struggle and legal agenda to those objectives preferred by and most useful to elites." *Id.* at 1492 (footnote omitted). Brown-Nagin defines the term "elites" as "those with superior status based on social standing, wealth, intellect, or identification with high status institutions, including governmental or political, educational, or commercial institutions." *Id.* at 1439 n.12.

[85] 478 U.S. 186 (1986). *Bowers v. Hardwick* upheld the constitutionality of criminal sodomy statutes, holding that homosexual sodomy was not protected under the constitutional right of privacy in light of our nation's history and tradition. *Id.*

[86] For a discussion of the bifurcation of status from conduct as a litigation strategy, see Knauer, *supra* note 38, at 54.

[87] *See* Janet Halley, *Reasoning About Sodomy: Act and Identity in and After Bowers v. Hardwick*, 79 VA. L. REV. 1721, 1737 (1993).

sexuality and denied protection for them.[88] This de-sexualized notion of a status homosexual was vigorously advanced in litigation designed to secure suspect classification under the Equal Protection clause, as court papers increasingly asserted that sexual orientation was an innate and unchangeable identity.[89] During this period, a rising percentage of the general public came to understand sexual orientation as inborn rather than chosen, begging the question of which came first, the identity or the litigation strategy?[90]

C. The Nature of Choice

Once CIA is expanded to acknowledge the contested nature of many social goals, its potential application to the study of social movements becomes obvious. As discussed in the preceding section, the comparative frame of CIA addresses the single institutionalism that results from an over emphasis of the courts and their importance in effecting social change. Moreover, the behavior of social movements can inform the notion of institutional choice which is at the core of CIA. As opposed to the omniscient prescriptive stance adopted by legal commentators applying CIA to their policy proposals, social movements practice CIA as a strategic means to achieve their social goals. The evaluation incorporates three general considerations: competency, responsiveness, and

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[88] Edward Stein has pointed out that gay men and lesbians suffer legal and social disabilities on account of their actions and not their sexual orientation or identity. He writes:

> [L]esbians and gay men deserve protection against discrimination and positive rights with respect to their actions and decisions rather than for their mere orientations. It is when they engage in same-gender sexual acts, identify as gay men and lesbians, and create lesbian and gay families that they especially need protections for and rights based on choices that build on their underlying (and perhaps immutable) desires.

EDWARD STEIN, THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY, AND ETHICS OF SEXUAL ORIENTATION 295 (1999) (emphasis and citation omitted).

[89] This was particularly true in the case of "Don't Ask, Don't Tell" litigation challenging the U.S. military's regulations against service members revealing their sexual orientation. Litigants argued unsuccessfully that a statement of "I'm gay" did not indicate any propensity on the part of the speaker to engage in same-sex sodomy. Knauer, *supra* note 38, at 57-61. As Janet Halley noted, unless the servicemember "is truly and contentedly celibate," this litigation strategy "is an insult to the personal sexual dignity of most servicemember clients." JANET HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY 125 (1999).

[90] *See* STEIN, *supra* note 88, at 230 (discussing increase in number of people who ascribe a biologic or genetic cause to homosexuality). *Id.* According to a 1977 Gallup poll, only thirteen percent of Americans believed that homosexuality was inborn. Mark Schoofs, *Straight to Hell*, VILLAGE VOICE, Aug. 11, 1998, at 56. That number had increased to thirty-one percent by 1996. *Id.* By 2001, the number of respondents who believed that homosexuality is something "a person is born with" had risen to forty percent. *See* Ontario Consultants on Religious Tolerance, *supra* note 39.

resilience. The result is not so much a singular "choice" as it is a ranking of institutional options.[91]

Movements working for social change cannot afford the luxury of single institutionalism that is practiced by and debated by legal commentators.[92] Even the relevant institutions will change, depending on the social movement and its particular vectors of oppression.[93] As noted above, the early gay liberation movement had to target medicine, specifically psychiatry, in order to advance its social goals.[94] Religion, education, and the media could also be counted as institutions with particular relevance to LGBT rights and recognition.[95] In addition, the LGBT movement has placed great importance on the power of individuals to change attitudes by being open and honest about their sexual orientation.[96]

As any activist knows, a program of legal reform that involves sharply contested, or simply unpopular, social goals cannot succeed without some degree of strategic planning involving elements of both education and persuasion.[97] This necessitates a multi-institutional approach. For example, the

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[91] For example, the conclusion that the federal courts are not as responsive as certain private employers to demands for relationship recognition would not suggest an abandonment of the courts. Because the oppression of gay men and lesbians originates in multiple sites, there is no rescue institution capable to mandate systemic and immediate social change.

[92] This is particularly true when dealing with a group of high stakes individuals, such as the men and women working for relationship recognition who are in same-sex relationships. For a discussion of the distribution of stakes, see *infra* text accompanying notes 141-44.

[93] Komesar recognizes that the relevant institutions "will change depending upon the subject studied and the inclinations of the investigator." KOMESAR, *supra* note 1, at 29.

[94] The efforts to win the declassification of homosexuality as a mental illness preceded the marriage litigation. The decision to target psychiatry was made by the fledgling homophile organizations even in advance of the Stonewall Riots. BAYER, *supra* note 72, at 91. Pickets began to appear at psychiatric and medical meetings as early as 1968. *Id.* at 92. Gay activists escalated the lobbying efforts throughout the early 1970s. *Id.* at 105-06.

[95] The LGBT movement devotes considerable resources to each of these institutions, with varying levels of success. The evaluation of these alternative institutions through the lens of CIA is beyond the scope of the Essay and necessarily a project for another day.

[96] The notion of "coming out" and declaring one's sexuality is very important for an otherwise invisible minority. A public avowal of homosexuality is considered to help identity formation and to operate as a public good with potentially transformative power. George Chauncey writes: "coming out to heterosexuals became a new moral imperative, an existentialist act of witness to a truth of oneself." GEORGE CHAUNCEY, WHY MARRIAGE? THE HISTORY SHAPING TODAY'S DEBATE OVER GAY EQUALITY 33 (2004).

[97] For example, the mission statement of the Human Rights Campaign (HRC), the largest LGBT lobbying organization in the United States, describes its activities as follows: "[The Human Rights Campaign] effectively lobbies Congress, mobilizes grassroots action in diverse communities, invests strategically to elect a fair-minded Congress, and increases public understanding through innovative education and communication strategies." Human Rights Campaign, Our Mission Statement, http://www.hrc.org/Template.cfm?Section=About_HRC (last visited Nov. 22, 2005).

early marriage cases brought by same-sex couples in the 1970's were long considered anomalies, more a reflection of guerilla conscience-raising tactics than a reasoned litigation strategy.[98] For twenty years, same-sex marriage disappeared as the movement grappled with other concerns, not the least of which was an internal debate regarding the very desirability of marriage as a social goal.[99] When marriage demands reappeared in the 1990's, they were part of an orchestrated litigation strategy that targeted certain jurisdictions and actively discouraged litigious couples from filing court cases in jurisdictions with less favorable outlooks.[100]

It would have been folly for the early gay rights movement to pursue marriage litigation in the 1970s. At the time, the prohibitions against same-sex relationships were pervasive, being grounded in religion, medicine, and law.[101] Education and the media helped enforce these prohibitions through either silence or highly negative and stereotypical portrayals.[102] Although litigants

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[98] There were several same-sex marriage cases that date from the early 1970s around the same time when states began adopting Equal Rights Amendments and ratification of the federal Equal Rights Amendment was pending before the states. Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972); Singer v. Hara, 522 P.2d 1187 (Wash. App. 1974). *See* CHAUNCEY, *supra* note 96, at 146-47 (describing Equal Rights Amendment). The claims for equal marriage rights were rejected largely on definitional grounds: marriage can only exist between a man and a woman. *See, e.g., infra* note 103 (discussing *Jones*).

[99] Marriage is still not a universal goal among men and women in same-sex relationships. Pam Belluck & Katie Zezima, *Gays Respond: 'I Do,' 'I Might' And 'I Won't,'* N.Y. TIMES, Nov. 26, 2003, at A1 (gauging reaction to impending legalization of same-sex marriage in Massachusetts). The debate within the LGBT community over marriage can be traced to an exchange that took place between Paula Ettlebrick and Tom Stoddard in responsive articles in *OUT Magazine*. Paula Ettlebrick, *Since When was Marriage a Path to Liberation?*, *in* LESBIANS, GAY MEN, AND THE LAW 401-05 (William B. Rubenstein ed., 1993); Thomas Stoddard, *Why Gay People Should Seek the Right to Marry*, *in* LESBIANS, GAY MEN, AND THE LAW 398-401 (William B. Rubenstein ed., 1993). Some criticism of marriage goals has suggested that marriage would lead to a "domestication" of same-sex relationships. *See, e.g.*, RUTHANN ROBSON, LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW 18 (1992) (describing "unthinkable assimilation of domestication").

[100] David J. Garrow, *Toward a More Perfect Union*, N.Y. TIMES MAG., May 9, 2004, at 52 (describing evolution of coordinated same-sex marriage litigation).

[101] Homosexuality was classified as a serious mental illness until December 1973. BAYER, *supra* note 72, at 123. Throughout the 1970s, states began to repeal their sodomy laws, but the process was slow. Ten years after declassification only the following states had repealed their sodomy laws: Illinois (1962), Connecticut (1971), Colorado (1972), Oregon (1972), Delaware (1973), North Dakota (1973), Ohio (1974), New Hampshire (1975), New Mexico (1975), California (1976), Maine (1976), West Virginia (1976), Washington (1976), Indiana (1977), South Dakota (1977), Vermont (1977), Wyoming (1977), Iowa (1978), Nebraska (1978), New Jersey (1979), Alaska (1980), Wisconsin (1983). Jeremy Quittner, *Are You Breaking the Law? Where Does Your State Stand on Sodomy Laws?*, THE ADVOCATE, Aug. 20, 2002, at 52.

[102] Chauncey notes that "it was only in the 1990s that lesbian and gay images, often positive

pointed out that the challenged marriage laws did not specify that the couple had to consist of a man and a woman, the force of heteronormativity was such that courts ruled against the same-sex couples on definitional grounds.[103] No other reading of marriage was possible. By definition, marriage could only exist between a man and a woman.[104]

Obviously, quite a bit had changed by 1993, when the Supreme Court of Hawai'i found that the denial of a marriage license to a same-sex couple violated the equal protection clause of the state constitution and the state of Hawai'i had failed to show a compelling state interest to justify that violation.[105] During those two intervening decades, the LGBT movement had started a dialogue with organized religion,[106] lobbied successfully for the declassification of homosexuality as a mental illness,[107] and secured legal gains such as the repeal of sodomy laws,[108] anti-discrimination measures,[109] and hate crimes legislation.[110] It campaigned for positive portrayals of gay men and lesbians in the media and educational materials.[111] In short, it pursued a very broad inter-related program of social change. At the same time, the LGBT movement saw the rise of the traditional values movement that countered

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and increasingly diverse and complex, permeated the mass media." CHAUNCEY, *supra* note 96, at 53. On college campuses, LGBT groups proliferated, but often met with considerable resistance from the administration. *See infra* note 154 (discussing student group litigation).

[103] For example, in *Jones v. Hallahan*, the Court of Appeals of Kentucky had only to consult two dictionaries to determine that the failure to issue a marriage license to Marjorie Jones and Tracey Knight did not implicate any constitutional rights. 501 S.W.2d 588 (Ky. 1973). True, the state statute did not specify that the applicants for a marriage license had to be of opposite sexes. *Id.* at 589. That notwithstanding, the court concluded that by definition Jones and Knight could not marry. *Id.* The judge reasoned: "It appears to us that appellants are prevented from marrying, not by the statutes of Kentucky or the refusal of the County Court Clerk of Jefferson County to issue them a license, but rather by their own incapability of entering into a marriage as that term is defined." *Id.*

[104] Despite the obviousness of this reasoning, state legislatures began to enact sex-specific marriage laws in the wake of these early marriage cases. CHAUNCEY, *supra* note 96, at 91. Chauncey reports that fifteen states passed such legislation. *Id.*

[105] Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (Haw. 1993).

[106] *See* CHAUNCEY, *supra* note 96 (noting religious views regarding homosexuality began to change in 1970s in favor of anti-discrimination laws).

[107] *See generally* BAYER, *supra* note 72 (describing lobbying for declassification).

[108] *See supra* note 101 (discussing state repeal of sodomy laws).

[109] *See* CHAUNCEY, *supra* note 96, at 38-39 (discussing anti-discrimination protections).

[110] *See generally* Human Rights Campaign, Hate Crimes, http://www.hrc.org/Template.cfm?Section=Hate_Crimes1 (last visited Aug. 27, 2005) (discussing need for and progress toward securing hate crime protections).

[111] The Gay & Lesbian Alliance Against Defamation was founded in 1985. GLAAD, *supra* note 37. The Gay, Lesbian, and Straight Education Network was founded in 1990 to address the needs of LGBT students. GLSEN, History, http://www.glsen.org/cgi-bin/iowa/all/about/history/index.html (last visited Aug. 27, 2005).

every gain and made particularly effective use of the citizens' referendum.[112] Over time, this counter movement evolved from a narrowly drawn anti-gay focus to espouse a much more comprehensive vision for social change and transformation.[113]

Throughout the 1990s, however, the largest gains with respect to the recognition of same-sex relationships came from the market in the form of domestic partnership benefits as employers began to extend the equivalent of spousal health insurance and other benefits to the same-sex partners of their employees.[114] Indeed, the practice coined the term "domestic partnership," and now the term "domestic partner" or more simply "partner" are widely used outside the Human Relations departments of corporations to signal an exclusive committed intimate relationship.[115] The willingness of the gay rights movement to pursue marketplace solutions illustrates that activists do not "hardwire" institutions to their goals, a common criticism the CIA wages against legal commentators.[116] Speaking in the broadest of ideological terms, and assuming that designations such as "left" or "right" retain some modicum

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[112] For a description of the rise of the traditional values movement, see CHAUNCEY, *supra* note 96, at 147-52 (describing the history of movement).

[113] HERMAN, *supra* note 11, at 195 (describing traditional values movement as a "paradigmatic movement for social change").

[114] According to the Human Rights Campaign Foundation, 11 state governments and 130 municipal or county governments extend domestic partnership benefits. Human Rights Campaign Foundation, Employers that Offer Domestic Partnership Health Benefits, http://www.hrc.org/Template.cfm?Section=Search_the_Database&Template=/CustomSource/WorkNet/srch.cfm&searchtypeid=3&searchSubTypeID=1 (last visited Aug. 27, 2005). In addition, 247 of the Fortune 500 companies offer domestic partnership benefits. *Id.* In order to qualify for these employee benefits, a same-sex couple must establish either that they are registered as domestic partners with the relevant jurisdiction or they must satisfy a prescribed number of factors establishing a relationship. *See* Knauer, *supra* note 21, at 346-48 (describing general requirements to qualify for domestic partnership benefits).

On the municipal or county level, domestic partner ordinances can extend relatively few benefits to non-employees. *Id.* at 340-42. Domestic partner registries are largely symbolic, although registration does provide strong evidence of a committed relationship. *Id.* at 340-41. According to the Human Rights Campaign Foundation, seventy municipalities and counties offer registries. Human Rights Campaign Foundation, Work Life: Search for an Organization or Agency, http://www.hrc.org/Template.cfm?Section=Get_Informed2&Template=/CustomSource/Agency/AgencySearch.cfm (last visited Aug. 28, 2005). However, the increasing availability of registries may lead to a negative inference in the case of a couple who fails to register.

[115] For example, one definition of "domestic partner" provides: "domestic partner or domestic partnership identifies the personal relationship between individuals who are living together and sharing a common domestic life together but are not joined in any type of legal partnership, marriage or civil unions." Wikipedia: The Free Encylpodiea, Domestic Partnership, http://en.wikipedia.org/wiki/Domestic_partner (last visited Aug. 27, 2005).

[116] KOMESAR, *supra* note 1, at 174-75 (noting "[y]ou cannot hardwire goals and institutions and, therefore, no program of law and public policy follows from goal choice").

of descriptive power, movements to secure rights and recognition for traditionally marginalized minority groups are generally considered to fall to the "left" of center, whereas the private orderings and remedies of the marketplace are more closely associated with the "right."[117] In fact, the efforts to secure domestic partnership benefits were considered suspect by some and exposed the LGBT movement to internal criticism, showing yet again how politics can make strange bedfellows.[118]

As explained more fully in Part IV, the amount of resources the LGBT movement expended on domestic partnership protections was also criticized given that market-based recognition provides a very partial remedy.[119] In other words, as an institution, the market is not competent to implement the social goal of equal recognition for same-sex relationships.[120] Despite this partiality, the market has been very responsive to demands for equal treatment of same-sex partners and relatively resilient to attempts by the traditional values movement to protest through the use of consumer boycotts and the like.[121] This placed the LGBT movement in the paradoxical situation where the institution that was the most responsive to its demands and able to withstand pressure from the traditional values counter-movement was the least competent to provide the desired relief.[122]

The key to CIA is the element of participation, and from its inception the LGBT movement has recognized the importance of the atomistic forces that determine institutional behavior.[123] It is individuals who demand

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[117] *Id.* at 92 (pointing to the label "conservative" as a "ideological generalization" that "misses much").

[118] *See* Knauer, *supra* note 21, at 349 n.56 (describing fear of "domestication").

[119] The remedy is partial because it is limited to the employees of certain employers and does not confer rights that are enforceable against third parties. The class of individuals benefited does not include the unemployed or the underemployed. The type of benefits available is limited to those generally associated with compensation packages.

[120] For a discussion of competence, see *infra* text accompanying notes 200-27.

[121] For example, the sixteen million member strong Southern Baptist Convention organized a boycott of the Walt Disney Company shortly after the company began to offer domestic partner benefits. Gustav Niebuhr, *Baptists Censure Disney for Gay-Spouse Benefits*, N.Y. TIMES, June 13, 1996, at A14. The boycott was largely regarded as a failure and ended eight years later. *See Baptists End Disney Boycott*, N.Y. TIMES, June 23, 2005, at A17 (quoting Southern Baptist Convention: "The boycott has communicated effectively our displeasure concerning products and policies that violate moral righteousness and traditional family values.").

[122] Komesar notes: "The world of institutional choice under high numbers and complexity—the real world—yields incomplete and paradoxical results. Simplistic associations of good and evil with particular institutions and ideologies as well as demands for perfection no longer fit." KOMESAR, *supra* note 1, at 121 (discussing paradoxical results).

[123] *See* CHAUNCEY, *supra* note 96, at 33 (discussing presumed transformative power of "coming out").

discriminatory legislation, support citizen referenda to repeal gay rights legislation, fire employees based on sexual orientation, determine the "best interest" of a child, and commit violent hate crimes.[124] These things are not the product of the neutral, albeit misguided, law. They are choices made by individuals. As such, the LGBT movement stresses the importance of individuals to "come out" and be open and honest regarding their sexual orientation because public opinion polls regularly show that individuals who know that they know someone who is gay are more likely to support gay rights initiatives.[125] Thus, the LGBT movement not only pursues its contested goal through strategic institutional choice, it also seeks to build consensus, or at least a majority, regarding the contested goal. Through the use of personal narrative, the coming out process seeks to achieve this by reaching one atomistic actor at a time.

II. THE RECOGNITION OF SAME-SEX RELATIONSHIPS

The year of 2004 was a tumultuous year for the recognition of same-sex relationships. Despite many procedural challenges and a pending state constitutional referendum, Massachusetts became the first state to legalize same-sex marriage, as mandated by a 2003 Massachusetts Supreme Court decision.[126] Several weeks before the Massachusetts order became effective, the Mayor of San Francisco, Gavin Newsom, authorized the issuance of marriage licenses to same-sex couples.[127] Night after night, television news

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[124] The "best interests" of the child is a family concept used to determine issues of custody and adoption. Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFFALO L. REV. 341, 364-68 (2002) (explaining "best interests" interests). Its multifactor analysis frequently denied custody to parents in same-sex relationships even where courts did not consider such parents to be unfit *per se*. *Id.*

[125] *See* Human Rights Campaign, Coming Out as a Straight Ally, http://www.hrc.org/Content/NavigationMenu/Coming_Out/Get_Informed4/Straight_Allies/Coming_Out_as_a_Straight_Ally2.htm (last visited Aug. 27, 2005) (stating "[o]pinion polls show that people who know someone who is gay or lesbian are more likely to support equal rights for all gay and lesbian people").

[126] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (holding that limiting access to protections and benefits of civil marriage violates state constitution).

[127] In advance of the implementation of the *Goodridge* decision of the Massachusetts Supreme Court, the Mayor of San Francisco authorized the issuance of marriage licenses to same-sex couple starting in February 2004. Dean E. Murphy, *Bid to Stop San Francisco From Letting Gays Marry*, N.Y. TIMES, Feb. 14, 2004, at A10. By the time the California courts enjoined the practice one month later, 4037 same-sex couple from forty-six states had married. Dean E. Murphy, *San Francisco Married 4,037 Same-Sex Pairs from 46 States*, N.Y. TIMES, Mar. 18, 2004, at A26. The Supreme Court of California later declared the marriages invalid. Lockyer v. City and County of S.F., 95 P.3d 459 (Cal. 2004).

programs showed long lines outside City Hall where couples patiently waited for hours as volunteer officiants scrambled to meet the pent up demand.[128] For a brief time, it appeared as if the United States had reached a tipping point. Bursts of localism led municipal officials to follow suit in Oregon,[129] New Jersey,[130] New Mexico,[131] and New York.[132] Over 8000 same-sex couples were "married" before the courts intervened and invalidated the marriages as *ultra vires*.[133]

The media images of the happy newlyweds energized the traditional values movement, and same-sex marriage became a defining issue for the 2004 Presidential election.[134] Faced with the specter of same-sex marriage spreading throughout the United States via the "activist judges" and the Full Faith and Credit Clause of the U.S. Constitution, anti-gay activists redoubled their efforts to use the constitutional amendment process, on both the federal and state levels, to stop court-mandated equal marriage rights.[135] In 2004, voters in thirteen states, representing a large percentage of the U.S. electorate,

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[128] Carolyn Marshall, *Rushing to Say 'I Do' Before City is Told 'You Can't'*, N.Y. TIMES, Feb. 17, 2004, at A10 (noting staff and volunteers worked through three-day weekend without pay).

[129] On March 3, 2004, "Oregon's largest county, Multnomah [County] began issuing marriage licenses to same-sex couples." Matthew Peusch, *Oregonians Look to One Suit to Settle Gay Marriage Issue*, N.Y. TIMES, Mar. 25, 2004, at A16. More than three thousands marriage licenses were issued to same-sex couples in Oregon before the state courts stopped the practice. Matthew Peusch, *Oregon: Judge Halts Same-Sex Marriage Licenses*, N.Y. TIMES, Apr. 21, 2004, at A21. The Oregon Supreme Court later invalidated the marriages. Li v. State, 110 P.3d 91 (Or. 2005).

[130] On March 10, 2004, Asbury Park, New Jersey issued a marriage license to a same-sex couple. Thomas Crampton, *A City on the Jersey Shore, Wading Into Gay Issues*, N.Y. TIMES, Mar. 13, 2004, at B4.

[131] Sandoval County, New Mexico issued sixty-six marriage licenses to same-sex couples on February 20, 2004. Steve Barnes, *New Mexico: Gay Marriage Injunction Stands*, N.Y. TIMES, Aug. 27, 2004, at A15. The state courts quickly enjoined the issuance. *Id.*

[132] A number of marriage licenses were issued to same-sex couples in New Paltz, New York, and the mayor personally performed twenty-five same-sex marriages. Thomas J. Lueck, *Police Charge New Paltz Mayor for Marrying Same-Sex Couples*, N.Y. TIMES, Mar. 3, 2004, at B4. The mayor was charged with nineteen criminal counts when he presided over twenty-five same-sex marriage ceremonies. *Id.* The charges were eventually dropped after eighteen months of legal maneuvering. Jennifer Medina, *Charges Dropped Against Mayor Who Performed Gay Weddings*, N.Y. TIMES, July 13, 2005, at B5.

[133] Lockyer v. City and County of San Francisco, 95 P.3d 459 (Cal. 2004) (invalidating over 4000 marriage licenses issued to same-sex couples by San Francisco); Li v. State, 110 P.3d 91 (Or. 2005) (invalidating over 3000 marriage licenses issued to same-sex couples in Oregon).

[134] *See* Wikipedia: The Free Encyclopedia, Same-Sex Marriage in the United States, http://en.wikipedia.org/wiki/Same-sex_marriage_in_the_United_States (last visited Aug. 29, 2005) (noting legal recognition became a major issue).

[135] *See* Rosen, *supra* note 17, at 48 (noting that the marriage amendment has potential to "provoke a mini-culture war in each of the [fifty] state legislatures").

approved state constitutional amendments prohibiting same-sex marriage.[136] A Federal Marriage Amendment (FMA) was introduced in Congress, with the support of the President.[137] The response against same-sex marriage was so overwhelming that leading Democrats publicly blamed Newsom for the re-election of President Bush, claiming that Newsom's improvident decision had given the Republican party compelling images around which to rally its base.[138]

The events of 2004 followed a now familiar pattern in the longstanding struggle over the recognition of same-sex relationships. A pro-marriage court ruling is challenged by the traditional values movement through the political process, which then sets in motion a flurry of prophylactic political measures in other jurisdictions. Regional or local pro-recognition sentiments are overwhelmed by majoritarian bias when the issue is re-framed on a larger scale. The general pattern has taken a variety of forms. For example, a municipal domestic partnership registry reflecting local pro-recognition views could be invalidated by a state constitutional amendment prohibiting not only same-sex marriage, but also any extension of "the incidents of marriage" to same-sex couples.[139] Massachusetts same-sex marriages, imposed by court order, could be invalidated by a pending Massachusetts state constitutional amendment or the FMA.[140]

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[136] In 2004, fifteen state constitutional amendments were ratified. Wikipedia, *supra* note 134. Some of the amendments not only prohibited marriage, but also any parallel status that would grant "the incidents of marriage." Human Rights Campaign Foundation, Marriage-Related State Constitutional Amendments, http://www.hrc.org/Template.cfm?Section=Center&CONTENTID=21264&TEMPLATE=/ContentManagement/ContentDisplay.cfm (last visited Oct. 12, 2004). As of September 2005, the Human Rights Campaign reports that one additional state had amended its constitution and amendments were pending in four more states. Human Rights Campaign Foundation, Proposed State Constitutional Amendments, http://www.hrc.org/Template.cfm?Section=Center&Template=/ContentManagement/ContentDisplay.cfm&ContentID=26900 (last visited Sept. 2, 2005). A total of eighteen states have passed state constitutional amendments banning same-sex marriage. Associated Press, *Psychiatric Group May Make Stand for Same-Sex Marriage*, N.Y. TIMES, May 23, 2005, at A15.

[137] In 2004, the Federal Marriage Amendment was considered in both the U.S. House and Senate where it failed to garner the required two-thirds majority to continue. Sheryl Gay Stolberg, *Same Sex Marriage Amendment Fails in the House*, N.Y. TIMES, Oct. 1, 2004, at A14 (noting vote was 227 to 186 in favor of the amendment, but short of the two-thirds majority needed).

[138] Dean E. Murphy, *Some Democrats Blame One of Their Own*, N.Y. TIMES, Nov. 5, 2004, at A18 (quoting Sen. Diane Feinstein).

[139] For a discussion of a new generation of marriage laws which, in addition to banning same-sex marriage, prohibit the grant of the "incidents of marriage" see *infra* text accompanying notes 309-13.

[140] Voters and legislators tried to circumvent the implementation of the *Goodridge* court order through appeal to the constitutional amendment process. Pam Belluck, *Massachusetts Plans to Revisit Amendment on Gay Marriage*, N.Y. TIMES, May 10, 2005, at A13. However,

To understand the dynamics of this strategic institutional maneuvering, it is important to examine the process of goal articulation and the costs and benefits of participation. As explained below, the demand for relationship recognition is driven by individuals in same-sex relationships who have very high stakes in the outcome. These stakes can run from such mundane concerns as whether the local swim club will let a same-sex couple sign up for a "family" membership[141] to issues involving fundamental questions of human dignity and bodily integrity, such as whether a surviving same-sex partner can control the disposition of her partner's remains[142] or sue on account of her partner's wrongful death.[143] In the case of the counter-demand from the traditional values movement, the benefits of participation are more diffuse and less immediate.[144]

A. The Demand for Recognition

The demand for the recognition of same-sex relationships began as a natural extension of the broader goals of equality and individual freedom espoused by the LGBT movement.[145] Tracing its inception to the Stonewall Riots of

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this attempt was thwarted in Massachusetts due to a design feature of the state amendment process. *Id.* The Massachusetts Assembly passed a constitutional amendment barring same-sex marriage, but voters will not be able to consider the amendment until 2006. *Id.*

[141] *See* Marcia Chambers, *At Country Clubs, Gay Members Ask for Privileges for their Partners*, N.Y. TIMES, Sept. 21, 2004, at D2 (describing efforts to win relationship recognition).

[142] Same-sex couples can draft documents which try to anticipate such circumstances, but the extent to which the documents can legally bind third parties such as funeral directors or cemeteries is uncertain, except where such documents are expressly authorized by law. For example, Virginia expressly authorizes the designation of an individual who "shall make arrangements for [the declarant's] burial or the disposition of [the declarant's] remains, including cremation, upon [the declarant's] death." VA. CODE ANN. § 54.1-2825 (2001). For the particular problems facing surviving same-sex partners, see Jennifer E. Horan, Note, *"When Sleep at Last has Come": Controlling the Disposition of Dead Bodies for Same-Sex Couples*, 2 J. GENDER RACE & JUST. 423 (1999) (discussing difficulty encountered by surviving same-sex partners).

[143] Standing to sue for wrongful death is established by statute. *See* John G. Culhane, *A "Clanging Silence": Same-Sex Couples and Tort Law*, 89 KY. L.J. 911, 953-54 (2000) (describing origin of wrongful death actions). The order of priority starts with the surviving spouse and continues through the next of kin. *Id.* at 956. Only a handful of states include surviving same-sex partners as spousal equivalents for wrongful death purposes.

[144] For a discussion of the distribution of stakes in the traditional values movement, see *infra* text accompanying notes 174-95 (discussing diffuse stakes).

[145] The gay rights movement originally espoused a liberationist philosophy based on principles of individual autonomy and freedom. *See generally* CHAUNCEY, *supra* note 96, at 29-31 (discussing gay liberation movement). Gay liberationists pursued a path of revolutionary social and political change, but it was short-lived, spanning from the 1969 Stonewall riots until the mid-1970s. *See* ANNAMARIE JAGOSE, QUEER THEORY: AN INTRODUCTION 30-43 (1996)

1969,[146] the contemporary LGBT movement is represented by a sophisticated array of advocacy organizations, including legal advocacy groups, media watchdogs, federal, state, and local lobbying efforts, and networks of educators, religious organizations, and special interest groups.[147] With its ultimate goal being the normalization of homosexuality, the LGBT movement has lobbied for anti-discrimination measures,[148] positive portrayals of homosexuals by the media,[149] and the repeal of sodomy laws.[150] In recent years, there has emerged a movement within a movement dedicated to the singular goal of equal relationship rights for same-sex couples.[151] Increasingly, this goal has been defined as equal marriage rights.[152]

(describing liberationist strategy). The emphasis the gay liberationists placed on personal autonomy gave way to equality demands that have dominated since the 1980s. *Id.*

[146] *Id.* On June 27, 1969, after a memorial service following the death of Judy Garland at the Stonewall Inn, police in New York City raided the gay and drag bar, and the resistance that followed has been established as marking the initiation of a social movement dedicated to seeking recognition and acceptance of same-sex relationships. *Id.*

[147] *See* CHAUNCEY, *supra* note 96, at 5 (noting "profound change" in "the place of lesbians and gay men in American society").

[148] Only sixteen states and the District of Columbia have legislation that prohibits discrimination on account of sexual orientation. Human Rights Campaign, Statewide Anti-Discrimination Laws & Policies, http://www.hrc.org (last visited Aug. 27, 2005). The sixteen states are: California, Connecticut, Illinois, Maine, Maryland, Minnesota, New Hampshire, Hawai'i, New Mexico, New Jersey, New York, Nevada, Rhode Island, Vermont, and Wisconsin. *Id.*

[149] For example, the Gay & Lesbian Alliance Against Defamation was founded in 1985. GLAAD, *supra* note 37. It was modeled after the B'nai B'rith Anti-Defamation League. CHAUNCEY, *supra* note 96, at 32. GLAAD is now a national organization dedicated to "promoting and ensuring fair, accurate and inclusive representation of people and events in the media as a means of eliminating homophobia and discrimination based on gender identity and sexual orientation." GLAAD, *supra* note 37. Chauncey notes that the efforts of GLAAD "prompted soul-searching and debate in many of the nation's newsrooms"). CHAUNCEY, *supra* note 96, at 44.

[150] By the time *Lawrence* was decided in 2003, only thirteen states had sodomy laws. Lawrence v. Texas, 539 U.S. 538, 573 (2003). This was down from twenty-four states and the District of Columbia when *Bowers v. Hardwick* was decided in 1986. *Id.* at 572. All states had sodomy laws until Illinois adopted the Uniform Penal Code in 1961 and as a result repealed its sodomy law. *Id.*

[151] *See generally* CHAUNCEY, *supra* note 96 (discussing historical roots of demand for equal marriage rights); *see also* MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE 87 (1999) (noting "[m]arriage became the dominant issue in lesbian and gay politics in the late 1990s, but not before").

[152] The momentum for equal marriage rights increased greatly after the *Goodridge* decision. However, the resounding defeat in terms of both the Presidential election and the state constitutional amendments has led many within the LGBT movement to question the wisdom of focusing on *marriage* rights instead of a more moderate demand for relationship recognition. John M. Broder, *Groups Debate Slower Strategy on Gay Rights*, N.Y. TIMES, Dec. 9, 2004, at A1 (reporting HRC leadership has concluded that "aggressively pursuing same-sex marriage only played into the hand of Republicans and religious conservatives").

The focus on marriage is understandable given the recent high profile case in Massachusetts and the fact that opposite-sex secular marriage is commonly used as a touchstone against which to measure the disabilities imposed on same-sex couples.[153] Once marriage is established as the benchmark for the desired quantum of rights and responsibilities, anything short of marriage smacks of inequality. This notwithstanding, same-sex couples have pursued recognition of their relationships in a variety of ways and in a variety of institutional settings. The greatest gains toward relationship recognition have been made in these margins, as same-sex partners establish standing and visibility often one employer or one case at a time.

From a pragmatic standpoint, the possibility of same-sex marriage seemed very remote when demands for domestic partnership benefits were first made in the 1980s.[154] The question of whether marriage was an appropriate goal for a movement dedicated to progressive social change was the subject of considerable internal dispute.[155] Rather than make an impulsive dash for marriage as had the early gay liberationists, advocates pursued a broad-based multi-institutional program, including employee benefits for domestic partners and other private contractual arrangements in the market,[156] dialogue with progressive religious denominations,[157] and municipal domestic partner

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[153] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (holding that limiting access to protections and benefits of civil marriage violates state constitution).

[154] From the perspective of the 1980s, the most successful LGBT litigation to date had concerned the associational freedoms and the right to organize LGBT student groups on college campuses. *See* Gay Students Serv. v. Texas A & M Univ., 737 F.2d 1317 (5th Cir. 1984), *cert. denied*, 471 U.S. 1120 (1985); Gay Lib v. Univ. of Missouri, 558 F.2d 848 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080, (1978); Gay Alliance of Students v. Matthews, 544 F.2d 162 (4th Cir. 1976); Gay Students Org. of Univ. of New Hampshire v. Bonner, 509 F.2d 652 (1st Cir. 1974); The Student Coalition for Gay Rights v. Austin Peay Univ., 477 F. Supp. 1267 (D. Tenn. 1979); Wood v. Davison, 351 F. Supp. 543 (N.D. Ga. 1972). In each case, the courts affirmed the students' associational freedoms guaranteed under the First Amendment. These politically themed cases were a far cry from marriage. Moreover, the resistance the early LGBT student groups faced was emblematic of the then-prevalent negative views of homosexuality. According to a 1982 Gallup poll, only 34% of the respondents thought that same-sex behavior was "acceptable." Ontario Consultants on Religious Tolerance, *supra* note 39.

[155] Progressive voices within the LGBT movement have questioned whether the emphasis placed on traditional "marriage" compromises the potentially transformative power of the movement. *See, e.g.*, Paula Ettlebrick, *supra* note 99 (questioning marriage as a goal). The perspective offered by Queer Theory has also offered a sustained and nuanced critique of the goal of same-sex marriage. *See, e.g.*, WARNER, *supra* note 151, at 87-95 (arguing same-sex marriage is inconsistent with tradition of queer thought).

[156] Writing in 1996, Urvashi Vaid, the former executive director of the National Lesbian and Gay Task Force, concluded that "[s]ome of the biggest successes of the gay rights movement came in the 1990s through changes in corporate policies that covered thousands of employees." URVASHI VAID, VIRTUAL EQUALITY 10 (1996).

[157] *See* CHAUNCEY, *supra* note 96, at 37 (discussing "debate in the churches over the place

registries.[158] In addition, advocates constructed a long-term plan to secure constitutionally mandated equal marriage rights through the state courts.[159]

Often, however, the demand for relationship recognition has not been the result of a carefully orchestrated design for social change. Instead, it arose from an individual tragedy visited upon a particular couple. For example, when the emergency room staff at the University of Maryland Medical System refused to allow Bill Flanigan to see his dying partner, he demanded to be recognized as "family."[160] Sherry Barone demanded recognition as the executor of her partner's will when the cemetery where her partner was buried refused to permit the term "beloved life partner" to be inscribed on the grave marker.[161] Frank Vasquez demanded to be recognized as something more than a "roommate" when the family of his deceased partner tried to evict Vasquez from the home he and his partner had shared for twenty-seven years.[162] As

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of lesbians and gay men in religious life").

[158] For example, West Hollywood California became the first municipality to establish a domestic partnership registry. Equality California, AB205 Fact Sheet, http://eqca.org (last visited Aug. 29, 2005).

[159] Garrow, *supra* note 100 (describing evolution of marriage litigation strategy).

[160] The hospital did not allow Flanigan to see his dying partner until the partner's mother arrived and authorized the visit. Flangian v. University of Maryland Medical Center, *Lambda Legal's Complaint, available at* http://www.lambdalegal.org/cgi-bin/iowa/cases/brief.html?record=1012http://www.lambdalegal.org/cgi-bin/iowa/cases/record?record=174 (last visited Aug. 29, 2005). The hospital denied Flanigan the right to see his partner even though his partner had executed a health care power of attorney in Flanigan's favor and the couple had registered as domestic partners in San Francisco. *Id.* By the time Flanigan was permitted to see his partner, he was unconscious and life-sustaining treatment had been administered contrary to his express wishes. *Id.* Flanigan later sued the hospital for negligence and intentional infliction of emotional distress. *Id.* The jury found for the hospital. *Id.*

[161] When Sherry Barone's partner of thirteen years, Cynthia Friedman, died at age thirty-five, she left a will which appointed Barone as executor. Debbie Woodell, *Gay Partner Battles for Rights Even at the Grave*, AUSTIN AMERICAN-STATESMAN, May 31, 1997, at C8. The will expressly authorized Barone to "arrange for the disposition" of Friedman's remains. Murray Dubin, *Late Woman's Parents, 'Life Partner' Wage Legal Battle Over Headstone Inscription*, PHILA. INQUIRER, June 30, 1997. The cemetery where Friedman was buried refused to inscribe her headstone with the epitaph directed by Barone—"beloved life partner, daughter, granddaughter, sister and aunt"–because Friedman's parents objected to the use of the term Abeloved life partner." Claudia N. Ginanni, *Cemetery To Inscribe Headstone, Pay $ 15,000*, THE LEGAL INTELLIGENCER, Sept. 8, 1997, at 5. The parents demanded a slightly different ordering of Friedman's filial ties: "our beloved daughter, sister, granddaughter, and loving friend." Dubin, *supra*. Shortly before the third anniversary of Friedman's death, the cemetery acceded to Barone's wishes as part of a settlement agreement reached in the federal lawsuit Barone brought against the cemetery. Ginanni, *supra*.

[162] Frank Vasquez's partner of twenty-seven years, Robert Schwerzler, died without a will. Marsha King, *Should Companion Get Deceased's Estate?*, SEATTLE TIMES, Jan. 23, 2001, at A1. Vasquez and Schwerzler ran a burlap bag recycling business in Puyallup, Washington where they shared a modest three-bedroom house. *Id.* When Schwerzler died intestate at the

these cases illustrate, the movement for relationship recognition is not driven by abstract considerations of equality, but by a very real vulnerability that confronts every person in a same-sex relationship: your same-sex partner is a legal stranger.[163] She is not considered family regardless of the length or quality of your relationship.[164]

In the United States, the status of same-sex relationships varies wildly from jurisdiction to jurisdiction and whether a same-sex partner will be considered a legal stranger, a spouse, or something in between, depends on where the couple lives and works.[165] When a couple who enjoys some form of recognition where they live decides to travel, they do so at their own risk, since

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age of seventy-eight, Vasquez quickly learned that the entire $230,000 estate was titled solely in Schwerzler's name. *Id.* Schwerzler's siblings asserted their rights to Schwerzler's property as next of kin and, according to Vasquez's lawyer, "literally wanted to put Mr. Vasquez out on the street with nothing." Sam Skolnik, *Same-Sex Estate Rights Backed; State High Court Says Gays May Be Entitled to Partners' Property in Absence of a Will*, SEATTLE POST-INTELLIGENCER, Nov. 2, 2001, at B1. Although not required to legally, the siblings justified their claim to Schwerzler's estate, including the home he had shared with Vasquez, on the basis that the two men were not homosexual. *Id.*; *see* King, *supra*. (quoting Schwerzler's brother: "[c]ertainly, there was nothing being done out in public"). In the eyes of Schwerzler's family Vasquez was really more like a housekeeper or a boarder who just happened to stay for twenty-seven years. *Id.* (stating that Vasquez "was a boarder or friend, nothing more than that[]").

Ultimately, the Washington Supreme Court recognized an equitable claim brought by Vasquez against his partner's estate. Vasquez v. Hawthorne, 33 P.3d 735 (Wash. 2001). The court extended to same-sex couples an established equitable doctrine that allows an unmarried opposite-sex partner who relied on the decedent to execute the necessary documents to secure the survivor's property interests to maintain an action against the estate that is somewhat akin to the doctrine of equitable adoption. *Id.*

[163] This raises a very important point of reference. Surviving same-sex partners are not simply unequal to surviving spouses. In the absence of some form of state-wide relationship recognition, same-sex partners are no relation to the decedent, standing behind siblings, cousins, and the state in terms of priority. Nancy J. Knauer, *The September 11 Attacks and Surviving Same-Sex Partners: Defining Family Through Tragedy*, 75 TEMP. L. REV. 31, 41 (2002).

[164] The disabilities that flow from this lack of status are too numerous to catalogue here. The HIV/AIDS epidemic of the 1980s exposed some of the most wrenching of these disabilities as a generation of young men faced a premature death and their partners were denied access to hospital rooms and rendered invisible in the face of often estranged and disapproving parents. *See* CHAUNCEY, *supra* note 56, at 95-104 (discussing role of HIV/AIDS epidemic in creating demand for same-sex marriage). In the 1990s, the highly publicized case of Sharon Kowalski who suffered a brain injury in a car accident and whose parents refused to allow her to see her partner, inspired a public education campaign to induce same-sex couples to write wills and sign health care powers of attorney. *See id.* at 111-15 (discussing emphasis on documents and role in forming demand for same-sex marriage). As is evident from the Flanigan and Barone cases, private documents are not sufficient to make a same-sex partner the equivalent of family. *See supra* notes 161-62.

[165] This is a function of the competence of the recognizing jurisdiction. *See infra* text accompanying notes 200-27 (discussing element of competence).

very few forms of relationship recognition are portable.[166] Both the American Psychiatric Association and the American Psychological Association have come out in support of equal marriage rights, citing the psychological toll caused by this uncertainty.[167] The problems caused by the lack of uniform relationship recognition are compounded when a same-sex couple is raising children and second-parent adoption is not available.[168]

At base, the movement for the recognition of same-sex relationships is driven by high stakes individuals who have a strong desire to protect their chosen family. Beyond these high stakes individuals, the movement for relationship recognition has attempted to build alliances with other marginalized groups and combat what was once a pervasive negative view of same-sex relationships.[169] For example, as recently as 1987, 78% of the U.S. population reported that same-sex relationships were always wrong.[170] With

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[166] The fragility of local grants of recognition was obvious when the University of Maryland Medical System rejected Flanigan's claim that his status as a registered domestic partner pursuant to a San Francisco ordinance made him "family" for purposes of the hospital's visitation policy. *See supra* note 160 (describing Flanigan's ordeal and suit against hospital).

[167] In 2004, the American Psychological Association ("APA") adopted a Resolution in favor of same-sex marriage. American Psychological Association, Resolution on Sexual Orientation and Marriage, July 2004, http://www.apa.org/pi/lgbc/policy/marriage.pdf. The APA Resolution supports equal marriage rights, noting "the minority stress" suffered by same-sex couples due to lack of legal recognition and the fact that a parallel or partial status such as a registered domestic partner is "rarely portable." *Id.* at 3. In 2005, the American Psychiatric Association followed suit with a similar resolution. Associated Press, *Top Psychiatric Group Urges Making Gay Marriage Legal*, WASH. POST, May 23, 2005, at A2; American Psychiatric Association, Same Sex Marriage Resource Document, http://www.psych.org/public_info/libr_publ/resource.cfm (last visited Aug. 29, 2005).

[168] According to the 2000 Census, thirty-four percent of female same-sex couples and twenty-two percent of male same-sex couples have at least one child under eighteen living in the home. National Gay and Lesbian Task Force, Parenting, http://www.thetaskforce.org/theissues/issue.cfm?issueID=30 (last visited Aug. 29, 2005). One of the major questions for same-sex parents is whether a second-parent adoption will be recognized in a state that does not allow such adoptions. For example, Oklahoma recently enacted a statute that prohibits the recognition of an adoption by more than one individual of the same sex. 10 OKLA. STAT. ANN. § 7502-1.4 (2004). This raises the disturbing possibility that a non-biological child who is jointly adopted by a same-sex couple would be considered an orphan if taken into the jurisdiction of Oklahoma. For an overview of the laws governing second-parent adoptions see National Gay and Lesbian Task Force, Second Parent Adoptions in the U.S. as of Jan. 2005, http://www.thetaskforce.org/downloads/secongparentadoptionmap.pdf (last visited Aug. 29, 2005).

[169] For example, the mission statement of Marriage Equality USA, a national organization dedicated to securing equal marriage rights, lists three core activities: education, media outreach, and forming partnerships and alliances with "gay and non-gay" organizations. Marriage Equality, About Marriage Equality, http://www.marriageequality.org/about_us.htm (last visited Aug. 29, 2005).

[170] CHAUNCEY, *supra* note 96, at 43 (reporting polling data).

that level of disapproval, local or regional gains could easily be overturned through majoritarian action, regardless of whether the gain was secured in the market, the courts or the political process. Faced with extraordinarily high information costs, the LGBT movement had to work to change the perception of homosexuality or risk losing any gains to periodic expressions of majoritarian bias.[171] Although views regarding homosexuality, including workplace protection from discrimination, have changed drastically over the last two decades,[172] the 2004 referenda results strongly suggest that the traditional values movement has successfully drawn the line at same-sex marriage–at least for now.[173]

B. The Counter-Demand and the Traditional Values Movement

The counter-demand for the non-recognition of same-sex relationships is part of the larger traditional values movement that can be traced to the founding of politically active conservative evangelical organizations in the late 1970s, such as the Reverend Jerry Falwell's influential Moral Majority.[174] The traditional values movement considers homosexuality, along with abortion, no-fault divorce, and the separation of church and state, as symptomatic of a general decline in morals that threatens the health of the nation.[175] In many ways, the traditional values movement mirrors the structure of the LGBT movement, complete with sophisticated advocacy groups, media watchdogs,

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[171] The available stock of negative stereotypes regarding homosexuality greatly increased the information costs for the LGBT movement. Chauncey notes that "[t]hose demonic [anti-gay] stereotypes became less effective as people became more familiar with gay people, as their friends and relatives came out to them and as they saw gay people treated in more humane and respectful ways in the media." *Id.* at 151.

[172] *See supra* note 39 (discussing current poll statistics showing 88% favor equal workplace treatment). On the availability of stock symbols, Komesar notes:

> The degree to which someone understands any issue also depends on that person's stock or endowment of general information. This stock is determined by culture, formal education, and the coverage of the press and media. Each culture has certain subjects such as religion or ethnicity that are part of the common experience of the members of that culture. This stock of "simple symbols" provides certain issues with easy recognition. Because the press and media provide cheap and accessible information, press and media response is a central element in determining the degree of majoritarian influence.

KOMESAR, *supra* note 1, at 63.

[173] This would be consistent with the national polling figures on the subject of relationship recognition, which lags behind equal workplace treatment. *See supra* note 40 (discussing polling data on attitudes toward same-sex marriage).

[174] *See* CHAUNCEY, *supra* note 96, at 147-48 (discussing Moral Majority).

[175] *See* HERMAN, *supra* note 11, at 195 (discussing traditional values movements in terms of its desired platform for social change).

and the like.[176] In terms of homosexuality, the traditional values movement has recharacterized anti-discrimination laws as government-granted "special rights" and led numerous successful state-wide referenda reversing pro-gay gains.[177]

After the 1993 decision of the Hawai'i Supreme Court in *Baehr v. Lewin*,[178] the traditional values movement increasingly focused on one particular "special right," namely same-sex marriage.[179] It characterizes the push for same-sex relationship recognition as an assault on traditional marriage that represents the next step on the ominous "gay agenda."[180] The traditional values movement correctly assumes that the limited gains same-sex couples make in terms of relationship recognition have a cumulative effect. Accordingly, it decries all actions that contain so much as a glimmer of recognition for same-sex relationships. For example, traditional values advocates have objected to providing domestic violence protections to victims of same-sex intimate battering on the grounds that it sets the stage for same-sex marriage.[181] Similar objections were raised in connection with the September 11 relief efforts when the Reverend Lou Sheldon, chairman of the Traditional Values Coalition, denounced the American Red Cross for providing emergency assistance to surviving same-sex partners.[182]

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[176] For example, the Family Research Council (FRC) is a full-service traditional values lobbying organization. Family Research Council, Defending Faith, Family, and Freedom, http://www.frc.org (last visited Aug. 29, 2005). Its numerous designated "policy areas" include such issues as: homosexuality, stem cell research, religious freedom, the "homosexual agenda in public education," judicial activism, abortion, covenant marriage, and tax reform. Family Research Council, Policy Areas, http://www.frc.org/get.cfm?c=RESEARCH (last visited Aug. 29, 2005).

[177] For a discussion of the rise of the referendum campaigns see CHAUNCEY, *supra* note 96, at 45-46. For a discussion of the "special rights" campaign, see *id.* at 46-47.

[178] 74 Haw. 530, 852 P.2d 44 (Haw. 1993); *see* ROSEN, *supra* note 17 (describing citizen's initiative to amend Hawai'i's constitution).

[179] Chauncey notes that "'defending marriage' as the union of one man and one woman had special symbolic significance for the opponents of gay rights." CHAUNCEY, *supra* note 96, at 145. The traditional values movement considers same-sex marriage "both the ultimate sign of gay equality and the final blow to their traditional ideal of marriage[.]" *Id.*

[180] The Gay Agenda is the title of an anti-gay documentary produced during the Amendment 2 battle in Colorado that culminated in *Romer v. Evans*. *Id.*

[181] Nancy J. Knauer, *Same-Sex Domestic Violence: Claiming a Domestic Sphere While Risking Negative Stereotypes*, 8 TEMP. POL. & CIV. RTS. L. REV. 325, 338-39 (1999).

[182] *See* American Red Cross, Guidelines on the Definition of Family for Red Cross Assistance and the Family Gift Program, http://www.lambdalegal.org/binary-data/LAMBDA_PDF/pdf/50.pdf (last visited Jan. 26, 2005). Reverend Lou Sheldon, chairman of the Traditional Values Coalition, denounced attempts to secure recognition for surviving same-sex partners as an attempt on the part of pro-gay advocacy organizations to use a "'national tragedy to promote their agenda.'" Thomas B. Edsall, *Minister Says Gays Should Not Get Aid*, WASH. POST, Oct. 5, 2001, at A22. Sheldon argued that relief should be awarded "'on the basis and priority of one man and one woman in a marital relationship.'" *Id.*

The traditional values movement typically does not have standing to challenge the individual unscripted victories that occur from time to time when same-sex partners demand recognition in the courts, such as when the California Supreme Court allowed Sharon Smith to bring a wrongful death action against the owners of the two dogs that had mauled her partner to death in the hallway outside their apartment.[183] In these individual cases, the traditional values movement is consigned to comment from the sidelines, occasionally making an appearance as amici.[184] The same is true when

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[183] Peter Hartlaub, *Same-Sex Partner Can Sue for Damages; Wrongful-Death Claim in Dog-Mauling Case*, S.F. CHRON., July 28, 2001, at A1. Diane Whipple, a thirty-three year old lacrosse coach, was mauled to death by her neighbors' two large dogs in the hallway outside the door to the apartment that she shared with her partner of seven years, Sharon Smith, on January 26, 2001. Christopher Heredia, *Dog Mauling Victim's Partner to Test Wrongful Death Law*, S.F. CHRON., Feb. 19, 2001, at A13. The details of Whipple's attack were widely reported in the press and generated considerable sympathy for her surviving partner and hostility toward the owners of the dogs. Bill Hewitt, Frances Dinkelspiel & Rebecca Paley, *Unleashed Fury; A Dog Attack in San Francisco Kills a Beloved Lacrosse Coach and Stirs Outrage Coast to Coast*, PEOPLE, Feb. 19, 2001, at 117. In the face of clear statutory language to the contrary, Smith pursued her wrongful death action against the owners arguing that the exclusion of same-sex partners was invalid under the California state constitution and met with unexpected success at the trial court level. Peter Hartlaub, *Same-Sex Partner Can Sue for Damages*, S.F. CHRON., July 28, 2001, at A1. *See also*, Heredia, *supra* (noting that "no case like Smith's has ever been successful"). Whipple's mother also filed a wrongful death suit in case Smith's was dismissed, with the intent that the two suits be merged. Jaxon Van Derbeken, *Dog-Mauling Case Settled: Victim's Mom, Partner Sued Landlords*, S.F. CHRON., Dec. 20, 2002, at A31.

[184] In their capacity as *amici*, traditional values organizations will often raise issues that are too controversial to find their way into the actual pleadings. For example, in *Lawrence v. Texas*, a variety of traditional values amici argued that public health and safety–not simply morals–justified the criminalization of same-sex sodomy. For example, an amicus brief filed by Texas legislators argued that the Texas Homosexual Conduct Law was rationally related to protecting public health. Brief of Amici Curiae Texas Legislators, at 15, Lawrence, (No. 02-102). The legislators argued, among other things, that "[s]ame-sex sodomy presents serious health problems that must be prevented in order to ensure that all of the people of the state of Texas, especially those that seek to engage in same-sex sodomy, are fully protected from the ravages of infection and disease." *Id.* at 17. The Texas Physicians' Resource Council argued specifically that "same-sex sodomy is more harmful to the public health than . . . opposite sex-sodomy" and noted that "[t]he extent of STDs associated with same-sex sodomy is likely related to the high frequency of sex, anonymous or multiple sex partners, and other high-risk behaviors." Brief of Amici Curiae Texas Physicians' Resource Council et al., at 20-21, Lawrence, (No. 02-102).

In *Dale v. Boy Scouts of Am.*, the Boy Scouts successfully argued that the New Jersey anti-discrimination law infringed upon the group's associational freedom by requiring it to reinstate an openly gay assistant scoutmaster. 706 A.2d 270 (N.J. Super Ct. 1998). An amicus brief filed by the Family Research Council, a traditional values organization with a particular focus on homosexuality, argued that male homosexuals should not be scoutmasters because of their tendency toward pedophilia. Brief of Amicus Curiae Family Research Council, at 22, Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (No. 99-699). In a thirty page brief, the

employees demand domestic partner benefits. Except in the case of public employers, aggrieved members of the traditional values movement have no standing to challenge the grant of benefits.

The lack of standing to challenge individual cases underscores a puzzling feature of the traditional values movement. Unlike same-sex couples who have an obvious personal stake in the debate, it is not clear what motivates the core participants in the traditional value movement. It is one thing for an individual to work toward formal and social recognition of her family, but it is quite a different thing to work toward the erasure of a stranger's family.[185] Therefore, as a practical matter, it makes sense that the movement concentrates its efforts on legislative action or constitutional amendments that can undo or forestall the individual court victory or grant of benefits. Locating its demand in the political process or direct democracy may be necessary because the benefits of participation are arguably so diffuse, and success depends on reaching the broadest possible base.

The vocabulary of the traditional values movement expresses the motivation in terms of a threat that is no less real or immediate than that encountered by Bill Franklin or Sharon Barone or Frank Vasquez. According to the traditional values movement, "Defense of Marriage" acts are necessary to secure traditional marriage and safeguard it from homosexual encroachment and degradation.[186] Senator Rick Santorum, in his impassioned statement on the floor of the Senate in support of the FMA, argued that stopping same-sex marriage was a matter of Athe ultimate homeland security."[187] Beyond the

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organization managed to use the term pedophile or some derivation thereof thirty-one times. Knauer, *supra* note 38, at 63.

[185] In response to claims by then-Representative Henry Hyde that same-sex marriage "demean" or "trivialize" marriage, Michael Warner asserts: "He doesn't just want his marriage to be holy; he wants us to be holy at the expense of someone else's. To see gay marriage as "demeaning" is, in his view, a way of seeing "traditional marriage" as more significant." Warner, *supra* note 80, at 82. Warner explains that "same-sex marriage provokes such powerful outbursts of homophobic feeling in many straight people . . . [because] [t]hey want marriage to remain a privilege, a mark that they are special." *Id.*

[186] For a discussion of what exactly the Defense of Marriage Act is trying to defend, see CHAUNCEY, *supra* note 96, at 144-55.

[187] 150 CONG. REC. S8061, S8075 (daily ed. July 14, 2004) (statement of Sen. Santorum). Senator Santorum was responding, in part, to Democratic claims that Congress had more important things to consider. The full statement also included an appeal to consider the best interests of the children:

> I would argue, the future of our country hangs in the balance because the future of the American family hangs in the balance. What we are about today is to try to protect something that civilizations for 5,000 years have understood to be the public good. It is a good not just for the men and women involved in the relationship and the forming of that union, which is certainly a positive thing for both men and women, . . . but even more important to provide moms and dads for the next generation of our children. Isn't that

immediate desire to protect marriage, there is the larger goal to eradicate or control homosexuality, which is seen as an unhealthy, immoral, and chosen lifestyle.[188] Working with this larger goal as its platform, the traditional values movement believes that any recognition of same-sex relationships to encourages homosexuality and abandons the individuals who are trapped in the unhealthy and immoral lifestyle.[189] Thus, the traditional values movement is decidedly other-regarding, expressing, in a very literal way, its evangelical roots.

When the traditional values movement denounces same-sex marriage, it demonizes homosexuality while at the same time exalting opposite-sex "one-flesh" unions.[190] At its inception, the movement could easily draw on the existing stock of stereotypical opinions regarding homosexuality and pervasive disapproval, thereby greatly reducing information costs.[191] As the public understanding of homosexuality gradually changed, however, the traditional values movement has had to incur increasing costs by continuing to champion an outdated view originally popularized by the American Freudians where homosexuality is a diseased condition, susceptible to therapeutic intervention.[192]

Increasingly, the traditional values movement has attempted to distance itself from its views regarding homosexuality and characterize the battle over same-sex marriage as a question of institutional legitimacy.[193] References to

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important? Isn't that the ultimate homeland security, standing up and defending marriage, defending the right for children to have moms and dads, to be raised in a nurturing and loving environment? That is what this debate is all about.

Id.

[188] *See* Knauer, *supra* note 38, at 46-50 (describing traditional values movement's construction of homosexuality).

[189] *See id.* at 46-47 (discussing ex-gays).

[190] Robert P. George, *What's Sex Got to do With It? Marriage, Morality, and Rationality*, 49 AM. J. JURIS. 63, 73-77 (2004) (explaining natural law concept of "marriage as one-flesh unity").

[191] *See supra* notes 171-72 (discussing easily available stock of negative stereotypes regarding homosexuality).

[192] A 1982 Gallup poll revealed that only 34% of the respondents considered homosexuality to be an acceptable "lifestyle." *See* Ontario Consultants on Religious Tolerance, *supra* note 39 (reproducing Gallup results from 1982 through 2003). By 2003, the number of respondents who believed that homosexuality was acceptable had risen to 54%. *Id.*

[193] For example, Senator Santorum argued that the FMA was necessary because courts "create rights and change the Constitution without having to go through this rather cumbersome process known as article V [the amendment process]." 150 CONG. REC. S8061, S8074 (daily ed. July 14, 2004) (statement of Sen. Santorum). Senator Santorum warned that if Congress failed to act, "the courts will go about the process, which they have been now for the past couple of decades, and simply change the Constitution without the public being heard." *Id.* at S8075. He concluded, "That is what this amendment is all about." *Id.*

morality and the best interests of the children have taken second place to concerns about the balance of powers and democracy.[194] According to the argument, important questions of moral and cultural significance are uniquely the province of the people to be determined by the precept of majority rule. The "activist judge" has replaced the "homosexual activist" as the object for derision.[195]

IV. THE ELEMENTS OF STRATEGIC INSTITUTIONAL CHOICE

The on-going struggle over the recognition of same-sex relationships illustrates a hands-on bottom-up approach to CIA that is an integral feature of any movement for the recognition of minority rights or social change. Advocates seeking to secure recognition of same-sex relationships must evaluate the various institutional alternatives, such as the market, the courts, and the legislature, not simply with regard to their competency to grant the desired quantum of rights, but also in terms of the institutions' perceived responsiveness to demands for such rights and resilience to anti-gay pressure.[196] This strategic analysis does not produce a singular choice, but informs the movement's allocation of resources among the various institutions.

A multi-institutional approach is required because, despite the hopes of some legal scholars, there is no one single rescue institution "waiting in the wings" that can deliver the desired relief with one groundbreaking decision or comprehensive legislation package.[197] A change in the law is not sufficient to effect social change.[198] Moreover, a favorable change in any single

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[194] Santorum's full statement represents a hybrid approach where claims of legitimacy are mixed with panic over children being raised by same-sex couples or otherwise influenced by homosexuals. 150 CONG. REC. S8061 (daily ed. July 14, 2004) (statement of Sen. Santorum).

[195] In 2005, the traditional values movement held two televised conferences called "Justice Sunday" to publicize its criticism of judicial activism and a judiciary that it views as hostile to religion. David D. Kirkpatrick, *Delay to Be on Christian Telecast on Courts*, N.Y. TIMES, Aug. 3, 2005, at A14 (noting Representative Tom Delay, House majority leader agreed to participate). The FRC website includes both "judicial activism" and "judicial reform" as "policy areas." Family Research Council, Policy Areas, http://www.frc.org/get.cfm?c=RESEARCH (last visited Aug. 29, 2005).

[196] As noted earlier, this Essay focuses on the three core institutions: the market, the courts, and the legislature. However, there are arguably a number of other relevant institutions, such as religion, the media, and communities. Within the three core institutions presented for analysis, there is often an important demarcation between federal and state actors. *See supra* notes 49 and 70 (discussing alternative institutional options).

[197] KOMESAR, *supra* note 1, at 24 (faulting the belief "that a perfect or idealized institution is waiting in the wings"); *see* ROSENBERG, supra note 25 (disputing ability of judiciary to effect meaningful social change).

[198] *See* Martha Minow, *Access to Justice: The Social Responsibility of Lawyers: Surprising Legacies of Brown v. Board*, 16 WASH. U. J.L. & POL'Y 11, 14-17 (2004) (discussing resistance

institutional setting is potentially transitory in nature. If adequately mobilized, the atomistic forces that shape institutional behavior hold the ultimate majoritarian prerogative. Through the constitutional amendment process, they have the power to redraw the lines that define institutions. Ultimately, they have the power to decide who decides.[199]

An understanding of the strategic nature of CIA can help explain what might appear at first glance to be puzzling choices or results, such as the decision of the LGBT movement to devote much time and resources to securing partial market-based rights. This section discusses the three core components of strategic institutional choice and the use of extra-institutional responses to reverse of blunt gains made in other institutional settings. After addressing the relative competence of each institution to grant the desired relief, it compares the responsiveness and resilience of the market with that of the courts and the political system. It also outlines the facility with which the traditional values movement has utilized extra-institutional responses to block relationship recognition on both the state and federal levels, particularly with its resort to direct democracy and the constitutional amendment process.

A. Competency

The market, the courts and the political process are each competent to provide some level of recognition to same-sex relationships. Indeed, all institutions in society are probably competent to do so because the recognition of marriage as a privileged status is so pervasive.[200] At the outset, it is important to make a distinction between relationship recognition and equal marriage rights. Although the goal of the relationship recognition movement has been increasingly expressed as same-sex *marriage*, many important combinations of rights and responsibilities short of marriage are potentially available.[201] The extension of these rights and imposition of these responsibilities sometimes occurs in a piecemeal and uncoordinated fashion; case by case, employer by employer. Whereas these seemingly isolated flashes of recognition do not amount to *marriage*, they often make a significant

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to desegregation order by *Brown v. Board of Education*).

[199] KOMESAR, *supra* note 1, at 162 (discussing importance of "who decides").

[200] On the federal level alone, there are an estimated 1138 benefits attached to marriage. Letter from Dayna K. Shah, Associate General Counsel, United States General Accounting Office, to Honorable Bill Frist, Majority Leader, United States Senate (Jan. 23, 2004), *available at* http://www.gao.gov/new.items/d04353r.pdf.

[201] The states that have adopted some form of relationship recognition each created a distinct parallel status typically designed to provide some, but not all, of the rights and responsibilities of marriage. *See infra* text accompanying notes 245-58 (describing different parallel structures). The Vermont structure of Civil Unions is an exception in that it provides identical benefits and responsibilities. *See infra* note 212 and accompanying text (describing civil unions).

difference in the lives of the individuals involved. They also have potential transformative value. Each instance of recognition furthers the larger social goal of the normalization of homosexuality and provides precedent on which to base future decisions.[202]

Traditionally, marriage is thought to be a state law issue, along with questions of divorce, inheritance, adoption, and tort claims.[203] However, the Defense of Marriage Act established a federal definition of marriage as the union of one man and one woman.[204] DOMA also purports to grant states the right to refuse to recognize same-sex marriages from sister states.[205] Same-sex marriages that are legally performed in Massachusetts are not respected at the federal level, and it remains to be seen whether sister states will recognize the unions.[206] As of January 2004, the United States General Accountability

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[202] In decisions that provide some degree of relationship recognition, courts routinely point to the existence of domestic partnership policies. *See, e.g.*, Langan v. St. Vincent's Hosp., 196 Misc. 2d 440, 452 (N.Y. Misc. 2003) (supporting decision to recognize Vermont Civil Union for wrongful death purposes with notice of widespread domestic partner policies).

[203] The traditional view is that family law is a state matter. *See, e.g.*, Sosna v. Iowa, 419 U.S. 393, 404 (1975) (identifying family law as "an area that has long been regarded as a virtually exclusive province of the States"); *but see* Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U. L.Q. 611, 619-23 (2004) (explaining traditional view that marriage is a state issue while outlining history of significant federal regulation).

[204] The Federal Defense of Marriage Act ("DOMA") was enacted in 1996 in response to the Hawai'i Supreme Court decision in *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (Haw. 1993). DOMA adds a definition of "marriage" and "spouse" to Title 1 of the United States Code, also known as the Dictionary Act. 1 U.S.C. § 7 (2004). It provides:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or wife.

Id.

[205] DOMA purports to grant states the authority not to recognize same-sex marriages performed in sister states. 28 U.S.C. § 1738C (2004). For a discussion of the Full and Faith and Credit concerns raised by this provision, see Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997).

[206] A New York court recognized a Vermont civil union as the equivalent of marriage for purposes of the state wrongful death statute. In *Langan v. St. Vincent's Hospital*, the court reasoned that Full Faith and Credit and equal protection considerations required it to treat a civil union in the same manner it would an out-of-state common law marriage. 196 Misc. 2d 440, 452 (N.Y. Misc. 2003). Although the case represented the first time that a civil union had been recognized outside of Vermont, it was restricted to the discrete question of whether the decedent's partner had standing to sue for wrongful death. There is also the issue of whether the same-sex marriages performed in Canada will be recognized. *See* Michael Cooper, *Hevesi Extends Pension Rights to Gay Spouses*, N.Y. TIMES, Oct. 14, 2004, at B1 (reporting New York State pension fund would recognize same-sex marriages performed in Canada and thereby grant same-sex partners those rights otherwise reserved for spouses).

Office identified 1138 federal statutory provisions under "which marital status is a factor in determining or receiving benefits, rights, and privileges." [207] These include favorable joint tax rates,[208] social security spousal benefits,[209] and pension rights.[210] Accordingly, the attainment of equal marriage rights would require action by the U.S. Supreme Court or Congress.

Although federal recognition has significant consequences, the issuance of marriage licenses is a state matter. A state supreme court or legislature can authorize the issuance of marriage licenses to same-sex couples.[211] In the alternative, a state legislature can choose to create a parallel status that grants all the rights of marriage, such as civil unions in Vermont.[212] Or, it can choose to create a partial status that carries some, but not all, of the rights and responsibilities of marriage, such as reciprocal beneficiaries in Hawai'i.[213] In any event, the benefits extended will be limited in scope to those that the granting jurisdiction has to offer. This question of portability remains an important aspect of competency because gains made on a state or local level are rarely transferable to another jurisdiction.[214] For example, a state can

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[207] Letter from Dayna K. Shah, *supra* note 200.

[208] 26 U.S.C. § 1(a)(2) (2005).

[209] A surviving spouse qualifies for social security death benefits. 42 U.S.C. § 402 (2004). The surviving spouse of a deceased retired worker receives one hundred percent of the deceased spouse's benefits. 42 U.S.C. § 402 (2003).

[210] The federal pension statute, ERISA, provides protection for a spouse's interest in certain retirement funds. *See* CHAUNCEY, *supra* note 96 (describing federal pension protections).

[211] To date, three state supreme courts have done so: Hawai'i, Massachusetts, and Vermont. *See infra* text accompanying notes 259-61.

[212] Vermont established civil unions under which parties to the union are granted "all the same benefits, protections and responsibilities . . . 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 marriage." VT. STAT. ANN. tit. 15, § 1204(a) (2002). This broad grant of rights includes equal status under the rules of intestate succession. VT. STAT. ANN. tit. 15, § 1204(e)(3) (2004).

[213] Hawai'i established the category of "reciprocal beneficiary relationship" in order "to extend certain rights and benefits which [were] presently available only to married couples to couples composed of two individuals who are legally prohibited from marrying under state law." HAW. REV. STAT. § 572C-1 (2004). Individuals must sign a "declaration of reciprocal beneficiary relationship" in order to be eligible for certain benefits. HAW. REV. STAT. § 572C-5 (2004). A reciprocal beneficiary is afforded the same status as a spouse under the rules of intestate succession. HAW. REV. STAT. § 560:2-102 (2004).

[214] Unlike the partial market-based benefits, the courts have the ability to order the issuance of marriage licenses to same-sex couples. With marriage would come the full panoply of rights and responsibilities available to married couples. On the federal level, it remains to be seen whether *Lawrence v. Texas*, 539 U.S. 558 (2003), will lead to the recognition of a fundamental right to marry a same-sex partner and the invalidation of DOMA, as well as the state constitutional amendments and state defense of marriage acts which restrict marriage to one man and one woman. Justice Scalia seems to believe that this day has arrived, but marriage litigation at the federal level is not currently being pursued by any of the leading advocacy

permit a same-sex couple to file joint income tax returns for state purposes, but, in light of DOMA, a valid marriage license will not prompt the federal government to extend the same privilege.[215] Finally, state courts and legislatures can provide specific relief to same-sex partners on a case-by-case basis that is not part of an over-arching scheme of relationship recognition.[216]

On the local level, the scope of available benefits is even more limited. By ordinance, a municipality or county can establish the status of domestic partner and provide a registry system to formalize the relationship.[217] The registry provides a governmental acknowledgement of the relationship, but the rights obtainable under these ordinances are necessarily limited to those rights that a municipality or county can grant.[218] These could include the right to visit a same-sex partner incarcerated at a county prison, municipal tax benefits enjoyed by married couples, and the ability to transfer certain municipal licenses, such as a liquor license, to a same-sex partner.[219]

Within the market, the recognition of same-sex couples has come in the form of domestic partnership employee benefits and other instances where third-party service providers choose to treat same-sex couples the same as married couples. The latter would include insurance companies that extend "married" rates to same-sex couples[220] and country clubs that offer family

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groups. However, for many dedicated to the goal of equal marriage rights, the struggle for the recognition of same-sex relationships will not be over until the U.S. Supreme Court extends the holding of *Loving v. Virginia*, 388 U.S. 1 (1967), to same-sex partners.

[215] *See* E.J. Graff, *Marrying Outside the Box*, N.Y. TIMES MAG., Apr. 10, 2005, at 22 (noting for first time individuals married under state law will be denied right to file as married for federal income tax purposes).

[216] *See, e.g.*, *supra* note 162 (discussing Vasquez's equitable claim against his partner's estate).

[217] The act of registration also provides evidence of the relationship if it were to be challenged in litigation. This poses a potential trap for the unwary. Because domestic registry provide little in the way of tangible benefits, it is reasonable that same-sex couples might not take the time to register. However, the lack of registration—for admittedly meager benefits—could be used at a later date to undermine the existence of the relationship or its seriousness.

[218] Such ordinances grant relative few benefits to non-municipal employees. Knauer, *supra* note 21, at 346-48. However, the San Francisco domestic partnership ordinance goes one step further and requires all city contractors to offer domestic partnership benefits equal to those provided for spouses. S.D. Myers, Inc. v. City and County of S.F., 253 F.3d 461, 467-76 (9th Cir. 2001) (upholding ordinance). In this way, the ordinance benefits a wider class of employees.

[219] The San Francisco Human Rights Commission website maintains a comprehensive list of all domestic partnership ordinances on the city and county level, including the requirements for registration and the rights conferred. San Francisco Human Rights Commission, State Domestic Partnership Registries, http://www.sfgov.org/site/sfhumanrights_page.asp?id=6283 (last visited Aug. 29, 2005).

[220] Lambda Legal, Top Three Car Insurance Companies in New York Will Recognize Gay Couples, http://www.lambdalegal.org/cgi-bin/iowa/news/press.html?record=1515 (last visited

memberships to same-sex couples.[221] Private contract also can help order the rights and responsibilities of individuals in same-sex relationships with documents involving property distribution or substituted decision making.[222]

Market-based solutions are by their nature inadequate to provide widespread and comprehensive protection for same-sex relationships, in that employer-provided domestic partnership benefits extend only to a limited class of workers.[223] However, workplace domestic partner benefits can be very valuable due to the structure of health care in the United States where health insurance is linked to employment.[224] A married worker whose employment package includes health insurance can generally elect to cover her spouse and children, resulting in greater costs for the employer and an additional co-pay for the employee.[225] In addition to health insurance benefits, employment packages often include a variety of spousal benefits, including bereavement or sick leave, tuition reimbursement, and retirement or pension benefits.[226] Domestic partnership benefits extend these spousal benefits, or some subset of them, to same-sex partners.[227]

Aug. 29, 2005).

[221] In *Koebke v. Bernandino Heights Country Club*, the Supreme Court of California ruled that registered domestic partners were equivalent to married couples for purposes of discrimination laws applying to private businesses. 115 P.3d 1212 (Cal. 2005).

[222] As noted earlier, however, a private contract is not sufficient to provide surviving same-sex partners with rights against third parties. *See supra* note 142. In particular, wills remain vulnerable to challenge by the next of kin, although the frequency with which next of kin actually contest wills which primarily benefit surviving same-sex partners is not clear nor is it easily susceptible to study. *See* E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1075 (1999).

[223] The benefits are limited to the employees of the slightly over eight thousand employers who offer some level of domestic partner benefits and do not confer rights enforceable against third parties. *See infra* note 268 (citing number and types of employers which offer domestic partner benefits). It is likely further limited to the full-time employees of such employers, as part-time employees typically work without benefits.

[224] An estimated forty-five million Americans do not have health insurance. Robert Pear, *Health Leaders Seek Consensus Over Uninsured*, N.Y. TIMES, May 29, 2005, at A1 (noting Census data estimating forty-five million Americans are uninsured). With forty-five million uninsured individuals, employment that includes health benefits is very desirable. *Id.* High health care costs significantly increase the disparity between the compensation packages of married employees and employees in same-sex relationships without domestic partner benefits.

[225] Employee benefits comprise an estimated forty percent of a total compensation package. Human Rights Campaign, Why Employers Offer Domestic Partner Benefits, http://www.hrc.org/Content/NavigationMenu/Work_Life/Get_Informed2/The_Issues/Why_Employers_Offer/Why_Employers_Offer.htm (last visited Aug. 29, 2005).

[226] For a comprehensive discussion of the different types of benefits offered and different types of domestic partner benefit programs, see ACLU, Domestic Partnership, http://www.aclu.org/GetEqual/rela/domestic.html (last visited July 31, 2005).

[227] *Id.*

B. Responsiveness

Beyond assessing the competency of an institution, strategic institutional choice must be predictive in nature. Inquiring how responsive a given institution will be to a demand ensures that resources are not imprudently allocated to an ideal, but remote, institutional choice.[228] This assessment involves issues of design, including structural roadblocks and susceptibility to majoritarian influence or bias.[229] The institutional jockeying of the traditional values movement has produced a number of structural roadblocks that are specifically designed to inhibit an institution's responsiveness to a demand for recognition of same-sex relationships. For example, the extent to which the courts in a given jurisdiction are receptive to demands for relationship recognition may depend on whether the jurisdiction has a state DOMA and/or a state constitutional amendment restricting marriage to one man and one woman.[230] Forty-four states have either a state-wide DOMA or a state constitutional amendment restricting marriage.[231] Many states have now have both.[232] The number of states with these roadblocks illustrates that the goal of relationship recognition has not been able to command broad support, thereby making it particularly vulnerable to majoritarian influence or bias.[233]

In terms of responsiveness, the greatest gains have been made in the marketplace, on the regional and local level in the political process, and in individual court challenges asking for some form of partial and discrete

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[228] An example of this would have been a decision to pursue marriage litigation in the 1970s. *See supra* note 98. The result would have likely been an accumulation of bad precedent.

[229] KOMESAR, *supra* note 1, at 62-63 (describing two-force model of majoritarian and minoritarian bias).

[230] *See* Garrow, *supra* note 100 (describing strategy for marriage litigation).

[231] Forty-four states have defense of marriage acts that define marriage as the union between one man and one woman or state constitutional amendments prohibiting same-sex marriage. Human Rights Campaign Foundation, State-Wide Marriage Laws, http://www.hrc.org/Template.cfm?Section=Your_Community&Template=/ContentManagement/ContentDisplay.cfm&ContentID=19449 (last visited Aug. 19, 2005). All but three of these provisions were enacted in response to the marriage litigation of the 1990s. *Id.* In addition, California passed a law restricting marriage in 1977, and then passed a law in 2000 that refuses to recognize same-sex marriages performed in other jurisdictions. *Id.*

[232] *Id.*

[233] These federal and state anti-marriage provisions were largely of academic interest because no state recognized same-sex marriage until the implementation of the *Goodridge* decision in June of 2004. Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003). However, the implementation of *Goodridge* and the U.S. Supreme Court's decision in *Lawrence v. Texas* led to a renewed interest in anti-marriage legislation on both the federal and state level. Lawrence v. Texas, 539 U.S. 558 (2003). In 2004, twenty-five state constitutional anti-marriage amendments were introduced, many of which purported to prohibit not only same-sex marriage, but also any parallel status that would grant "the incidents of marriage." Human Rights Campaign Foundation, *supra* note 136.

recognition.[234] Thus, there appears to be an inverse relationship between an institution's responsiveness to demands for recognition and its competency to provide comprehensive relief; the least competent institutional settings are the most responsive. Employer-provided domestic partnership benefits are now commonplace, but they remain a partial benefit reserved for a privileged few.[235] Sixty-nine municipalities and counties have enacted some form of recognition for same-sex couples, but the recognition is largely symbolic.[236] Courts have also recognized same-sex partners as family in very specific instances, such as protection from eviction under municipal rent control guidelines,[237] standing to sue for wrongful death,[238] and the right to take from a partner's estate.[239] However, these decisions are based on the notion of a "functional" family or equitable principles, not a declaration of equality for same-sex couples.[240]

With respect to the local and regional gains secured through the political process, one explanation for this success is that majoritarian forces are not sufficiently motivated to challenge these partial and piecemeal episodes of

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[234] This would be domestic partner employee benefits, municipal domestic partner registries, and cases such as the ones brought by Frank Vasquez and Sharon Smith. *See supra* notes 162 and 183 (discussing the Vasquez and Smith cases, respectively).

[235] *See infra* text accompanying notes 257-69 (discussing prevalence of domestic partner benefits).

[236] *See supra* note 218 (discussing quantum of benefits available under municipal ordinances).

[237] New York City rent control guidelines allowed a member of the decedent's immediate family who shared the household to stay in a rent controlled apartment even where the family member was not a named party to the lease. The ground-breaking 1989 case of *Braschi v. Stahl Associates Co.*, extended this protection to a surviving same-sex partner through the adoption of a functional definition of family, with an emphasis on mutual interdependence. 543 N.E.2d 49 (N.Y. 1989).

[238] Standing to sue for wrongful death is established by statute. *See* Culhane, *supra* note 143 (describing origin of wrongful death actions). The order of priority starts with the surviving spouse and continues through the next of kin. *Id.* Only a handful of states include surviving same-sex partners as spousal equivalents.

[239] *See supra* note 162 (discussing equitable claim brought by Frank Vasquez against his partner's estate).

[240] In response to specific demands for recognition, courts in many states have expanded the notion of family to allow second-parent adoption and mandate visitation or shared custody for non-biological parents, expressing an element of pragmatism that acknowledges the changing face of the American family. *See supra* note 168 (discussing Census data regarding number of same-sex couples raising children). Other courts have used equitable principles. By and large, these decisions have not recognized same-sex partners *qua* spouses. Some courts have interpreted anti-discrimination laws to compel employers to provide domestic partner benefits and private business to offer spousal rates to same-sex couples. For example, the California Supreme Court recently ruled that registered domestic partners were equivalent to married couples for purposes of discrimination laws applying to private businesses. Koebke v. Bernandino Heights Country Club, 115 P.3d 1212 (Cal. 2005).

recognition. The pro-recognition gains at issue are relatively modest or symbolic in nature and not portable.[241] Arguably, these types of gains do not pose a direct "threat" to traditional marriage and, as a result, mobilization carries with it relatively low stakes and very diffuse benefits. In such cases, the concentrated interests of a high stakes minority can easily overwhelm the slumbering majority.

As an alternative to this capture scenario, it is possible that relationship recognition *can* garner majority support among certain demographics.[242] Thus, the explanation for the local and regional gains lies in the geographic outlines of the nation's growing polarization on social issues, such as homosexuality.[243] For example, public opinion polls show that 75% of the residents of the San Francisco Bay area favor same-sex marriage whereas that figure drops to 49% when measured nationwide.[244] The municipal ordinances might reflect a geographically discrete pro-recognition majority that is lost once the frame is amplified to the state or national level. Predictably, the traditional values movement excels at expanding the frame to secure the broadest possible voter or constituent base.

On the state level, only the California legislature has voted to authorize same-sex marriage, and the bill was quickly vetoed by the Governor.[245] The legislatures of six states and the District of Columbia have granted some level of recognition to same-sex couples. The jurisdictions represented are all decidedly in the "Blue-state" camp[246]: California,[247] Connecticut,[248] District

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[241] *See supra* note 218 (discussing quantum of benefits conferred by municipal ordinances).

[242] This would represent a more nuanced polarization than suggested by the popular Red v. Blue states explanation. *See supra* note 29 (explaining the Red and Blue state designations). As some commentators have suggested, there are often Blue urban areas surrounded by a big Red state. *See, e.g.*, John Wildermuth, *Red State, Blue State: California's Political Map Reflects the Nation*, S.F. CHRON., Nov. 7, 2004, at A1.

[243] For a breakdown of views regarding relationship recognition on the basis of party affiliation, age, and region, see Wikipedia: The Free Encyclopedia, *supra* note 134.

[244] abc7news.com, Same-Sex Marriage: Summary of Key Findings, http://abclocal.go.com/kgo/story?section=local&id=3306039 (last visited Aug. 27, 2005).

[245] Dean E. Murphy, *Schwarzeneggar to Veto Same-Sex Marriage Bill*, N.Y. TIMES, Sept. 8, 2005, at A18.

[246] For a list of the "Blue" states, see Wikipedia: The Free Encyclopedia, Red state vs. blue state divide, http://en.wikipedia.org/wiki/Red_states (last visited Nov. 22, 2005).

[247] CAL. FAM. CODE §§ 297, 297.50, 290, 298.5 (West 2004) (establishing procedure for "Registered domestic partners"). Effective January 1, 2005, "registered domestic partners" enjoy substantially all the rights and responsibilities enjoyed by spouses under California law. 2003 Cal. Stat. 2586. Prior law had extended to "registered domestic partners" a number of rights traditionally reserved for spouses, including inheritance rights, certain health care decision-making authority, and standing to sue for wrongful death. CAL. CIV. PRO. CODE § 377.60 (2004).

[248] In 2005, Connecticut enacted civil union legislation. 2005 Conn. Acts 05-3 (Spec. Sess.).

of Columbia,[249] Hawai'i,[250] Maine,[251] New Jersey,[252] and Vermont.[253] In some of these instances, the legislation was the product of pending litigation or, in the case of Vermont, an express court order.[254] The state-wide legislation varies with respect to the scope of the rights granted. Civil Union status in Vermont carries with it all of the benefits and responsibilities of marriage.[255] The California domestic partnership law extends a substantial number of rights that are commonly associated with marriage to registered domestic partners,[256] as does Connecticut's newly enacted domestic partnership law.[257] On the other end of the spectrum, the New Jersey domestic partnership law grants registered domestic partners certain decision making authority and state tax benefits, but little in the way of substantive property rights.[258]

If the failure to secure gains through the political process is due to majoritarian bias, then the presumed top-down nature of courts should predict that the courts would be more responsive to demands for minority recognition than the political process. However, both the courts and the legislature have been reluctant to grant broad-based recognition. The Supreme Courts of only

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The Connecticut law is modeled on Vermont's civil union legislation and grants all the rights and responsibilities applicable to married couples. *Id.* Unlike Vermont, Connecticut was not pressured to do so through litigation. William Yardley, *Connecticut Approves Civil Unions for Gays*, N.Y. TIMES, Apr. 21, 2005, at B5.

[249] The District of Columbia provides a domestic partner registry. D.C. CODE §§ 32-701 to -710 (2005). The legislation provides domestic partner benefits for the employees of the District of Columbia. § 32-705. It also provides limited benefits, such as the right of visitation in District hospitals. § 32-704. Congress blocked the implementation of the domestic partner provisions for nine years. Adam Clymer, *House Approves D.C.'s Law on Rights of Domestic Partners*, N.Y. TIMES, Sept. 21, 2001, at A12.

[250] HAW. REV. STAT. § 572C-1 (2004). Hawai'i enacted legislation granting certain inheritance and other rights to "reciprocal beneficiaries." *Id.*

[251] In 2004, Maine enacted legislation establishing a state-wide domestic partner registry and extending to same-sex couples certain health-care decision-making authority and inheritance rights equivalent to spouses. ME. REV. STAT. ANN. Tit. 22, § 2710 (West 2005).

[252] New Jersey's newly enacted status of "domestic partners" extends certain medical decision-making authority to same-sex partners, as well as certain insurance and state tax benefits. N.J. STAT. ANN. §§ 26:8A-1 to 8A-11 (West 2004).

[253] VT. STAT. ANN. tit. 15, §§ 1201-1207 (2004). Vermont established same-sex civil unions. *Id.* The parallel status extends to same-sex couples who enter into civil unions the benefits and responsibilities equivalent to spouses. *Id.*

[254] Baker v. State, 744 A.2d 864 (Vt. 1999).

[255] VT. STAT. ANN. tit. 15, §§ 1201-07 (2004).

[256] CAL. FAM. CODE §§ 297, 297.50, 290, 298.5 (West 2004) (establishing procedure for "Registered domestic partners"); *see* CAL. CIV. PROC. CODE § 377.60 (2004) (inheritance and wrongful death).

[257] 2005 Conn. Acts 05-3 (Spec. Sess.).

[258] N.J. STAT. ANN. §§ 26:8A-1 to 8A-11 (West 2004).

three states, Hawai'i,[259] Vermont,[260] and Massachusetts,[261] have held that the denial of marriage licenses to same-sex couples violates their state constitutions.[262] As explained more fully in the following section, only the Massachusetts decision was implemented.

One possible explanation for this lackluster response is that in this particular struggle the courts involved are for the most part state courts where the majority of judges are elected and, therefore, are perhaps more susceptible to the types of majoritarian or minoritarian bias that plague the political process than the federal judiciary.[263] Unlike federal judges who serve with Article III lifetime tenure, 87% of all state judges are elected, including the supreme court justices of thirty-eight states.[264] Although state court judges typically serve longer terms than legislators,[265] the fact that many state judges remain responsible to local voters might explain certain jurisdictional differences.[266]

The responsiveness of the market to demands for relationship recognition stands in sharp contrast to the reluctance exhibited by the courts and legislatures. For example, 8286 employers offer domestic partner benefits, including 244 of the Fortune 500 companies, eleven state governments, 130

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[259] Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (Haw. 1993).

[260] Baker v. State, 744 A.2d 864 (Vt. 1999).

[261] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

[262] The cases have all been decided on state constitutional grounds, thereby making them not appealable to the U.S. Supreme Court.

[263] In part, the emphasis on state courts and state constitutions represents the lingering effect of *Bowers v. Hardwick*, 478 U.S. 186 (1986). It also represents the continuing effect of DOMA. Writing for the majority in *Bowers*, Justice White stated unequivocally, that "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated." *Id.* at 191. This precedent forced advocates to look to state courts for relief and relationship recognition, given the absence of protection under the U.S. Constitution.

[264] Press Release, Brennan Center for Justice at NYU School of Law (June 27, 2002), *available at* http://www.brennancenter.org/presscenter/releases_2002/pressrelease_2002_0525.html.

[265] Some judges are initially chosen in a contested elections and thereafter only stand for a yes or no retention vote. *Id.* Others are appointed to an initial term and then stand for retention. *Id.* Longer terms and the retention votes, give judges greater security than members of Congress or state legislators. Notwithstanding this added security, the cost of judicial campaigns has increased significantly in recent years. *Id.* For example, candidates for state Supreme Court raised an estimated $45.6 million during the 2000 campaign, which represented a 61% increase over the amount raised in 1998, and a 200% increase over that raised in 1994. *Id.*

[266] Judges who must stand for election in progressive jurisdictions may be more likely to reflect the values of their constituents. This need not be a question of ideology and judicial activism. For example, judges who live in communities with a large visible population of gay men and lesbians may be more likely to apply the functional family definition that reflects the changing face of the American family. *See supra* note 168 (discussing 2000 Census data).

cities and municipalities, and 295 colleges and universities.[267] An even greater number of employers have included sexual orientation in their anti-discrimination policies.[268] Indeed, domestic partnership policies are now so widespread in both the private and public sectors that LGBT lobbyists argue in favor of the Federal Domestic Partnership Bill on competition grounds, asserting that "[c]orporate America is leaving the federal government in its dust[.]"[269]

The market was the first mover with respect to formalized relationship recognition, and its innovation of domestic partnership benefits provides an excellent example of the dynamic process that can take place when institutions participate in the formation and articulation of contested social goals.[270] Any institutional response to a demand, whether positive or negative, also helps to shape the next demand and refine the stated goal. The market not only coined the term domestic partner, it participated in the construction of the concept that is now widely deployed both socially and politically to convey something much more that an eligible recipient of certain employee benefits.[271]

The concept of domestic partnership had very pragmatic roots. When employers started to extend benefits to their employees' same-sex partners in the 1980s, it was necessary to determine who qualified for these newly created benefits. The definition, crafted in conjunction with LGBT advocacy groups, has influenced state and municipal relationship-recognition schemes, as well as court decisions attempting to define functional families. Unlike a married employee, and employee with a same-sex partner could not rely on the bright-

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[267] Human Rights Campaign, *supra* note 114.

[268] The first private employer to offer domestic partner benefits was the alternative weekly, THE VILLAGE VOICE. ACLU, *supra* note 226. Two years later, Berkeley became the first municipal employer to offer the benefits. Despite its counterculture origins, domestic partner benefits have now been accepted as part of the corporate mainstream.

[269] Human Rights Campaign, HRC Urges Passage of the Federal Domestic Partnership Bill, http://www.hrc.org/Template.cfm?Section=The_Issues&CONTENTID=27901&TEMPLATE=/ContentManagement/ContentDisplay.cfm (last visited July 31, 2005) (quoting HRC President Joe Solmonese). According to the HRC, managers report that domestic partner benefits are a relatively inexpensive and very effective recruitment and retention tool. Human Rights Campaign, *supra* note 225.

[270] It is important to keep the market-based domestic partnership status distinct from a relationship status granted through the political process that is designed to provide parallel benefits to marriage. For example, in 2005, California extended to same-sex couples who register as "domestic partners" many of the rights and responsibilities enjoyed by opposite-sex married couples. *See supra* note 256. The potential for confusion arises because the market was the first mover in the area of recognition of same-sex partners and "domestic partnership" was a marketplace innovation. In addition, municipalities were among some of the early employers to offer benefits for domestic partners.

[271] A simple dictionary definition of the term "domestic partner" provides: "A person, other than a spouse, with whom one cohabits." Answers.com, Domestic Partner, http://www.answers.com/topic/domestic-partnership (last visited July 31, 2005).

line status of state-sanctioned marriage to telegraph the legitimacy of her relationship.[272] Accordingly, employers developed a multi-part inquiry that attempted to disaggregate the hallmarks of a committed spousal-type relationship. It required a statement of commitment,[273] adherence to otherwise applicable marriage requirements, such as minimum age, prohibited degrees of consanguinity, exclusivity, and finally proof of financial interdependence.[274]

C. Resilience

The question of resilience attempts to measure the potential longevity of any gain by predicting an institution's ability to withstand counter-demands. Often the counter-demands are made through intra-institutional channels and represent the common give and take associated with politics. For example, the traditional values movement has waged consumer boycotts of firms granting domestic partnership benefits,[275] threatened to impeach judges who are perceived to be pro-gay,[276] and worked to frustrate the re-election attempts of legislators who supported relationship recognition.[277] However, the real success of the traditional values movement has been its ability to harness the natural advantage enjoyed by the majority in the political process, particularly when paired with an unpopular minority. The result has been a steady stream of prophylactic legislation in the form of state DOMAs designed to forestall relationship recognition and a series of counter demands designed to reverse gains already realized.[278] The latter course often involves appealing to a wider

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[272] Today, employers typically require employees to sign an affidavit, and, in many instances, submit supporting documents as proof of the relationship in order to prove their eligibility for domestic partner benefits. Human Rights Campaign, Domestic Partner, http://www.hrc.org/Content/NavigationMenu/Work_Life/Get_Informed2/The_Issues/Domestic_Partners_Definition/Domestic_Partners_Definition.htm (last visited July 31, 2005).

[273] The statement of commitment is sometimes referred to as the "hearts and flowers" clause. ACLU, *supra* note 226.

[274] Financial interdependence often can be shown by a variety of means, such as joint ownership of property and reciprocal beneficiary designations. *Id.*

[275] *See supra* note 121 (discussing Southern Baptist Convention boycott of the Walt Disney Company).

[276] *See, e.g.*, Dana Milbank, *And the Verdict on Justice Kennedy is: Guilty*, WASH. POST, Apr. 9, 2005, at A3 (reporting on meeting of conservatives where consensus was that Justice Kennedy, author of majority opinion in Lawrence, "should be impeached, or worse").

[277] For example, the Christian Coalition publishes a Congressional scorecard that rates the annual performance of members of Congress on a scale of zero to one hundred. Representative Barney Frank, an openly gay Congressman from Massachusetts, scored a seven for 2004. Christian Coalition, House Issues, http://www.cc.org/scored.pdf (last visited on Sept. 2, 2005).

[278] Many of the states enacted these so-called "mini-DOMAS" following *Baehr v. Lewin*. 74 Haw. 530, 852 P.2d 44 (Haw. 1993); *see supra* note 231 (discussing number of states with anti-marriage legislation).

demographic, such as subjecting a regional or local gain to a state-wide referendum. It also involves using extra-institutional avenues, such as attempting to moot a court decision by legislation or a state-constitutional amendment.

In the case of relationship recognition, the pattern of escalating counter-demands that expand the jurisdictional frame or appeal to another institution began after the 1993 decision of *Baehr v. Lewin*.[279] Once the Hawai'i Supreme Court ruled that the failure to grant marriage licenses to same-sex couples violated the Equal Rights amendment to the state constitution, it took another several years and numerous decisions for the court to conclude that the state had not established a compelling state interest that would to justify the denial.[280] Before the case concluded, however, the voters mobilized, amended the state constitution through a referendum process, and mooted the decision.[281] This trajectory was followed again in 1998 when an intermediate court in Alaska ruled in favor of same-sex marriage.[282]

Clearly, when assessing the potential responsiveness of a state court to a demand for same-sex marriage, it is important to address any structural roadblocks which would include the prophylactic measures such as a state-wide DOMA.[283] However, the lessons of Hawai'i and Alaska illustrate that in order to measure resilience, it is essential to consider the state constitutional amendment process.[284] By design, the next two state supreme court decisions favorable to same-sex marriage occurred in jurisdictions with much more cumbersome amendment processes and the outcomes in both cases were very different.[285]

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[279] 74 Haw. 530, 852 P.2d 44. The traditional values movement, however, had successfully employed similar methods in connection with its attempt to stop the spread of anti-discrimination protection.

[280] Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). At the trial level, Judge Chang made extensive findings of fact and concluded that the state, which had relied on a modified 'best interests' of the children argument, had failed to meet its burden. *Id.* For an overview of this very complicated and protracted litigations, see Human Rights Campaign, Same-Sex Marriage from Frontline to Footnote, http://www.hrc.org/Template.cfm?Section=Home&CONTENTID=18157&TEMPLATE=/ContentManagement/ContentDisplay.cfm (last visited Aug. 31, 2005).

[281] Baehr v. Miike, No. 20371, 1999 Haw. LEXIS 391 (Haw. Dec. 9, 1999) (ruling constitutional amendment rendered lower court decision moot). Article I, section 23 of the Constitution of the State of Hawai'i now provides: "The legislature shall have the power to reserve marriage to opposite-sex couples." HAW. CONST. art. I, § 23 (amended 2004). The Hawai'i Supreme Court held that the amendment validated the sex-specific marriage law. *Id.*; *see* CHAUNCEY, *supra* note 96, at 126 (describing concerted effort by national organization to derail same-sex marriage in Hawai'i).

[282] Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *1 (Alaska Super. Ct. Feb. 27, 1998).

[283] *See* Garrow, *supra* note 100 (describing evolution of marriage litigation strategy).

[284] *Id.*

[285] *Id.*

In 1999, the Vermont Supreme Court ruled that same-sex couples were entitled to the same rights and privileges afforded to married couples.[286] The decision specifically suspended the issuance of marriage licenses to same-sex couples until the state legislature could attempt to remedy the situation.[287] A year later, the legislature enacted the parallel status of Civil Unions which granted same-sex couples all of the rights of marriage in order to avoid the implementation of the 1999 court decision.[288] Vermont does not have a statewide referendum process and, therefore, the decision could not be overturned by resort to direct democracy.[289] Only the state legislature can introduce a constitutional amendment and the process takes a period of several years.[290]

In 2003, the Massachusetts Supreme Court held in *Goodridge* that the state constitution requires equal treatment of same-sex couples with respect to marriage.[291] In an advisory opinion, the majority of the justices of the Massachusetts Supreme Court concluded that proposed Vermont-style civil union legislation would not cure the constitutional infirmity, noting that the difference between civil unions and civil marriage "is more than semantic."[292] Although aggrieved voters mobilized around a state constitutional amendment, procedural constraints dictated that it could not be considered by the voters until 2006.[293] Massachusetts began issuing marriage licenses to same-sex couples in 2004.[294] There are currently marriage cases pending in five states: California, Maryland, New Jersey, New York, and Washington.[295]

The prophylactic measures spawned by *Baehr v. Lewin* began as definitional statutes designed to clarify for the courts that marriage was by definition a union only between one man and one woman.[296] This type of statute is reflected in the federal DOMA and the many state DOMAs that were passed immediately following *Baehr*.[297] The scope of these measures has expanded

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[286] Baker v. State, 744 A.2d 864 (Vt. 1999).

[287] *Id.*

[288] VT. STAT. ANN. tit. 15, §§ 1201-07 (2004).

[289] Vermont does not have a statewide initiative process. VT. CONST. ch. II, § 72.

[290] *Id.*

[291] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (holding that limiting access to protections and benefits of civil marriage violates state constitution).

[292] Opinion of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004).

[293] *See supra* note 140 (describing constitutional amendment process).

[294] Massachusetts began issuing marriage licenses to same-sex couples on May 17, 2004. Pam Belluck, *Massachusetts Arrives at Moment for Same-Sex Marriage*, N.Y. TIMES, May 17, 2004, at A16.

[295] Lambda Legal, Marriage Project, http://www.lambdalegal.org/cgi-bin/iowa/issues/record2?record=9 (last visited July 31, 2005).

[296] DOMA falls into this category. *See supra* note 204 (describing DOMA). It amended the U.S. Dictionary Act to provide that for all federal purposes "marriage" could only be between one man and one woman. 1 U.S.C. § 7 (2004).

[297] In 1993, the Hawai'i Supreme Court remanded the case to be considered under the

over time. Some constitutional amendments restricted the jurisdiction of the courts by consigning the definition of marriage to the legislation.[298] Measures aimed at restricting the powers of the courts reflect the traditional values movement's growing hostility toward "activist" judges and the "Imperial Judiciary."[299] In 2004, the U.S. House of Representatives passed a court-stripping bill that purports to limit the power of the federal judiciary to decide the constitutionality of DOMA.[300]

As explained more fully in the following section, the traditional values movement has cast a wider net in attempts to address all forms of relationship recognition, not simply demands for equal marriage rights. Recent state constitutional amendments prohibit same-sex marriage, as well as any grant of "the incidents of marriage."[301] States have also chosen to address individual instances of relationship recognition. For example, Oklahoma recently enacted a law that refuses to recognize a second-parent adoption from a sister

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appropriate constitutional standard requiring the government to show a compelling state interest in denying marriage licenses to same-sex couples. Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (Haw. 1993). The trial was postponed for three years, and finally started in 1996 on the same day the U.S. Senate approved DOMA. CHAUNCEY, *supra* note 96, at 125.

[298] For example, the amendment to the Hawai'i Constitution reserves for the legislature the power to define marriage. HAW. CONST. art. I, § 23 (amended 2004). Article I, section 23 of the Constitution of the State of Hawai'i provides: "The legislature shall have the power to reserve marriage to opposite-sex couples." *Id.*

[299] The traditional values movement has increasingly attacked judges who author pro-gay opinions. For example, Justice Kennedy, who authored the majority opinion in *Lawrence v. Texas*, has been singled out for some particularly pointed criticism. Milbank, *supra* note 276 (reporting on meeting of conservatives where consensus was that Justice Kennedy "should be impeached, or worse"). This treatment is part of a larger ideological objection to "activist" judges who are perceived to have overstepped their authority and usurped the legislative role. *See supra* note 195 (discussing "Justice Sunday"). This hostility bubbled over during the Terri Schiavo controversy when U.S. House majority leader, Tom Delay, warned, "The time will come for the men responsible for this to answer for their behavior." Carl Hulse and David D. Kirkpatrick, *Even Death Does Not Quiet Harsh Political Fight*, N.Y. TIMES, Apr. 1, 2005, at A1 (reporting Rep. Delay "threatened retribution").

[300] Marriage Protection Act of 2004, H.R. 3313, 108th Cong. (2004); *see* Alexander K. Hooper, *Recent Development: Jurisdiction-Stripping: The Pledge Protection Act of 2004*, 42 HARV. J. ON LEGIS. 511 (2005) (discussing court-stripping and focusing on Pledge Protection Act).

[301] For example, the amendment to the Ohio Constitution adopted in 2004 specifically addresses attempts "to approximate the design, qualities, significance or effect of marriage." OHIO. CONST. art. XV, § 11 (2004). This differs from the standard type of DOMA that was adopted by Mississippi in 2004. MISS. CONST. art. 14, § 263A (2004). Section 263A of the Mississippi Constitution provides:

> Marriage may take place and may be valid under the laws of this State only between a man and a woman. A marriage in another State or foreign jurisdiction between persons of the same gender, regardless of when the marriage took place, may not be recognized in this State and is void and unenforceable under the laws of this state.

Id.

state.[302] Virginia, on the other hand, chose to enact a blanket statute that purports to void all private contracts "between persons of the same sex purporting to bestow the privileges of marriage."[303]

This new generation of counter-measures has placed the continued resilience of marketplace gains in question. The site of some of the most widespread gains in terms of relationship recognition, the market has proven to be largely impervious to intra-institutional counter-demands in the form of consumer and stakeholder pressure.[304] Only a handful of employers have rescinded domestic partnership policies in the face of stakeholder complaints,[305] and a much publicized boycott of the Walt Disney Company by the sixteen million member Southern Baptist Convention ended in failure.[306] State constitutional amendments that prohibit "incidents of marriage" could arguably void the grant of domestic partner benefits by public employers.[307] Laws such as one

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[302] OKLA. STAT. tit. 10, § 7502-1.4(A) (2004). The law provides that "this state, any of its agencies, or any court of this state shall not recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction." *Id.*

[303] VA. CODE ANN. § 20-45.3 (2005). Titled "The Affirmation of Marriage Act," its language could void not only domestic partnership benefits offered by private employer, but also private contractual arrangements between same-sex partners. The full text of the statute provides:

> A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited. Any such civil union, partnership contract or other arrangement entered into by persons of the same sex in another state or jurisdiction shall be void in all respects in Virginia and any contractual rights created thereby shall be void and unenforceable.

Id.

[304] Despite their widespread use, the adoption of a domestic partnership policy can still provoke the protests of anti-gay consumers and other constituents, such as alumni and shareholders. *See supra* note 121 (discussing Southern Baptist Convention boycott of Walt Disney Co.) (quoting Southern Baptist Convention, "The boycott has communicated effectively our displeasure concerning products and policies that violate moral righteousness and traditional family values").

[305] A notable exception to this general rule is the town of Eastchester, New York, where the decision to provide domestic partner benefits to city employees provoked a strong response from the traditional values movements. Jennifer Medina, *A Town in Westchester Ends Health Benefits for Domestic Partners*, N.Y. TIMES, Jan. 6, 2005, at B1. The traditional values organization, Family First, filed a lawsuit against the city and then endorsed a candidate for the local city council who was opposed to the grant of benefits. *Id.* Eastchester rescinded its grant of benefits. *Id.*

[306] *Baptists End Disney Boycott*, *supra* note 121.

[307] The Federal Marriage Amendment refers to the "legal incidents" of marriage. The Federal Marriage Amendment, H.R.J. Res. 56 (2003). The Oklahoma state constitution also refers to "legal incidents." OKLA. CONST. art. II, § 35 (2004). The constitutions of Kentucky and Louisiana speak of "a legal status identical or substantially similar to that of marriage." KY. CONST. § 233a (amended 2004); LA. CONST. art. XII, § 15 (2004). North Dakota and Utah both state in their constitution that "no other domestic union" may be given "the same or substantially equivalent effect" as marriage. N.D. CONST. art. XI, § 28 (2004); UTAH CONST.

adopted in Virginia could threaten even private employers.[308]

V. THE FEDERAL MARRIAGE AMENDMENT: THE ULTIMATE MAJORITARIAN PREROGATIVE

As explained in the preceding section, the political process has been very responsive to counter-demands from the traditional values movement. Initially, these efforts were designed to block or reverse "activist" courts committed to legalizing same-sex marriage. The success of this program of institutional pre-emption illustrates the potentially transitory nature of any court-ordered minority gain, as favorable court decisions were ultimately reversed through the political process. Courts may be designed to insure their institutional independence, but the exact contours of their jurisdiction remain subject to constitutional revision through the political process. The success also underscores the contingent nature of CIA because the analytic frame itself is subject to majoritarian revision.

In its latest efforts, the traditional values movement has attempted to break out of the "paper, scissors, rock" stalemate that is sometimes produced by strategic institutional choice. First, it extended its demand for prohibition to reach specific forms of relationship recognition short of marriage by drafting more aggressive DOMAs.[309] Second, it continued with its tactic of appealing to ever larger and more diffuse electorates by moving the issue to the national stage with its demand for an amendment to the U.S. Constitution.[310] In this way, the traditional values movement's most recent demands are comprehensive in terms of both subject matter and jurisdiction.

The new type of DOMA expands its reach well beyond same-sex marriage. No longer content to prohibit only actual marriage, the new DOMAs have sprouted teeth, in that they purport to prohibit any grant of the "incidents of marriage" to same-sex couples.[311] These newly aggressive state constitutional amendments target grants of parallel status by the legislature, such as civil unions and municipal registries, as well as the provision of domestic partner employee benefits by public employers.[312] In addition, they could be

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art. I, § 29 (2004). Ohio forbids any "legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage." OHIO. CONST. art. XV, § 11 (2004).

[308] VA. CODE ANN. § 20-45.3 (2005).

[309] *See supra* note 307 (discussing different attempts to reach "incidents of marriage").

[310] *See supra* note 139 (describing current legislative status of FMA).

[311] *See supra* note 307 (describing different ways states express concept of "incidents of marriage").

[312] For example, the newly enacted marriage amendment to the Michigan state constitution provides: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only

interpreted to inhibit the ability of courts to apply concepts of "functional" family or equity to secure certain rights and standing for same-sex partners.[313]

The traditional values movement gave this new generation of DOMA teeth because it correctly realized that instances of relationship recognition have potentially transformative value, even when the recognition falls well short of equal marriage rights. For example, a court will often bolster its decision to recognize same-sex relationships by citing other examples of recognition, including the prevalence of domestic partnership registries and employee benefits.[314] These limited flashes of recognition have a cumulative effect on public perception and, as such, they further the long-term goal of the normalization of homosexuality.

The Virginia law represents yet another innovation. Whereas the new DOMAs apply to state recognition of same-sex relationships, the Virginia "Affirmation of Marriage Act" purports to void private contracts that attempt to secure the "privileges or obligation of marriage" for same-sex couples.[315] This could include the grant of domestic partner employee benefits by a private employer and cohabitation agreements entered into by same-sex partners.[316] Although the attempt to reach private ordering may be Constitutionally infirm,[317] it demonstrates the extent to which the traditional values movement aims to erase any vestige of relationship recognition.[318] No longer content to ignore non-state actors, it wants to reverse the gains made in the

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agreement recognized as a marriage or similar union for any purpose." MICH. CONST. art. I, § 25 (2004). After its adoption, the Michigan Attorney General issued an opinion stating that all governmental entities had to stop offering domestic partner benefits. Rick Lyman, *Gay Couples Files Suit After Michigan Denies Benefits*, N.Y. TIMES, Apr. 4, 2005, at A16. The litigation is currently pending.

[313] For example, a court in Ohio determined that the state's marriage amendment mandated that a unmarried partner could not be charged with a domestic violence felony charge because it would approximate marriage. Brian Albrecht, *Issue 1 Conflicts with Domestic Abuse Law, Judge Says; Marriage Amendment Makes a Portion of Law Unconstitutional, He Rules*, PLAIN DEALER (CLEV.), Mar. 24, 2005, at A1.

[314] *See, e.g.*, Langan v. St. Vincent's Hosp., 196 Misc. 2d 440, 452 (N.Y. Misc. 2003) (noting that "Ford, General Motors, Chrysler and Coca-Cola" provide domestic partner benefits).

[315] VA. CODE ANN. § 20-45.3 (2005).

[316] Editorial, *Uncivil Disunion*, WASH. POST, May 9, 2004, at B6 (noting potentially broad scope that could reach health care powers of attorney).

[317] Article I, Section 10 of the U.S. Constitution prohibits states from interfering with obligations under existing contracts. U.S. CONST. art. I, § 10.

[318] The Family Foundation, a traditional values organization in Virginia, includes the law under the heading "Victories for Our Families." Family Foundation, Victories for Our Families, http://www.familyfoundation.org/victories.html (last visited Sept. 2, 2005). It notes that the law was necessary to insure that "counterfeit forms of marriage" did get receive any measure of legal recognition. *Id.*

market that, up until now, have been remarkably resilient in the face of stakeholder pressure.[319]

The FMA represents an endgame strategy to guarantee the durability of the scheme of state-wide DOMAs and impose the prohibitions on all states. Days after the U.S. Supreme Court decided *Lawrence v. Texas* and repealed *Bowers v. Hardwick*, influential Republican leaders and the President expressed their support for the FMA.[320] In his dissent in *Lawrence*, Justice Scalia predicted a precipitous fall down a slippery slope that would end inexorably with same-sex marriage,[321] and the traditional values movement took notice.[322] To many in the traditional values movement, *Lawrence* signaled that the state DOMAs and the federal DOMA were now vulnerable to challenge under the U.S. Constitution.[323] A federal amendment would forestall this potential challenge and have the added benefit of reversing all forms of state and local relationship recognition by putting a stop to regional experimentation.[324] As currently drafted, the FMA prohibits same-sex marriage and the extension of the "incidents" of marriage to same-sex couples.[325]

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[319] *See supra* note 275 (discussing failed boycott of Walt Disney Co.).

[320] Senate majority leader, Bill Frist, expressed his unqualified support for the FMA three days after the Court decided *Lawrence*. *Frist Opposes Gay Marriage*, N.Y. TIMES, June 30, 2003, at B8. The next day, President Bush addressed the issue of same-sex marriage during a Rose Garden news conference. Neil A. Lewis, *Bush Backs Bid to Block Gays From Marrying*, N.Y. TIMES, July 31, 2003, at A1.

[321] Lawrence v. Texas, 539 U.S. 558, 604-05 (Scalia, J., dissenting). Justice Scalia warned that "judicial imposition of homosexual marriage . . . has recently occurred in Canada." *Id.* at 604.

[322] *See* Sarah Kershaw, *Adversaries on Gay Rights Vow State-by-State Fight*, N.Y. TIMES, July 5, 2003, at 8 (noting that both sides "agree[] that the question of whether the United States will allow gays to marry would become the next major focus of both the gay rights movement and of social conservatives").

[323] After *Lawrence*, some public opinion polls showed what was described as backlash, particularly with respect to views regarding same-sex marriage. Joanna Grossman, *Two States Offer Different Path to Same-Sex Marriage*, CNN, Nov. 20, 2003, http://www.cnn.com/2003/LAW/11/20/fl.grossman.samesex (last visited Sept. 2, 2005) (reporting that after *Lawrence* percentage in support of gay marriage dropping from 60 to 48).

[324] One of the most quoted statements on federalism and the ability of the states to implement a novel scheme is from Justice Brandeis' dissent in the 1932 U.S. Supreme Court case, *New Ice Co. v. Leibman*, 285 U.S. 262 (1932): "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *Id.* at 311 (challenging state regulation of private industry).

[325] The Federal Marriage Amendment ("FMA") provides in full:

> Marriage in the United States shall consist only of a union of a man and a woman. Neither this Constitution or the constitution of any State, nor State or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.

The Federal Marriage Amendment, H.R.J. Res. 56 (2003); *see* Senator John Cornyn, *Opening*

As discussed in Part III, the movement for relationship recognition is driven by individuals with very high stakes, whereas the interests of the traditional values movement are more diffuse. The contested social goal of the recognition of same-sex relationships raises important issues of equality, autonomy, fundamental rights, morality, custom, and sincerely held religious beliefs.[326] In an attempt to mobilize broad support for the FMA, the traditional values movement has adopted the rhetoric of institutional choice and legitimacy.[327] It characterizes the debate over the amendment as a question of who should have the power to define marriage: the unelected judiciary or the people? In this way, the FMA is linked to the traditional values movement's larger critique of the judiciary and its base discomfort with the principal of judicial review.[328]

This abstraction taps a fundamental question of CIA, namely "who decides."[329] However, it also glosses over the unabashedly anti-gay sentiments that typically animate the counter-demands of the traditional values movement.[330] With the help of this abstraction, one can support the FMA without thinking that homosexuality is an immoral, unhealthy, and chosen lifestyle.[331] One can also support the FMA without considering the effect it will have on individuals in same-sex relationships and the families they have

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Statement, Hearing of the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Property Rights, Sept. 4, 2003, *available at* http://judiciary.senate.gov ("Recent . . . cases . . . have raised serious questions regarding the future of the traditional definition of marriage, as embodied in DOMA.").

[326] Justice Kennedy recognized that for some the question of the decriminalization of homosexual behavior raised "profound and deep conviction accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives." Lawrence v. Texas, 539 U.S. 538, 571 (2003) ("[F]or centuries there have been powerful voices to condemn homosexual conduct as immoral.").

[327] *See, e.g.*, Robert P. George, Judicial Activism and the Constitution: Solving a Growing Crises, http://www.frc.org/get.cfm?i=IS05D01&f=BC05F01 (last visited Sept. 2, 2005) (discussing same-sex marriage case in context of legitimacy of judicial review). *See also supra* note 195 (discussing Justice Sunday).

[328] *See generally supra* note 195 (discussing Justice Sunday). On the topic of judicial review, an article on the FRC website begrudgingly acknowledges that the principle is Constitutionally defensible, but notes the negative reaction to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). George, *supra* note 327.

[329] Komesar notes that "Constitutional law raises the central issue of who decides who decides." KOMESAR, *supra* note 1, at 162.

[330] *See* Knauer, *supra* note 38, at 46-50 (describing traditional values construction of homosexuality).

[331] *Id.*

formed.[332] The comfort provided by the abstraction is the reason that a social movement is necessarily larger than a platform of proposed legal reform.

As with any movement for minority rights, the movement for relationship recognition practices its strategic institutional choice against a potentially bleak majoritarian backdrop. State constitutional amendments have blocked and reversed many court-ordered gains. The FMA has the potential to block many more. The ultimate majoritarian prerogative to delimit institutional boundaries exists outside considerations of majoritarian influence or bias.[333] It is the stark reality of majority rule. Accordingly, at the end of the day, the path to minority recognition does not lie in deciphering the best institutional alternative or mounting a flawless litigation strategy. It lies with the atomistic forces that drive the institutions, with the neighbor across the street and the colleague down the hall.

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[332] According to the 2000 Census, same-sex couples live in 99.3% of all counties in the United States. Human Rights Campaign, Gay and Lesbian Families in the United States: Same-Sex Unmarried Partner Households, http://www.hrc.org/Content/ContentGroups/Publications1/census.pdf (last visited Sept. 2, 2005). In addition, according to the 2000 Census, 34% of female same-sex couples and 22% of male same-sex couples have at least one child under eighteen living in the home. National Gay and Lesbian Task Force, The Issues: Parenting, http://www.thetaskforce.org/theissues/issue.cfm?issueID=30 (last visited Aug. 29, 2005).

[333] For an explanation of majoritarian influence and majoritarian bias, see KOMESAR, *supra* note 1, at 67-70.

Population, Voting, and Citizenship in the Kingdom of Hawai'i

Jon M. Van Dyke*

INTRODUCTION

This article was written as a chapter in *Who Owns the Crown Lands of Hawai'i?*,[1] which is being published by the University of Hawai'i Press. This article addresses a set of issues that have become important (and controversial) in the debates regarding the claims of the Native Hawaiian People related to the illegal overthrow of the Kingdom of Hawai'i in 1893. It can stand alone apart from the rest of the book, and is being published separately to provide broad readership to these specific topics.

POPULATION, VOTING, AND CITIZENSHIP IN THE KINGDOM OF HAWAI'I

This chapter examines a relevant and misunderstood topic–what was the nature of the polity or political community in the Kingdom of Hawai'i in the years before the 1893 overthrow? This issue is important to modern analysis regarding claims to the Crown Lands, because it is central to the question of who it was that was injured by the overthrow and the accompanying transfer of lands. As the materials that follow demonstrate, this issue has some complexities, but the central answer is not in doubt–Native Hawaiians constituted the overwhelming majority of the political community that participated in decisionmaking in the Kingdom at the time of the 1893 overthrow.

This issue has become important because some commentators have contended that Native Hawaiians had lost control over their lands and the Kingdom's government before 1893 and hence suffered no injury as a result of the overthrow. Professor Stuart Minor Benjamin has written, for instance, that "[b]y 1890, those descended from pre-1778 inhabitants constituted less than half of the population. A majority of the inhabitants were non-Native Hawaiians; many of them were born in Hawai[']i, and many were citizens of Hawai[']i."[2] The late attorney Patrick W. Hanifin, who represented groups

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[1] JON M. VAN DYKE, RHODA A.N. KEALOHA-SPENCER & D. KAPUA SPROAT, WHO OWNS THE CROWN LANDS OF HAWAI'I? (2006).

[2] Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537 (1996).

challenging programs established for Native Hawaiians before his untimely death in 2003, argued similarly that Native Hawaiians had suffered no injury from the overthrow of the Kingdom, because they no longer controlled the Kingdom, and had previously lost effective control of its lands.[3] He asserted that "[t]he government of the Kingdom of Hawaii actively encouraged immigration and offered immigrants easy naturalization and full political rights. Race and ethnicity did not matter."[4] "The Kingdom had thousands of citizens and voters of other ancestries and their numbers were growing toward a majority."[5] Retired Big Island Circuit Court Judge Paul M. de Silva has contended that "[f]rom the very early years after discovery, Hawaiians welcomed foreigners," that in 1893 "approximately three-fourths of the population protected by the [K]ingdom were not Native Hawaiians," that all the Kingdom's Constitutions protected "people of all races,"[6] and that as of 1893 "anyone born or naturalized in the Republic of Hawai'i could be a Hawaiian citizen regardless of race."[7] He has therefore asked that if the Crown and Government Lands "were wrongfully obtained by the United States and if they should be returned, why is it that they should be returned only to people with Hawaiian blood?"[8] Indeed, the U.S. Supreme Court has also given a version of history in its 2000 *Rice v. Cayetano*[9] opinion that provides a distorted view of these matters:

> The[se] conflicts came to the fore in 1887. Westerners forced the resignation of the Prime Minister of the Kingdom of Hawaii and the adoption of a new Constitution, which, among other things, reduced the power of the monarchy *and extended the right to vote to non-Hawaiians.*[10]

Justice Stephen Breyer's concurring opinion in *Rice* is also based on a misunderstanding of Hawaiian history, when he imagines that Hawai'i's population today might contain "individuals who are less than one five-

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[3] Patrick Hanifin, *Hawaiian Reparations: Nothing Lost, Nothing Owed*, 17 HAWAII B. J. 107 (1982).

[4] Patrick W. Hanifin, *To Dwell on the Earth in Unity: Rice, Arakaki, and the Growth of Citizenship and Voting Rights in Hawaii*, 5 HAWAII B. J. 15, 15 (2002).

[5] *Id.* at 27.

[6] Paul M. de Silva, *Racial-Based Sovereignty Is Unjust*, HONOLULU ADVERTISER, Aug. 10, 2001, at A14.

[7] Paul M. de Silva, Letter to the Editor, *Hawaiians: Solution Not in Race-Based Sovereignty*, HONOLULU ADVERTISER, Aug. 25, 2001, at A8.

[8] de Silva, *supra* note 6.

[9] 528 U.S. 495 (2000).

[10] *Id.* at 504 (citation omitted) (emphasis added).

hundredth original Hawaiian (assuming nine generations between 1778 and the present)."[11]

These contentions and factual assertions raise serious issues, and they deserve a serious analysis. If one looks closely at the structure of the Kingdom's Constitution, one finds a much more complex picture regarding voting and citizenship than those presented above, and one finds that some of these assertions are factually incorrect or seriously misleading. Although it is certainly true that contract laborers were arriving in the islands in substantial numbers during the twenty five years that preceded the overthrow, these plantation workers were in the Kingdom on a temporary basis and most had the intention of returning home, or going elsewhere when their contracts were completed. "Nearly all of the immigrants considered themselves temporary residents, bound to the terms of their contract and anxious to save some money and return home."[12] The practice in the 1870s was to import foreign laborers under three-year contracts "after which they were expected to return home."[13] Lorrin Thurston was very clear in his writings that the Asian laborers were in Hawai'i "temporarily . . . for what they can make out of it," that they "are not citizens" and that "they are not eligible to become citizens."[14] Many of the Japanese laborers left Hawai'i for North America after their contracts were completed.[15] These Asian laborers were excluded from decisionmaking political circles, as guest workers are excluded from political activity in many countries today, and thus the numbers alone provide an incomplete picture. Although pressure by Westerners to wrest control of the Kingdom was intense, and was eventually successful in the 1887 *coup d'etat*[16] and the 1893 overthrow,[17] Native Hawaiians continued to play the dominant role in the Kingdom and its Monarchy until the end and they certainly have a unique and exclusive claim today to the Crown Lands.

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[11] *Id.* at 526.

[12] LAWRENCE H. FUCHS, HAWAII PONO: A SOCIAL HISTORY 25 (1961); *see also* JONATHAN KAY KAMAKAWIWO'OLE OSORIO, DISMEMBERING LAHUI: A HISTORY OF THE HAWAIIAN NATION TO 1887, at 281 n.9 (2002) ("most of the new arrivals were not, and did not intend to become, citizens").

[13] SALLY ENGLE MERRY, COLONIZING HAWAII: THE CULTURAL POWER OF LAW 125 (2000) (citing EDWARD D. BEECHERT, WORKING IN HAWAII: A LABOR HISTORY (1985)).

[14] *Id.* at 135 (quoting LORRIN A. THURSTON, A HANDBOOK ON THE ANNEXATION OF HAWAII 28 (circa 1897)).

[15] "After their contracts were finished, thousands of Japanese workers left for the mainland and higher wages. By early 1907, 40,000 Japanese had left Hawai'i for the West Coast. The 1907 order prohibiting Japanese from Hawai'i from going to the mainland trapped many eager emigrants in Hawai['i]." *Id.* at 338 n.6 (citing RONALD TAKAKI, PAU HANA: PLANTATION LIFE AND LABOR IN HAWAII, 1835-1920, at 148 (1989)).

[16] *See* VAN DYKE ET. AL, *supra* note 1, ch. 14.

[17] *See id.* ch. 16.

Population

Because of introduced diseases that they did not have the necessary immunities to fend off, the population of Native Hawaiians declined dramatically from estimates ranging from 400,000 to 800,000 at the time of Captain James Cook's arrival in 1778 to little more than 40,000 in 1890.[18] Westerners started arriving in the late eighteenth and early nineteenth centuries, but their numbers remained small during those periods. Kamehameha I "and other chiefs were always ready to make an offer to a skilled navigator, sailmaker, blacksmith, armorer, or carpenter. A good tradesman could depend on a gift of land and a native wife or two or three if he stayed."[19] In 1794, sixteen years after Cook's first arrival, "at least 11" foreigners were living in the islands, and by 1818, they numbered in the low hundreds.[20]

In 1820, missionaries began to arrive, leading to substantial changes in social values and land control. Whalers and itinerant travelers came to the islands in small numbers during the next three decades, but no significant changes in the demographics occurred until the introduction of contract laborers to work in the agricultural fields, primarily in the sugar plantations. In 1832, only some 400 foreigners were residing in the islands,[21] and by 1844 this number had grown to about 600.[22] The 1850 census reported the total population as 84,165, of whom 82,035 were pure Hawaiian, about 500 were part Hawaiians and about 1600 were "adventurers from all parts of the globe–American and French missionaries, traders and seamen from such widely separated regions as Africa, China, South America, the United States, Scandinavia, the Philippines, and Asia Minor."[23]

The recruitment of foreign workers began in 1852, when about two hundred Chinese men were brought to Hawai'i,[24] and the flow of imported workers continued until 1930. Fewer than two thousand Chinese came into the Kingdom between 1852 and 1875,[25] but the importation of workers increased

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[18] *See id.* ch. 2.

[19] GAVAN DAWS, SHOAL OF TIME: A HISTORY OF THE HAWAIIAN ISLANDS 46 (1968).

[20] RALPH S. KUYKENDALL & A. GROVE DAY, HAWAII: A HISTORY 37 (1961).

[21] WALTER F. JUDD, HAWAII JOINS THE WORLD 66 (1999).

[22] *Id.* at 156.

[23] ANDREW W. LIND, HAWAII'S PEOPLE 64 (4th ed. 1990).

[24] WILLIAM FREMONT BLACKMAN, THE MAKING OF HAWAII: A STUDY IN SOCIAL EVOLUTION 194 (1906).

[25] MERRY, *supra* note 13, at 131. "Before the signing of the Reciprocity Treaty, twenty-three hundred immigrants had arrived from Asia, most of them from China, with contracts to work on the plantations." TOM COFFMAN, NATION WITHIN: THE STORY OF AMERICA'S ANNEXATION OF THE NATION OF HAWAII 63 (1998).

dramatically after the adoption of the Reciprocity Treaty of 1875,[26] which accelerated the growth in the number and size of sugar plantations.[27] Some, including (in 1869) the twenty-five-year-old Sanford Ballard Dole,[28] criticized the early practice of bringing in contract laborers and their treatment once they arrived in the islands, but after the expansion of the plantations that followed the Reciprocity Treaty, the momentum behind the importation of workers became unstoppable. In 1876, the population of Hawai'i was about 55,000, of which 46,500 were Hawaiians, 3000 were part-Hawaiians, 3500 were Caucasians (including 450 Portuguese laborers), and 2500 were Chinese.[29] Hawaiians and part-Hawaiians thus made 89.2% of the population as of that date.[30] But in the years that followed Hawaiians became the numerical minority.

By the time he was twenty-eight, in 1872, Dole started giving strong support to the need to increase Hawai'i's population, writing a series of articles in the *Pacific Commercial Advertiser* explaining his views. He observed that "until our islands are occupied to their fullest extent, the limit of our productive power will never be reached," and that "with sufficient labor, there would be room for one hundred average sugar plantations here instead of thirty-two at present, and it is probable that this number could be increased to one hundred and fifty."[31] "And there is no less doubt but that, with our lands brought to a state of careful cultivation, and through the economies of a higher civilization than our dusky predecessors could boast, a nation of at least a million might

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[26] Treaty of Commercial Reciprocity, Jan. 30, 1875, 19 Stat. 625, T.S. No. 161, *reprinted in* 8 CHARLES I. BEVANS, TREATIES & OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776-1949, at 874 (1968) (entered into force Sept. 9, 1876).

[27] "Faced with the need for a labor force over twice that used before reciprocity, a sharp labor shortage developed which produced a revived demand for foreign immigration." SYLVESTER K. STEVENS, AMERICAN EXPANSION IN HAWAII 1842-1898, at 143-44 (1945).

[28] RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 1854-1874: TWENTY CRITICAL YEARS 189 (4th printing 1982) (describing a meeting in October 1869 when Dole said that he opposed the contract labor system "from principle," explaining that "[t]ried in the balance of the 'free and equal rights' principle, the contract system is found wanting"). After a series of meetings of the economic elites in October 1869, resolutions were adopted stating that "the further introduction into this country of Chinese coolies is undesirable" and that "laws, enforcing contracts to service by penal enactment, tend to injustice, and are contrary to the spirt of the age." *Id.* at 190. Some legislators tried to repeal the law governing contract labor which had been written earlier by William Little Lee, and some adjustments were made to provide laborers some rights and prohibit married women from entering into labor contracts, but because of planter opposition, "the penal sanctions contained in the masters and servants law were not removed." *Id.* at 191 (citation omitted).

[29] RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 1874-1893: THE KALAKAUA DYNASTY 116 (1987).

[30] *Id.*

[31] S.B. Dole, *The Problem of Population*, PAC. COM. ADVERTISER, Sept. 28, 1872, at 3.

in comfort and plenty occupy our islands, and make them rich and prosperous."[32] "The Hawaiian is not to be displaced, but must be supplemented."[33] He sought "a steady tide of immigration," but favored a mix of immigrants, not just contract laborers, arguing that the islands needed

> settlers and citizens rather than convicts and coolies; that our mountains and our plains must first be planted with men, before they can be profitably and fully planted with cane and rice; that families rather than plantations constitute the true basis of state prosperity, and therefore the first object of our needs.[34]

Dole appears to have made his personal peace with the contract labor system by 1872, explaining that "[a]t present, our contract laborers are, as a rule, highly paid, well fed and cared for, and treated perhaps according to their behavior as well as they deserve, sometimes better."[35] He suggested that plantations should be encouraged to experiment with cooperative arrangements with their workers and profit-sharing deals, stating that with such inducements the workers would "receive high wages, good care and treatment, together with some other circumstances undoubtedly objectionable to an Anglo-Saxon mind, but which would not make any insurmountable obstacle to unsophisticated Mongolians or Malays," because "the life they take up here is immensely superior in a material sense to the life they leave behind."[36]

Between 1872 and 1900, Hawai'i's population almost tripled, growing from 56,896 in 1872 (of whom 51,531 were Hawaiian or part-Hawaiian) to 154,001 in 1900 (of whom only 39,656 were Hawaiian or part-Hawaiian).[37] The plantation owners sought to diversify the labor force: "The need for effective labor control . . . dictated a policy of drawing the workers from a number of different sources."[38] "So large a number of these [contract workers] were Chinese as to arouse alarm and lead to an attempt to encourage Portuguese instead . . . . In 1886 an immigration convention with Japan resulted in increased numbers of this race coming to the Islands."[39] Of the some 154,000 individuals in the islands in 1900, about 30,000 were pure Hawaiian, 10,000 were part-Hawaiian, 27,000 were Caucasian (including 18,000 Portuguese), 26,000 were Chinese, and 61,000 were Japanese.[40]

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[32] *Id.*

[33] *Id.*

[34] S.B. Dole, *Immigration*, PAC. COM. ADVERTISER, Oct. 5, 1872, at 3.

[35] S.B. Dole, *Inducements to Immigration*, PAC. COM. ADVERTISER, Oct. 12, 1872, at 2.

[36] *Id.*

[37] ROBERT C. SCHMITT, HISTORICAL STATISTICS OF HAWAII 25 tbl.1.12 (1977). The importation of plantation laborers continued until about 1930.

[38] LIND, *supra* note 23, at 6.

[39] STEVENS, *supra* note 27, at 145.

[40] LIND, *supra* note 23, at 34 tbl.3.

Despite their numbers, however, the newly-arrived laborers played little or no role in political decisionmaking, because the accepted view was that they would earn some money and then return to their homelands.[41] They were viewed by the planter elites as a "necessary evil" because, in their view, "sugar production could not be carried on profitably without cheap labor," but "[t]he attitude of the planters toward this more or less servile labor element came to resemble the Southern philosophy of slavery days toward the negro in the United States."[42] This importation of uneducated "servile" laborers was not the approach preferred by the Kingdom's government, which had wanted "a high type of immigration capable of repopulating the Islands on a substantial basis," and the U.S. Minister to Hawai'i, Henry A. Pierce denounced this practice as "the slave trade under another name."[43] In 1896 and 1897, 2473 individuals were criminally convicted for "deserting or refusing bound service" under the contract labor law,[44] which illustrates how the agricultural workers were controlled.

All told, some 400,000 individuals were brought to Hawai'i for agricultural labor between 1852 and 1930,[45] but a significant percentage went home or continued on to North America. Fuchs has reported that although a "minority stayed on," they took "no part in the continuing struggle between haoles and natives for governmental control of the Kingdom."[46] Commissioner James Blount wrote in 1893 that "[f]rom 1876 to 1887 there were imported 23,268 Chinese, 2,777 Japanese, 10,216 Portuguese, 615 Norwegians, 1,052 Germans, 1,998 South Sea Islanders, making a total for this one decade of 39,926 immigrants."[47] One author has reported that between 1875 and 1887, 25,497

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[41] FUCHS, *supra* note 12, at 25.

[42] STEVENS, *supra* note 27, at 144; *see also* HELENA G. ALLEN, THE BETRAYAL OF LILIUOKALANI: LAST QUEEN OF HAWAII 1838-1917, at 212, 304 (1982) (stating that the Chinese immigrants brought to Hawai'i worked "at slave wage and conditions" and reporting that Queen Lili'uokalani "thought the 'slave labor' on the plantations was 'inhuman'").

[43] STEVENS, *supra* note 27, at 144. Pierce served as U.S. Minister to the Kingdom of Hawai'i from 1869 to 1877; after his resignation he became the Foreign Minister of the Kingdom for three months. *Id.* at 148.

[44] BLACKMAN, *supra* note 24, at 199.

[45] *Rice v. Cayetano*, 528 U.S. 495, 506 (2000); FUCHS, *supra* note 12, at 24; LIND, *supra* note 23, at 6-7 (reporting that 180,000 came from Japan and Okinawa, 125,000 from the Philippines, 46,000 from South China, 17,500 Portuguese from the Azores and the Madeira Islands, 8000 from Korea, 6000 from Puerto Rico, 8000 from Spain, 1300 from Germany and Galicia, 2500 from the Pacific Islands, 2000 from Russia, and "numerous other groups in smaller numbers").

[46] FUCHS, *supra* note 12, at 25.

[47] Letter from Commissioner James Blount to U.S. Secretary of State W.C. Gresham (July 17, 1893), *in* 27 EXECUTIVE DOCUMENTS OF THE HOUSE OF REPRESENTATIVES FOR THE SECOND SESSION OF THE FIFTY-THIRD CONGRESS, 1893-94, at 105 (1895) [hereinafter EXECUTIVE HOUSE DOCUMENTS].

Chinese moved to the Kingdom (almost all of whom were male), and 10,196 left to return home,[48] and also that of the 200,000 Japanese who came between 1885 and 1924, 110,000 went back to Japan and another 40,000 went to the West Coast of the United States.[49] 29,000 of these Japanese arrived in the islands between 1885 and 1894,[50] leading to an increase in the number of Japanese in Hawai'i from 12,360 in 1890 to 24,407 in 1896,[51] and this massive influx was significant both domestically and internationally.[52]

The desire to return home was perhaps particularly strong among those male laborers who came without wives or families. As Lind explained, "[o]wing to the tendency on the part of many of the unmarried immigrants to return to their homeland after the completion of their plantation contracts, the Chinese population actually declined by approximately 1,500 between 1884 and 1890."[53] In 1893, Commissioner Blount reported that 14,522 Chinese males resided in the islands, but only 779 Chinese females, and that "[t]he Japanese men outnumber their women by nearly 5 to 1."[54] Lind has further pointed out that although 46,000 Chinese had been brought as laborers, primarily between 1876 and 1885, only 21,674 persons of Chinese ancestry (including some born in the islands) were counted in the census of 1910.[55] Commissioner Blount reported in 1893 that of the 1,238 "merchants and traders in the entire country . . . 776 are Chinamen and 81 are Americans."[56] Blount observed that it should "not be imagined that the Chinese, Japanese, and Portuguese disappear at the end of their contract term," and reported that "[m]ore than 75 per cent [of the Japanese laborers] may be said to locate here [in Hawai'i] permanently."[57]

The 1890 census counted 40,612 persons of Hawaiian ancestry, who constituted 45% of the 89,990 people in the Kingdom,[58] but by the 1896 census the figure had dropped to 36% of the 109,020 residents.[59] Hanifin

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[48] MERRY, *supra* note 13, at 131.

[49] *Id.* at 338 n.6, 341-42 n.62 (citing TAKAKI, *supra* note 15, at 148, 169).

[50] COFFMAN, *supra* note 25, at 189.

[51] STEVENS, *supra* note 27, at 274 n.14.

[52] "[T]he growing influx of Japanese into Hawai['i began by this date [1894] to give rise to fears of its consequences." *Id.* at 274; *see also id.* at 283.

[53] LIND, *supra* note 23, at 32.

[54] Letter from Commissioner James Blount to U.S. Secretary of State W.C. Gresham (June 1, 1893), *in* EXECUTIVE HOUSE DOCUMENTS, *supra* note 47, at 75.

[55] LIND, *supra* note 23, at 27. Many of the Spaniards recruited between 1907 and 1913 left Hawai'i for California. *Id.* at 31. "[B]ecause of extensive movement of the single [Filipino] men back to the Philippines or to California, the number of Filipinos left in Hawai['i declined by 11,000 in the decade 1930-1940." *Id.* at 32.

[56] Blount Letter of June 1, 1893, *supra* note 54, at 74.

[57] *Id.*; *see also* EXECUTIVE HOUSE DOCUMENTS, *supra* note 47, at 135.

[58] Blount Letter of June 1, 1893, *supra* note 54, at 73-74.

[59] SCHMITT, *supra* note 37, at 25; LIND, *supra* note 23, at 28.

extrapolated that the figure in 1893 was thus "about 40%."[60] But these numbers misrepresent the reality of governance in the islands, because the foreign contract laborers were considered to be temporary visitors and those of Asian ancestry were systematically excluded from participation in the Kingdom's political decisionmaking.

Citizenship

The question of who was eligible to be a "citizen" of the Kingdom of Hawai'i is complex, because the word citizen was not widely used in Kingdom documents. The more typical term used with regard to a kingdom is "subject."[61]

In 1830, Dr. Thomas C.B. Rooke, who had arrived from England the previous year, was allowed to marry the Ali'i Grace Kama'iku'i Young on the understanding that he would swear allegiance to the Mo'i (King).[62] The earliest formal consideration of this topic was apparently an August 1838 document called "Alien Laws" signed by Kauikeauoli (Kamehameha III), but apparently never formally promulgated as law.[63] The first two articles said that the subjects of the Kingdom were those born in the islands, or born to Native Hawaiians living elsewhere, or born on a ship belonging to the Kingdom, and that others were to be considered aliens unless they took an oath of allegiance to the Kingdom.[64] The first law actually enacted related to citizenship was a law adopted in November 12, 1840, which required foreigners who married Hawaiians to "take the oath of allegiance to this government."[65] In 1846, "despite petitions of protests signed by 5,790 Hawaiians,"[66] "representing 8% of the total adult population of Hawai[']i in 1845,"[67] this procedure was

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[60] Hanifin, *supra* note 4, at 26. Judge de Silva's figure of 25% is completely unsupported by any historical data. de Silva, *supra* note 6.

[61] *See, e.g.*, Hanifin, *supra* note 4, at 15 n.4.

[62] GEORGE S. KANAHELE, EMMA: HAWAI'I'S REMARKABLE QUEEN 2 (1999).

[63] 1 RALPH S. KUYKENDALL, THE HAWAIIAN KINGDOM 1778-1854: FOUNDATION AND TRANSFORMATION 230 n.17 (1989); OSORIO, *supra* note 12, at 57 (citing MAUDE JONES, NATURALIZATION IN HAWAII 17 (1934)).

[64] Alien males wishing to marry native females who declined to pledge allegiance to the Kingdom would have been required under this law to post a bond of $400, which would be forfeited to help support the family left behind if the male ever left the islands.

[65] KUYKENDALL, *supra* note 63, at 230 (citation omitted); Hanifin, *supra* note 4, at 21 (citation omitted).

[66] Davianna Pomaka'i McGregor, *An Introduction to the Hoa'aina and Their Rights*, 30 HAWAIIAN J. OF HIST. 1, 9 (1996).

[67] Davianna Pomaika'i McGregor, *The Cultural and Political History of Hawaiian Native People*, *in* OUR HISTORY, OUR WAY: AN ETHNIC STUDIES ANTHOLOGY 349 (Gregory Yee Mark, Davianna Pomaika'i McGregor & Linda A. Revilla eds., 1996) [hereinafter McGregor, *Cultural and Political History*].

expanded to permit naturalization by foreigners who had lived in the Kingdom for one year.[68] The naturalization process was a flexible one, and John Ricord (the Kingdom's first Attorney General[69]), for instance, was naturalized immediately upon landing in the islands in 1844,[70] but was released from his oath in 1847, when he departed for other adventures.[71]

This 1846 statute also recognized the category of "denizens," who were specially-favored aliens allowed to retain their foreign citizenship but granted the rights and privileges of natives by the Mo'i.[72] Relatively few were accorded this special status as denizens—only 143 during the half century between 1846 and 1893.[73] The number naturalized was also relatively modest. An 1847 publication estimated that 600 foreigners were living in Honolulu, of whom 146 had become naturalized as subjects of the Kingdom.[74] Another author estimated that about 350 foreigners had became naturalized subjects as of 1846.[75] By 1851, 1600 foreigners were living in the Kingdom (about 2% of the Kingdom's overall population), but only 676 had become naturalized, with 428 of those being from the United States.[76] Between 1877 and 1892, 366 persons became naturalized citizens of the Kingdom.[77] By 1893, a total of 3239 foreigners had become naturalized, including 1105 Americans, 763 Chinese, 596 British, 242 Portuguese, 230 Germans, 47 French, 68 other

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[68] *Id.* at 22 (citing 1 Statute Laws of Kamehameha III, sec. X at 78).

[69] John Ricord became legal advisor to the Mo'i in 1944 and served as Attorney General of the Kingdom from 1846 to 1847.

[70] KUYKENDALL, *supra* note 63, at 236.

[71] OSORIO, *supra* note 12, at 59.

[72] KUYKENDALL, *supra* note 63, at 266 n.162 (citing 1 Statute Laws 79-80, which said that the denizen was "in all respects accountable to the laws of this kingdom" and had "the like fealty to the king, as if he had been naturalized"); Hanifin, *supra* note 4, at 22 (citing 1 Statute Laws of Kamehameha III, sec. XIV).

[73] Hanifin, *supra* note 4, at 22 (citing H. ARAI, INDICES TO CERTIFICATES OF NATIONALITY 1846-1854, DENIZATION 1846-1898, OATHS OF LOYALTY TO THE REPUBLIC FROM OAHU 1894, AND CERTIFICATES OF SPECIAL RIGHTS OF CITIZENSHIP 1896-1898 (1991)). A list of the 66 men granted "letters patent of denization" between 1883 and 1893 can be found in the EXECUTIVE HOUSE DOCUMENTS, *supra* note 47, at 611-12. Among those given the status of being denizens was Paul Neumann, who had been "a prominent, able lawyer and politician of Bohemian habits" and "was said to be a spokesman for the Spreckels sugar monopoly," who came to Hawai'i in 1883 "and within a few days was granted letters of denization by the king and was admitted to the Hawaiian bar" and then quickly became Attorney General. KUYKENDALL, *supra* note 29, at 267-68.

[74] STEVENS, *supra* note 27, at 37 (citing THE FRIEND, Jan. 15, 1847).

[75] WILLIAM D. ALEXANDER, A BRIEF HISTORY OF THE HAWAIIAN PEOPLE 256 (1899).

[76] OSORIO, *supra* note 12, at 52, 67 (citing ROBERT C. SCHMITT, DEMOGRAPHIC STATISTICS OF HAWAII 25 (1977)).

[77] EXECUTIVE HOUSE DOCUMENTS, *supra* note 47, at 614.

Europeans, 136 Pacific Islanders, 27 South Americans, 3 Japanese, and 25 others.[78]

The 1850 statute first establishing voter qualifications and the 1852 Constitution granted certain rights to this new category of individuals called denizens. When the Civil Code was adopted later in 1859, Article 433 stated that:

> It shall be competent for His Majesty to confer upon any alien resident abroad, or temporarily resident in this Kingdom, letters patent of denization, conferring upon such alien, without abjuration of allegiance, all the rights, privileges, and immunities as a native. Said letters patent shall render the denizen in all respects accountable to the laws of this Kingdom, and impose upon him the like fealty to the King as if he had been naturalized as hereinbefore provided.[79]

The distinction between natives and foreigners was recognized and upheld by the Hawai'i Supreme Court in the 1856 decision of *Naone v. Thurston*.[80] Asa G.T. Thurston, son of Asa Thurston (one of the original missionaries) and father of Lorrin Thurston (leader of the 1887 Bayonet Constitution and 1893 overthrow), protested the fact that he was obliged by an 1851 enactment applicable only to persons "born of foreign parentage"[81] to pay a $5 school tax to support schools then being established for children of foreigners. Thurston acknowledged that he was "born of foreign parentage," but claimed that because he was born in the Kingdom he was "a Hawaiian subject by birth."[82] In an opinion written by Justice George M. Robertson, the Hawai'i Supreme Court rejected Thurston's argument, ruling that the statute was not "repugnant either to the letter, or spirit, of the Constitution."[83] Similarly, Section 1st, Chapter 42d of the Kingdom's Penal Code prohibited the sale of "any spirituous liquor, or other intoxicating drink or substance" to "any native of this Kingdom," and this provision was also upheld by the Kingdom's Supreme Court, which rejected the argument that this was "class legislation."[84]

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[78] *Id.* (citing INDEX TO THE NATURALIZATION RECORD BOOK FOR INDIVIDUALS NATURALIZED BY THE MINISTER OF THE INTERIOR OF THE HAWAIIAN ISLANDS, 1844-1894, Hawai'i State Archives).

[79] This provision is quoted in *Aliens and Denizens*, 5 Haw. 167, 1884 WL 6673, at *4 (1884).

[80] 1 Haw. 220, 1856 WL 4225 (1856).

[81] An Act to Provide for the Education of the Children of Foreigners, and Those of Foreign Extraction in the City of Honolulu, and Other Places in the Kingdom, June 28, 1851.

[82] *Naone*, 1 Haw. 220, 1856 WL 4225, at *1. Asa G.T. Thurston may have been a particularly inappropriate person to make this argument, because apparently his parents "erected a high wall around their compound and prohibited their children from leaving it" in order to "separate their children from Hawaiian children." MERRY, *supra* note 13, at 75.

[83] *Naone*, 1 Haw. 220, 1856 WL 4225, at *3.

[84] *Rex v. Booth*, 2 Haw. 616, 626-31, 1863 WL 2527, at *7 (1863). In his concurring opinion, Chief Justice Elisha H. Allen mentioned numerous other laws that treated natives

Laws that treated natives and nonnatives differently continued to be enacted until the end of the Kingdom and through the Republic period. Juries, for instance, were sometimes formed exclusively of natives, sometimes exclusively of nonnatives, and sometimes rigidly structured with set numbers of natives and nonnatives. As the Hawai'i Supreme Court later explained:

> [A]s set out in sections 1331 and 1332 of the Civil Laws of 1897, . . . a native Hawaiian, accused of any crime, was entitled to be tried by a jury composed entirely of natives, and a foreigner by a jury composed entirely of foreigners, while in all civil cases in which one party was a native Hawaiian and the other a foreigner (alien or naturalized) the jury was composed of an equal number of natives and foreigners, drawn alternatively from separate boxes.[85]

In 1874, an act was passed requiring those of foreign birth who held government jobs to take an oath of allegiance to the Constitution and laws of the Kingdom,[86] and the Hawai'i Supreme Court interpreted this provision as requiring that job holders "shall not be an alien."[87]

An Act passed in 1882[88] made it more difficult to become a naturalized citizen, requiring (1) the approval of the King and the Minister of Interior, (2) five years of residence in the Kingdom, (3) ownership of taxable real estate, and (4) good moral character, and excluding those fleeing justice or deserting the military of another country. In 1884, the Hawai'i Supreme Court softened the edge of this provision by ruling that denizens could hold government jobs, and that a letter of denization was an effective substitute for an oath of allegiance, pointing out that the Kingdom's first Chief Justice, William Little

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differently from nonnatives, such as the 1846 law that severely restricted the enlistment of natives as sailors on foreign vessels, and the establishment of specific schools to teach English to Hawaiian youth. *Id.* at 635, 1863 WL 2527, at *11. Chief Justice Allen explained that "[t]he history of our whole legislation shows *that many laws have been passed which applied to the native subjects exclusively*," *id.* (emphasis added), and concluded by presenting "[m]y own view," which was that "in forming the Constitution it was not the intention of the framers to prohibit legislation exclusively applicable to native subjects."

[85] *State v. Jones*, 45 Haw. 247, 258, 365 P.2d 460, 466 (1961). For purposes of jury formation, a nonnative continued to be classified as a "foreigner" even after naturalization. *See State v. Johnson*, 51 Haw. 195, 456 P.2d 805 (1969) (Levinson, J., dissenting) (providing a historical summary of the laws impaneling native-only and foreigner-only juries); *Territory v. Ng Kow*, 15 Haw. 602, 1904 WL 1294, at *1 (1904) (explaining the practice of impaneling native Hawaiians and "persons of foreign parentage" separately under the jury laws in force at the time of annexation). This practice was not abolished until 1900, with the enactment of the Organic Act, ch. 339, § 83, 31 Stat. 141 (1900).

[86] An Act to Provide for the Taking of the Oath of Allegiance by Persons in the Employ of the Hawaiian Government, 1874 Session Laws, Chapter XLII, *quoted in Aliens and Denizens*, 5 Haw. 167, 1884 WL 6673, at *1 (1884).

[87] *Aliens and Denizens*, 5 Haw. 167, 1884 WL 6673, at *3.

[88] 1882 Session Laws, Chapter XVIII, amending Sections 428 and 429 of the Civil Code, *quoted in Aliens and Denizens*, 5 Haw. 167, 1884 WL 6673, at *4.

Lee, was a denizen.[89] These requirements became less significant after the Bayonet Constitution of 1887, which no longer required persons of Hawaiian, American, or European ancestry to be citizens in order to vote.[90]

So, what was the composition of the category of "citizens" or "subjects" of the Kingdom at the time of the overthrow in January 1893? Hanifin acknowledged that as of the 1890 census, 84.42% of the citizens or subjects were natives, and surmised that this figure might have dropped to 80% by 1893.[91]

Voting

As just explained, determining whether a person was a "citizen," "subject," or "denizen" of the Kingdom was somewhat complicated, but a further complication was that even persons clearly in one of those categories were not necessarily entitled to vote.[92] Women were never allowed to vote under any of the Kingdom's constitutions, and many men were excluded as well.

The 1840 Constitution created a legislative body, consisting of a House of Nobles with sixteen high Ali'i who were specifically named in the Constitution plus a "representative body" whose members "shall be chosen by the people, according to their wish, from Hawai'i, Mau'i, O'ahu and Kaua'i."[93] These members "were initially chosen on the basis of petitions sent to the king."[94] Pursuant to a law enacted in 1842, petitions were circulated and those whose petitions had the most signatures became one of the seven members of the House of Representatives (two from Hawai'i, Mau'i, and O'ahu, and one from Kaua'i).[95] On July 30, 1850, a law was enacted allowing male subjects

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[89] *Aliens and Denizens*, 5 Haw. 167, 1884 WL 6673, at *4.

[90] *See infra* text at notes 119-27.

[91] The 1890 census reported 40,622 ethnic Hawaiians and 7,495 native-born subjects who were not ethnic Hawaiians . . . . The next census, in 1896, reported 39,504 ethnic Hawaiians and 13,733 native-born subjects who were not ethnic Hawaiians. The percentage of native-born subjects who were not ethnic Hawaiians . . . was probably about 20% in 1893, midway between the 1890 and 1896 censuses.

Hanifin, *supra* note 4, at 21 n.55 (citing THRUM'S 1900 HAWAIIAN ANNUAL 39).

[92] "Under the constitutions of the Hawaiian Kingdom, being a subject was neither necessary nor sufficient to be a voter." *Id.* at 22.

[93] Constitution of 1840, Oct. 8, 1840.

[94] SCHMITT, *supra* note 37, at 593.

[95] Hanifin, *supra* note 4, at 23 (citing Laws of the Hawaiian Islands, 1842, Chapter II, Of the Representative Body); Robert C. Schmitt, *Voter Participation Rates in Hawaii Before 1900*, 5 HAWAIIAN J. OF HIST. 50, 50 (1971) (citing THE FUNDAMENTAL LAW OF HAWAII 6, 11, 12 (Lorrin A. Thurston ed., 1904)). Osorio has reported, however, that the lower house was supposed to have eight members, but never in fact had more than seven, and had only five in 1847 and 1849, because of "voting irregularities" and the dissatisfaction of the people on Kauai with the political decisions of the representative they had sent previously. OSORIO, *supra* note 12, at 66 (citing Journal of the House of Representatives, April 16, 1851, at 9, and Journal of

of the Kingdom (native-born or naturalized) plus male denizens to vote if they were at least twenty years old, had lived for one year in the Kingdom, and were neither insane nor unpardoned felons.[96] A companion statute increased the size of the House of Representatives to twenty-four and gave the Mo'i's Ministers seats and the right to vote in the House of Nobles.[97]

The first election for members of the House of Representatives occurred on January 6, 1851.[98] Even though foreign settlers constituted only 2% of the Kingdom's population, seven of the twenty-four representatives elected were Caucasians,[99] including George M. Robertson, William L. Lee, and Thomas C.B. Rooke, and they immediately took control and started changing the procedures followed in the legislature.[100]

The 1852 Constitution, drafted primarily by William L. Lee,[101] maintained the practice of allowing all male subjects and denizens to vote. Article 78 said that:

> Every male subject of His Majesty, whether native or naturalized, and every denizen of the Kingdom, who shall have paid his taxes, who shall have attained the full age of twenty years, and who shall have resided in the Kingdom for one year immediately preceding the time of election, shall be entitled to one vote for the representative or representatives, of the district in which he may have resided three months next preceding the day of election . . . .[102]

Annual elections were held between 1851 and 1856, and thereafter elections were held every two years.[103] The first Kingdom-wide election figures are for the 1858 election, when 12,673 persons cast votes.

Alexander Liholiho (Kamehameha IV) opposed the universal male suffrage utilized in the elections in the 1850s, and sought to amend the 1852 Constitu-

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the Legislative Council, May 11, 1847, at 136).

[96] KUYKENDALL, *supra* note 63, at 265-66 (citing An Act to Regulate the Election of Representatives of the People, July 30, 1850); SCHMITT, *supra* note 37, at 594; Schmitt, *supra* note 95, at 50 (citing PENAL CODE OF THE HAWAIIAN ISLANDS 1850 at 161-66).

[97] KUYKENDALL, *supra* note 63, at 265 (citing An Act to Increase the Number of Representatives of the People in the Legislative Council, July 30, 1850).

[98] SCHMITT, *supra* note 37, at 593.

[99] OSORIO, *supra* note 12, at 67-69.

[100] *Id.* at 75-76. "Among the twenty-four members elected to the house of representatives of 1851 were several naturalized haoles of excellent ability." KUYKENDALL, *supra* note 63, at 266.

[101] OSORIO, *supra* note 12, at 85.

[102] This section excluded those who were "insane" or who "have been convicted of any infamous crime," unless their vote had been restored through a pardon. The 1852 Constitution has been "regarded as a distinct triumph of the 'foreign' over the native influence in the development of Hawaiian political institutions." BLACKMAN, *supra* note 24, at 122.

[103] Schmitt, *supra* note 95, at 51 (citing CIVIL CODE OF THE HAWAIIAN ISLANDS 187 (1859)).

tion to add a property requirement.[104] Based on this recommendation, a committee of the House of Representatives drafted an amendment that would have required voters to own $1000 worth of property or to have an annual income of $1000, and the committee also drafted an amendment that would have required voters to pass a reading test.[105] Although these proposals were originally supported, because of the procedural complexities required to amend the 1852 Constitution and because of public concern about these requirements, the amendments were never formally ratified.[106]

But the 1864 Constitution, developed according to the instructions of the new Mo'i Lot (Kamehameha V),[107] did eliminate universal male suffrage, which Lot viewed as detrimental to monarchial power. Article 62 required voters to own property of at least $150, or a leasehold with rent of at least $25/year, or to have an annual income of $75/year, and also required them to be able to read and write if they were born after 1840. One had to be a "male subject of the Kingdom" to vote under this provision, which eliminated denizens from casting their votes.[108] The phrase in Article I of the 1852 Constitution proclaiming that "God hath created all men free and equal" was also removed from the 1864 document.[109]

The dramatic impact of these restrictive requirements can be seen by examining the number of voters in Honolulu, where figures were tabulated during this period. In January 1860, 1776 votes were cast in Honolulu, increasing to 2962 in January 1862, and then 2408 in January 1864.[110] But in January 1866, when the election was governed by the new 1864 Constitution, according to Schmitt's statistics, only 218 votes were cast, with the number slowly rising to 607 in February 1868, 921 in February 1870, 1275 in February 1872, and 1336 in February 1874.[111] Osorio has quoted the *Pacific Commercial Advertiser* as stating that only 500 of the nearly 5000 adult males in the District of Honolulu had voted in the January 1866 election, even though 3500 of them were taxpayers, confirming its views that the changes in

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[104] RALPH S. KUYKENDALL, CONSTITUTIONS OF THE HAWAIIAN KINGDOM: A BRIEF HISTORY AND ANALYSIS 23 (1940).

[105] *Id.*

[106] *Id.* at 24-25.

[107] The Constitutional Convention established to produce a new constitution deadlocked over the issue of property and income qualifications, and so Lot dissolved the body and worked with those favoring such qualifications to produce the Constitution of 1864 which was promulgated by the Mo'i without approval of the legislature or the public. KUYKENDALL, *supra* note 28, at 131-32.

[108] *See* OSORIO, *supra* note 12, at 125 (reporting that Lot "wanted to confine the franchise to actual subjects of the kingdom"). *Id.* at 134 ("Denizens . . . were disenfranchised.").

[109] Constitution of 1852, art. 1; Constitution of 1864, art 1; Osorio, *supra* note 12, at 132-33.

[110] SCHMITT, *supra* note 37, at 597 tbl.24.1.

[111] *Id.*

the 1864 Constitution were "unjust" because "only a few government officials and rich persons" were allowed to vote.[112]

After Lot (Kamehameha V) died in 1872, William Charles Lunalilo sought public approval of his ascension to the Crown, and on January 1, 1873, an election of "all the male subjects of the kingdom"[113] was held, which he won overwhelmingly. He then promoted the repeal of the property/income requirement for all elections, which occurred in 1874.[114] But the wealth requirements were reinstated in 1887, along with an onerous literacy requirement, for electors casting votes for the House of Nobles.[115] The 1874 repeal of the property requirements apparently did not have much of an impact on voting practices, because only 1402 votes were cast in Honolulu in February 1876, 1179 in February 1878, 1490 in February 1880, 1451 in February 1882, 1942 in February 1884, and 2157 in February 1886.[116] About one-ninth of the qualified voters in Honolulu in 1884 were Caucasian, although this percentage might have been substantially higher "if all of them had paid their taxes and claimed their privileges."[117] The jump in numbers to 3619 for the September 1887 election[118] is attributable to the provision in the 1887 Constitution allowing Portuguese laborers to vote, discussed below.

The 1887 Constitution

The 1887 Constitution, drafted by Lorrin A. Thurston and the other Westerners who led a *coup d'etat*[119] against the Mo'i,[120] converted the House of Nobles into an elected rather than appointed body, made the number of Nobles equal to the number of Representatives (they met in a unicameral body), and imposed different voting qualifications for the House of Nobles and for the House of Representatives. To vote for the Nobles, one had to be a taxpaying male resident twenty years of age "of Hawaiian, American or European birth or descent" who could "read and comprehend an ordinary newspaper in either Hawaiian, English or some European language"[121] who

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[112] OSORIO, *supra* note 12, at 142, 275 n.89 (citing and quoting from PAC. COM. ADVERTISER, Jan. 6, 1866, at 1).

[113] KUYKENDALL, *supra* note 28, at 243.

[114] *See* KUYKENDALL, *supra* note 104, at 42-43 (discussing the amendments to Articles 62 and 63 of the 1864 Constitution).

[115] SCHMITT, *supra* note 37, at 594.

[116] *Id.* at 597.

[117] OSORIO, *supra* note 12, at 279 n.76 (quoting PAC. COM. ADVERTISER, Feb. 9, 1884, at 3, col. 4).

[118] SCHMITT, *supra* note 37, at 597.

[119] *See* Hanifin, *supra* note 4, at 25.

[120] *See* VAN DYKE ET. AL, *supra* note 1, ch. 14.

[121] 1887 Constitution, art. 62.

had resided in the Kingdom for three years or more and met the "stiff property qualification"[122] of owning at least $3000 in taxable property or having an annual income of $600/year.[123] The same requirements applied to voters for the House of Representatives, except that the property/income requirement was eliminated.

The literacy requirements—requiring the ability to read Hawaiian, English, or another European language—had the effect of allowing immigrant-laborers from Portugal and Puerto Rico to vote, but not those from Asia, even if they had become naturalized citizens of the Kingdom. The property/income requirements, which were substantially higher than those utilized in the 1864 Constitution, had the effect of giving Westerners almost complete control of the House of Nobles.[124] As one commentator explained, the Bayonet Constitution, "which set up a Government savoring of the English variety, was a clever device for securing to the [foreigners] the control of the Kingdom."[125] "Considering that the annual income of the highest paid Hawaiian free laborer was $248,"[126] fewer than half of those eligible to vote for the House of Representatives could vote for the Nobles in Honolulu, and in the other islands only about one-third of those who could vote for the House of Representatives could vote for the Noble representing them.[127]

In the 1887 election, 14,598 were registered to vote, but only 2997 were eligible to vote for the House of Nobles.[128] In 1890, 13,593 were registered to vote,[129] 11,671 actually voted in the election for House of Representatives, but only 3187 votes were cast for the House of Nobles. The Native Hawaiians and part-Hawaiians registered to vote numbered 9554,[130] another 2091

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[122] Hanifin, *supra* note 4, at 25.

[123] 1887 Constitution, art. 59. The literacy and three-year residency requirements were waived for persons residing in the Kingdom as of 1887 if they registered to vote for the first election following its promulgation.

The Constitution stated that the 24 Nobles (who previously had served for life) would have six-year terms; to be a Noble, one had to be 25 years old, have resided in the Kingdom for three years, and be able to meet the same property requirements that applied to voters for the House of Nobles. *Id.* art. 56. Perhaps inadvertently, this article did not require Nobles to be male or to be able to read.

[124] FUCHS, *supra* note 12, at 29 ("[T]he House of Nobles was thus converted from an instrument of the King to the legislative voice of the haoles."); WILLIAM A. RUSS, THE HAWAIIAN REVOLUTION: 1893-94, at 20 (1959); KUYKENDALL, *supra* note 29, at 370 ("many of the native Hawaiians were excluded by the high property qualification").

[125] RUSS, *supra* note 124, at 20.

[126] McGregor, *Cultural and Political History*, *supra* note 67, at 363.

[127] For voting statistics during this period, see SCHMITT, *supra* note 37, at 597.

[128] Samuel P. King, *The Federal Courts and the Annexation of Hawaii*, 2 W. LEGAL HIST. 1, 8 (1989) (citing a 1971 research study by the Hawai'i state statistician).

[129] LILI'UOKALANI, HAWAII'S STORY BY HAWAII'S QUEEN 237 n.1 (1898).

[130] McGregor, *Cultural and Political History*, *supra* note 67, at 365.

registered voters were Portuguese, 637 were American, 505 were British, and 382 were German. In 1892, 14,217 male individuals were registered to vote, of whom 9931 were Hawaiians.[131]

Citizenship or holding a letter of denization was no longer a requirement for voting. Only eight of the 10,216 Portuguese contract workers brought to the islands between 1878 and 1886 became naturalized citizens, but all who were adult males were allowed to vote if they signed a document indicating that they would support the Bayonet Constitution and the laws of the Kingdom. This document also stated that the individual was "[n]ot hereby renouncing, but expressly reserving, all allegiance and citizenship now owing or held by me" to Portugal.[132] In late September 1887, U.S. Secretary of State Thomas Bayard told the U.S. Minister to the Kingdom, George Merrill, that U.S. citizens "could take an oath to support the new Hawaiian Constitution, vote, and hold office without losing American citizenship."[133] Professor Osorio has observed that "[t]he Bayonet Constitution allowed the whites political control without requiring that they swear allegiance to the king. Indeed, the constitution removed every paradox that had previously confounded haole citizens and other white residents by making the nation belong to them without requiring that they belong to the nation."[134] Or, as John Bassett Moore wrote in 1906:

> While government was more securely conducted under [the 1887 Constitution], yet a certain native antagonism was exhibited toward it, not only because it curtailed the powers of the native king but also because it increased the political privileges of the foreign residents, who were allowed to enjoy political rights without renouncing their foreign allegiance and citizenship.[135]

This "native antagonism" led to a failed attempt to remove the "reform" government through arms in 1889[136] and then the more successful electoral effort in 1890 which led to the removal of the "reform" cabinet.[137]

One of the most significant aspects of the 1887 Constitution was that it introduced "a racial requirement" by limiting voting by nonnatives to those of European or American ancestry. Aliens of Asian ancestry had no opportunities to participate in political decisionmaking, even if they had become

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[131] King, *supra* note 128, at 7.

[132] Blount Letter of July 17, 1893, *supra* note 54, at 112.

[133] RICH BUDNICK, STOLEN KINGDOM: AN AMERICAN CONSPIRACY 69 (1992) (citing Bayard to Merrill, Sept. 30, 1887; EXECUTIVE HOUSE DOCUMENTS, *supra* note 47, at 1168-69).

[134] OSORIO, *supra* note 12, at 197.

[135] 1 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW 496 (1906).

[136] This effort was led by Robert W. Wilcox and Robert Boyd, but King Kalakaua failed to support it, and it was suppressed with the support of U.S. arms and U.S. troops that came ashore from the *U.S.S. Adams*. Seven Hawaiians were killed and twelve were wounded.

[137] *See infra* text at notes 155-61.

naturalized citizens. In 1884, 18,254 Chinese were in the Kingdom, some of whom were qualified to vote under the 1864 Constitution by having been born or naturalized in the Kingdom. More than 400 Chinese had become naturalized between 1850 and 1887.[138] But after the 1887 Constitution, none of those who had become citizens through naturalization could continue to vote.[139] In a 1892 opinion written by Justice Samuel B. Dole, the Hawai'i Supreme Court upheld the "radical change" introduced by the 1887 Constitution "which substituted the race requirement for the old condition of citizenship" and thus prohibited a naturalized citizen of Chinese ancestry from voting.[140] A male of Chinese ancestry born in the Kingdom was deemed to be of "Hawaiian" birth under the language in the 1887 Constitution,[141] but still had to establish that he could read a newspaper in Hawaiian, English, or another European language before he could vote. This arrangement was actively opposed by the Chinese and Japanese in the Kingdom,[142] and by the Japanese government,[143] and it "gave to the *haoles* as a group a greatly increased power in the government and reduced the Hawaiians to a position of apparent and, for a while, actual inferiority in the political life of the country."[144]

The carefully-crafted language in the 1887 Constitution did allow persons of European ancestry to vote if they could read a newspaper in any European language, a provision designed explicitly to allow those of Portuguese ancestry to vote. Thurston and the others who wrote the 1887 Constitution deduced that the 10,000 laborers of Portuguese ancestry[145] would support their efforts,

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[138] OSORIO, *supra* note 12, at 281 n.8 (citing MAUDE JONES, NATURALIZATION IN HAWAII 17 (1934)).

[139] *See* Schmitt, *supra* note 95, at 56 (reporting that the 1890 census stated that persons of Chinese and Japanese ancestry accounted for 51.8% of all males of voting age, but that none were registered to vote).

[140] *Ahlo v. Smith*, 8 Haw. 420, 1892 WL 1076, at *2 (1892).

[141] KUYKENDALL, *supra* note 29, at 407 n.*.

[142] *Id.* at 406.

[143] "[T]he Japanese Government now claims for its citizens equal rights with other foreigners." Statement of the Hawaiian Patriotic League, *in* EXECUTIVE HOUSE DOCUMENTS, *supra* note 47, at 448, 454.

[144] KUYKENDALL, *supra* note 29, at 370 (emphasis added).

[145] By 1884, 10,000 Portuguese were in the islands. OSORIO, *supra* note 12, at 281 n.9 (citing ROBERT C. SCHMITT, DEMOGRAPHIC STATISTICS OF HAWAII 25 (1977)).

Reflecting the anti-Asian sentiments of the time, Thurston characterized the Chinese and Japanese contract workers as "an undesirable population from a political standpoint, because they do not understand American principles of government" and because they seek to return home "[a]s soon as they accumulate a few hundred dollars." He favored the Portuguese immigrants, calling them "a hard-working industrious, home-creating and home-loving people who would be of advantage to any developing country. They constitute the best laboring element in Hawai['i." MERRY, *supra* note 13, at 135 (quoting LORRIN A. THURSTON, A HANDBOOK ON THE ANNEXATION OF HAWAII 28 (circa 1897)).

and, in fact, "[i]t was the votes of foreigners including the Portuguese, enfranchised by the new constitution, that gave the Reform Party [which was dominated by Westerners] its decisive victory" in the election held September 12, 1887.[146] Chief Justice Albert Francis Judd later told Commissioner James Blount that "the reason that the Portuguese were allowed to vote was to balance the native vote."[147]

But the Native Hawaiians still played an active and usually dominant role in the politics of the islands, because "[t]hough the new [1887] Constitution increased the political power of the large foreign property-holders in various ways, . . . the suffrage was still in native hands."[148] The 1890 census reported that 13,593 were registered to vote, and of these 8777 were listed as "natives" and another 777 were "half-castes," *i.e.*, part-Hawaiians.[149] Of the remainder, half (2,091) were Portuguese laborers.[150]

In 1890, the legislature approved amendments to the Constitution to reduce the amount of property one had to own to vote for the Nobles from $3000 to $1000, to allow only "subjects" instead of mere "residents" to vote, and to require Nobles to be male.[151] But these provisions were never adopted, because the 1892 legislature did not reconsider and confirm them, as required by Article 82 of the 1887 Constitution.[152] It is not altogether clear whether denizens would have been excluded from voting by the requirement that voters must be "subjects."

The constitution drafted by Queen Lili'uokalani, which she was prepared to present to her subjects in January 1893, would have included the provision proposed in 1890 to limit the electorate to male "subjects" (those born in Hawai'i or naturalized), would have changed the House of Nobles to become a body of twenty-four individuals appointed by the monarch for life, rather than being a group elected for three-year terms by those with property, and

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Commissioner James Blount was less enthusiastic about the 10,216 Portuguese contract laborers imported from Madeira and the Azores Islands, describing them as "the most ignorant of all imported laborers and reported to be very thievish. They are not pure Europeans, but a commingling of many races, especially the negro . . . . Very few of them can read and write . . . . It is wrong to class them as Europeans." Blount Letter of June 1, 1893, *supra* note 54, at 74.

[146] KUYKENDALL, *supra* note 29, at 410 (citing DAILY BULL., Sept. 16, 1887 (letter of "One Who Voted Straight Reform")).

[147] Blount Letter of July 17, 1893, *supra* note 54, at 110, 113.

[148] STEVENS, *supra* note 27, at 146.

[149] Blount Letter of July 17, 1893, *supra* note 54, at 132.

[150] *Id.*

[151] KUYKENDALL, *supra* note 104, at 51; KUYKENDALL, *supra* note 29, at 465. Another proposed amendment would have given the legislature the right to limit and control the activities of the contract laborers brought into the Kingdom. KUYKENDALL, *supra* note 104, at 51.

[152] KUYKENDALL, *supra* note 104, at 51-52.

would have increased the number in the House of Representatives from twenty-four to forty-eight.[153] She later defended the change that would have limited voting to "subjects" of the Kingdom by explaining that she "had thought it wise to limit the exercise of suffrage to those who owed allegiance to no other country" and that this approach is not "different from the usage in all other civilized nations on earth."[154]

As explained above,[155] 13,593 men were registered and eligible to vote in the February 1890 election[156] and of these 9554 were of Hawaiian ancestry;[157] "about two-thirds of the voters for representatives were Hawaiians and . . . Hawaiians comprised more than a third of the voters for nobles."[158] In the February 1890 election, the National Reform Party, led by Robert W. Wilcox who voiced the dissatisfaction of the Native Hawaiians about the 1887 Constitution and rallied their political enthusiasm, particularly in Honolulu, won fourteen out of the twenty-four seats in the House of Representatives and took all nine of the seats for Nobles on O'ahu (but lost the other fifteen seats on the neighbor islands).[159] The National Reform Party was able to organize the legislature (the Nobles and Representatives met together as one body), elect its President and control its committees,[160] and force the members of the Cabinet, led by Lorrin Thurston, to resign.[161]

The February 1892 election did not break down along racial lines.[162] "The elections of 1892 produced a strange assembly, in which no party had a majority."[163] Wilcox and his group formed the Liberal Party along with people like the Ashford Brothers, who had been active in promoting the Bayonet Constitution, and they were critical of Queen Lili'uokalani and called for a constitutional convention. Three conservative parties supported the Queen and stability, generally opposing a constitutional convention and supporting a new free trade agreement with the United States. The Liberal Party won only thirteen seats, with the other parties holding thirty-five.[164] Native Hawaiians held twenty-five of the forty-eight seats in the House of Representatives and

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[153] KUYKENDALL, *supra* note 29, at 586; Blount Letter of July 17, 1893, *supra* note 54, at 115.

[154] LILI'UOKALANI, *supra* note 129, at 237.

[155] *See supra* text accompanying note 149.

[156] LILI'UOKALANI, *supra* note 129, at 363 n.1.

[157] McGregor, *Cultural and Political History*, *supra* note 67, at 365.

[158] KUYKENDALL, *supra* note 29, at 453 (citing PAC. COM. ADVERTISER, Nov. 22, 1889).

[159] *Id.* at 454.

[160] *Id.* at 459.

[161] *Id.* at 461.

[162] *Id.* at 514-22.

[163] DAWS, *supra* note 19, at 267.

[164] KUYKENDALL, *supra* note 29, at 521.

House of Nobles in the legislature that met during 1892-93.[165] Whatever these results meant, they certainly do not indicate that the Native Hawaiians had lost control of the Kingdom. Even with the restrictive property and income restrictions governing the voting for the Nobles, Native Hawaiians continued to play the dominant role in decisionmaking, and the election also confirmed that the Queen continued to have broad support.

CONCLUSIONS

Those who claim that the Kingdom was a multi-ethnic pluralistic place where everyone was welcome and everyone was treated equally are misrepresenting history. Patrick Hanifin was wrong when he wrote that "[t]he government of the Kingdom of Hawai[']i . . . offered immigrants easy naturalization and full political rights. Race and ethnicity did not matter."[166] In fact, after the 1887 Constitution, the immigrants that came from Asia, as most did, were granted no political rights whatsoever, and were completely barred from political participation because of their race and ethnicity, even if they became naturalized citizens. Similarly, the U.S. Supreme Court misrepresented reality in *Rice v. Cayetano*, when it said that the 1887 Constitution "extended the right to vote to non-Hawaiians,"[167] and it seems particularly insensitive for the Court to have ignored the blatant racial discrimination against those of Asian origins promoted by the "Reform Party" in a case in which the Court purported to condemn classifications based on ancestry.[168] Lorrin Thurston and the others who drafted the 1887 Constitution gave the Portuguese immigrants advantages over other immigrant workers, because they thought the Portuguese voters would benefit their political agenda. Judge de Silva is technically correct that all immigrants could have become naturalized citizens, but such a status would not have benefited the vast majority who were of Asian ancestry because they would still have been denied the right to vote. The Kingdom during this difficult period was occupied by numerous ambitious political opportunists playing hardball, and Native Hawaiians were struggling to maintain their heritage, sovereignty, and lands against a better-resourced and unrelenting opposition.

In her protest to the annexation treaty being promoted by the Western revolutionaries that had led the January 1893 overthrow, Queen Lili'uokalani stated that: "[m]y people constitute four-fifths of the legally qualified voters of Hawaii, and excluding those imported for the demands of labor, about the

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[165] Clinton R. Ashford, *Who Were the Victims of the Overthrow?*, HONOLULU ADVERTISER, Aug. 20, 1995, at B1, col. 1.

[166] Hanifin, *supra* note 4, at 15.

[167] 528 U.S. 495, 504 (2000).

[168] *Id.* at 514-17.

same proportion of the inhabitants."[169] Although this statement claims a percentage of voters somewhat higher than the two-thirds reported in November 1889 by the *Pacific Commercial Advertiser*, it presents a relatively accurate description of the political community of the Kingdom at the time of the overthrow. In the 1890 election, Native Hawaiians had effectively wrested control of the Kingdom from those who had foisted the Bayonet Constitution on the Kingdom, and efforts were underway during the years that followed to reassert a stronger role for the Monarchy. Those who now claim that the Native Hawaiians had lost control of the Kingdom prior to the 1893 overthrow are wrong.

[169] LILI'UOKALANI, *supra* note 129, at 355 (quoting from the Queen's official protest to the proposed 1893 annexation treaty).

Promoting Trustee Adherence to the Fiduciary Duty of Impartiality: A Case for Enacting Unitrust Conversion Statutes in Conjunction with Equitable Adjustment Statutes

I. INTRODUCTION

> For as a trust is an office necessary in the concerns between man and man, and which, if faithfully discharged, is attended with no small degree of trouble, and anxiety, it is an act of great kindness in any one to accept it.[1]

The position of trustee "on which the law has fastened many burdensome duties, is onerous."[2] Trustees act in a fiduciary capacity and are thus held to extremely high standards of conduct, that is to say "a level higher than that trodden by the crowd."[3] Ensuring the adherence of trustees to the fiduciary duties imposed upon them by state law, is vital in providing individuals with the confidence and peace of mind that their property will be disposed of according to their final written wishes.

One type of fiduciary duty, the duty of impartiality or the duty to refrain from favoring the interests of income beneficiaries at the expense of remainder beneficiaries (and vice versa)[4] can be an especially difficult duty to fulfill, and has thus been the basis of much litigation arising between beneficiaries and trustees.[5] Nationwide trends in trust and estate law that endow trustees with greater discretion in making investment decisions and in allocating the earnings among income and remainder beneficiaries, further exacerbates the difficulty a trustee faces in acting impartially with respect to these two types of beneficiaries.[6] Specifically, the Uniform Prudent Investor

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[1] JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 903 (6th ed. 2000) (quoting Knight v. Earl of Plymouth, 21 Eng. Rep. 214, 216 (1747)).

[2] *Id.*

[3] Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).

[4] *See* DUKEMINIER & JOHANSON, *supra* note 1, at 929.

[5] *See* Dennis v. R.I. Hosp. Trust Nat'l Bank, 744 F.2d 893, 895 (1st Cir. 1984); Scott v. United States, 186 F. Supp. 2d 664, 668 (E.D. Va. 2002); Law v. Law, 753 A.2d 443, 446-47 (Del. 2000).

[6] *See* Lyman W. Welch, *Brave New World of Total Return Laws*, 141 TR. & EST. 24, 24-27 (June 2002). The author notes that between 1999 and 2002 alone, twenty-nine states plus the District of Columbia enacted total return legislation that "liberate[d] the trustee to invest as the trustee thinks best for the maximum total return suitable to the purposes and circumstances of the trust". *Id.* at 24-25. However, the author also recognizes that "risks of mistake, abuse and

Act ("Prudent Investor Act"),[7] and the Uniform Principal and Income Act ("UPIA"),[8] adopted in a majority of states over the last decade, attempt to maximize return on investments by providing greater flexibility to trustees in both pursuing investment strategies,[9] and in allocating trust assets among beneficiaries.[10]

While the goal of maximizing return on investment instruments is a worthy aim, the Prudent Investor Act may have granted trustees excessively free reign in creating the investment portfolio. Similarly, the UPIA may have granted trustees too much discretion in allocating trust earnings to income or principal[11] as this discretion may hinder the trustee's ability to act impartially. Given that a trustee's exercise of discretion generally increases potential risk of mistake, abuse, and controversy,[12] the trustee may conceivably be more apt to err by improperly favoring one type of beneficiary because the trustee relied upon his own personal opinions and values rather than upon established, time-tested guidelines focused on promoting impartiality. This Article examines the possible impairment of trustees' ability to fulfill their duty of impartiality as a result of the Prudent Investor Act and the UPIA. This Article also proposes that this impairment can be minimized by using the Unitrust Conversion ("UC")[13] method of allocation in conjunction with the Equitable Adjustment ("EA")[14] method of allocation.

Both the UC and EA allocation methods allow the trustee to better fulfill his duty of impartiality.[15] The EA method, described and incorporated in the 1997 UPIA,[16] accomplishes this by enabling the trustee to increase or decrease distributable net income by "adjust[ing] between principal and income to the

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dispute" may be issues for concern arising from the implementation of certain total return laws. *Id.* at 25.

[7] UNIF. PRUDENT INVESTOR ACT (1994) [hereinafter 1994 PRUDENT INVESTOR ACT].

[8] UNIF. PRINCIPAL & INCOME ACT (1997) [hereinafter 1997 UPIA].

[9] *See infra* Part II.A.2.

[10] *See infra* Part II.B.2.

[11] The term "principal" is used interchangeably with "capital" and "corpus" throughout this paper, and refers to that portion of the trust assets to which the remainder beneficiaries are entitled.

[12] *See* Welch, *supra* note 6, at 28. The author states that the more one is concerned about mistakes and abuse of discretion in allocating between principal and income, the more one is inclined to establish "definite rules" that place limitations on the trustee's flexibility and discretion in allocation flexibility. *Id.*

[13] *See infra* Part III.B.2.

[14] *See infra* Part III.B.1.

[15] *See* Welch, *supra* note 6, at 24. Since "how a trustee would invest to achieve the best total return too often conflicts with how a trustee would invest to achieve fair or necessary income distributions[,]" many states have enacted total return laws like the EA or UC methods of allocation. *Id.*

[16] 1997 UPIA, *supra* note 8, § 104.

extent the trustee considers necessary"[17] in order to fulfill the duty of impartiality, or to fulfill the purpose of the trust.[18] The UC method, adopted from charitable remainder unitrusts,[19] also enables the trustee to change the amount of distributable net income that may be too high or too low by granting the trustee the authority to annually distribute as income a certain percentage of the aggregate value of trust assets.[20]

Part II of this paper provides background information on the history and development of trust investment laws and trust earnings allocation laws. Part III describes the challenges that the Prudent Investor Act and UPIA pose to the trustee in fulfilling the duty of impartiality, and examines how the UC and EA allocation methods can mitigate those problems. Part IV offers concluding remarks.

II. FIDUCIARY INVESTMENT AND ALLOCATION DUTIES

A trust is created when a settlor transfers property to a trust and the trustee acquires legal title to the property.[21] The trustee's primary duty is to administer the trust in the interest of the beneficiaries.[22] Private testamentary trusts generally provide for successive beneficial interests, thereby giving rise to multiple classes or types of beneficiaries.[23] Income beneficiaries (also called life tenants) comprise one class of beneficiaries that hold a life interest in the trust and are entitled to the trust income.[24] Remainder beneficiaries form another class that possess an interest in the trust corpus (also known as principal), and a right to corpus distribution upon termination of the trust.[25]

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[17] *Id.* § 104(a).

[18] *See id.* § 104 cmt. (stating that the principal consideration in adjusting between principal and income is to fulfill the Section 103(b) requirements of impartiality and the obligation to further the intent of the trust).

[19] DUKEMINIER & JOHANSON, *supra* note 1, at 972; *see id.* at 631 ("[I]n a unitrust, the income beneficiary is entitled not to the actual income earned but to a fixed percentage of the value of the trust corpus, which is revalued each year.").

[20] Welch, *supra* note 6, at 25.

[21] RESTATEMENT (THIRD) OF TRUSTS § 14 cmt. a (1992) (stating that transfer of property is necessary for creation of a testamentary trust or creation of a trust by declaration or inter vivos transfer) [hereinafter RESTATEMENT (THIRD)]; *see* DUKEMINIER, *supra* note 1, at 560.

[22] RESTATEMENT (THIRD), *supra* note 21, § 2 ("A trust . . . is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons. . . .").

[23] DUKEMINIER & JOHANSON, *supra* note 1, at 562.

[24] *Id.*

[25] *Id.*

The trustee is held to a high standard of conduct in carrying out his many duties such as safeguarding the trust property, keeping inventory, and maintaining accounting records for the trust.[26] This paper focuses on two of the trustees most important (and often problematic) duties: the duty to invest prudently, and the duty to treat all classes of beneficiaries equally (also known as the duty of impartiality).

It is important to note that most trust rules are default rules only. These rules may be expanded, contracted, modified, or disregarded altogether if the governing trust document so instructs.[27]

A. Fiduciary Investment Duties

Fiduciary investment laws evolved substantially over time. The laws went through alternate cycles of advocating substantial restriction of trustee investment flexibility on the one hand, and promoting trustee investment discretion on the other hand.[28]

1. Early investment rules and practices

The English are credited with developing the trust concept and many of the basic rules surrounding trust operation.[29] The trustee's ability to exercise discretion in selecting investments for the trust was severely curtailed in England following the sudden nosedive taken by South Sea Company stock prices in 1720.[30] Driven by fear of a volatile market and a desire to shield trust assets from the effects of a similar stock price collapse, English chancellors initially restricted trust investments to government bonds and later allowed investment in well-secured first mortgages.[31]

Over the two centuries following the South Sea Company's stock plummet, English lawmakers gradually permitted investment in a limited number of other assets.[32] It was not until 1961, however, that trustees were allowed to invest in equities generally.[33] Conservation of trust principal for future

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[26] *Id.* at 560.

[27] 1994 PRUDENT INVESTOR ACT, *supra* note 7, § 1(b) cmt.

[28] *See infra* Part II.A.

[29] DUKEMINIER & JOHANSON, *supra* note 1, at 553-54.

[30] John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641, 643 (1996).

[31] *Id.*; *see* King v. Talbot, 40 N.Y. 76, 83 (1869) ("[I]n England, the rule is, and has long been settled, that a trustee . . . is bound to make such investment in the public debt, for the safety whereof the faith of their government is pledged; or in loans, for which real estate is pledged as security.").

[32] Langbein, *supra* note 30, at 643.

[33] *Id.*

generations was presumed to be the trustee's foremost duty.[34] This belief fostered conservatism in selecting trust investments.

In an effort to protect trust assets, United States laws also sought to constrain trustee investment activity although not nearly as harshly or restrictively as English law.[35] The seminal case of *Harvard College and Massachusetts General Hospital v. Amory*[36] in 1830, set forth these constraints in the form of the Prudent Man Rule.[37] Specifically, the Prudent Man Rule required the trustee to exercise prudence and care in selecting trust investments, with an eye toward potential income as well as potential risk.[38]

In *Amory*, the remainder beneficiaries of a testamentary trust brought an action against the trustees, alleging that the trustees' investment in "trading companies,"[39] such as the stock of manufacturing and insurance companies, was imprudent and therefore rendered the trustees liable for the decline in the value of stock comprising the trust corpus.[40] The remainder beneficiaries claimed that the trustees' should have invested in safer stocks such as bank shares or public funds (government backed instruments).[41]

The court, however, was quick to point out that significant risk was inherent in these types of stock as well since bank stocks were exposed (albeit indirectly) to industry risk via the notes underlying their stock.[42] Likewise, public fund investments backed by the government could suffer losses if the government's credit was suddenly impaired by an event such as war.[43]

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[34] Mayo Adams Shattuck, *The Development of the Prudent Man Rule for Fiduciary Investment in the United States in the Twentieth Century*, 12 OHIO ST. L.J. 491, 492 (1951).

[35] Robert J. Aalberts & Percy S. Poon, *The New Prudent Investor Rule and the Modern Portfolio Theory: A New Direction for Fiduciaries*, 34 AM. BUS. L.J. 39, 42 (1996).

[36] 26 Mass. (9 Pick.) 446 (1830).

[37] Langbein, *supra* note 30, at 644.

[38] *Amory*, 26 Mass. at 461.

[39] *Id.* at 459.

[40] *Id.*

[41] *Id.* Remainder beneficiaries took exception to the fact that the trustees "did not invest in the public funds, bank shares or other stock . . . but in trading companies, and so exposed the capital to great loss." *Id.*

[42] *Id.* at 460. The court noted that:

> The bank deals in bills of exchange and notes, and the value of its capital depends upon the solvency of its debtors . . . . In this way a bank becomes indirectly interested in navigation, trade and merchandise, to an extent very little, if any, short of the trade in which manufacturing companies engage. The capital in both cases may be lost by the conduct of those who direct their affairs, notwithstanding the exercise of reasonable prudence and discretion.

Id.

[43] *See id.* at 461. "If the public funds are resorted to, what becomes of the capital when the credit of the government shall be so much impaired as it was at the close of the last war?"). The court also noted "it may well be doubted, if more confidence should be reposed in the engagements of the public [i.e. public fund investments], than in the promises and conduct of

In light of the fact that even investments in real estate that were thought relatively safe and "as firm as the earth itself"[44] could suffer great value fluctuations and even fail altogether,[45] the court did not find that the trustees took excessive investment risks and refused to hold the trustees liable for the trust's investment losses.[46] The court established a standard of care, to become known as the Prudent Man Rule, that stated:

> All that can be required of a trustee to invest, is, that he shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested.[47]

The court found that the trustees had met this requisite standard of care as they had exercised the necessary level of skill and discretion in selecting the trust's investments.[48]

Amory was noteworthy in that it represented the court's attempt to grant flexibility to trustees in making investment decisions for the trust.[49] The court held that prudent investing involved considering both the "probable income"[50] and the "probable safety of the capital to be invested,"[51] but did not limit the range of assets trustees could invest in.[52] Thus, practitioners and scholars came to equate the Prudent Man Rule established in *Amory* with judicial approval to invest trust assets in corporate stocks and bonds[53] that were prohibited at that time under English law.[54]

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private corporations which are managed by substantial and prudent directors." *Id.* at 460.

[44] *Id.* at 461.

[45] *Id.*

[46] *Id.* at 463.

[47] *Id.* at 461.

[48] *Id.* at 463.

[49] *See* John H. Martin, *A Preface to the Prudent Investor Rule*, 132 TR. & EST. 42, 42-43 (Nov. 1993); C. Boone Schwartzel, *Is the Prudent Investor Rule Good For Texas?*, 54 BAYLOR L. REV. 701, 711 ("The prudent man rule was one developed in *Amory* and later embraced by the states primarily to give trustees more flexibility to meet the needs of the current beneficiary . . . .").

[50] *Amory*, 26 Mass. at 461.

[51] *Id.*

[52] *Id.*

[53] Langbein, *supra* note 30, at 644; Schwartzel, *supra* note 49, at 709 (quoting *Amory*, 26 Mass. at 461). *Amory* held that "'it will not do to reject . . . stocks as unsafe'" *per se*. Schwartzel, *supra* note 49, at 709 (quoting Amory, 26 Mass. at 461).

[54] Langbein, *supra* note 30, at 643; Sjur Midness, *Minnesota's Prudent Investor Rule: Aligning Law With Practice*, 23 WM. MITCHELL L. REV. 713, 715 (1997). "Absent a provision in the trust instrument authorizing the trustee to invest in other securities, the only proper investment was government securities" according to the old English rule. *Id.*

Although the Prudent Man Rule seemed to endorse flexibility and permit reasoned discretion in making investment choices, this Rule came to signify rigidity and even an outright prohibition on the use of many types of investment vehicles.[55] The case of *King v. Talbot*[56] in 1869, is credited with first establishing a narrow interpretation of the Prudent Man Rule, which imposed severe constraints on trustees.[57]

King involved a testamentary trust with a corpus of approximately $45,000, which represented the combined amounts of $15,000 that the testator bequeathed to each of his three children.[58] The trust document instructed the trustees to pay the income to the children to the extent necessary for their maintenance and education, and to pay the remainder of the trust assets to the children when they reached the age of majority.[59] The children brought an action against the trustees for losses the trust incurred as a result of the trustees' decision to invest in the stock of various railroad companies and the Hudson canal company.[60] The court not only held that the trustees investment in these companies was improper,[61] but also went further in holding that any exposure of trust funds to risk of loss or gain stemming from the failure or success of a business was necessarily imprudent.[62]

The holding in *King* essentially amounted to a prohibition on investment in corporate stocks,[63] and unduly limited trust investments to fixed maturity instruments like bonds and some interests in real estate.[64] The *King* decision, also known as the New York or English rule,[65] contrasted sharply to the

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[55] Edward C. Halbach, Jr., *Trust Investment Law in the Third Restatement*, 77 IOWA L. REV. 1151, 1151-52 (1992); Midness, *supra* note 54, at 718 (citing Shattuck, *supra* note 34, at 499) (noting that trust investment law initially rejected the flexibility of the *Amory* rule and instead embraced a more rigid investment rule).

[56] 40 N.Y. 76 (1869).

[57] Martin D. Begleiter, *Does the Prudent Investor Need the Uniform Prudent Investor Act—An Empirical Study of Trust Investment Practices*, 51 ME. L. REV. 27, 32 (1999). The author notes that *King* left a "pernicious" legacy marked by unnecessarily rigid investment rules. *Id.*

[58] *King*, 40 N.Y. at 87.

[59] *Id.*

[60] *Id.* at 85-90.

[61] *Id.* at 89.

[62] *See id.* at 88. The court held that whenever funds are held in trust, "it is not . . . within any just idea of prudence, to place the principal of the fund in a condition, in which, it is necessarily exposed to the hazard of loss or gain, according to the success or failure of the enterprise in which it is embarked . . . ." *Id.*; *see also* Begleiter, *supra* note 57, at 32.

[63] *See* Begleiter, *supra* note 57, at 32 (citing *King v. Talbot* 40 N.Y. at 88). The court in *King* "rejected investments in common stocks, believing that by so investing the trustees had in effect delegated the performance of the trust to the corporate directors." *Id.*

[64] Shattuck, *supra* note 34, at 495.

[65] Midness, *supra* note 54, at 718-19; Shattuck, *supra* note 34, at 496.

Prudent Man Rule that advocated broad trustee investment discretion. *King*'s constriction of a trustee's liberty to make investment decisions, however, gained wider acceptance among the states (especially states with large concentrations of capital), as it provided a strong safeguard against potential financial havoc that inexperienced and ignorant trustees could wreak.[66]

King's highly restrictive treatment of trustees regarding investments ultimately led to late nineteenth century predominance of legal list jurisprudence[67] in the majority of states whereby trustees were bound to specific sets of investments pre-approved by state legislatures.[68] The legal lists typically permitted trust investment primarily in fixed income or fixed maturity securities such as bonds and excluded equity securities like stocks.[69] The law strongly discouraged a trustee from investing in stocks by making him a "guarantor"[70] against any declines in value.[71] Courts in numerous states deemed improper those trust investments in securities outside of the securities explicitly authorized in legal lists.[72]

The use of legal lists to constrain trustee investment discretion and the virtual common law prohibition on investment in stocks had myriad disadvantages. The restriction of trust investments to bonds led inadvertently to the unfair treatment of income and remainder beneficiaries.[73] Fixed maturity investments often provided a steady stream of interest income to

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[66] Begleiter, *supra* note 57, at 32 (noting that "permissible investments over time became quite restricted" in the early twentieth century); Shattuck, *supra* note 34, at 499.

[67] Begleiter, *supra* note 57, at 32; Shattuck, *supra* note 34, at 499.

[68] Jeffrey N. Gordon, *The Puzzling Persistence of the Constrained Prudent Man Rule*, 62 N.Y.U. L. REV. 52, 87 (1987); Shattuck, *supra* note 34, at 503 (citing ALA. CODE tit. 58, § 47 (1940); GA. CODE ANN. §§ 108-417 (1933); OHIO REV. CODE ANN. §§ 10506-41 (West 1910)).

[69] Bevis Longstreth, *Modern Investment Management and the Prudent Man Rule* 12 (1986); *see also* Shattuck, *supra* note 34, at 503 (citing NEB. REV. STAT. §§ 24-601 (1943)). Some of the legal lists allowed investment in preferred and common stocks. Shattuck, *supra* note 34, at 503. There were, however, numerous conditions such as limitations on the amount that could be invested in such equities, required investment service ratings, minimum earnings ratios, etc. *Id.*

[70] Shattuck, *supra* note 34, at 499.

[71] *Id.*

[72] Williams v. Cobb, 219 F. 663, 667 (2d Cir. 1914) (holding that trustees had no right to invest in stock of a national bank because under Wisconsin law, trustees were permitted to invest only in real estate, government securities, mortgage bonds, and preferred stock of railroad companies). Investment in bank stocks was not authorized by the Wisconsin legislature. *Id.*; Mathews v. Sheehan, 57 A. 694, 697 (Conn. 1904) (holding that an administrator or executor is not permitted to invest in trade, manufacturing, stock speculation, where the trust fund is placed at risk); Penn v. Fogler, 55 N.E. 192, 199 (Ill. 1899) (holding that a trustee may be subject to liability unless he invests in government or real estate securities or other court-approved securities because investing in stock or shares of private corporations would expose the trust funds to "fluctuations of trade").

[73] Shattuck, *supra* note 34, at 500.

which the income beneficiary was solely entitled, but such investments provided little or no appreciation in overall value in which the remainder beneficiary could take advantage.[74] In times of low interest rates and dollar devaluation, the income beneficiary suffered along with the remainder beneficiary as he saw a steadily shrinking inflow of interest income to support his needs.[75] Critics of the legal list rule argued in favor of permitting investment in stock to counterbalance the fluctuations of the bond market.[76]

Furthermore, the fact that returns on trust investment in states subscribing to the Prudent Man Rule were typically two percent higher than returns in states adhering to the legal list rule[77] also contributed to discontent with the legal list rule.

Lawyers and lawmakers began to question the prudence of the legal list rule as equity capital was a necessary and vital component of free enterprise.[78] Keeping the vast expanse of trust wealth out of the reach of the equity market could detrimentally impact business development and commercial enterprise.[79]

Further impairing the usefulness of the legal list method for trust investment was the fact that a dwindling number of securities qualified for inclusion in the legal lists.[80] For instance, in New York, the volume of "legal investments"[81] declined by over sixty percent between 1931 and 1939, or from $7.6 billion to $2.58 billion.[82] Coupled with the declining number of securities eligible for legal-list approval was a waning of public faith in bond values during this Great Depression era.[83] People confronted the startling reality that

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[74] *Id.*

[75] *Id.*

[76] *Id.* (citing 6 SEC ANN REP.); *see also* 1994 PRUDENT INVESTOR ACT, *supra* note 7, § 2 cmt. Investment in long-term bonds appeared well-suited for trust investment given their stability. 1994 PRUDENT INVESTOR ACT, *supra* note 7, § 2 cmt. Bonds, however, carried more risk than originally thought in the form of inflation risk. *Id.*

[77] Shattuck, *supra* note 34, at 501.

[78] Austin Fleming, *Prudent Investments: The Varying Standards of Prudence*, 12 REAL PROP. PROB. & TR. J. 243, 245 (1977); Shattuck, *supra* note 34, at 501.

[79] Christin V. Adkins, *Oklahoma Uniform Prudent Investor Act and Its Influence on Oklahoma Trust Investment Law*, 22 OKLA. CITY U. L. REV. 1235, 1239 (1997) (citing Bruce Stone, *The Prudent Investor Rule: Conflux of the Prudent Man Rule with Modern Portfolio Theory*, 229 PLI/EST 9, 14 (1993)) (noting that "unlike stocks, statutorily permitted investments ([such as] government bonds and secured mortgages) did not recover their value once economic conditions improved" after the Great Depression); Shattuck, *supra* note 34, at 501.

[80] *See* Fleming, *supra* note 78, at 244 (noting the impracticability of the legal list jurisprudence); Shattuck, *supra* note 34, at 500.

[81] Shattuck, *supra* note 34, at 500.

[82] *Id.*

[83] *Id.*

even investment in government securities and assets "entailed some economic risks."[84]

These many weaknesses inherent in the rigid legal list rule resulted in a gradual shift among states to the more flexible Prudent Man Rule beginning in 1939.[85] Indeed, after 1940, many courts avidly embraced the Prudent Man Rule.[86] By 1951, almost half of the states had adopted some form of the Prudent Man Rule.[87]

2. *Evolution and development of modern investment rules*

During the second half of the twentieth century, cataclysmic changes took place in the area of trustee investment law. These transformations were attributable in large part to the advancement of economic concepts and models such as Modern Portfolio Theory, that forever changed the way the capital market was viewed.

The popularization of Modern Portfolio Theory (MPT) in the 1990s initiated major shifts in investment guidelines and regulations pertaining to trusts.[88] MPT changed the way investment risk was viewed and calculated, leading to the currently accepted concept that high-risk, high-return stocks could be beneficial to overall investment portfolio performance.[89]

In the 1950s, Professor Harry M. Markowitz first developed basic MPT principles while pursuing a Ph.D. in economics at the University of Chicago.[90]

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[84] Jeffrey J. Rachlinski, *Behavioral Economics Law and Psychology: Heuristics and Biases in the Courts: Ignorance or Adaptation?*, 79 OR. L. REV. 61, 75 (2000) (citing Shattuck, *supra* note 34, at 496-501).

[85] Shattuck, *supra* note 34, at 501 ("The combined effect of these factors, beginning with the year 1939, led to a series of desertions from the ranks adherent to the 'legal list' rule.").

[86] Rand v. McKittrick, 142 S.W.2d 29, 33 (Mo. 1940) (holding that investment of trust funds in stock was not imprudent as the trustees exercised "that degree of care and prudence, when making investments of trust funds, as is required"); St. Louis Union Trust Co. v. Toberman, 140 S.W.2d 68, 73 (Mo. 1940) (holding that investment of trust funds in company stock may be a proper investment and recognizing that there are corporate stocks "of which the most prudent and cautious persons are accustomed to invest their savings with a primary view to the safety and permanency of their investments").

[87] Shattuck, *supra* note 34, at 502-03.

[88] Avishai Glikman, *Estates and Trusts: The New Uniform Principal and Income Act: Friend or Foe?*, 31 MCGEORGE L. REV. 463, 467 (2000) (citing Brantley Phillips, Jr., Note, *Chasing Down the Devil: Standards of Prudent Investment Under the Restatement (Third) of Trusts*, 54 WASH. & LEE L. REV. 335, 342 (1997)) ("Modern Portfolio Theory revolutionized the world of fiduciary investment in the 1990s.").

[89] Edward A. Moses et al., *Modern Portfolio Theory and the Prudent Investor Act*, 30 AM. C. TR. & EST. COUNS. J. 166, 170 (2004).

[90] *Id.* at 167. Professor Markowitz received the Nobel Prize in Economic Sciences for his role in developing MPT. *Id.*

MPT was revolutionary in that it demonstrated that portfolio risk was not simply the weighted average of expected standard deviations of the assets comprising the portfolio, but also "encompass[ed] the inter-asset correlations or how each asset moves with every other asset in the portfolio."[91] In other words, the degree to which individual stocks respond (increasing or decreasing in value) in unison to certain economic conditions could exert a critical influence on total portfolio risk.[92]

To illustrate, consider two highly correlated stocks D and E with values that both increase sharply in response to low interest rates and low oil prices, and decrease sharply in response to high interest rates and high oil prices.[93] Since both of these stocks exhibit the same behavior in response to the two economic factors under consideration, interest rates and oil prices, a portfolio consisting solely of these two stocks would not be diversified.[94] There would be no amelioration of the volatility inherent in interest rates and oil prices because there would be no asset that would rise to offset the loss in value of D and E during times of high interest rates and high oil prices.[95]

While two stocks that have a high, positive correlation with one another may decrease portfolio diversification and thereby increase investment risk, stocks that have low, positive correlation (or negative correlation) with each other could increase portfolio diversification and decrease risk.[96] In fact, portfolio risk calculated using the MPT method could actually be lower than the lowest expected risk level of any of the individual assets in the portfolio,[97] demonstrating that "the contribution of an individual asset to the riskiness of a portfolio depends more on its correlations than on its variability."[98]

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[91] *Id.* at 168; *see also* Deborah M. Weiss, *Pension Benefit and Legal Investment Law: The Regulation of Funded Social Security*, 64 BROOKLYN L. REV. 993, 995 (1998) ("[T]he central insight of portfolio theory is that risk is not additive: two properly chosen assets will generally be less risky than either asset alone.").

[92] Moses, *supra* note 89, at 168.

[93] *Id.* at 169.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *See id.* To illustrate, consider the following: Stock A (Expected return = 4.60%, expected risk = 5.62%) and Stock B (Expected return = 7.30%, expected risk = 5.92%). *Id.* Using the following equation, the standard deviation or risk of a portfolio comprised 50% of Stock A and 50% of Stock B would be 4.66% and the expected return for the portfolio would be 5.95%:

$$\sigma_{AB} = \sqrt{w2_A\sigma2_A + w2_B\sigma2_B + 2w_Aw_B\rho_{AB}\sigma_A\sigma_B}$$

σ_i = standard deviation (or risk) of i.

w_i = weight assigned to asset i in the portfolio.

ρ_{ij} = correlation between stocks i and j.

[98] Moses, *supra* note 89, at 173; *see also* Weiss, *supra* note 91, at 995.

This phenomenon in which overall portfolio risk could be reduced by the addition of investment assets that exhibited little correlation or negative correlation with other portfolio assets is known as the *portfolio effect*.[99] Due to the *portfolio effect* one could conceivably invest in higher risk, higher return stocks without increasing the overall portfolio risk if these stocks exhibited little or negative correlation with each other or with the existing stocks in the portfolio.[100] Thus, the trustee's duty to construct the most efficient portfolio (or that portfolio yielding the highest expected return for a given level of risk)[101] would necessarily entail considering investment in some riskier assets that boasted higher returns.[102]

MPT's novel method of overall portfolio risk calculation and its recognition that high risk, high return assets might be necessary components of the most efficient portfolio, granted more flexibility to trustees regarding investment decisions.[103] Trustees were no longer limited to investing only in those low risk assets that a prudent man would invest in.[104] On the contrary, trustees were now required to consider a substantially broader array of investment instruments so as to fulfill the duty of adopting a portfolio with the maximum return for the acceptable level of risk.[105]

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[99] Moses, *supra* note 89, at 170; *see also* Lawrence A. Cunningham, *The Essays of Warren Buffett: Lessons for Corporate America Compiled and Introduced by Lawrence A. Cunningham*, 19 CARDOZO L. REV. 1, 12 (1997). In describing MPT's portfolio effect, "you can eliminate the peculiar risk of any security by holding a diversified portfolio, that is, it formalizes the folk slogan 'don't put all your eggs in one basket.'" Cunningham, *supra* note 99, at 12.

[100] *See* R.A. BREALEY, AN INTRODUCTION TO RISK AND RETURN FROM COMMON STOCKS 103 (2d ed. 1983). If stock prices do not react or move together in response to certain economic events, "the risk of a diversified portfolio will be less than the average risk of the separate holdings." *Id.*

[101] Moses, *supra* note 89, at 170.

[102] *See id.* at 173. "A fiduciary who rejects risky assets without considering their possible role in enhancing portfolio returns is inconsistent with the [Prudent Investor] Rule and MPT." *Id.*

[103] *See* Edwin J. Elton & Martin J. Gruber, *The Lessons of Modern Portfolio Theory, in* MODERN INVESTMENT STRATEGY AND THE PRUDENT MAN RULE 161, 190 (Bevis Longstreth ed.; 1986). A widely accepted tenet of MPT is that "[t]he only way to increase the return of an efficient portfolio is to increase its risk. A manager must be judged in terms of both the risk and the return. Placing total emphasis on risk would force all managers to hold the risk-free asset and to give up returns." *Id.*

[104] *Id.* MPT instructs that "[w]hile it is necessary to be careful of non-traded assets and the transaction costs associated with them, all assets should be considered as appropriate candidates for a portfolio." *Id.* The Uniform Prudent Investor Act that is based upon MPT, works to "free trustees from the old preoccupation with avoiding speculation." Langbein, *supra* note 30, at 650.

[105] *See* Halbach, *supra* note 55, at 1169 ("Sound diversification is fundamental to the management of uncompensated risk. It is, therefore, ordinarily required of trustees . . . .").

Along with the growing acceptance of MPT in the 1990's and its emphasis on considering higher risk, higher return stocks when constructing the optimal portfolio,[106] came the need to grant trustees greater flexibility in selecting investment assets.[107] There was also a shift in the perception of the proper function of the trustee.[108] While the principal role of the trustee had originally been that of a wealth conservator,[109] the trustee eventually became regarded as a wealth manager.[110] Recognizing this need, Restatement writers set to work in redefining the old Prudent Investor Rule such that trustees would gain the freedom to invest in a wider range of assets with the aim of maximizing return for the accepted level of risk.[111] The American Law Institute approved the Restatement (Third) of Trusts containing the revised Prudent Investor Rule, and released the final text in 1992.[112] The National Conference of Commissioners on Uniform State Laws codified the basic elements of the Restatement's Prudent Investor Rule[113] into the Uniform Prudent Investor Act (Prudent Investor Act) in 1994.[114]

The Prudent Investor Act itself acknowledges the far-reaching changes that have resulted from the advancement of new economic theories such as the MPT.[115] The Prudent Investor Act further states that it was developed in order to respond to such new knowledge.[116] The Prudent Investor Act clearly attempts to expand trustee investment discretion in a number of ways.

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[106] Glikman, *supra* note 88, at 467. "Modern Portfolio Theory revolutionized the world of fiduciary investment in the 1990s." *Id.*

[107] Langbein, *supra* note 30, at 650.

[108] RESTATEMENT (THIRD), *supra* note 21, ch. 7, topic 5, introductory note 4. "Modern experience with inflation" has taught that trustees must do more than simply preserve corpus, they must consider "the real value of corpus" taking inflation into account, and must recognize that "a deliberate effort to achieve real growth in some trust estates" may be required. *Id.*

[109] *See* Shattuck, *supra* note 34, at 492 ("[I]magination was not permitted to the trustee. He was to act as a conservator and not as a manager.").

[110] RESTATEMENT (THIRD), *supra* note 21, ch. 7, topic 5, introductory note 4.

[111] *Id.* § 227 cmt. e. The new prudent investor rule:

> Despite its requirement of caution, does not classify specific investments or courses of action as prudent or imprudent in the abstract. The rule recognizes that what may be underproductive of trust accounting income or risky—or even characterized as speculative—in isolation, or in a different context, may play a role in an investment strategy that contributes to the trustee's compliance with the requirement of caution.

Id.

[112] *Id.* ch. 7.

[113] *Id.* § 227(a)-(b). The Restatement's Prudent Investor Rule contains many important elements that were incorporated into the Uniform Prudent Investor Act such as the emphasis on evaluating trust portfolios in totality rather than evaluating the individuals investments comprising the portfolio in isolation. *Id.*; *see also infra* Part II.A.2.

[114] 1994 PRUDENT INVESTOR ACT, *supra* note 7.

[115] *Id.* Prefatory Note.

[116] *Id.*

First, the Act abrogates all categorical prohibitions on types of investments, expressly stating that "the trustee can invest in anything"[117] so long as the investment "plays an appropriate role in achieving the risk/return objectives of the trust and meets the other requirements of prudent investing."[118] Prudent investing as defined in the Prudent Investor Act involves taking into account the specific circumstances surrounding the trust arrangement such as the trust purpose, terms, and distribution requirements.[119]

Second, the Act states that a trustee's investment decisions will be "evaluated not in isolation but in the context of the trust portfolio as a whole and as a part of an overall investment strategy."[120] This provision is in keeping with one of the most important tenets of MPT, namely the *portfolio effect*. MPT emphasizes that a higher risk, higher return asset standing alone might generate some concern; however, including such an asset in the investment portfolio could substantially lower total portfolio risk depending on the correlation of that asset to the other assets.[121] Hence, the Prudent Investor Act's recognition that the performance of the total portfolio should serve as the basis for evaluating trustee investment decisions, facilitates the use of MPT investment strategies.

Third, the Prudent Investor Act imposes an affirmative duty upon the trustee to diversify the investment portfolio unless the trustee has a reasonable basis for asserting that the trust purposes are "better served without diversifying."[122] The Prudent Investor Act (and its underlying MPT foundation), with its emphasis on investment diversification and its expansion of acceptable investment vehicles for the trust funds,[123] endowed trustees with greater responsibility and greater flexibility in performing the investment function.[124]

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[117] *Id.*

[118] *Id.*; *id.* § 2(e) ("A trustee may invest in any kind of property or type of investment consistent with the standards of this [Act].") (alteration in original); *see also infra* Part II.A.2.

[119] 1994 PRUDENT INVESTOR ACT, *supra* note 7, § 2(a).

[120] *Id.* § 2(b).

[121] *See* Cunningham, *supra* note 99, at 12; Moses, *supra* note 89, at 172-73.

[122] 1994 PRUDENT INVESTOR ACT, *supra* note 7, § 3.

[123] *See* Langbein, *supra* note 30, at 646-47. The Prudent Investor Act brought "great changes in the law" including a duty to diversify the trust investment portfolio and an elimination of the "old preoccupation with avoiding speculation." *Id.* at 645; Glikman, *supra* note 88, at 467-68.

[124] Langbein, *supra* note 30, at 651-53. The investment flexibility promoted by the Prudent Investor Act also resulted in the investment function "grow[ing] ever more complex" with "less reason to believe that nonspecialists are fit to conduct it." *Id.* at 651. This growing complexity contributed to the Prudent Investor Act's abrogation of the non-delegation rule that had previously prevented trustees from delegating the investment decisions even to trained financial experts. *Id.* at 651-52.

B. Fiduciary Allocation Duties

Original laws governing allocation of investment earnings between income and principal were relatively simple at first as allocation decisions were made according to the form of the earning (i.e. whether in the form of rents, dividends, capital gains, interest, etc.).[125] These allocation rules, however, made it difficult for the trustee to invest according to the new principles of MPT and the Prudent Investor Act.[126] Hence, later allocation laws were injected with greater flexibility.[127]

1. Original principal and income allocation rules

For most of the twentieth century, trust earnings were allocated to income or principal according to how those earnings were generated. Money paid to the trust in exchange for the use of trust property, such as interest, rents, and cash dividends, was automatically regarded as income and therefore allocated to income beneficiaries.[128] In contrast, money paid to the trust in the sale of trust assets and money received as a result of debt collection, were accrued to the principal and allocated to remainder beneficiaries.[129]

Even with this relatively simple and straightforward approach to allocating trust earnings between principal and income, trustees sometimes encountered difficulty in making the allocation decision.[130] For instance, Pennsylvania common law advanced a complex rule that would provide greater accuracy in allocation, whereby dividends earned on a particular stock would first be allocated to the corpus to the extent necessary to preserve the book value of that stock.[131] Pennsylvania courts emphasized the importance of preserving the "original intact value so that the *status quo* of the remaindermen may be maintained,"[132] as a basis for applying this complicated rule.[133]

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[125] *See infra* Part II.B.1.

[126] Halbach, *supra* note 55, at 1171. The author notes that "[a]ny bright line between trust accounting 'income' and 'principal' produces conflict over the income and growth elements of portfolio return." *Id.*; Langbein, *supra* note 30, at 667 ("Traditional principal-and-income concepts will not survive in the world of MPT-driven investing.").

[127] *See infra* Part II.B.2.

[128] GEORGE G. BOGERT & GEORGE T. BOGERT, HANDBOOK OF THE LAW OF TRUSTS 408, 412, 415 (5th ed. 1973).

[129] *Id.* at 403.

[130] George G. Bogert, *The Revised Uniform Principal and Income Act*, 38 NOTRE DAME L. REV. 50, 50 (1963).

[131] *Id.* at 50 (citing Appeal of Smith, 21 A. 438 (Pa. 1891)).

[132] *In re* Estate of Harvey, 149 A.2d 104, 107 (Pa. 1959).

[133] *Id.*

In contrast, Massachusetts common law advocated a simple rule that allocated corporate dividends to principal or income depending upon the form of those dividends.[134] For example, cash dividends were added to income, and stock dividends were added to corpus.[135] Unlike the Pennsylvania courts, Massachusetts courts often declined to stress the importance of assiduously preserving the corpus for the remaindermen in favor of providing trustees with a clear and simple guiding principle to help ease the trustee's burden.[136]

The sharp contrasts between Massachusetts and Pennsylvania common law in this respect is not surprising. Pennsylvania courts have long been preoccupied with vigilantly guarding the value of the trust corpus for the beneficiaries as evidenced by the courts' tendency to limit trustee investments to those handful of carefully selected, virtually risk-free investments on the state legal list.[137] On the other hand, the Massachusetts Supreme Court subscribed to the Prudent Man Rule which granted trustees' greater investment flexibility,[138] but arguably created greater risk to the trust assets.[139]

In an effort to help resolve issues such as the question of how to allocate corporate dividends, the National Conference of Commissioners on Uniform State Laws ("NCCUSL")[140] approved the first UPIA[141] in 1931.[142] The 1931 UPIA resolved the conflicting treatment of dividends by following the Massachusetts common law approach mostly because that approach was simpler, and the benefits the remaindermen would derive from the use of the complex Pennsylvania rule would often be negligible.[143]

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[134] Bogert, *supra* note 130, at 50 (citing Talbot v. Milliken, 108 N.E. 1060 (Mass. 1915)).

[135] *Id.*

[136] Minot v. Paine, 99 Mass. 101, 108 (1868) ("A trustee needs some plain principle to guide him. . . . A simple rule is, to regard cash dividends, however large, as income, and stock dividends, however made, as capital.").

[137] Carwithen's Estate, 28 Pa. D. & C. 66, 82 (1937). "The law requiring legal investments takes hold if the will or deed is silent or if the discretion is not clearly given . . . ." *Id.* Even when the trustee is granted investment discretion, but only discretion to invest in "good securities," such language "[does] not give the trustee power to go outside of legal investments." *Id.*

[138] Harvard Coll. and Mass. Gen. Hosp. v. Amory, 26 Mass. (1 Pick.) 446, 461, 464 (1830).

[139] *See* Shattuck, *supra* note 34, at 494. The Prudent Man rule of *Harvard College* was a "rejection of . . . so-called 'safe investments.'" *Id.*

[140] NCCUSL is a conference composed of "practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed by state governments . . . to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical." About NCCUSL, http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=9 (last visited Dec. 10, 2005).

[141] UNIF. PRUDENT INVESTOR ACT (1931).

[142] Bogert, *supra* note 130, at 50.

[143] *Id.*

By 1959, NCCUSL felt that changes in law and business practices warranted the development of an updated UPIA.[144] Among the many issues that NCCUSL sought to resolve with a new UPIA was the criticism that the 1931 Act unfairly favored remainder beneficiaries with respect to distribution on earnings from natural resources investments,[145] and that many states faced difficulty in getting the 1931 Act to apply retroactively to existing trusts and estates.[146] Thus, there was disparate treatment of trusts depending upon whether the trust was established prior to a state's adoption of the 1931 UPIA (in which case the trust was subject to the old rules of principal and income allocation), or after the adoption of the UPIA (in which case the trust was subject to the provisions of the UPIA).

NCCUSL attempted to address the shortcomings of the 1931 UPIA as well as provide further allocation guidance by creating the Revised Uniform and Principal Act of 1962 ("RUPIA").[147] One of the RUPIA's most important provisions was the rule regarding the allocation of capital gains.[148] Although many courts and investors alike believed capital gains on investments to be properly allocable to income,[149] the RUPIA instructed that capital gains were to be added to the trust corpus.[150]

Trust allocation law thus underwent numerous changes and revisions throughout most of the twentieth century. It was not however, until the release of the 1997 UPIA[151] that revolutionary transformations in allocation practices began to take place.[152]

2. *Uniform Principal and Income Act of 1997 and 2000*

Although the RUPIA resolved many problems posed by the 1931 UPIA, the RUPIA created many difficulties itself. For instance, in establishing that capital gains should be allocated to principal,[153] the RUPIA created a disincentive to invest in securities that were likely to appreciate significantly even if these securities would maximize the overall value and income-

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[144] *Id.* at 51.

[145] *Id.*

[146] *Id.* at 52.

[147] REVISED UNIF. PRINCIPAL AND INCOME ACT (1962) [hereinafter RUPIA].

[148] Bogert, *supra* note 130, at 54 (citing RUPIA, *supra* note 147, § 6(c)).

[149] *Id.*

[150] RUPIA, *supra* note 147, § 6(c) ("All other distributions made by the company or trust, including distributions from capital gains . . . are principal.").

[151] 1997 UPIA, *supra* note 8.

[152] Albert D. Spalding, *Put Your Trust in Trustees*, 11-98 J. ACCT. 69, 71 (1998). The 1997 UPIA represented a significant change from the older versions of the UPIA. *Id.*

[153] *Id.*

generating potential of the trust assets.[154] The trustee's primary duty at the time of the RUPIA's issuance was to provide income to meet the income beneficiaries' needs and to avoid capital losses.[155] There was no incentive under the RUPIA for trustees to invest in securities with rapidly appreciating values because the high capital gains earned on these securities would be allocated to capital.[156] Given that the trustee did not have a duty to increase the capital (only a duty to prevent loss of capital), the effective result of RUPIA's capital gains mandate was to discourage investment in securities that tended to yield high capital gains.[157] Stated differently, the basic problem with RUPIA and all the prior principal-income allocation laws was that they often forced trustees to construct a portfolio that provided sub-optimal returns in order to achieve a particular income/principal allocation ratio.[158]

The widespread view that the trustee's primary function was to preserve wealth rather than attempt to generate maximum returns for the trust,[159] was at odds with MPT that stresses the importance of adopting an investment portfolio that yields the highest expected return for a given level of risk tolerance.[160] The Restatement's Prudent Investor Rule incorporated the teachings of MPT, requiring fiduciaries to consider how to produce the most efficient portfolio.[161] Scholars and practitioners recognized the need for principal and income allocations to likewise evolve in order to take advantage of the benefits of investing in accordance with the MPT approach.[162]

In response to these concerns regarding the RUPIA of 1962, NCCUSL developed a modified principal and income act, namely the UPIA of 1997.[163]

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[154] *Id.* at 70 ("In the past, trustees were concerned about a trust's accounting income, on one hand, and the avoidance of capital losses on the other.").

[155] *Id.*

[156] *Id.*; RESTATEMENT (SECOND) OF TRUSTS § 232 cmt. c (1959) [hereinafter RESTATEMENT (SECOND)].

[157] *See* Bogert, *supra* note 130, at 54. In reference to the Revised Prudent Investor Act rule that capital gains be allocated to capital/corpus, the author notes that no reasonably prudent trustees would seek to invest in securities that generated earnings primarily in the form of capital gains because the trustee's duty was to "produce a normal trust yield for the income account and to *preserve but not to increase* the capital account[.]" *Id.* (emphasis added).

[158] *See* Gordon, *supra* note 68, at 100-01. Rules that demand trust earnings allocation to principal or income depending on the manner in which the earnings were derived results in "a portfolio that is not optimally diversified" and that has "not been assembled with the objective of producing the greatest expected returns for the risk." *Id.*

[159] Glikman, *supra* note 88, at 467 (citing Sara Hansard, *States Pushing Trust Companies, Despite Kicks, Not Stocks*, INVESTMENT NEWS, Mar. 29, 1999, at 18, 19).

[160] Moses, *supra* note 89, at 167.

[161] *Id.* at 173.

[162] *See* Langbein, *supra* note 30, at 666 ("Traditional principal-and-income concepts [would] not survive in the world of MPT-driven investing.").

[163] 1997 UPIA, *supra* note 8.

The 1997 UPIA granted trustees much needed flexibility in allocating earnings between income and remainder beneficiaries by endowing trustees with the power to "adjust between principal and income to the extent the trustee considers necessary"[164] in order to fulfill the duty of impartiality.[165] Three years after the release of the 1997 UPIA, NCCUSL released the final draft of the 2000 UPIA, which was essentially identical to the 1997 UPIA except for the addition of a new section designed to further solidify the trustee's discretionary power.[166]

Trust law thus gradually evolved throughout the twentieth century, relaxing the tight restraints imposed upon trustees and ultimately culminating in two uniform acts that clearly and explicitly granted trustees the investment and allocation flexibility they required in order to make the most efficient use of the trust assets.[167]

III. IMPAIRMENT OF THE FIDUCIARY DUTY OF IMPARTIALITY

Increased investment and allocation discretion were granted to trustees via the Prudent Investor Act and UPIA with the worthy aim of improving total returns on trust assets.[168] These acts, however, may have generated an entirely new subset of problems, most notably, an impairment of the trustee's ability to fulfill the duty of impartiality.[169]

A. Problems Caused by the Uniform Prudent Investor Act and the Uniform Principal and Income Act

By increasing trustee investment and distribution flexibility, the Prudent Investor Act and UPIA freed trustees from the shackles that bound them to conservative investment securities that tended to provide less than optimal returns.[170] In so doing, however, these acts also eliminated many guidelines

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[164] *Id.* § 104(a).

[165] *Id.*

[166] This was accomplished by expressly stating that absent an abuse of discretion by the trustee, "[t]he court may not order a fiduciary to change a decision to exercise or not to exercise a discretionary power conferred by [the UPIA] . . . ." UNIF. PRINCIPAL AND INCOME ACT § 105(a)(2000) [hereinafter 2000 UPIA].

[167] *See* 1997 UPIA, *supra* note 8, Prefatory Note. One of the main purposes of developing the 1997 UPIA was "to provide a means for implementing the transition to an investment regime based on principles embodied in the Uniform Prudent Investor Act, especially the principle of investing for total return . . . ." *Id.*

[168] *Id.*

[169] *See infra* Part III.A.2.

[170] *See supra* Part II.

and rules that helped trustees fulfill their fiduciary duty of impartiality or the duty to treat income and remainder beneficiaries equally.[171]

1. General description of the duty of impartiality

In the case of a trust with two or more beneficiaries, the Prudent Investor Act requires the trustee to "act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries."[172] Similarly, the UPIA requires that trustees perform the allocation function "based on what is fair and reasonable to all of the beneficiaries . . . ."[173]

It is important to note that impartiality does not necessarily mean treating income and remainder beneficiaries equally. Both the Prudent Investor Act and the UPIA carve out exceptions that allow the trustee to favor one or more beneficiaries if the governing trust document explicitly instructs or if the trust document manifests the settlor's intent that certain beneficiaries be favored.[174] Thus, both the Prudent Investor Act and UPIA are *default rules* to be exercised only in the absence of guidance in the trust document regarding how the trustee should invest or allocate trust earnings.[175] By expressly requiring the trustee to perform his duties impartially, the Prudent Investor Act and the UPIA advance one of the principal tenets of trust law: that the trustee must not favor any class of beneficiaries unless the testator manifested such a clear intention to do so in the trust document.[176]

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[171] *See infra* Part III.A.1-2.

[172] 1994 PRUDENT INVESTOR ACT, *supra* note 7, § 6.

[173] 2000 UPIA, *supra* note 166, § 103(b); 1997 UPIA, *supra* note 8, § 103(b).

[174] *See* 2000 UPIA, *supra* note 166, § 103(b); 1994 PRUDENT INVESTOR ACT, *supra* note 7, § 1(b), cmt. In exercising the power to adjust allocation amounts between income and remainder beneficiaries, the trustee "shall administer a trust or estate impartially, . . . except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries." 2000 UPIA, *supra* note 166, § 103(b). The Prudent Investor Rule and other trust rules may be abrogated, modified or disregarded according to the terms of the trust document. 1994 PRUDENT INVESTOR ACT, *supra* note 7, § 1(b) cmt.

[175] *See* 2000 UPIA, *supra* note 166, § 103(b); 1994 PRUDENT INVESTOR ACT, *supra* note 7, § 1(b) cmt.

[176] RESTATEMENT (SECOND), *supra* note 156, § 183. "When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them." *Id.* By the terms of the trust document however, "the trustee may have discretion to favor one or more beneficiaries over others." *Id.* cmt. a.

2. *Impairment of the fiduciary duty of impartiality*

The Prudent Investor Act and UPIA may have increased trustee investment and distribution flexibility.[177] Scholars and practitioners, however, have criticized both acts for failing to provide adequate guidelines in exercising that flexibility.[178]

The Prudent Investor Act imposes upon the trustee an affirmative duty to diversify,[179] yet, even the act itself acknowledges that it does not offer standards or guidelines to determine the degree to which the trustee must diversify.[180] In contrast, the Prudent Man Rule, with its "emphasis on safety, preservation of the trust corpus and income productivity,"[181] steered the trustee in the direction of slanting investment strategies toward the interests of the income beneficiaries.[182] Thus, under the Prudent Man Rule's bias in favor of the income beneficiary, the trustee could seek "safe harbor"[183] by simply shunning investments of questionable risk even though they might offer slightly higher returns.[184] Unfortunately, the Prudent Investor Act offers no such valuable guidance to the trustee regarding how he should discharge his duty to diversify the investments. As a result, he is left mired in a quandary.[185] Given that diversification usually serves to benefit the

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[177] *See supra* Part II.A.

[178] Mark R. Gillett and Kathleen R. Guzman, *Managing Assets: The Oklahoma Uniform Principal and Income Act*, 56 OKLA L. REV. 1, 75 (2003). The authors state that the Oklahoma UPIA "grants the trustee discretion to make equitable adjustments . . . but does not mandate its exercise. In fact, the statute and the comments provide little guidance as to when the trustee should exercise its discretion, and extensive case law does not exist either in Oklahoma or in the other adopting states" to help interpret the acceptable use of EA. *Id.*; *see also* Glikman, *supra* note 88, at 471 n.85.

[179] 1994 PRUDENT INVESTOR ACT, *supra* note 7, § 3 ("A trustee shall diversify the investments of the trust unless the trustee reasonably determines . . . the purposes of the trust are better served without diversifying.").

[180] *Id.* § 3 cmt. ("There is no automatic rule for identifying how much diversification is enough."). *Id.*; *see also id.* (quoting RESTATEMENT (THIRD), *supra* note 21, § 227 cmt. e-h). The comments offer no further advice than to quote the Restatement's equally vague recommendation that "'[b]roader diversification is usually to be preferred in trust investing.'" *Id.*

[181] Schwartzel, *supra* note 49, at 705.

[182] *Id.* (citing RESTATEMENT (SECOND), *supra* note 156, § 232 cmt. b).

> Although the trustee is not under a duty to the beneficiary entitled to the income to endanger the safety of the principal in order to produce a large income, he is under a duty to him not to sacrifice income for the purpose of increasing the value of the principal.

Id.

[183] Schwartzel, *supra* note 49, at 706.

[184] *Id.*

[185] *Id.* "[T]he prudent investor rule materially dilutes or eliminates the fiduciary investment policy's traditional bias favoring the current beneficiary and leaving trustees much more in

remaindermen,[186] over or under-diversification due to unclear standards could result in inadvertent favoring or injury of the beneficiaries.[187]

The wide range of investment vehicles that trustees may now choose from, and the new liberty trustees have gained in distributing the earnings from those investments, places the trustee at greater risk of violating the duty of impartiality.[188] For instance, the Prudent Investor Act requires the trustee to consider tax consequences in making investment decisions,[189] but does not provide further guidelines about how to invest when certain tax situations or conditions arise.[190] The comments to the Prudent Investor Act acknowledge that it may be prudent for the trustee to invest in securities that yield tax-exempt interest because, although the yields may be relatively low, the high tax bracket beneficiary will realize greater economic benefit in earning smaller amounts of tax-free interest income than in earning larger amounts of heavily taxed interest income.[191] The Prudent Investor Act, however, leaves unanswered the question of how much of the trust corpus should be invested in tax-exempt, low yield securities.[192] The Prudent Investor Act does not even provide guidelines for determining how much of the trust corpus to invest in these types of securities. The trustee thus finds himself in a sticky situation: if he invests too heavily in tax-exempt securities, the remainder beneficiaries may decry the fact that the trustee did not invest sufficiently in securities with greater appreciation rates, i.e. growth stocks. On the other hand, the trustee who invests too sparsely in tax-exempt securities may find himself under attack by income beneficiaries that incurred adverse tax consequences.

The 2000 UPIA may also hamper the trustee's ability to act impartially with respect to all types of beneficiaries. Provisions that allow trustees to adjust principal and income assignments as the trustee deems necessary, create new

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doubt than before concerning how much risk they must assume in pursuit of higher returns." *Id.*

[186] Joel C. Dobris, *Changes in the Role and the Form of the Trust at the New Millennium, or, We Don't Have to Think of England Anymore*, 62 ALB. L. REV. 543, 569 (1998) ("[T]hese days we live in a total return world, where most of the apparent return is on equity, and comes in the form of capital gain.").

[187] Welch, *supra* note 6, at 26.

[188] *See id.* at 25 ("Granting trustee discretion is a double-edged sword. It confers flexibility to accomplish trust purposes, but also increases risks of mistake, abuse, and dispute.").

[189] 1994 PRUDENT INVESTOR ACT, *supra* note 7, § 2(c)(3).

[190] *Id.* § 2 cmt.

[191] *Id.*

[192] *See id.* § 2. The Prudent Investor Act provides only that "[a]mong [the] circumstances that a trustee shall consider in investing and managing trust assets" is "the expected tax consequences of investment decisions or strategies." *Id.* § 2(c). However, neither the text of the Prudent Investor Act nor the comments provide insight regarding how weighty the tax consideration is with respect to investing. *See id.* § 2.

problems since determining the "fair and reasonable"[193] amount of earnings each beneficiary is entitled to is a very subjective process.[194]

Extremely detrimental consequences can result when trustees are given insufficient guidance regarding how to invest and how to allocate those investment earnings to beneficiaries.[195] On one hand, trustees may attempt to diversify, maximize trust earnings, and otherwise comply with the Prudent Investor Act and the tenets of MPT.[196] Given the absence of sufficiently solid and objective allocation rules, however, the trustee may simply allocate subjectively and end up favoring one beneficiary at the expense of another, thus violating the duty of impartiality.[197]

On the other hand, a trustee fearful of violating the impartiality duty may invest in a manner that is completely evenhanded but may sacrifice a substantial portion of earnings potential in the process.[198] One researcher noted that confused trustees often took the latter approach, investing half of the trust assets in bonds and the other half in equities, thereby earning sub-optimal returns and disappointing all beneficiaries equally.[199]

While the Prudent Investor Act and UPIA have advanced the worthy aim of granting trustees the flexibility to optimize the return on total trust assets,[200] the acts have arguably impaired the trustee's ability to act impartially by eliminating many guideposts and safe harbors in favor of broad, subjective discretion.[201]

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[193] David Keene, A Primer on the Uniform Principal and Income Act: How Accounting Affects Trust and Estate Beneficiaries, http://leimberg.com/freeResources/truArticles/primerOnUniformPrincipal.asp (last visited Oct. 20, 2005).

[194] *Id.*

[195] *See* Ronald R. Volkmer, *Nebraska's Updated Principal and Income Act: Apportioning, Allocating, and Adjusting in the New Trust World*, 35 CREIGHTON L. REV. 295, 311 (2002) ("The shift in emphasis to the performance of the whole portfolio" is accompanied by a "tension between investing for total return and meeting the traditional income and principal allocations").

[196] *See supra* Part II.A.2.

[197] *See* Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581, 610 (noting that it may be problematic that trustees are allowed to act as fiduciaries for both current and future beneficiaries, as these two groups have competing interests).

[198] *See* Robert B. Wolf, *Defeating the Duty to Disappoint Equally—The Total Return Trust*, 32 REAL PROP. PROB. & TR. J. 45, 50-51 (1997).

[199] *Id.* ("[M]ost corporate fiduciaries are reluctant to invest less than one-half of their long-term trust portfolios in equity securities, simply because of the duty of impartiality. . . . With an even mix of stocks and bonds, one is currently able to generate only a net 3.9% return.").

[200] Schwartzel, *supra* note 49, at 704 (praising the Uniform Act's attempt to "liberate trustees to embrace modern portfolio theory, to expand the menu of permissible fiduciary investments").

[201] *Id.* at 706 (explaining that the Prudent Investor Act provides "'no objective, general legal standard'" and allows the determination of appropriate portfolio risk to become "'ultimately a matter for interpretation and judgment.'" (quoting RESTATEMENT (THIRD), *supra* note 21, § 227

B. Alternative Solutions

Two primary solutions emerge to the impartiality challenges posed by greater trustee allocation flexibility: Equitable Adjustment and Unitrust Conversion. Both of these methods, however, possess inherent strengths and weaknesses.[202]

1. Equitable Adjustment

The Equitable Adjustment (EA) allocation approach, described and incorporated in the 1997 UPIA,[203] involves the trustee making the initial allocations according to traditional allocation rules that use the form of the earnings (e.g. rents, dividends, interest, capital gain, etc.) as the basis for allocating to either principal or income.[204] Under the EA method, however, the trustee has the ability to reallocate the returns if he believes that the initial allocation improperly favors one type of beneficiary over another.[205] For instance, if the trustee's investment decisions yield an inappropriately low amount of income for the income beneficiary, the trustee could distribute a portion of the principal to the income beneficiary to compensate for the shortfall.[206]

In determining the degree to which he will reallocate returns, the trustee has substantial discretion.[207] As a guideline for determining how much income should properly be distributed to income beneficiaries, the trustee could set income as: (1) a fixed percentage of the trust principal; (2) an annuity value adjusted for inflation; (3) a pro-rata share of the total discounted cashflows that are expected to be distributed over the term of the trust; (4) the amount historically paid to those income beneficiaries; (5) a variable amount adjusted by changes in market indicators; or (6) any of a number of other values.[208]

These values, however, serve primarily as guideline or starting points.[209] In deciding how much income and/or principal allocations will be adjusted, the trustee must consider factors such as: (1) the nature, purpose, and duration of the trust; (2) the settlor's intent; (3) the circumstances of the beneficiaries;

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cmt. e)); Keene, *supra* note 193.

[202] *See infra* Part III.C.1.

[203] 1997 UPIA, *supra* note 8, § 104.

[204] Langbein, *supra* note 30, at 669.

[205] *Id.*

[206] Welch, *supra* note 6, at 26.

[207] *Id.* at 26-28.

[208] *Id.* at 26.

[209] *See* 2000 UPIA, *supra* note 166, § 104(b).

(4) the importance of liquidity to the beneficiaries of the trust; and (5) other aspects.[210] The EA method thus represents an allocation method that provides the trustee with substantial flexibility in deciding how to reapportion the returns between income and principal when application of traditional allocation rules results in excess allocation to one group of beneficiaries.[211]

2. *Unitrust Conversion*

Under the Unitrust Conversion ("UC") allocation approach, which is adopted from charitable remainder unitrusts,[212] all investment earnings for an accounting period, whether they be in the form of dividends, interest, capital appreciation, etc., are assigned to principal and are then partially distributed as income for that period to income beneficiaries in accordance with a spending formula.[213] This approach basically involves treating income and remainder beneficiaries as partners in the total investment earnings where the trustee's investment decisions should no longer be impacted whatsoever by traditional allocation rules.[214]

The UC allocation method thus represents a slightly more structured and objective apportionment procedure as allocation to beneficiaries are based upon a fixed percentage of the total trust assets.[215] Objectivity, however, is still present in the UC system as the trustee may exercise some discretion in selecting that fixed percentage.[216]

C. Comparison and Recommendation of Alternatives

Currently, twenty-five states and the District of Columbia allow trustees to use the EA method of allocation exclusively,[217] and four states allow trustees

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[210] *Id.*

[211] Welch, *supra* note 6, at 25.

[212] DUKEMINIER & JOHANSON, *supra* note 1, at 972.

[213] *See* Langbein, *supra* note 30, at 669. The spending formula for determining amounts to be distributed as income to income beneficiaries could be either a fixed percentage of the principal, or a variable rate like the inflation rate plus a certain percent. *Id.*

[214] Welch, *supra* note 6, at 25.

[215] Alyssa A. DiRusso & Kathleen M. Sablone, *Statutory Techniques for Balancing Financial Interests of Trust Beneficiaries*, 39 U.S.F. L. REV. 261, 282 (2005). The Unitrust Conversion method imparts some "stagnant requirements . . . ." *Id.*

[216] *Id.* at 282-83.

[217] These states include Alabama, Arizona, Arkansas, California, Colorado, Connecticut, D.C., Hawaii, Idaho, Indiana, Kansas, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, Virginia, West Virginia, and Wyoming. Paul S. Lee, Implementing Total Return Trusts (2003) (unpublished), http://leimberg.com/freeResources/truArticles/Implementing%20TRTs%20Leimberg.pdf.

to use the UC method of allocation exclusively.[218] Only ten states, however, currently enable trustees to use the EA method in conjunction with the UC method of allocation.[219] Since the UC and EA allocation methods both possess strengths and weaknesses, more states should be encouraged to allow trustees to employ both the UC and EA methods of allocation.

1. Comparison of alternatives

The EA method of allocation not only imparts greater flexibility to the trustee but also contains more subjectivity as the trustee must evaluate and frequently speculate about a number of factors such as whether the settlor intended to favor one type of beneficiary over another, and what constitutes a fair and reasonable level of earnings to allocate to the income and remainder beneficiaries.[220] The trustee then uses this subjective analysis as a basis for periodically (usually annually) adjusting the income and/or principal allocation amounts.[221]

In contrast, the UC method of allocation provides much greater limits on trustee allocation discretion as the trustee becomes somewhat locked into using a specific allocation formula.[222] The UC method of allocation appears preferable to the EA method in this respect as it limits trustee allocation discretion, and thereby limits the potential for the exercise of erroneous, imprudent, or negligent judgment[223] that could harm either the income or remainder beneficiaries. Limiting the potential for harmful or impartial treatment of the beneficiaries is of heightened concern given that the UPIA restricts the ability of the courts to second guess the trustee's discretion in adjusting the principal-income allocation amount.[224] Section 105 of the UPIA makes clear that "the court may not order a fiduciary to change a decision to exercise or not exercise a discretionary power"[225] of allocation unless there was an abuse of discretion.[226] Furthermore, the UPIA asserts a narrow

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[218] These four states include Delaware, Illinois, Iowa, and South Dakota. *Id.*

[219] These ten states include Florida, Maine, Maryland, Missouri, New York, North Carolina, Oregon, Pennsylvania, Texas, and Washington. *Id.*

[220] Welch, *supra* note 6, at 27-28.

[221] DiRusso, *supra* note 215, at 281-82; Welch, *supra* note 6, at 27-28.

[222] *See* Welch, *supra* note 6, at 27-28. "Rather than granting discretion to make discrete, subjective judgments about income adjustments every year . . . [UC statutes] grant discretion to elect into a relatively fixed regime of determining current return by an objective percentage of asset value." *Id.*

[223] *Id.*

[224] 2000 UPIA, *supra* note 166, § 105(a).

[225] *Id.*

[226] *Id.*

definition of "abuse of discretion,"[227] explicitly stating that it is not an abuse of discretion just because the court might have exercised the discretionary adjustment power in a different way or might not have exercised the power at all.[228] Given the UPIA's reluctance to subject the trustee's allocation decisions to outside scrutiny and control, the trustee's partial allocations could conceivably be more difficult to identify and correct. Hence, there is strong argument for building safeguards into the UPIA that will restrict trustee allocation discretion, such as the UC's fixed allocation formula.[229]

The UC's more limited tolerance for trustee discretion cuts both ways however. The greater rigidity of the UC's allocation guidelines could pose problems under certain circumstances, such as during times of a bear market,[230] or when unexpected events suddenly increase the income beneficiary's income needs.[231] Clearly, neither the EA nor the UC method alone will serve as a panacea to the problems of trust allocation.[232]

2. Recommended alternative

Given that both the UC and EA methods of trust earnings allocation have strengths as well as weaknesses, the optimal allocation method will involve a combination of both of these methods. A number of additional guidelines, however, must also be implemented in order to enhance the trustee's ability to fulfill the duty of impartiality with respect to earnings allocation while still allowing for maximum returns on trust investments. The ideal principal and income allocation law should therefore contain the following features.

First, the EA's power to adjust provision should be maintained in the UPIA. The ideal principal and income allocation law will contain language that clearly and explicitly grants the trustee discretion to adjust between principal and income. As noted previously, trustees must have freedom to allocate between principal and income because investment strategies that maximize the total return on investment for the trust might require the trustee to invest more heavily in securities that provide greater benefit to the income beneficiaries

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[227] *Id.*

[228] *Id.*

[229] James C. Hardin & Laura Pleicones, *New Regime for the Total Return Trust: The 2001 South Carolina Uniform Principal and Income Act*, 14 S.C. LAWYER 26, 30-31 (2002).

[230] A bear market is characterized by declining securities prices. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).

[231] Gerald J. Monchek, The TRU Debate: If Total Return Unitrusts Are So Good, Then Why Are They Not Already More Widely Accepted by Practitioners?, http://leimberg.com/freeResources/truArticles/TRU%20THESIS%20NOVEMBER%202002.pdf (last visited Oct. 20, 2005).

[232] *See infra* Part III.C.2.

than to the remainder beneficiaries, or *vice versa*.[233] In other words, trust accounting and allocation laws that require the income generated by certain securities to be allocated to either principal or income depending on the security type, may force the trustee to allocate excessive amounts of return to either the income or remainder beneficiary.[234] In so doing, the trustee may have maximized the value of the trust but may have simultaneously violated the duty of impartiality.[235] Thus, it is imperative that the trustee be allowed to adjust the allocations between income and principal so that he may be free to achieve optimum investment returns without fear that accounting and allocation laws will cause those returns to be inequitably divided between income and remainderman.[236]

Incorporation of EA into the allocation law will achieve this goal of enabling the trustee to invest for optimal return, unhampered by the worries that the types of investments he chooses will unfairly benefit one type of beneficiary at the expense of another.[237] The broad language of EA that grants substantial authority to the trustee to adjust the principal and income allocations is crucial. This explicit grant of extensive adjustment powers to the trustee is necessary as courts have erred by inappropriately restricting the trustee's authority to allocate between principal and income even where the trust document affirmatively and unequivocally grants the trustee the power to allocate according to his discretion.[238] For instance, in *Beattie v. J.M. Tull Foundation*[239] the appellate court held that the lower court erred in sustaining the plaintiff's claim that the trustee had improperly failed to allocate a sufficient portion of income from capital gains to the income beneficiary.[240] The terms of the will specifically "vest[ed] the trustee with broad discretionary powers . . . includ[ing] the unfettered right to apportion between income and principal."[241] Thus, in reversing the lower court's decision, the appellate court held that the trustee had the right to use discretion in allocating capital gains from the sale of stock to income and/or principal as she saw fit.[242]

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[233] *See supra* Part III.A.2.

[234] *See supra* Part III.A.2.

[235] *See supra* Part III.A.2.

[236] Langbein, *supra* note 30, at 666.

[237] *Id.*

[238] *See* Beattie v. J.M. Tull Foundation, No. 97-2746, 1999 U.S. App. LEXIS 7522 (4th Cir. Apr. 16, 1999).

[239] *Id.*

[240] *Id.* at *23.

[241] *Id.* at *8-9.

[242] *Id.* at *18 ("[T]he most reasonable interpretation of the will, and that which best effectuates [the testator's] intent, is one that permitted the trustee, in her discretion, to apportion capital gains between income and principal.").

Furthermore, the explicit grant of extensive adjustment powers to the trustee in the form of the EA method is also necessary as states differ according to the degree of allocation discretion that trustees are allowed.[243] In *Detroit Bank & Trust Co. v. United States*,[244] the Michigan district court held that the trustee did have the power to invade the trust corpus for the benefit of the income beneficiary because the trust settlor had granted broad discretion to the trustees to allocate trust property between principal and income.[245] The trustee in this case was subject to the RUPIA,[246] which states that the trust corpus or principal is the domain of the remaindermen.[247] The court, however, held that the trustee could distribute portions of the corpus to income beneficiaries because the testator expressly gave the trustee broad allocation discretion and under Michigan law, trustees are allowed to exercise such broad discretionary power even in a manner that might be contrary to the RUPIA.[248]

In contrast, other courts hold that a trustee may not allocate between principal and income in a manner that contradicts the trust allocation and accounting rules adopted by the state even though the testator specifically granted the trustee complete freedom to allocate as the trustee saw fit.[249] In *Provident Nat'l Bank v. United States*,[250] the Pennsylvania district court held that the trustee did not have the power to allocate portions of the corpus to the income beneficiaries despite the fact that the trust document granted the trustee power to allocate according to the trustee's discretion.[251] The court held that the trustee could not allocate in a manner that appeared to favor one type of beneficiary over another, notwithstanding any trust provision that granted the trustee full allocation discretion, unless the trust document also

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[243] *See* Detroit Bank & Trust Co. v. United States, 338 F. Supp. 971 (E.D. Mich. 1971).

[244] *Id.*

[245] *Id.* at 975 ("Inasmuch as the Palmer trustees also had the power to allocate all receipts and disbursements between principal and income as they in their discretion saw fit, . . . it is the opinion of this court that the possibility of an invasion of principal exists and is not remote.").

[246] *Id.* at 975-76.

[247] RUPIA, *supra* note 147, § 3(b) ("Principal is the property which has been set aside by the owner or the person legally empowered so that it is held in trust eventually to be delivered to a remainderman . . . .").

[248] *See Detroit Bank*, 338 F. Supp. at 976 (citing MICH. COMP. LAWS §§ 555.51-52 (1971)) (stating that a trustee must allocate between principal and income in accordance with the trust document terms regardless of any contrary provisions in the RUPIA); *see also id.* (holding that based on a reading of Michigan's RUPIA "a settlor can in the trust instrument, give a trustee the power to allocate receipts and disbursements between income and principal, in his discretion, notwithstanding contrary provisions as to allocation in the same Act").

[249] *See* Provident Nat'l Bank v. United States, 353 F. Supp. 1025 (E.D. Pa. 1973).

[250] *Id.*

[251] *Id.* at 1031 ("This Court is of the opinion that the Supreme Court of Pennsylvania would not permit a trustee to erode principal in favor of the life tenants . . . .").

manifested the testator's clear intent to favor one type of beneficiary.[252] Therefore, under the holding of *Provident National Bank*, a testator's grant of full allocation discretion to the trustee would not really grant full discretion unless the testator had also manifested an intent to favor a particular class of beneficiaries.[253] Decisions like this are potentially problematic in that a trustee's individual act of allocation might appear to favor one beneficiary although, taken in the context of the trustee's overall investment and allocation strategy, the individual act of allocation will promote equity on the whole between all beneficiaries.[254] A Pennsylvania trustee might therefore find his hands tied and that he cannot adjust between principal and income because a single act of allocation or adjustment on his part, taken in isolation, might be deemed an unauthorized favoring of one type of beneficiary.

Indeed, trustee use of the EA allocation method has been shown to promote equity and parity between current and remainder beneficiaries. In *Frazier v. Brechler*,[255] the trust document stated that the trustee had sole discretion "[t]o determine the allocation of receipts and disbursements between principal and income . . . ."[256] This provision essentially amounted to an EA provision. The trustees made distributions to the income beneficiary at the income beneficiary's request during early 2001, a time when there was insufficient earned income to fulfill the request.[257] At the conclusion of the subsequent accounting period on October 31, 2001, by which time the trust had net earned income of $113,397.07, the income beneficiary attempted to compel the trustees to distribute this amount to him as well,[258] an act that would arguably have been unfair to the remainder beneficiaries in light of the large sum that had already been distributed to the income beneficiary. This inequitable result was avoided and the income beneficiary's attempt was thwarted as the court held that the early 2001 distributions the trustees made to the income beneficiary was income and that the income beneficiary was not entitled to another distribution.[259] In the absence of the EA provision granting the trustees the discretion to classify returns as income or principal as they saw fit, the distribution would have been deemed "principal encroachments"[260] and

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[252] *Id.* at 1029. The court explained that the testator may grant the trustee "the power to allocate between principal and income regardless of whether the allocation follows the usual rules of trust accounting" however, such grant of power is not equivalent to a desire to favor one class of beneficiaries. *Id.*

[253] *Id.* at 1029.

[254] *See supra* Part III.B.

[255] 839 So. 2d 761 (Fla. Dist. Ct. App. 2003).

[256] *Id.* at 762.

[257] *Id.*

[258] *Id.*

[259] *Id.*

[260] *Id.*

the trustees would have had to distribute the $113,397.07 to the income beneficiaries to the detriment of the remainder beneficiaries.[261] Thus, incorporating the EA method into state allocation laws would prevent such anomalous outcomes that would preclude a trustee from allocating in a manner that would promote overall parity between the income and remainder beneficiaries.[262]

Second, the UC allocation method should be used in conjunction with the EA method[263] and incorporate smoothing provisions.[264] While the ideal principal and income allocation law will contain the EA provision such that trustees may have the requisite flexibility to fulfill the duty of impartiality, the broad discretionary powers granted by the EA should be tempered by incorporation of the UC provision given that the UC provides a more structured allocation formula that is less vulnerable to abuse.[265]

As previously noted, a shortcoming of the UC stems from the allocation of income based upon a fixed percentage of the total principal value.[266] In times of market decline, the value of the trust securities could drop substantially, thereby causing a proportional decline in the income distributions to income beneficiaries.[267] This problem can be somewhat alleviated by the use of a "smoothing provision"[268] whereby the distribution to the income beneficiary is based on the average value of the trust assets over the last three years rather than on the annual value of the trust assets.[269]

The use of the UC method in conjunction with the EA method will help alleviate the financial burdens and consequences arising under such market conditions. By allowing the trustee to use the EA method of allocation during market lows (as determined by certain market indicators), the proposed version of the UPIA will allow the trustee to acquire the flexibility to equitably adjust income distribution upwards to compensate for the unusually

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[261] *Id.*

[262] Welch, *supra* note 6, at 27-28.

[263] Monchek, *supra* note 231, at 19. UC provisions "give the income beneficiary predictability of payout" while EA provisions "provide added flexibility that would allow the trustee to potentially make distributions in a more tax-efficient manner . . . ." *Id.*

[264] *Id.* at 20.

[265] DiRusso & Sablone, *supra* note 215, at 281-82.

[266] Monchek, *supra* note 231, at 36. A shortcoming of unitrusts is "that they are inflexible by their very nature of mandating the trustee to pay a fixed percentage of the trust's fair market value to the income beneficiary." *Id.*

[267] *Id.* at 28.

[268] *Id.* at 18 n.74.

[269] *Id.* The author notes that "a beneficiary could benefit from [a smoothing provision] because in down markets their payout would be increased by virtue of prior up markets . . . ." *Id.* at 20.

low income distributions that might be allocable under the UC method,[270] or to increase compensation to meet the unforeseen needs or changing circumstances of the income beneficiary.[271]

Third, fixed percentage distribution amounts under the UC method should serve as a quasi-safe harbor. A quasi-safe harbor should be established for the range of fixed percentages of total trust assets earmarked for distribution to income beneficiaries. Ohio and New Jersey, for example, create safe harbors via provisions in their principal and income allocation laws that percentage distribution adjustments within a certain range (up to four percent) are presumed to be fair and reasonable to all beneficiaries.[272] New Jersey's provision, however, differs from Ohio's provision in that an upward adjustment within the "safe harbor"[273] range creates only a rebuttable presumption of reasonability and fairness rather than a conclusive presumption.[274] This type of quasi-safe harbor for fixed percentage distributions to income beneficiaries under the UC method is arguably ideal in that the predictability and structure of the UC allocation method is largely maintained yet, at the same time, the UC fixed percentage is not set in stone as a trustee may use a different percentage if he or she can prove that such divergence is necessary to fulfill the duty of impartiality or to fulfill the goals of the trust.[275]

Trustees of existing trusts that have been using the traditional method of allocating earnings between principal and income according to the type and source of the earnings face an easier task in implementing the EA and UC allocation methods as these trustees may adjust between principal and income such that the historical distribution patterns and ratios among beneficiary classes are maintained.[276] That beneficiaries have approved earlier accountings and distribution patterns creates a presumption that such distributions by the trustee were impartial and in compliance with other

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[270] *Id.* at 19 n.79 (citing Edward Jay Beckwith, *Distribution Issues for Substantially Appreciated Trusts—Is It Possible To Provide A Fair Return To Both Current and Future Beneficiaries?*, SF68 ALI-ABA 555 (2001)).

[271] *Id.* at 33; Welch, *supra* note 6, at 26-27.

[272] Monchek, *supra* note 231, at 18 n.76. The New Jersey statute states in relevant part that:

> [a] decision by a trustee to increase the distribution to the income beneficiary . . . to an amount not in excess of four percent, or to decrease that period's distributions to not less than six percent, of the net fair market value of the trust assets . . . shall be presumed to be fair and reasonable to all of the beneficiaries.

Id. (quoting N.J. STAT. ANN. § 3B:19-4 (2005)).

OHIO REV. CODE ANN. § 1340.42(G)(3) (West 2005) states that "from time to time a trustee may make a safe-harbor adjustment to increase net trust accounting income up to and including an amount equal to four percent of the trust's fair market value . . . ."

[273] Monchek, *supra* note 231, at 18.

[274] *Id.*

[275] *See supra* Part III.B.2.

[276] Glikman, *supra* note 88, at 471 (citation omitted).

fiduciary duties.[277] Thus, statutes that authorize the use of the EA and UC allocation methods should provide that historical allocation ratios be maintained.

IV. CONCLUSION

The benefit of generating higher investment returns for trusts was accompanied by the cost of impairing trustees' ability to fulfill the duty of impartiality.[278] The duty imposed by the Prudent Investor Act on the trustee to invest prudently and to obtain a maximum return for the tolerable level of risk defined in the trust document seemed to conflict with the trustee's duty of impartiality.[279] While the UPIA attempted to remedy this conflict, it succeeded primarily in increasing the allocation flexibility available to the trustee and therefore actually increased the potential danger for trustees of violating the duty of impartiality.[280] In order to promote trustee compliance with the duty of impartiality, states should adopt a version of the UPIA that permits the use of the EA method of allocation in conjunction with the UC method.[281]

Kristi Arakaki[282]

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[277] Brown Bros. Harriman Trust Co. v. Bennett, 827 N.E.2d 1101, 1111 (Ill. App. Ct. 2005) (stating that the fact that the trustees informed the income beneficiary directly and/or indirectly of the accounting and received no objection at such time from the income beneficiary, served as evidence that the trustees did not abuse their discretion in allocating certain expenses to income rather than principal).

[278] *See supra* Part III.A.

[279] *See supra* Part III.A.

[280] *See supra* Part III.A.

[281] *See supra* Part III.C.

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Dolan v. City of Tigard and the Distinction Between Administrative and Legislative Exactions: "A Distinction Without a Constitutional Difference"[1]

I. INTRODUCTION

The Fifth Amendment to the United States Constitution guarantees that private property shall not be taken for public use unless just compensation is paid.[2] The Takings Clause serves "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[3] Although the Takings Clause does not identify the precise types of governmental actions that constitute a taking, the Supreme Court of the United States has held that three specific actions qualify: physical invasions,[4] over-regulation,[5] and exactions.[6]

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[1] Parking Ass'n of Ga. v. City of Atlanta, 515 U.S. 1116, 1118 (1995) (Thomas, J., dissenting from denial of certiorari).

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

[3] Armstrong v. United States, 364 U.S. 40, 49 (1960), *quoted in* Dolan v. City of Tigard, 512 U.S. 374, 384 (1994).

[4] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421-23, 441 (1982) (holding that a statute which required the minor, but permanent, installation of a cable connection to an apartment building, worked a taking).

[5] In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), Justice Holmes observed "that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415. Regulatory takings have been characterized as either partial or total. In partial takings, where the landowner is left with some economically beneficial use, the Court has utilized a balancing test:

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

Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (holding that a historic landmark preservation program did not constitute a taking) (citations omitted).

Total takings, on the other hand, leave the landowner with no economically beneficial uses. In such instances, the Court employs a categorical rule:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part

"[E]xactions are levies imposed on persons developing their property as a condition of development within a municipality."[7] Used to shift the costs of infrastructure to developers,[8] exactions usually come in the form of either "a dedication of land for a public facility, or a fee in lieu of dedication that the municipality can use to provide a public facility."[9] Impact fees are another type of exaction, which are normally imposed "as a condition to the issuance of building permits to pay for off-site facilities such as water and sewage treatment facilities."[10] Ultimately, "any requirement that a developer provide or do something as a condition to receiving municipal approval is an exaction."[11]

Development exactions which are adjudicatively imposed by an administrative agency ("Administrative Exactions"), such as a planning commission, fall under the Court's "well-settled doctrine of unconstitutional

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of his title to begin with.

. . . .

. . . Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.

Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027, 1029 (1992).

[6] *See* Otto J. Hetzel & Kimberly A. Gough, *Assessing the Impact of Dolan v. City of Tigard on Local Governments' Land-Use Powers*, *in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS 222 (David L. Callies ed., 1996).

[7] *See id.* at 228; *see also* DAVID L. CALLIES, PRESERVING PARADISE: WHY REGULATION WON'T WORK 37-40 (1994) [hereinafter CALLIES, PRESERVING PARADISE]; DAVID L. CALLIES ET AL., BARGAINING FOR DEVELOPMENT: A HANDBOOK ON DEVELOPMENT AGREEMENTS, ANNEXATION AGREEMENTS, LAND DEVELOPMENT CONDITIONS, VESTED RIGHTS, AND THE PROVISION OF PUBLIC FACILITIES 5-8 (2003) [hereinafter CALLIES, BARGAINING FOR DEVELOPMENT]; DANIEL R. MANDELKER, LAND USE LAW §§ 1.09, 9.11 (5th ed. 2003).

[8] *See* Hetzel & Gough, *supra* note 6, at 228; CALLIES, PRESERVING PARADISE, *supra* note 7, at 37-40; CALLIES, BARGAINING FOR DEVELOPMENT, *supra* note 7, at 5-8; MANDELKER, *supra* note 7, §§ 1.09, 9.11.

[9] MANDELKER, *supra* note 7, § 9.11, at 9-13.

[10] *Id.* For a discussion on the types and purposes of exactions, see CALLIES, PRESERVING PARADISE, *supra* note7, at 37-40, CALLIES, BARGAINING FOR DEVELOPMENT, *supra* note 7, at 3-8, and 13 POWELL ON REAL PROPERTY § 79D.04 (2004).

[11] Town of Flower Mound v. Stafford Estates L.P., 71 S.W.3d 18, 20 n.7 (Tex. Ct. App. 2002), *aff'd*, 135 S.W.3d 620 (Tex. 2004); *see also* Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1578 n.20 (10th Cir. 1995) ("'Development exactions' are where a governmental agency requires that a property owner dedicate some of his or her land for public use before granting that property owner a permit to develop the land."); Salt Lake County v. Bd. of Educ., 808 P.2d 1056, 1058 (Utah 1991) ("Development exactions may be defined as contributions to a governmental entity imposed as a condition precedent to approving the developer's project. Usually, exactions are imposed prior to the issuance of a building permit or zoning/subdivision approval. Development exactions may take the form of: (1) mandatory dedications of land for roads, schools or parks, as a condition to plat approval, (2) fees-in-lieu of mandatory dedication, (3) water or sewage connection fees, and (4) impact fees." (quotations and citations omitted)).

conditions," which provides that "the government may not require a person to give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property."[12] As stated, the Takings Clause protects the right to receive just compensation when private property is taken.[13] To assure that the government does not impose such conditions on developers without this required "relationship,"[14] and thereby avoid its obligation to pay just compensation, the Court held in *Nollan v. California Coastal Commission*,[15] and *Dolan v. City of Tigard*,[16] that when Administrative Exactions are imposed, the government must show (1) that an "essential nexus" exists between a "legitimate state interest" and the permit condition exacted;[17] and (2) that the permit condition is "rough[ly] proportional" "both in nature and extent to the impact of the proposed development."[18]

However, in *Dolan*, the Court twice distinguished the purported Administrative Exactions at issue from legislatively enacted, generally applicable, zoning regulations ("Legislative Zoning Regulations"). First, after briefly reviewing its decisions in *Village of Euclid v. Ambler Realty Co.*,[19] *Pennsylvania Coal Co. v. Mahon*,[20] and *Agins v. City of Tiburon*,[21] the Court clarified:

> The sort of land use regulations discussed in the cases just cited . . . differ in two relevant particulars from the present case. *First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel.* Second, the conditions imposed were not simply a limitation on the use of petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city.[22]

Second, in footnote eight of the opinion, and while discussing the burden of proof, the Court further explained:

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[12] Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (citing Perry v. Sindermann, 408 U.S. 593 (1972); Pickering v. Bd. of Ed., 391 U.S. 563, 568 (1968)).

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

[14] *Dolan*, 512 U.S. at 385 (citing *Perry*, 408 U.S. at 593; *Pickering*, 391 U.S. at 568).

[15] 483 U.S. 825 (1987).

[16] 512 U.S. 374.

[17] *Nollan*, 483 U.S. at 837.

[18] *Dolan*, 512 U.S. at 391.

[19] 272 U.S. 365 (1926).

[20] 260 U.S. 393 (1922).

[21] 447 U.S. 255 (1980), *overruled by* Lingle v. Chevron U.S.A. Inc., ___ U.S. ___, 125 S. Ct. 2074 (2005).

[22] *Dolan*, 512 U.S. at 385 (emphasis added).

> [I]n evaluating *most generally applicable zoning regulations*, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. Here, by contrast, the city made an *adjudicative decision* to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city.[23]

Whether the Court meant to imply that the level of scrutiny under which an exaction is reviewed should turn on the nature of the governmental body (be it legislative or administrative) that imposed the exaction, has been the subject of debate since *Dolan*. Specifically, many lower courts have held *Dolan* inapplicable to generally applicable, legislatively enacted, development exactions ("Legislative Exactions") in view of this language, because, they reason, such exactions do not involve an adjudicative decision by an administrative agency.[24]

This Article contends that this administrative/legislative distinction is, in the words of Associate Justice Clarence Thomas, a "distinction without a constitutional difference."[25] Part II of this Article reviews the Court's reasoning in *Agins*, *Nollan*, and *Dolan*. Part III surveys how the lower courts have treated *Dolan* in the context of Legislative Exactions. The following three parts provide reasons why *Dolan* should apply to Legislative Exactions. Part IV scrutinizes the textual basis for the administrative/legislative distinction, and suggests that the text actually supports *Dolan*'s application to Legislative Exactions in view of Justice Thomas's reasoning in his dissent from the Court's denial of certiorari in *Parking Ass'n of Georgia v. City of Atlanta*.[26] Part V addresses the traditional deference courts have shown legislative bodies and argues that such deference is not appropriate in the context of exactions. Finally, Part VI examines the analysis lower courts have employed as they struggle to distinguish between Administrative and Legislative Exactions.

II. *AGINS*, *NOLLAN*, & *DOLAN*

In the Court's denial of certiorari in *Parking Ass'n of Georgia*, in dissent, Justice Thomas observed that "*Dolan* purports to be an exception to *Agins*," and that "the logic of these two cases appears to point in different

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[23] *Id.* at 321 n.8 (citing *Euclid*, 272 U.S. 365) (emphases added).

[24] *See infra* Part III.A-C.

[25] Parking Ass'n of Ga. v. City of Atlanta, 515 U.S. 1116 (1995) (Thomas, J., dissenting from denial of certiorari).

[26] *Id.*

directions."[27] To illustrate, in *Parking Ass'n*'s prior proceedings,[28] the Supreme Court of Georgia summarily distinguished *Dolan*'s application from a Legislative Exaction and instead applied *Agins* by default.[29]

A. Agins

In *Agins*, the Court upheld a Legislative Zoning Regulation against a facial attack.[30] There, subsequent to the developers' purchase of five acres of undeveloped land for residential development, the city adopted ordinances that placed that land in a zone that only allowed for the construction of one to five residences per parcel.[31] The Court held that, facially, the ordinances did not work a taking.[32] The Court ruled, "[t]he application of a *general zoning law* to particular property effects a taking if the ordinance does not *substantially advance legitimate state interests*, or denies an owner economically viable use of his land."[33]

Concluding that the ordinances substantially advanced the legitimate state interest in the preservation of open space, the Court explained that the ordinances were "exercises of the city's police power to protect the residents of Tiburon from the ill effects of urbanization."[34] In analyzing the economically viable use of the developers' property, the Court noted, "[a]lthough the ordinances limit development, they neither prevent the best use of [the developers'] land, nor extinguish a fundamental attribute of ownership."[35] Before addressing how *Dolan* relates to *Agins*, it is necessary to review the intervening case of *Nollan*.

B. Nollan

In *Nollan*, the Court held that an Administrative Exaction did not "substantially advance" its purported legitimate state interest.[36] In that case, James and Marilyn Nollan received a coastal development permit to demolish and rebuild their beachfront home, conditioned upon their granting of a public

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[27] *Id.* at 1118.

[28] 450 S.E.2d 200 (Ga. 1994).

[29] *Id.* at 203 n.3. For further discussion of the Supreme Court of Georgia's opinion in this case, see *infra* Part III.A.

[30] Agins v. City of Tiburon, 447 U.S. 255, 259 (1980), *overruled by* Lingle v. Chevron U.S.A. Inc., ___ U.S. ___, 125 S. Ct. 2074 (2005).

[31] *Id.* at 257.

[32] *Id.* at 259.

[33] *Id.* at 260 (citations omitted) (emphasis added).

[34] *Id.* at 261.

[35] *Id.* at 262 (citations omitted).

[36] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834 (1987).

easement across their property.[37] According to the California Coastal Commission, this condition was imposed because the new structure was larger than the old one and would, among other things, "increase blockage of the view of the ocean, thus contributing to the development of a wall of residential structures that would prevent the public psychologically from realizing a stretch of coastline exists nearby that they have every right to visit."[38] The Commission's authority to exact the easement stemmed from the California Coastal Act of 1976.[39]

The Court preliminarily held that the easement exaction was a taking because it was a "permanent physical occupation."[40] The Court next questioned "whether requiring [the easement] to be conveyed as a condition for issuing a land-use permit alters the outcome."[41] The Court then remarked that its "cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter."[42]

Apparently[43] applying the first prong of *Agins*, the Court assumed, for the sake of argument, that the Administrative Exaction had its basis in a

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[37] *Id.* at 828.

[38] *Id.* at 828-29 (quotation marks omitted).

[39] *Id.* at 829 (citations omitted).

[40] *Id.* at 832 (quoting Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432 n.9 (1982)) (quotation marks omitted).

[41] Id. at 834.

[42] *Id.*

[43] Recently, in *Lingle v. Chevron U.S.A. Inc.*, ___ U.S. ___, 125 S. Ct. 2074 (2005), the Court overruled *Agins*' "substantially advances" test, *id.* at ___, 125 S. Ct. at 2085, and explained that it did not in fact apply this test in *Nollan* or *Dolan*, but merely quoted its language, *id.* at ___, 125 S. Ct. at 2086-87. Specifically, the Court stated:

> Although *Nollan* and *Dolan* quoted *Agins*' language, the rule those decisions established is entirely distinct from the "substantially advances" test we address today. Whereas the "substantially advances" inquiry before us now is unconcerned with the degree or type of burden a regulation places upon property, *Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings. In neither case did the Court question whether the exaction would substantially advance *some* legitimate state interest. Rather, the issue was whether the exactions substantially advanced the *same* interests that land-use authorities asserted would allow them to deny the permit altogether. As the Court explained in *Dolan*, these cases involve a special application of the "doctrine of 'unconstitutional conditions,'" . . . That is worlds apart from a rule that says a regulation affecting property constitutes a taking on its face solely because it does not substantially advance a legitimate government interest. In short, *Nollan* and *Dolan* cannot be characterized as applying the "substantially advances" test we address today, and our decision should not be read to disturb these precedents.

Id. (citations omitted). Thus, unlike *Agins*' test, *Nollan* and *Dolan*'s takings test is still valid.

"legitimate state interest" which could have justified the Commission's denial of the permit altogether.[44] The Court reasoned that

> if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house . . . so long as the Commission could have exercised its police power . . . to forbid construction of the house altogether, imposition of the condition would also be constitutional.[45]

It follows, the Court explained, "[i]f a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not."[46]

Nonetheless, the Court cautioned that the

> evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that *essential nexus* is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury.[47]

Under such facts, the Court acknowledged that the "purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation."[48] Striking at the heart of the issue, the Court mandated that "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'"[49] The Court noted that the next issue in its analysis was "how close a 'fit' between the condition and the burden is required."[50] It did not reach this question, however, because it held that the Administrative Exaction worked a taking, as it lacked an essential nexus to its purported purpose.[51]

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[44] *Nollan*, 483 U.S. at 835.

[45] *Id.* at 836. Such would be the case, the Court mused, if the Nollans had to "provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." *Id.*

[46] *Id.* at 836-37.

[47] *Id.* at 837 (emphasis added).

[48] *Id.*

[49] *Id.* (quoting J.E.D. Assocs., Inc. v. Atkinson, 432 A.2d 12, 14-15 (N.H. 1981)) (citations omitted).

[50] *Id.* at 838.

[51] *Id.* at 838-39. Specifically, the Court reasoned that it was impossible to understand "how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house," or "how it lowers any 'psychological barrier' to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house." *Id.*

C. Dolan

Seven years later, the Court decided just how close a fit between the condition and the burden is required in *Dolan*.[52] There, Florence Dolan applied for a permit to redevelop and expand her plumbing and electric supply store.[53] The City Planning Commission granted her request, conditioning her permit upon the dedication of two portions of her property.[54] The first dedication was within a 100-year floodplain and to be used "for improvement of a storm drainage system," and the second dedication was a "15-foot strip of land adjacent to the floodplain" and would be used as a "pedestrian/bicycle pathway."[55] The pedestrian/bicycle pathway exaction was imposed pursuant to a community development code that required that new development facilitate a plan to create a pedestrian/bicycle pathway "by dedicating land for pedestrian pathways where provided for in the pedestrian/bicycle pathway plan."[56] The floodplain condition was imposed under a city drainage plan.[57] The Commission denied Ms. Dolan's requests for variances from the floodplain and pathway dedications.[58]

The Court held that the exactions were unconstitutional.[59] In reviewing the stated purposes of the conditions imposed, the Court observed, "[t]he question for us is whether these findings are constitutionally sufficient to justify the conditions imposed by the city on petitioner's building permit."[60] After summarizing its holding in *Nollan*, the Court stated that if it found an "'essential nexus,'"[61] it would then have to "decide the required *degree of connection* between the exactions and the projected impact of the proposed development."[62] Finding such a nexus, the Court moved on to the second inquiry, looking for guidance from the state courts in setting the constitutional floor.[63] In the end, the Court adopted the "reasonable relationship" test, which it renamed the "rough proportionality" test:

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[52] Dolan v. City of Tigard, 512 U.S. 374, 386 (1994).
[53] *Id.* at 379.
[54] *Id.* at 379-80.
[55] *Id.* at 380.
[56] *Id.* at 378.
[57] *Id.*
[58] *Id.* at 380-81.
[59] *Id.* at 395.
[60] *Id.* at 389.
[61] *Id.* at 386 (quoting Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987)).
[62] *Id.* (emphasis added).
[63] *Id.* at 388-91.

> We think the "reasonable relationship" test adopted by a majority of the state courts is closer to the federal constitutional norm .... But we do not adopt it as such, partly because the term "reasonable relationship" seems confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.[64]

Under this standard, the Court mandated that the burden of proof rightly fell upon the government to show rough proportionality between the harm caused by the development and the exaction imposed.[65]

Ultimately, the Court found that although the exactions had the "essential nexus,"[66] the exactions were unconstitutional for want of "rough proportionality."[67] This result was largely a product of the Commission's inadequate documentation of its findings.[68] With respect to the floodplain exaction, the Court reasoned that the city had not made any individual determination explaining why the exaction would justify the taking of Ms. Dolan's right to exclude.[69] As to the pedestrian/bicycle pathway exaction, the Court concluded that the city's findings were too tentative.[70] As discussed later, Justice Souter's dissent criticized the majority for, among other things, having its new standard turn on the adjudicative/legislative distinction.[71]

After *Dolan*, an Administrative Exaction must: (1) serve a legitimate state interest; and (2) substantially advance that interest, as evidenced by an individual determination made by the administrative body imposing that exaction, which showed (a) that there is an essential nexus between that state interest and that exaction, and (b) that the exaction is roughly proportional to the development in both nature and extent.[72]

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[64] *Id.* at 391.

[65] *Id.* at 391 n.8.

[66] *Id.* at 387-88.

[67] *Id.* at 393-96.

[68] *Id.*

[69] *Id.* at 393.

[70] *Id.* at 394-95.

[71] *Id.* at 414 n.* (Souter, J., dissenting).

[72] *Id.* at 386, 391. Professor Hetzel and Ms. Gough observe that *Dolan* marked three "doctrinal shifts":

> It created a new terminology to justify a heightened form of judicial scrutiny. Reversing considerable contrary doctrine, it shifted the presumption of constitutionality from the challenging property owner to the government entity attempting to exercise its police powers. Finally, it mandated a newly created form of proportionality requirements for its balancing test.

As discussed before, however, the Court twice distinguished "generally applicable *zoning* regulations,"[73] from Administrative Exactions.[74] Thus, when faced with a challenge to a generally applicable *exaction* regulation, i.e., a Legislative Exaction, some lower courts have made the logical leap, and have held *Dolan* inapplicable.[75] Rather, these courts employ the deferential, and now overruled,[76] *Agins* standard, which requires neither a nexus nor proportionality, and which does not shift the burden of proof to the government.[77]

III. AFTER *DOLAN*: CONFLICT IN THE LOWER COURTS

The lower courts have come down both ways when deciding whether Legislative Exactions are properly evaluated under *Dolan*.[78] Particularly, the lower courts that distinguish *Dolan* do so either by looking narrowly to certain provisions in *Dolan*,[79] or by going a step further and coupling these provisions with the Court's rationale in *Nollan*.[80] The latter view is prevalent in challenges to monetary exactions.[81] Interestingly, at least one lower court has treated the legislative character of an exaction as merely one factor for

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Hetzel & Gough, *supra* note 6, at 231.

[73] *Dolan*, 512 U.S. at 391 n.8 (emphasis added).

[74] *Id.* at 385, 391 n.8.

[75] *See infra* Part III.A-B.

[76] *See* Lingle v. Chevron U.S.A. Inc., ___ U.S. ___, 125 S. Ct. 2074, 2085 (2005).

[77] *See infra* Part III.A-B.

[78] For a thorough survey of the approaches taken by the lower courts, see CALLIES, BARGAINING FOR DEVELOPMENT, *supra* note 7, at 22-28; David L. Callies, Article, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from Penn Central to Dolan, and What State and Federal Courts Are Doing About It*, 28 STETSON L. REV. 523, 567, 572-74 (1999) [hereinafter Callies, *Regulatory Takings*]; 8 NICHOLS, EMINENT DOMAIN § 14E.04[4] (2002); Hetzel & Gough, *supra* note 6, at 235-37; 2-9 ZONING AND LAND USE CONTROLS § 9.02[4] (2004); Daniel J. Curtin, Jr., *Exactions, Dedications and Development Agreements Nationally and in California: When and How Do the Dolan/Nollan Rules Apply?*, *in* INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN §§ 2.01[4], [6] (Aileen Sterling et al. eds., Lexis-Nexis 2003); MANDELKER, *supra* note 7, § 9.22 (discussing the approach taken by the lower courts to development fees); J. David Breemer, Article, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go from Here*, 59 WASH & LEE L. REV. 373, 390-95 (2002); Inna Reznik, Article, *The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U. L. REV. 242, 252-57 (2000) (surveying cases by the nature of the exaction imposed, i.e., scheduled, negotiated, or indeterminate).

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

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

[81] *See infra* Part III.B-D.

consideration in *Dolan*'s applicability.[82] The remaining lower courts follow *Dolan* in the context of both physical and monetary exactions.[83]

A. Distinguishing Dolan *Based on its Text*

All courts that draw the adjudicative/legislative distinction at minimum distinguish *Dolan* on a factual basis.[84] They hold that while *Dolan*'s heightened scrutiny may apply to Administrative Exactions, it does not apply, in *Dolan*'s words, to "generally applicable zoning regulations"[85] that involve "essentially legislative determinations classifying entire areas of [a] city."[86] For instance, in *San Mateo County Coastal Landowners' Ass'n v. County of San Mateo*,[87] the Court of Appeal of California held that *Dolan* did not apply in a facial challenge to a legislatively formulated policy that imposed an agricultural and open space easement on subdivision applicants.[88] In the court's view, "*Dolan* makes clear that it does not reach the type of legislative determination classifying entire areas of a county, such as we are here concerned with."[89] The court thus declined to apply *Dolan*.[90]

Georgia courts have taken a similar view. Returning to *Parking Ass'n of Georgia*, a group of developers challenged an ordinance regulating "surface parking lots with 30 or more spaces."[91] The ordinance required "minimum barrier curbs and landscaping areas equal to at least ten percent of the paved area within a lot, ground cover (shrubs, ivy, pine bark or similar landscape materials) and at least one tree for every eight parking spaces."[92] The Supreme Court of Georgia distinguished *Dolan* because "the city made a legislative determination with regard to many landowners and it simply limited the use the landowners might make of a small portion of their lands."[93] The court reaffirmed its approach recently in *Greater Atlanta Homebuilders*

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[82] *See infra* Part III.C.
[83] *See infra* Part III.D.
[84] *See infra* notes 87-94.
[85] Dolan v. City of Tigard, 512 U.S. 374, 391 n.8 (1994).
[86] *Id.* at 385.
[87] 45 Cal. Rptr. 2d 117 (Cal. Ct. App. 1995).
[88] *Id.* at 132.
[89] *Id.*
[90] *Id.*
[91] Parking Ass'n of Ga. v. City of Atlanta, 450 S.E.2d 200, 201 (Ga. 1994).
[92] *Id.* at 201-02.
[93] *Id.* at 203 n.3.

Ass'n v. DeKalb County.[94] The Court of Appeals of Minnesota,[95] and the United States District Court for the District of Kansas,[96] have also followed this manner of analysis.

B. Distinguishing Dolan *Based on* Nollan*: The* Ehrlich *Approach to Monetary Exactions*

Some jurisdictions hold *Dolan* inapplicable to Legislative Exactions by virtue of the Court's rationale in *Nollan*.[97] First, such jurisdictions begin by observing that in *Dolan*, the Court distinguished "generally applicable legislative zoning regulations" from adjudicative decisions.[98] Next, they note the Court's concern over "'out-and-out extortion'" in *Nollan*.[99] Bridging the logical gap, these courts argue that such *regulatory leveraging* (i.e., extortion) poses much less of a threat at the legislative level than at the administrative level.[100] Therefore, *Dolan*'s procedural safeguards are unnecessary beyond the administrative decisionmaking context.[101] This analysis was pioneered by the Supreme Court of California in *Ehrlich v. City of Culver City* (the "*Ehrlich* Approach").[102]

In that case, the court held that a Legislative Exaction which levied a non-discretionary development fee was not subject to *Dolan*, for such fees were not likely to be susceptible to "regulatory leveraging."[103] The landowner

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[94] 588 S.E.2d 694 (Ga. 2003). There, the Supreme Court of Georgia held *Dolan* inapplicable, *id.* at 697, in context of a facial challenge to a generally applicable tree preservation ordinance, *id.* at 696.

[95] See *Arcadia Development Corp. v. City of Bloomington*, 552 N.W.2d 281 (Minn. Ct. App. 1996), where the court held that *Dolan* did not apply to a requirement that landowners choosing to cease operation of a mobile home park, compensate tenants with a relocation fee. *Id.* at 286-87. The court reasoned that since the fee was applicable to the whole city, *Dolan* did not apply. *Id. But cf.* Country Joe, Inc. v. City of Eagan, 560 N.W.2d 681 (Minn. 1997) (holding that a road impact fee was subject to review for proportionality).

[96] See *Harris v. City of Wichita*, 862 F. Supp. 287 (D. Kan. 1994), *aff'd*, 74 F.3d 1249 (10th Cir. 1996), where the law at issue was a usage restriction "enacted at the recommendation of the United States Air Force and [was] based on a 1987 Air Force study of airplane crashes near Air Force bases." *Id.* at 293. The court seized upon the language in *Dolan* distinguishing Administrative from Legislative Exactions, to draw the adjudicative/legislative distinction, and to hold that *Dolan* did not apply. *Id.* at 294.

[97] *See infra* notes 102-22 and accompanying text.

[98] Dolan v. City of Tigard, 512 U.S. 374, 391 n.8. (1994).

[99] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (quoting J.E.D. Assocs., Inc. v. Atkinson, 432 A.2d 12, 14-15 (N.H. 1981)) (citation omitted).

[100] *See infra* notes 102-22 and accompanying text.

[101] *See infra* notes 102-22 and accompanying text.

[102] 911 P.2d 429, 444 (Cal. 1996).

[103] *Id.*

received a general plan, specific plan, and zoning amendment permitting the construction of condominiums,[104] in exchange for a discretionary $280,000 fee in lieu of a dedication of land, and a scheduled $33,200 art fee.[105] The court ruled that *Dolan* applied to the discretionary in lieu fee, thus requiring a showing of nexus and proportionality, because discretionary decisions carry the threat of regulatory leveraging.[106] The court reasoned as follows: first, *Dolan* is triggered by cases "exhibiting circumstances which increase the risk that the local permitting authority will seek to avoid the obligation to pay just compensation."[107] Second, such circumstances are present chiefly in the discretionary context, which "presents an inherent and heightened risk that local government will manipulate the police power to impose conditions unrelated to legitimate land use regulatory ends, thereby avoiding what would otherwise be an obligation to pay just compensation."[108] Third, that type of manipulation was not present in ministerial, "legislatively formulated," "broadly applicable fees," which are thus subject to a lesser standard of scrutiny.[109] Consequently, the court held that the art fee was not reviewable under *Dolan*, since it was legislatively formulated and non-discretionary.[110]

Concurring in *Ehrlich*, Justice Stanley Mosk went further, stating that the court's deferential review of broadly applicable fees had its basis in the separation of powers doctrine, which "clothes such a fee in a presumption of constitutionality."[111] This presumption stems from the deference courts have traditionally shown legislative enactments.[112] Three years later, Justice Mosk's view was formally integrated into the *Ehrlich* doctrine in *Santa Monica Beach, Ltd. v. Superior Court*:[113]

> The duty to uphold the legislative power is as much the duty of appellate courts as it is of trial courts, and under the doctrine of separation of powers neither the trial nor appellate courts are authorized to "review" legislative determinations. The only function of the court is to determine whether the exercise of legislative power has exceeded constitutional limitations.[114]

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[104] *Id.* at 433-34.

[105] *Id.* at 434-35.

[106] *Id.* at 438-39 (quotation marks omitted).

[107] *Id.* at 439.

[108] *Id.* (emphasis omitted).

[109] *Id.* at 443-44.

[110] *Id.* at 435-36.

[111] *Id.* at 459 (Mosk, J., concurring).

[112] *Id.*

[113] 968 P.2d 993 (Cal. 1999) (Mosk, J.) (holding that a rent control law was not subject to *Dolan*).

[114] *Id.* at 999 (quoting Lockard v. City of Los Angeles, 202 P.2d 38 (Cal. 1949)) (quotations omitted).

Most recently, in *San Remo Hotel L.P. v. City and County of San Francisco*,[115] the court further justified its regulatory leveraging rationale, i.e., that leveraging only goes on in the discretionary context, reasoning that even if legislative bodies engaged in regulatory leveraging, the legislative process would prevent such activity in the next election:

> While legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the *democratic political process. A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election. Ad hoc* individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls.[116]

Thus, the *Ehrlich* Approach declares that *Dolan* does not apply to legislatively imposed exactions, because (1) the text of *Dolan* does not so demand; (2) the threat of regulatory leveraging only exists in the discretionary, adjudicatory context; (3) deference should be shown to legislative determinations; and (4) even if legislative bodies engaged in regulatory leveraging, the democratic process adjusts accordingly.[117]

An *Ehrlich*-like approach has been followed by the Ninth Circuit,[118] Arizona,[119] Colorado,[120] and Oregon.[121] Whether the *Ehrlich* Approach will

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[115] 41 P.3d 87 (Cal. 2002). In that case, the court held that *Dolan* did not apply to a scheduled housing replacement in lieu fee. *Id.* at 105. The fee was imposed when a hotel owner was granted a conditional use permit to reconfigure its business so that it would no longer provide rooms to long-term renters. *Id.* at 91.

[116] *Id.* at 105 (emphasis added).

[117] *See supra* notes 98-116 and accompanying text.

[118] In *Garneau v. City of Seattle*, 147 F.3d 802 (9th Cir. 1998), a decision without a majority, senior federal district court judge, Spencer M. Williams, in his concurrence, commented that a scheduled legislative fee imposed by a city should not be subject to *Dolan* because, "courts have traditionally been deferential to generally applicable development fees or assessments resulting from legislative and political processes aimed at adjusting the benefits and burdens of economic life to promote the common good," and because the fee was not "individual and discretionary." *Id.* at 815-16 (Williams, J., concurring) (citations omitted). Additionally, Circuit Judge Melvin Brunetti, noted that footnote eight in *Dolan* indicated that the burden-shifting approach for Administrative Exactions evinced "the Court's concern that where the government demands individual parcels of land through adjudicative, rather than legislative, decision making, there is a heightened risk of extortionate behavior by the government." *Id.* at 811 (citations omitted).

[119] In *Home Builders Ass'n of Central Arizona v. City of Scottsdale*, 902 P.2d 1347 (Ariz. Ct. App. 1995), *aff'd in part by* 930 P.2d 993 (Ariz. 1997), a landowner contested the imposition of a scheduled water resources development fee, which was applicable to all new realty developments, and which was "based upon a standardized schedule." *Id.* at 1352. The court explained that the fees were "tailored to the type of development involved and are uniform

be employed beyond the context of development fees is an open question;

within each class of development." *Id.* The court continued, "[b]ecause the fees are standardized and uniform, and because the ordinance permits no discretion in its application, a prospective developer may know precisely the fee that will be charged." *Id.* Finally, the court observed:

> Dolan is implicated when an administrator or commission exacts conditions from individual property-owners with little or no legislative guidance. This concern, however, is simply not present when the legislature, after undertaking sufficient analysis, has determined a policy and then mandated uniform and specific means of accomplishing that policy, as Scottsdale has done here.

Id.

On a second appeal, in *Home Builders Ass'n of Central Arizona v. City of Scottsdale*, 930 P.2d 993 (Ariz. 1997) (en banc) [hereinafter *Home Builders (II)*], the court recognized the distinction between Legislative and Administrative Exactions with respect to the applicability of *Dolan*. *Id.* at 1000. The court distinguished *Dolan* on the ground that *Dolan* does not apply to Legislative Exactions, because in such instances, "[t]he risk of [regulatory leveraging] does not exist when the exaction is embodied in a generally applicable legislative decision." *Id.*

Likewise, in *GST Tucson Lightwave, Inc. v. City of Tucson*, 949 P.2d 971 (Ariz. Ct. App. 1997), the court followed the adjudicative/legislative distinction set down in *Home Builders (II)*, *id.* at 979, in the context of a regulatory framework respecting telephone competitive access providers that imposed a licensing requirement and accompanying scheduled fees, *id.* at 974.

Finally, in *Wonders v. Pima County*, 89 P.3d 810 (Ariz. Ct. App. 2004), a landowner argued that a broadly applicable ordinance that required a "native-plant preservation plan," *id.* at 811, which prevented the destruction of plants on the landowner's property under certain circumstances, *id.* at 813, worked a regulatory taking, *id.* at 814. The court distinguished *Dolan*, citing *GST Tucson* and *Home Builders (II)*, on the ground that the ordinance involved a generally applicable legislative decision. *Id.* at 816.

[120] In *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687 (Colo. 2001) (en banc), a landowner challenged a broadly applicable ordinance that imposed a scheduled fee on all new development within a district. *Id.* at 696. First, the court seized upon the distinction drawn in *Dolan* itself. *Id.* at 695-96. Second, the court looked to the state's regulatory takings statute, which codified *Dolan*, and which dictated that it not apply to broad Legislative Exactions. *Id.* at 696. Finally, consulting the law of other jurisdictions, namely California, Georgia, and Arizona, the court took note that the threat of leveraging is not present at the legislative level. *Id.*

[121] Oregon decisions that distinguish *Dolan*, are limited to challenges to monetary exactions. For instance, in *Home Builders Ass'n v. Tualatin Hills Park & Recreation Dist.*, 62 P.3d 404 (Or. Ct. App. 2003), the court held that a "system development charge," which is "a one-time fee imposed by a government unit on new developments, used to help offset financial costs resulting from the growth associated with those new developments[,]" was not reviewable under *Dolan*. *Id.* at 406. The court reasoned that the fee was "a generally applicable development fee imposed on a broad range of specific, legislatively determined subcategories of property through a scheme that leaves no meaningful discretion either in the imposition or in the calculation of the fee." *Id.* at 409 (quoting Rogers Mach., Inc. v. Washington County, 45 P.3d 966, 983 (Or. Ct. App. 2002)). The court continued, stating that the "fees are calculated by means of a carefully determined formula based on the impact the development will have on infrastructure." *Id.* Likewise, in *Rogers Mach., Inc.*, 45 P.3d 966, the court held that a scheduled impact fee ordinance was not subject to *Dolan*, because (1) it was not adjudicative and therefore bore no threat of leveraging; and (2) the political process prevented such activity. *Id.* at 982-83.

however, Justice Mosk noted in his concurrence in *Ehrlich* that:

> [T]he distinction between generally applicable regulations and those imposed discretionarily on a single-property owner is critical in the context of takings jurisprudence only when monetary fees, rather than the physical occupation of land, is in question . . . . [E]ven generally applicable laws which authorize the physical occupation of property are takings, or, in the case of regulations, that occur in the development permit process, subject to a greater presumption that a taking has occurred.[122]

C. *Factor Consideration of Legislative Character*

At least one court has treated the legislative character of an exaction as merely one factor for consideration.[123] *Curtis v. Town of South Thomaston*[124] involved a challenge to a Legislative Exaction, a fire protection ordinance, which required developers seeking to subdivide to "construct a 250,000 gallon fire pond within 2,000 feet of any proposed development if no adequate water supply exists."[125] The Supreme Court of Maine explained that the language in *Dolan* regarding Legislative Zoning Regulations is not dispositive but is merely one factor to consider when reviewing the validity of an exaction.[126] The court stated: "[o]ur inquiry into rough proportionality does not end at this legislative determination, but we assign weight to the fact that the easement requirement derives from a legislative rule of general applicability and not an ad hoc determination made by the planning board at the time of the pending application."[127] In the end, the court nonetheless applied *Dolan*, concluding that the municipalities met *Dolan*'s requirements.[128]

D. *Following* Dolan

A number of jurisdictions have strictly followed *Dolan* in the context of Legislative Exactions, both physical and monetary. With respect to physical

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[122] Ehrlich v. City of Culver City, 911 P.2d 429, 460 n.4 (Cal. 1996) (Mosk, J., concurring) (citations omitted) (emphasis added). For further discussion of this point, see *infra* Part III.D, which addresses the Oregon courts' bifurcated approach to physical and monetary Legislative Exactions.

[123] Curtis v. Town of South Thomaston, 708 A.2d 657 (Me. 1998).

[124] *Id.*

[125] *Id.* at 658-59 (footnote omitted). The ordinance also required that a "'right of way or easement' be conveyed to the Town 'to allow the Town to maintain and use both the pond and hydrant pumping.'" *Id.* at 659 (footnote omitted).

[126] *Id.* at 660.

[127] *Id.*

[128] *Id.*

Legislative Exactions, in *Dakota, Minnesota & Eastern Railroad v. South Dakota*,[129] a state statute imposed an easement exaction on railroad companies seeking to develop.[130] When confronting the legislative character of the statute, the United States District Court for the District of South Dakota observed:

> Another basic difference between this and the typical land-use cases is that here the provision at issue is in the form of a statute rather than the individualized determination of a zoning or planning board with respect to a specific proposed use of a particular parcel of property. *This distinction may make it more difficult for the State to satisfy the essential nexus test employed in regulatory takings cases because it may not have made the necessary level of individualized findings with regard to the impact of [the railroad's] project and the need for the easement to mitigate that impact. This fact, however, does not mean that a regulatory takings analysis is the wrong framework for this case, only that the State may have difficultly meeting its burden.* The Court finds that [the state statute] presents a regulatory taking question since the State is not forcing [the railroad] to grant the easement outright but rather is conditioning its power to use eminent domain on such a grant.[131]

Illinois[132] and Washington[133] courts have taken similar approaches. Additionally, in *J.C. Reeves Corp. v. Clackamas County*,[134] the Court of Appeals of Oregon held that Legislative Exactions concerning street improvements were subject to review under *Dolan*.[135] The court reasoned that although many of the improvements were required by ordinance, "'the character of the [condition] remains the type that is subject to the analysis in *Dolan*,' whether it is legislatively required or a case-specific formulation. The nature, not the source, of the imposition is what matters."[136] Speaking directly to footnote eight in *Dolan*, the court said:

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[129] 236 F. Supp. 2d 989 (D.S.D. 2002), *aff'd*, 362 F.3d 512 (8th Cir. 2004).

[130] *Id.* at 1025.

[131] *Id.* at 1026-27 (emphasis added).

[132] *See* Amoco Oil Co. v. Vill. of Schaumburg, 661 N.E.2d 380 (Ill. App. Ct. 1995). For a discussion of this case, see *infra* Part IV.

[133] *See* Sparks v. Douglas County, 904 P.2d 738 (Wash. 1995) (en banc) (holding that a road dedication exaction was reviewable under *Dolan*); Benchmark Land v. City of Battle Ground, 972 P.2d 944, 950 (Wash Ct. App. 1999) ("*Nollan* and *Dolan* apply here where the City requires the developer as a condition of approval to incur substantial costs improving an adjoining street."), *aff'd on other grounds*, 49 P.3d 860 (Wash. 2002); Burton v. Clark County, 958 P.2d 343, 348, 357 (Wash. Ct. App. 1998) (applying *Dolan* to "road dedications and improvements" exactions).

[134] 887 P.2d 360 (Or. Ct. App. 1994).

[135] *Id.* at 365.

[136] *Id.* (quoting Schultz v. City of Grants Pass, 884 P.2d 569, 573 (Or. Ct. App. 1994)) (footnote omitted).

> Our conclusion is not at odds with the Supreme Court's differentiation between adjudicative conditions on particular properties and generally applicable legislative regulations on uses. A condition on the development of particular property is not converted into something other than that by reason of legislation that requires it to be imposed.[137]

Interestingly, as already indicated above,[138] the Court of Appeals of Oregon took a different stance when deciding monetary Legislative Exaction cases, holding *Dolan* inapplicable to *monetary* Legislative Exactions.[139] This shift seems largely due to the influence of *Ehrlich* and its progeny.[140]

Some courts, however, have remained true to the Court's holding in *Dolan* in the face of challenges to legislatively enacted monetary exactions.[141] In *Town of Flower Mound v. Stafford Estates Ltd. Partnership*,[142] for example, the Supreme Court of Texas held that an off-site road improvement Legislative Exaction was properly assessed under *Dolan*.[143] In addition, a number of jurisdictions have similarly held monetary Legislative Exactions reviewable under *Dolan*.[144] These jurisdictions, Washington,[145] Ohio,[146] and the United States District Court for the Eastern District of Virginia,[147] have

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[137] *Id.* at 365 n.1 (citing Dolan v. City of Tigard, 512 U.S. 374, 391 n.8 (1994)). For an overview of other Oregon cases addressing the legislatively enacted physical exactions, see *Dudek v. Umatilla County*, 69 P.3d 751 (Or. Ct. App. 2003) (roadway widening), *McClure v. City of Springfield*, 28 P.3d 1222 (Or. Ct. App. 2001) (street right-of-way dedication), *Art Piculell Group v. Clackamas County*, 922 P.2d 1227 (Or. Ct. App. 1996) (road dedication), and *Schultz v. City of Grants Pass*, 884 P.2d 569 (Or. Ct. App. 1994) (street right-of-way dedication).

[138] *See supra* Part III.B.

[139] Indeed, this approach is consistent with Justice Mosk's concurrence in *Ehrlich*. *See supra* Part III.B; *see also* Ehrlich v. City of Culver City, 911 P.2d 429, 460 n.4 (Cal. 1996) (Mosk, J., concurring).

[140] *See supra* Part III.B.

[141] *See infra* notes 142-54 and accompanying text.

[142] 135 S.W.3d 620 (Tex. 2004).

[143] *Id.* at 641; *see also* Town of Flower Mound v. Stafford Estates Ltd. P'ship, 71 S.W.3d 18 (Tex. Ct. App. 2002), *aff'd*, 135 S.W.3d 620 (Tex. 2004).

[144] *See infra* notes 145-47 and accompanying text.

[145] See *Trimen Dev. Co. v. King County*, 877 P.2d 187 (Wash. 1994) (en banc), where the court held that a scheduled park development in lieu fee, *id.* at 188, was subject to review under *Dolan*, *id.* at 194.

[146] See *Home Builders Ass'n v. City of Beavercreek*, 729 N.E.2d 349 (Ohio 2000), where the court held that a traffic impact fee exaction was subject to review under *Dolan*. *Id.* at 356.

[147] In *National Ass'n of Home Builders v. Chesterfield County*, 907 F. Supp. 166 (E.D. Va. 1995), *aff'd*, 92 F.3d 1180 (4th Cir. 1996), the court declined to resolve the adjudicative/legislative distinction in the context of a facial attack to a "cash proffer policy," *id.* at 167, because it found that even if the *Dolan* standard did apply, the facts on hand could pass that standard, *id.* at 168. The "cash proffer policy" was a scheduled fee imposed on residential rezoning requests. *Id.*

not, however, expressly addressed the adjudicative/legislative distinction in their opinions.

At least one court has applied *Dolan* beyond the context of exactions.[148] In *Manocherian v. Lenox Hospital*,[149] the Court of Appeals of New York held that a legislative enactment requiring the owners of apartments to offer renewal leases was subject to review under *Dolan*.[150] The court reasoned, "[w]e are governed by this framework and discern no analytical basis or precedential authority to drop below this floor of constitutional protection for property owners or to alter well-established substantive and procedural rubrics and guidance in this complex field."[151] The court's conclusion rested on its observations that in *Nollan*, "the Supreme Court refrained from placing any limitations or distinctions or classifications on the application of the 'essential nexus' test[,]"[152] and that "[t]his suggests and supports a uniform, clear and reasonably definitive standard of review in takings cases."[153] However, the court has since reversed course, limiting *Dolan* to exactions cases.[154]

In short, the lower courts sharply disagree on whether Legislative Exactions should be analyzed under *Dolan*. Some lower courts distinguish *Dolan* on the basis of its text, while other lower courts further support this reading by citing to the Court's extortion rationale in *Nollan*, i.e., the *Ehrlich* Approach.[155] Still, other courts hold that *Dolan* is applicable to Legislative Exactions.[156] The following three parts advance the latter view, looking specifically to the plain meaning of the Court's exactions cases.

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[148] *Contra* Clajon Prod. Corp. v. Petera, 70 F.3d 1566, 1579 (10th Cir. 1995) ("[W]e believe that the 'essential nexus' and 'rough proportionality' tests are properly limited to the context of development exactions." (citing Dolan v. City of Tigard, 512 U.S. 374, 385 (1994))); *cf.* City of Monterey v. Del Monte Dunes, 526 U.S. 687, 702-03 (1999) ("[W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use.") (citations omitted).

[149] 643 N.E.2d 479 (N.Y. 1994).

[150] *Id.* at 482.

[151] *Id.*

[152] *Id.* at 483.

[153] *Id.*

[154] See *Bonnie Briar Syndicate Inc. v. Town of Mamaroneck*, 721 N.E.2d 971 (N.Y. 1999), where the Court of Appeals of New York found that *Dolan*'s scope was "finally resolved" by the Supreme Court in *Del Monte Dunes*. *Id.* at 975. For further review of *Del Monte Dunes*, see *supra* note 148.

[155] *See supra* Part III.B.

[156] *See supra* Part III.D.

IV. *DOLAN* APPLIES TO LEGISLATIVE EXACTIONS

In his dissent from the Court's denial of certiorari in *Parking Ass'n of Georgia*, Justice Thomas, joined by Justice Sandra Day O'Connor, observed:

> It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.[157]

Although Justice Thomas explained why certiorari was necessary to clarify certain conflicts in *Dolan*,[158] his view is actually consistent with the plain language of *Dolan*. As previously stated,[159] the Court twice distinguished the exactions imposed on Ms. Dolan from Legislative Zoning Regulations.[160] Specifically, in discussing the burden of proof, a central characteristic of *Dolan*'s heightened scrutiny, the Court clarified that "in evaluating most generally applicable *zoning regulations*, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights."[161] In making this statement, the Court cited *Euclid* as an example of "most generally applicable zoning regulations." [162] Elsewhere in the opinion, after citing *Euclid*,[163] *Pennsylvania Coal*,[164] and *Agins*,[165] the Court said:

> The sort of land use regulations discussed in the cases *just cited* . . . *differ* in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel.[166]

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[157] Parking Ass'n of Ga. v. City of Atlanta, 515 U.S. 1116, 1117-18 (1995) (Thomas, J., dissenting from denial of certiorari).

[158] *Id.*

[159] *See supra* Part I.

[160] *See supra* Part I.

[161] Dolan v. City of Tigard, 512 U.S. 374, 391 n.8 (1994) (citing Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)) (emphasis added).

[162] *Id.*

[163] 272 U.S. 365.

[164] 260 U.S. 393 (1922).

[165] 447 U.S. 255 (1980).

[166] *Dolan*, 512 U.S. at 385 (emphases added).

Taken together, these passages teach that the type of "generally applicable zoning regulations,"[167] in *Euclid*, *Pennsylvania Coal*, and *Agins*, which are "essentially *legislative* determinations classifying entire areas of [a] city," are not subject to review under *Dolan*.[168]

In *Euclid*, the Court facially upheld a comprehensive zoning ordinance, which prohibited industrial uses on a landowner's property.[169] In *Pennsylvania Coal*, the Court held as unconstitutional a statute which prohibited "the mining of anthracite coal in such way as to cause the subsidence of, among other things, any structure used as a human habitation."[170] In *Agins*, as discussed above,[171] the Court upheld the constitutionality of ordinances that imposed density restrictions.[172] These cases are all classic examples of Euclidian zoning classifications, which divide regions into different use zones by specifying the appropriate uses of land in each zone.[173] The Court's reference to these regulations as "generally applicable"[174] and "legislative determinations"[175] is in consonance with how zoning and rezoning are legislative functions.[176]

Moreover, because the regulations in *Euclid*, *Pennsylvania Coal*, and *Agins* did not impose exactions, they do not logically fall under the Court's "well-settled doctrine of 'unconstitutional conditions.'"[177] This doctrine prevents the government from requiring a person to "give up a constitutional right . . . in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property."[178] Indeed, the regulations in *Euclid*, *Pennsylvania Coal*, and *Agins*, all involved the

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[167] *Id.* at 384.

[168] *Id.* at 385 (emphasis added).

[169] Vill. of Euclid v. Ambler Realty Co., 272 U.S. 397 (1926).

[170] Penn. Coal Co. v. Mahon, 260 U.S. 393, 412 (1922).

[171] *See supra* Part II.A.

[172] Agins v. City of Tiburon, 447 U.S. 255, 257 (1980), *overruled by* Lingle v. Chevron U.S.A. Inc., ___ U.S. ___, 125 S. Ct. 2074 (2005).

[173] BLACK'S LAW DICTIONARY 1650 (8th ed. 2004). Euclidian zoning is also referred to as "use zoning." *Id.*

[174] Dolan v. City of Tigard, 512 U.S. 374, 391 n.8 (1994).

[175] *Id.* at 385.

[176] Aldridge v. Grund, 302 So. 2d 847, 853 (Ala. 1974); Pioneer Trust Co. v. Pima County, 811 P.2d 22, 25 (Ariz. 1991) (citing Wait v. City of Scottsdale, 618 P.2d 601, 602 (Ariz. 1984)); Paul v. City of Manhattan, 511 P.2d 244, 251 (Kan. 1973); Pierce v. King County, 382 P.2d 628, 632 (Wash. 1963); BLACK'S LAW DICTIONARY 1649 (defining zoning as "the legislative division of a region, esp. a municipality, into separate districts with different regulations within the districts for land use, building size, and the like").

[177] *Dolan*, 512 U.S. at 385 (citing Perry v. Sindermann, 408 U.S. 593 (1972); Pickering v. Bd. of Ed. of Twp. High School Dist. 205, Will County, 391 U.S. 563, 568 (1968)).

[178] *Id.*

classification of land, not the granting of "discretionary benefits."[179] This principle was recently applied in *City of Monterey v. Del Monte Dunes*,[180] where the Court declined to extend the application of *Dolan*'s heightened scrutiny to a city's decision to reject a landowner's development plan.[181] In *Monterey*, there were no discretionary benefits involved, and consequently the Court explained:

> The rule applied in *Dolan* considers whether dedications demanded *as conditions of development* are proportional to the development's anticipated impacts. It was not designed to address, and is not readily applicable to, the much different questions arising where . . . the landowner's challenge is based not on excessive exactions but on denial of development.[182]

Thus, it is clear that Euclidian zoning classifications, which merely limit the use of land, are beyond the ambit of *Dolan*'s heightened scrutiny. It is, however, also clear that these two passages from *Dolan*, when carefully examined, do not provide support for the proposition that legislatively enacted, generally applicable regulations which impose exactions, are not reviewable under *Dolan*. Absent such support, that notion is hardly defensible.

Instead, it stands to reason that the unconstitutional conditions doctrine can be offended by both Legislative and Administrative Exactions. If a legislative body enacted an exaction regulation which did not bear the required "relationship to the property,"[183] be it for lack of an "essential nexus"[184] or for want of "rough proportionality,"[185] the result would seem no less unconstitutional than the conditions exacted in *Nollan*[186] or *Dolan*.[187] Since both Legislative and Administrative Exactions can violate the unconstitutional conditions doctrine, it makes little sense that the latter is subject to heightened scrutiny while the former is not. In this way, the "distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference."[188] Legislative Exactions are thus properly

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[179] *See supra* notes 169-72 and accompanying text.

[180] 526 U.S. 687 (1999).

[181] *Id.* at 703.

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

[183] *Dolan*, 512 U.S. at 385.

[184] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

[185] *Dolan*, 512 U.S. at 391.

[186] *See supra* Part II.B.

[187] *See supra* Part II.C.

[188] Parking Ass'n of Ga. v. City of Atlanta, 515 U.S. 1116, 1117 (1995) (Thomas, J., dissenting from denial of certiorari).

evaluated under *Dolan*.[189] Indeed, by this reading of *Dolan*, "the general applicability of the ordinance" is not "relevant in a takings analysis."[190]

As a practical matter, to a person trying to develop his land, irrespective of whether the decision to impose an unconstitutional condition is adjudicative or legislative, the result is the same: unfair.[191] For instance, in *Amoco Oil Co. v. Village of Schaumburg*,[192] responding to a landowner's application for a special use permit, a municipality passed an ordinance to exact a dedication for roadway widening, i.e., a Legislative Exaction.[193] The municipality maintained that "*Dolan* and its progeny do not apply to the present case on the grounds that its actions were purely legislative in nature rather than adjudicative."[194] Rephrasing this argument, the court explained that the municipality "apparently" believed that it could "skirt its obligation to pay compensation when taking private property for public use merely by having the Village Board of trustees pass an 'ordinance' rather than having a planning commission issue a permit."[195] In adopting Justice Thomas's rationale, the court further observed that "a municipality should not be able to insulate itself from a takings challenge merely by utilizing a different bureaucratic vehicle when expropriating its citizen's property."[196] To guard against such abuses, and in the interest of "'fairness and justice,'"[197] "[a]ny exaction, no matter how small or large, must comply with the rough proportionality standard of *Dolan*."[198]

In summary, *Dolan* applies to Legislative Exactions because: (1) although in *Dolan* the Court explained that its test does not apply to Legislative Zoning Regulations, the Court did not address whether its test applied to Legislative Exactions;[199] and (2) Legislative Exactions can offend the unconstitutional conditions doctrine as well as Administrative Exactions, in theory as well as in practice.[200]

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[189] *Dolan*, 512 U.S. at 391 n.8.

[190] *Parking Ass'n of Ga.*, 515 U.S. at 1118.

[191] *See* Breemer, *supra* note 78, at 403.

[192] 661 N.E.2d 380 (Ill. App. Ct. 1995).

[193] *Id.* at 383.

[194] *Id.* at 389.

[195] *Id.*

[196] *Id.* at 390.

[197] Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

[198] City of Annapolis v. Waterman, 745 A.2d 1000, 1013 n.11 (Md. 2000).

[199] *See supra* notes 158-76 and accompanying text.

[200] *See supra* notes 177-98 and accompanying text.

V. DEFERENCE TO LEGISLATIVE BODIES IS INAPPROPRIATE IN THE CONTEXT OF EXACTIONS

The argument that regulatory leveraging presents substantially less of a threat in the context of Legislative Exactions, as represented by the *Ehrlich* Approach,[201] is merely wishful thinking for three reasons. First, central to most lower courts' efforts to distinguish *Dolan* on this basis, is a review of the Court's concerns for such overreaching in *Nollan*: "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'"[202] While the situation in *Nollan* presented a physical Administrative Exaction, there is evidence that the Court's rationale was not confined to those facts. The Court's oft-quoted "'out-and-out plan of extortion'"[203] language was taken from *J.E.D. Associates, Inc. v. Atkinson*.[204]

In *J.E.D. Associates*, the Supreme Court of New Hampshire held that a physical Legislative Exaction ordinance which required "every subdeveloper to deed to the town seven and one-half percent of the total acreage of its proposed subdivision as a condition of subdivision approval,"[205] was unconstitutional for, in the end, a lack of a nexus.[206] The specific sentence from which the Supreme Court of the United States quoted this opinion, however, dealt not with a physical exaction, but with a monetary exaction:

> [T]here is evidence . . . which indicates that some developers would be permitted to pay the town the value of the land *in lieu of its dedication*. This appears to us to be an *out-and-out plan of extortion* whereby developers are *required to pay* for the privilege of using their land for valid and reasonable purposes even though it satisfies all other requirements of the town's zoning and subdivision regulations.[207]

Because the amount paid for the in lieu fee hinged upon the amount of land that was required to be dedicated, and because the amount of land dedicated was defined by ordinance, it follows that the amount paid for the in lieu fee was also set in quantum. In other words, the amount paid was not discretionary (although it appears that the decision to permit a developer to pay the fee may have been).

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[201] *See supra* Part III.B.

[202] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (quoting J.E.D. Assocs., Inc. v. Atkinson, 432 A.2d 12, 14-15 (N.H. 1981)) (citation omitted).

[203] *Id.*

[204] 432 A.2d 12, *overruled on other grounds*, Town of Auburn v. McEvoy, 553 A.2d 317, 321 (N.H. 1988) (appellate jurisdiction issue).

[205] *Id.* at 13.

[206] *Id.* at 14-15.

[207] *Id.* at 14 (emphasis added).

Returning to *Nollan*, then, although the Court concluded that the California Coastal Commission had engaged in extortionate behavior, the Court's reasoning followed a precedent that essentially addressed the effect of regulatory leveraging in a monetary Legislative Exaction. Thus, the Court's command against the government's unconstitutional "'out-and-out extortion'"[208] of landowners logically extends to (as it flows from) monetary Legislative Exactions.

Second, to buttress the regulatory leveraging rationale, the *Ehrlich* approach argues that even if such activity does occur at the legislative level, the political process will take its course at the next election.[209] However, this argument does not account for underrepresented minorities' lack of political power. This point is illustrated by the instance of exclusionary zoning. In reference to exclusionary zoning, Professor Daniel R. Mandelker[210] explained:

> If land use controls are too restrictive they will exclude lower income groups from the community. Exclusionary land use controls are primarily a suburban zoning problem. Suburban municipalities may adopt large-lot residential zoning, prohibit multifamily housing or adopt other *exclusionary restrictions* to exclude lower-income groups and racial minorities.[211]

For example, some exclusionary restrictions come in the form of exactions, which increase the cost of low-income housing. Although exclusionary zoning may never amount to a taking, it does demonstrate how elected officials can use their political leverage to exclude minorities from a community. The Supreme Court of Utah has observed, "[w]ithout legal limits —imposed by statute or constitution—subdivision charges could easily be used to avoid . . . legal limits on restrictive or exclusionary zoning."[212] Moreover, in remedying instances of exclusionary zoning, the Supreme Court of New Jersey specifically required that municipalities eliminate restrictive devices, such as exactions, in certain instances: "municipalities must remove zoning and subdivision restrictions and exactions that are not necessary to protect health and safety."[213]

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[208] *Nollan*, 483 U.S. at 837 (quoting *J.E.D. Assocs.*, 432 A.2d at 14-15) (citation omitted).

[209] *See supra* Part III.B.

[210] Professor Mandelker is one of the nation's leading scholars in land use law. *See Evolving Voices in Land Use Law: A Festschrift in Honor of Daniel R. Mandelker: Part II: Discussions on the National Level: Chapter 4: Proposals: The Rise of Reason in Planning Law: Daniel R. Mandelker and the Relationship of the Comprehensive Plan in Land Use Regulation*, 3 WASH. U. J.L. & POL'Y 323 (2000).

[211] MANDELKER, *supra* note 7, § 1.10 (emphasis added).

[212] Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899, 902 (Utah 1981).

[213] S. Burlington County N.A.A.C.P. v. Mount Laurel, 456 A.2d 390, 441 (N.J. 1983).

By contrast, in *San Remo*, the victim of regulatory leveraging was the landowning minority.[214] There, the Supreme Court of California held that *Dolan* did not apply to a housing replacement in lieu fee, i.e., a Legislative Exaction.[215] The city imposed a fee when hotel owners applied for conditional use permits to reconfigure their business in order to discontinue their policies of providing rooms for long-term renters.[216] In her dissent, Justice Janice R. Brown opined that the city officials had merely placed "the burden of providing low-income housing disproportionately on a relatively small group of hotel owners."[217] She further explained that the political process fails particularly "where the legislation affects a relatively powerless group and therefore the restraints inherent in the political process can hardly be said to have worked."[218] Likewise, responding to the *San Remo* majority's political process argument, the Supreme Court of Texas declared:

> We are not convinced. While we recognize that an *ad hoc* decision is more likely to constitute a taking than general legislation, we think it entirely possible that the government could "gang up" on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others.[219]

Third, the *Ehrlich* approach's reliance on the separation of powers doctrine to grant deference to legislative decisions to impose exactions is misplaced.[220] Seventh Circuit Judge Richard A. Posner has recognized that "the separation of powers is less elaborate on a local than on a state or federal level" to the extent that, among other things, "they blur the distinction between executive and legislative conduct."[221] On the other hand, "[a]t the higher levels of government the separation of powers, bureaucratic resistance to elected officials, the competition of parties and candidates, and an alert press combine to prevent elected officials from conspiring against individual citizens," said Judge Posner.[222] These forces, he continued, "may be attenuated at the local

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[214] San Remo Hotel L.P. v. City & County of San Francisco, 41 P.3d 87 (Cal. 2002).

[215] *Id.* at 104.

[216] *Id.* at 91.

[217] *Id.* at 120 (Brown, J., dissenting). Put differently, Mr. J. David Breemer observes, "San Francisco's elected officials legislated the burden of ameliorating a city-wide housing shortage —and the associated homelessness—upon approximately 500 hotel owners." Breemer, *supra* note 78, at 405.

[218] *San Remo*, 41 P.3d at 124 (Brown, J., dissenting) (citing United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938)).

[219] Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 641 (Tex. 2004) (emphasis added).

[220] *See supra* Part III.B.

[221] Fraternal Order of Police Hobart Lodge # 121, Inc. v. City of Hobart, 864 F.2d 551, 557 (7th Cir. 1988) (Posner, J.).

[222] Reed v. Shorewood, 704 F.2d 943, 953 (7th Cir. 1983) (Posner, J.).

level."[223] The Court of Appeals of Utah has similarly observed that "'local governments are not structured under strict separation of powers principles,' and 'the nature of the land use decision-making process relies on flexibility and discretion.'"[224] Thus, deference to legislative bodies at the local level based on the separation of powers doctrine is inappropriate.

In short, based on the Court's rationale in *Nollan*, the lack of procedural safeguards provided by the political process, and the inapplicability of the separation of powers doctrine at the local level, distinguishing *Dolan* on a regulatory leveraging rationale has little, if any, doctrinal basis beyond "blind deference to legislative decisions."[225]

VI. DISTINGUISHING BETWEEN ADJUDICATIVELY AND LEGISLATIVELY IMPOSED EXACTIONS

Precisely what manner of adjudicative decision triggers *Dolan*'s heightened scrutiny is unclear. Certainly, when an administrative body decides to saddle a landowner with a disproportionate share of the infrastructural burdens on an ad hoc basis, that decision is likely to be deemed adjudicative. That, however, was not the case in *Dolan*. In his dissent, Justice Souter noted: "[t]he majority characterizes this case as involving an 'adjudicative decision' to impose permit conditions, but the permit conditions were imposed pursuant to Tigard's Community Development Code. The adjudication here was of Dolan's requested variance from the permit conditions otherwise required to be imposed by the Code."[226] The pedestrian/bicycle pathway dedication was imposed by the development code pursuant to a pedestrian/bicycle pathway plan.[227] Likewise, the floodplain dedication was levied by the development code pursuant to a master drainage plan.[228]

Interestingly, the Court scrutinized the Commission's findings that were all made in response to Ms. Dolan's variance request.[229] Assuming that a variance from an exaction was the only adjudicative decision in *Dolan*, then it must be that exactions that are subject to a variance are "adjudicative" under

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[223] *Id.* Indeed, Judge Posner's observations lend credence to the position that local legislative bodies are more likely to engage in regulatory leveraging against underrepresented minorities at the local level, since the safeguards of the separation of powers are attenuated at that level.

[224] B.A.M. Dev., L.L.C. v. Salt Lake County, 87 P.3d 710, 728 (Utah Ct. App. 2004) (quoting Reznik, *supra* note 78, at 257).

[225] Callies, *Regulatory Takings*, *supra* note 78, at 567.

[226] Dolan v. City of Tigard, 512 U.S. 374, 414 n.* (1994) (Souter, J., dissenting); *see also* Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 641 (Tex. 2004).

[227] *Dolan*, 512 U.S. at 378.

[228] *Id.*

[229] *Id.* at 380-82.

Dolan,[230] and therefore subject to heightened scrutiny. For example, in *Town of Flower Mound*, the Supreme Court of Texas held that a Legislative Exaction concerning off-site public improvements was properly reviewed under *Dolan*.[231] There, the Town had the discretion to grant Stafford, a developer, a variance from the exaction requirement, which Stafford had requested and was denied.[232] While analogizing to *Nollan* and *Dolan*, the court reasoned:

> It is enough to say that we can find no meaningful distinction between the condition imposed on Stafford and the conditions imposed on Dolan and the Nollans. All were based on general authority taking into account individual circumstances. Dolan's request for a variance was denied. The Town was authorized to grant, and did grant, exceptions to the general requirement that roads abutting subdivisions be improved to specified standards. Stafford applied for an exception and was refused, but the Town nevertheless considered whether an exception was appropriate.[233]

Put in *Ehrlich*'s terms, perhaps a municipality's ability to grant a variance was all the "discretion"[234] that the United States Supreme Court had in mind when it characterized the exaction in *Dolan* as "adjudicative."[235]

Furthermore, even assuming that the adjudicative decision examined in *Dolan* was the decision on the part of the Commission to impose the exactions (of which the opinion provides no evidence), such a standard is not workable. In holding that a roadway dedication exaction was subject to review under *Dolan*,[236] the Court of Appeals of Utah remarked that a distinction between administrative and legislative decisions is unrealistic, because "'the nature of the land use decision-making process relies on flexibility and discretion.'"[237] The court observed that "some exactions 'are somewhere in the middle of adjudicative and legislative' because 'the legislature [may give] some guidelines, [while] the administrative body retains considerable discretion as well.'"[238] Moreover, as stated before, Judge Posner has observed that the separation of powers doctrine plays far less of a role at the local level.[239] Thus, the distinction between the executive and the legislative branches is

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[230] *Id.* at 385, 391 n.8.

[231] *Town of Flower Mound*, 135 S.W.3d at 622-24.

[232] *Id.* at 624.

[233] *Id.* at 641 (footnotes omitted).

[234] *See* Ehrlich v. City of Culver City, 911 P.2d 429, 444 (Cal. 1996).

[235] *See Dolan*, 512 U.S. at 385, 391 n.8.

[236] B.A.M. Dev., L.L.C. v. Salt Lake County, 87 P.3d 710, 726-27 (Utah Ct. App. 2004).

[237] *Id.* at 728 (quoting Reznik, *supra* note 78, at 257).

[238] *Id.* at 729 n.23 (quoting Reznik, *supra* note 78, at 266).

[239] *See supra* Part V.

further blurred at the local level.[240] As Supreme Court of Georgia Justice George H. Carley has concluded, "[i]t is prohibitively difficult and unrealistic to draw a line between legislative and adjudicative decisions . . . ."[241] Consequently, if that line cannot be clearly drawn, it should not be drawn at all.

In sum, if the availability of a variance from an exaction was the adjudicative action that the Court referenced in *Dolan*, then the availability of such an option should serve as a bright-line on the applicability of *Dolan* in drawing the legislative/administrative distinction. However, if the adjudicative action in *Dolan* was the imposition of the exaction, then such a standard for drawing the legislative/administrative distinction is unworkable and should not be applied.

VII. CONCLUSION

Dolan supports the evenhanded application of its standard to both Legislative and Administrative Exactions, for, in the end, a Legislative Exaction can offend the "well-settled doctrine of 'unconstitutional conditions,'"[242] as well as an Administrative Exaction.[243] While the unconstitutional conditions doctrine assures that the government does not take constitutional rights unjustifiably, the threat of unjust and downright "'out-and-out plan of extortion'"[244] is ever-present in legislative decisions, particularly against underrepresented minorities, both rich and poor.[245] Although adjudication has been a condition precedent to many jurisdictions' application of *Dolan*, that threshold should be easily met under *Dolan* by the showing that an exaction is subject to a variance.[246] Beyond such a showing, any heightened requirements to trigger *Dolan* are unworkable, especially at the local level.[247] Such impediments pose unnecessary hurdles to the procedural safeguards that *Dolan* provides (i.e., a showing of a nexus and proportionality). *Dolan* set a

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[240] *See supra* Part V; *see also* Reed v. Shorewood, 704 F.2d 943, 953 (7th Cir. 1983) (Posner, J.).

[241] Greater Atlanta Homebuilders Ass'n v. Dekalb County, 588 S.E.2d 694, 701 (Ga. 2003) (Carley, J., dissenting) (quoting Town of Flower Mound v. Stafford Estates Ltd. P'ship, 71 S.W.3d 18, 34 (Tex. Ct. App. 2002)) (brackets omitted). Justice Carley also dissented in *Parking Ass'n of Georgia v. City of Atlanta*, 450 S.E.2d 764 (Ga. 1994) (Sears & Carley, JJ., dissenting).

[242] Dolan v. City of Tigard, 512 U.S. 374, 385 (1994).

[243] *See supra* Part IV.

[244] Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (quoting J.E.D. Assocs., Inc. v. Atkinson, 432 A.2d 12, 14-15 (N.H. 1981)) (citation omitted).

[245] *See supra* Part V.

[246] *See supra* Part VI.

[247] *See supra* Part VI.

"constitutional minimum floor of protection"[248] which the lower courts "lack[] authority to diminish under the Supremacy Clause."[249] The Fifth Amendment to the United States Constitution thus requires that unless there is a "constitutional difference"[250] to justify the distinction between Administrative and Legislative Exactions, that constitutional floor must be observed by the lower courts when exactions are challenged.

Christopher T. Goodin[251]

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[248] Manocherian v. Lenox Hill Hosp., 643 N.E.2d 479, 482 (N.Y. 1994) (citing William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV 535, 550 (1986)) (citation omitted).

[249] *Id.*

[250] Parking Ass'n of Ga. v. City of Atlanta, 515 U.S. 1116, 1118 (1995) (Thomas, J., dissenting from denial of certiorari).

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Reconsidering Hawai'i's HIV Statute: The Need to Protect an Individual's Basic Liberties

I. INTRODUCTION

As the number of individuals infected has grown, the fear of contracting Acquired Immune Deficiency Syndrome ("AIDS")[1] has never been more pervasive.[2] This fear is greatly amplified among victims of sexual assault.[3] Indeed, the violent nature of such non-consensual encounters significantly increases the risk of transmission.[4] The risk of transmission during such assaults is also enhanced by the high-risk behavior of some sexual offenders, such as intravenous drug use and homosexual activity in the prison environment.[5] The threat of spreading AIDS to innocent victims has triggered a legislative response nationwide, requiring mandatory AIDS testing of sex offenders.[6]

Amidst the fear and pandemonium, Hawai'i recently enacted legislation requiring, upon the request of the alleged victims, mandatory pre-conviction Human Immunodeficiency Virus ("HIV")[7] testing of those charged with sexual assault.[8] Hawai'i's pre-conviction testing scheme calls into question a basic tenet of American jurisprudence—that every person is presumed

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[1] *See infra* Part II.

[2] The Surgeon General's HIV/AIDS Website, Federal Responses to the Epidemic, http://www.osophs.dhhs.gov/aids/frpage1.html (last visited Oct. 7, 2005).

[3] *See* Lawrence O. Gostin et al., *HIV Testing, Counseling, and Prophylaxis After Sexual Assault*, 271 JAMA 1436, 1437 (1994). The fear of contracting HIV, which ultimately results in AIDS, adds "to the incidence, prevalence, and severity of psychiatric morbidity in rape survivors." *See id.*

[4] *See id.* "The presence of lesions or blood from violent assaults may significantly increase the probability of transmission." *Id.*

[5] *See* Paul H. MacDonald, Note, *AIDS, Rape and the Fourth Amendment: Schemes for Mandatory AIDS Testing of Sex Offenders*, 43 VAND. L. REV. 1607, 1631 (1990). Prison inmates are almost twice as likely to have used intravenous drugs than are individuals in the general population. *Id.* Close to 30% of the United States prison population engages in homosexual acts, with between 9% and 20% of inmates being the victims of prison rape. *Id.*

[6] *See* Robyn Cheryl Miller, Annotation, *Validity, and Propriety Under Circumstances, of Court-Ordered HIV Testing*, 87 A.L.R. 5th 631 (2005); *see, e.g.*, MONT. CODE ANN. § 46-18-256 (2005); NEV. REV. STAT. ANN. § 441A.320 (West 2004); R.I. GEN. LAWS § 11-37-17 (2004); S.D. CODIFIED LAWS § 23A-35B-3 (2005); VA. CODE ANN. § 18.2-62 (West 2005).

[7] *See* AIDS: A GUIDE TO THE LAW 1-2 (Dai Harris & Richard Haigh eds., 1990) [hereinafter AIDS]. HIV is the blood-borne virus that causes the immune system deficiency in AIDS. *See id.*

[8] *See* HAW. REV. STAT. § 325-16 (2004).

innocent until proven guilty. More importantly, it raises concerns about whether governmental interests in safeguarding public health justify intrusion upon a defendant's constitutional right to privacy.

This article explores the constitutional issues surrounding mandatory HIV testing of criminal sex offenders, with particular concentration on Hawai'i's 2002 enactment of the pre-conviction mandatory HIV testing scheme.[9] Part II briefly discusses the background of HIV and AIDS, and the medical aspects of HIV and AIDS antibody testing. The constitutional framework used to analyze mandatory testing, including Fourth Amendment case law, is discussed in Part III. Part IV examines federal and state legislation in the United States, as well as judicial approaches to balancing the competing interests regarding pre-conviction HIV testing. The current statutory scheme in the State of Hawai'i and its constitutional implications are reviewed in Part V. Part VI offers recommendations for amending Hawai'i's HIV statute in light of constitutional concerns. Finally, Part VII concludes this article with some final considerations regarding the victims' interests and the defendants' legal rights.

II. SCIENCE AND HISTORY OF HIV AND AIDS

Discovered in 1981,[10] HIV and AIDS infection has quickly turned into a deadly epidemic threatening hundreds of thousands of lives in the United States alone.[11] Science, meanwhile, has yet to produce a cure or a vaccine for the disease.[12] Today, the disease stirs up uncomfortable issues for society at large, which include sexual orientation, racism, and poverty.[13]

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[9] This article will focus on the rights of accused or charged, rather than convicted sexual offenders. It is well established that convicted persons, including those on probation, lose some rights to personal privacy that would otherwise be protected under the Fourth Amendment. Griffin v. Wisconsin, 483 U.S. 868, 880 (1987); Hudson v. Palmer, 468 U.S. 517, 530 (1984). Indeed, "[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." Price v. Johnston, 334 U.S. 266, 285 (1948). The fact of confinement and the legitimate goals and policies of the penal institution impose limitations on constitutional rights. Jones v. N.C. Prisoners' Labor Union, Inc., 433 U.S. 119, 125 (1977).

[10] Centers for Disease Control and Prevention [hereinafter CDC], *First Report of AIDS*, 50 MORBIDITY & MORTALITY WKLY. REP. 429 (2001), *available at* http://www.cdc.gov/mmwr/PDF/wk/mm5021.pdf.

[11] *See infra* Part II.B.

[12] *See infra* Part II.A.2.

[13] *See infra* Part II.B.

A. Medical Aspects of HIV and AIDS

HIV infection is a sexually transmitted disease[14] caused by a virus that attaches itself to and kills lymphocytes, which are white blood cells essential to the functioning of the human body's immune system.[15] HIV is a retrovirus, a type of virus that "is slow-acting and not highly infectious."[16] As the virus kills the human body's lymphocytes, the immune system becomes increasingly unable to combat fungi, bacteria, protozoa, and other viruses that invade the body.[17]

In the latter stages of HIV infection, known as AIDS, those infected are overcome by opportunistic infections and cancers[18] associated with the disease.[19] Although some of these infections can be treated, AIDS itself is incurable.[20] On average, it takes about ten years from the time an individual is initially infected with HIV for AIDS to develop.[21]

HIV is a blood-borne virus, spread through fluids such as semen, vaginal fluids, and blood.[22] It is spread through the sharing of needles, through unprotected sexual contact,[23] and from infected mothers to their babies.[24] Male-to-female HIV transmission during sex is twice as likely to occur as female-to-male transmission,[25] a statistic attributed to the increased susceptibility of the thin layers of cells in the female cervix.[26] The virus cannot be spread through daily contact with someone who has the virus,[27] nor can it be spread through

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[14] A "sexually transmitted disease" is defined as "[a]ny of various diseases, including chancroid, chlamydia, gonorrhea, and syphilis, that are usu[ally] contracted through sexual intercourse or other intimate sexual contact." AMERICAN HERITAGE COLLEGE DICTIONARY 1250 (3d ed. 1993).

[15] Steven Eisenstat, *An Analysis of the Rationality of Mandatory Testing for the HIV Antibody: Balancing the Governmental Public Health Interests with the Individual's Privacy Interest*, 52 U. PITT. L. REV. 327, 329 (1991).

[16] AIDS, *supra* note 7, at 1.

[17] *See* Eisenstat, *supra* note 15, at 329.

[18] Kaposi's sarcoma and Pneumocystis carinii pneumonia are the most common examples of opportunistic infections and unusual cancers that invade the bodies of individuals infected with HIV. *Id.*

[19] *Id.*

[20] AIDS, *supra* note 7, at 1.

[21] Lawrence O. Gostin & James G. Hodge, Jr., *The "Names Debate": The Case for National HIV Reporting in the United States*, 61 ALB. L. REV. 679, 686 (1998).

[22] AIDS, *supra* note 7, at 2.

[23] *See id.* "[T]he risk of infection extends to anyone, anywhere, who has vaginal or anal sex without using a condom, which acts as a barrier to HIV." *Id.*

[24] *Id.*

[25] Lawrence K. Altman, *Female Cases Of H.I.V. Found Rising Worldwide*, N.Y. TIMES, Nov. 24, 2004, at A11.

[26] *Id.*

[27] AIDS, *supra* note 7, at 2.

sharing cups or cutlery,[28] toilet seats, or touching or kissing.[29] HIV is thus not only slow-acting, but also difficult to transmit to other individuals.

1. Detection of the virus

In addition to being difficult to transmit, HIV is also difficult to detect. Indeed, the term "test for AIDS"[30] is somewhat misleading in that it generally refers to tests that do not detect the disease of AIDS.[31] Even the test for HIV infection does not detect the actual virus itself.[32] Rather, the tests commonly used to detect HIV or AIDS infection detect the presence of antibodies[33] manufactured by the body to fight off the HIV virus.[34]

While HIV antibodies are typically produced in most individuals within one to six months following exposure to the virus,[35] the period between infection and the development of a positive antibody test can well exceed a year.[36] It is often feared that tests during this "window period"[37] may produce false negative results, leading individuals to erroneously believe they are not infected.[38] As such, these individuals may unwittingly infect others during this period.

In 2004, the United States Department of Health and Human Services ("DHHS") announced a new rapid saliva test for HIV/AIDS approved by the Food and Drug Administration ("FDA") in March of that year.[39] Known as the OraQuick H.I.V.-1/2 test, it works with either saliva or a drop of blood and

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[28] *Id.* Although researches have found HIV in saliva, resulting in a theoretical possibility of transmitting the virus by such contact as kissing, biting, or spitting, no case resulting from such transmission has ever been reported. *See id.*

[29] *Id.*

[30] Martha A. Field, *Testing for AIDS: Uses and Abuses*, 16 AM. J.L. & MED. 34, 37 (1990).

[31] *Id.* at 37-38.

[32] *Id.* at 38.

[33] Antibodies are Y-shaped proteins on the surface of B cells that are secreted into the blood or lymphs in response to antigenic stimulae, such as a bacterium, viruses, parasites, or transplanted organs, and that neutralize the antigens by binding specifically to them; immunoglobulins. *See* THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 37 (4th ed. 2000).

[34] The enzyme-linked immunosorbant assay (ELISA) and Western Blot are the two tests most commonly employed to detect HIV. *See* Schwartz et al., *Human Immunodeficiency Virus Test Evaluation, Performance and Use*, 259 JAMA 2574 (1988).

[35] Stacey B. Fishbein, *Pre-Conviction Mandatory HIV Testing: Rape, AIDS and the Fourth Amendment*, 28 HOFSTRA L. REV. 835, 840 n.44 (2000).

[36] *Id.*

[37] *Id.* at 840.

[38] *Id.*

[39] Donald G. McNeil Jr., *Quick H.I.V. Test Is More Widely Available*, N.Y. TIMES, June 26, 2004, at A9.

provides easy-to-read results in about twenty minutes—much like a home pregnancy test.[40] While processing test results has itself become faster, scientists have yet to significantly narrow the window period between infection and detection.[41]

2. Medical treatment of the condition

As of 2005, medical science has yet to produce either a cure or a vaccine for AIDS.[42] During the past ten years, however, the FDA approved a number of drugs to fight HIV infection, and the virus's associated infections and cancers.[43] The first group of drugs used to treat HIV infection, called nucleoside reverse transcriptase ("RT") inhibitors, interrupt an early stage of HIV and can slow its spread as the virus reproduces itself.[44] The second class of drugs approved by the FDA are called protease inhibitors.[45] Protease inhibitors function to interrupt the virus's replication at a later stage in its life cycle.[46]

RT inhibitors and protease inhibitors must be used in combination because HIV can become resistant to any one of the drugs.[47] This combination, known as highly active antiretroviral therapy ("HAART"),[48] has been a major factor in significantly reducing the number of deaths from AIDS in this country.[49] While offering hope to many infected individuals, HAART's long-term viability is still uncertain,[50] and combination drug therapies may continue to be cost-prohibitive for much of the general public.[51] Indeed, the continuing

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[40] *See id.*

[41] Centers for Disease Control & Prevention, How long after a possible exposure should I wait to get tested for HIV?, http://www.cdc.gov/hiv/pubs/faq/faq9.htm (last visited Nov. 11, 2005).

[42] National Institutes of Health [hereinafter NIH], HIV Infection and AIDS: An Overview (Mar. 2005), http://www.niaid.nih.gov/factsheets/hivinf.htm.

[43] *See id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *See* Allison N. Blender, *Testing the Fourth Amendment for Infection: Mandatory AIDS and HIV Testing of Criminal Defendants at the Request of a Victim of Sexual Assault*, 21 SETON HALL LEGIS. J. 467, 476-77 (1997).

[51] *See id.* at 501 n.59 ("Most of the people infected with HIV are unable to pay $12,000 to $16,000 per year for the combination drug therapies." (citing Kitta MacPherson, *Startling Gains Seen on AIDS: Drug Companies Race to Announce Test Results*, STAR LEDGER, July 8, 1996, at A7)).

incurability of HIV, as the following section explains, fuels the social stigma attached to those infected.

B. History of HIV/AIDS in the United States

The Centers for Disease Control and Prevention ("CDC") of the DHHS first documented HIV in its June 5, 1981 issue of the *Morbidity and Mortality Weekly Report*.[52] The report documented five cases of an unusual pneumonia, pneumocystis carinii pneumonia, among young men in Los Angeles who had previously been healthy.[53] All five of the men were described as "homosexuals."[54] While this new disease was called the gay-related immunodeficiency syndrome for a brief period,[55] the CDC, by September 1982, had published a case definition using the current designation of "acquired immune deficiency syndrome (AIDS)."[56] Reports of a similar syndrome in injecting drug users appeared soon thereafter.[57]

In 1983, the CDC reported that over 450 persons had died from what had become known as AIDS,[58] and that the fatality rate exceeded 60% for cases first diagnosed over one year earlier.[59] The CDC further noted that during 1981, an average of one new case per day was reported, while three to four cases were reported daily in late 1982 and early 1983.[60] Cases involving women infected with HIV were first reported in 1982.[61] A subsequent CDC report identified certain groups in the U.S. at increased risk for developing

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[52] CDC, *First Report of AIDS*, 50 MORBIDITY & MORTALITY WKLY. REP. 429 (2001), *available at* http://www.cdc.gov/mmwr/PDF/wk/mm5021.pdf.

[53] Lawrence O. Gostin & James G. Hodge, Jr., *Piercing the Veil of Secrecy in HIV/AIDS and Other Sexually Transmitted Diseases: Theories of Privacy and Disclosure in Partner Notification*, 5 DUKE J. GENDER L. & POL'Y 9, 23 (1998).

[54] *See id.*

[55] Thomas C. Quinn, M.D., *The Global HIV Pandemic: Lessons from the Past and Glimpses into the Future*, HOPKINS HIV REP., *available at* http://www.hopkins-aids.edu/publications/report/jan01_4.html (last visited Oct. 12, 2005).

[56] *See* CDC, *Current Trends Update on Acquired Immune Deficiency Syndrome (AIDS)—United States*, 31 MORBIDITY & MORTALITY WKLY. REP. 507 (1982), http://www.aegis.com/pubs/mmwr/1982/MM3137.html.

[57] Henry Masur et al., *An Outbreak of Community-Acquired Pneumocystis Carinii Pneumonia: Initial Manifestation of Cellular Immune Dysfunction*, 305 N. ENGL. J. MED. 1431 (1981).

[58] *See* CDC, *Current Trends Prevention of Acquired Immune Deficiency Syndrome (AIDS): Report of Inter-Agency Recommendations*, 32 MORBIDITY & MORTALITY WKLY. REP. 101 (1983), http://www.aegis.com/pubs/mmwr/1983/MM3208.html.

[59] *See id.*

[60] *Id.*

[61] THEODORE J. STEIN, THE SOCIAL WELFARE OF WOMEN AND CHILDREN WITH HIV AND AIDS: LEGAL PROTECTIONS, POLICY, AND PROGRAMS 1 (1998).

AIDS: homosexual men with multiple sexual partners,[62] abusers of intravenous ("IV") drugs,[63] and Haitians (who had entered the country in the early 1980's).[64]

As fear and misunderstanding amongst the general public grew, the CDC attempted to reduce public scorn for HIV/AIDS by using a publicity campaign informing the public that the disease could not be transferred through casual contact.[65] Public fear and intolerance nonetheless continued to grow, reaching a new height in 1985[66] when Ryan White was barred from his grade school in Indiana after having contracted the virus through a transfusion.[67] Two years later, the Immigration and Naturalization Service initiated the mandatory antibody testing of all non-citizens applying for entry into the United States and,[68] based on the results of the tests, excluded those non-citizens that tested HIV-positive.[69]

The 1990's brought newfound hope in the form of public awareness campaigns, new drug treatments, and comprehensive legislation on all levels of government.[70] Indeed, it was during this decade that the Americans with Disabilities Act was signed into law, making available new protections for all individuals living with disabilities—including those disabled by HIV/AIDS.[71]

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[62] *See* CDC, *supra* note 58.

[63] *See id.*

[64] *See id.*

[65] *See* CDC, Milestones in the U.S. HIV Epidemic, http://www.cdc.gov/nchstp/od/mmwr/TimeLine%20rev2.pdf (last visited Apr. 29, 2005); *see also* Caroline Palmer & Lynn Mickelson, *Many Rivers to Cross: Evolving and Emerging Legal Issues in the Third Decade of the HIV/AIDS Epidemic*, 28 WM. MITCHELL L. REV. 455, 457-58 (2001).

[66] National Library of Medicine, Living with AIDS, http://www.nlm.nih.gov/exhibition/visualculture/living.html (last visited Oct. 16, 2005).

[67] Human Rights Campaign, *HIV/AIDS & HRC: Two Decades of Fighting for Life* 5, 11, http://www.hrc.org/Template.cfm?Section=Home&CONTENTID=15268&TEMPLATE=/ContentManagement/ContentDisplay.cfm (last visited Oct. 16, 2005).

[68] HIV/AIDS infection was added to the list of "dangerous contagious diseases" subject to mandatory testing under section 212(a)(6) of the Immigration and Nationality Act. *See* Medical Examination of Aliens, 52 Fed. Reg. 32,540 (Aug. 28, 1987) (to be codified at 42 C.F.R. pt. 34).

[69] amfAR, People with HIV Face U.S. Immigration Ban, http://www.amfar.org/cgi-bin/iowa/programs/publicp/z.record.html?record=174 (last visited Oct. 12, 2005).

[70] *See* CDC, supra note 65. One example of legislation, the 1990 Americans with Disabilities Act ("ADA"), offered new legal protections to all individuals living with disabilities, including those disabled by HIV/AIDS. *See* 42 U.S.C. §§ 12111, 12131, 12181 (1990).

[71] U.S. Department of Justice, Questions and Answers: The Americans with Disabilities Act and Persons with HIV/AIDS, http://www.usdoj.gov/crt/ada/pubs/hivqanda.txt (last visited Feb. 23, 2005).

This complex disease, however, continues to call into question the sensitive societal issues of sexual orientation, racism, and poverty.[72] Today, forty thousand new infections are diagnosed in the United States every year,[73] while over half a million people with AIDS in the United States have died since 1981.[74] In 2003, there were 2619 cases reported in the State of Hawai'i, of which 93% were infected males and 67% were Caucasians.[75] What was once an unknown disease affecting only five individuals just two decades ago is now a true plague threatening the lives of millions worldwide.

III. CONSTITUTIONAL FRAMEWORK FOR ANALYZING MANDATORY TESTING

In the midst of the deadly AIDS pandemic, all fifty states and the District of Columbia have enacted legislation mandating or authorizing HIV testing for charged or convicted sex offenders.[76] By compelling individuals to undergo such testing, however, these laws invoke the protection of the Fourth Amendment[77] to the United States Constitution. The Fourth Amendment provides that the federal government shall not infringe upon an individual's right to be free from unreasonable searches and seizures.[78]

In determining whether a search is reasonable, the United States Supreme Court probes the circumstances surrounding the search and examines the nature of the search itself.[79] Whether a search is permissible "is judged by balancing its intrusion on the individual's Fourth Amendment interests against

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[72] Palmer & Mickelson, *supra* note 65, at 461-62.

[73] *See* CDC, *Advancing HIV Prevention: New Strategies for a Changing Epidemic—United States, 2003*, 52 MORBIDITY & MORTALITY WKLY. REP. 329 (2003), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5215a1.htm.

[74] *See* CDC, CDC-NCHSTP-DHAP: HIV/AIDS 2003 Surveillance Report Table 7, http://www.cdc.gov/hiv/stats/2003SurveillanceReport/table7.htm (last visited Feb. 25, 2005).

[75] AIDS Action, HIV/AIDS in Hawaii, http://www.aidsaction.org/communications/publications/statefactsheets/pdfs/2004/hawaii_2004.pdf (last visited Feb. 28, 2005).

[76] *See* National Conference of State Legislatures [hereinafter NCSL], HIV-State Policy and Program Issues (Dec. 1999), http://www.ncsl.org/programs/health/hivpolicy.htm; *see, e.g.*, MONT. CODE ANN. § 46-18-256 (2005); NEV. REV. STAT. ANN. § 441A.320 (West 2004); R.I. GEN. LAWS § 11-37-17 (2004); S.D. CODIFIED LAWS § 23A-35B-3 (2005); VA. CODE ANN. § 18.2-62 (West 2005).

[77] U.S. CONST. amend. IV. It is well-established that a blood test is a search within the meaning of the Fourth Amendment. *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616 (1989); Schmerber v. California, 384 U.S. 757, 767-68 (1966) (upholding compulsory taking of blood in order to perform warrantless blood alcohol tests).

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

[79] *Skinner*, 489 U.S. at 619 (citing United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985)).

its promotion of legitimate governmental interests."[80] The Supreme Court has consistently held that medical examinations, including blood or urine tests, trigger, at a minimum, the Fourth Amendment balancing test.[81]

The purpose of the Fourth Amendment is "to guarantee[] the privacy, dignity, and security of persons against certain arbitrary and invasive acts by officers of the Government or those acting at their direction."[82] As such, most government searches require a warrant issued by a judge based upon probable cause, in order to guard against arbitrary and invasive acts.[83]

The Supreme Court, however, has recognized exceptions to this rule, "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'"[84] Generally, searches that have noninvestigatory, noncriminal purposes often fit within the category of "special needs,"[85] which are subject to a balancing test rather than to the more rigorous requirement of warrant or consent.[86] Under the special needs doctrine, the Court evaluates the propriety of a warrantless search by simply balancing the government's interest against the individual's expectation of privacy without any requirement to show particularized suspicion.[87]

This current approach to determining whether HIV testing statutes are "reasonable"[88] or not is primarily derived from two of the Courts' decisions from its 1989 session, *Skinner v. Railway Labor Executives' Ass'n*,[89] and *National Treasury Employees Union v. Von Raab*.[90] The Court held in these

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[80] *See id.* (citing Delaware v. Prouse, 440 U.S. 648, 654 (1979); United States v. Martinez-Fuerte, 428 U.S. 543 (1976)).

[81] *See, e.g.*, Board of Educ. v. Earls, 536 U.S. 822 (2002) (urine testing constitutes a search triggering Fourth Amendment inquiry under the special needs balancing test); *Skinner*, 489 U.S. at 616-17 (breathalyzer exam for chemical analysis constitutes search); *Schmerber*, 384 U.S. at 767-68 ("compelled" blood testing is an intrusion constituting a search); *see also* Yin v. State of California, 95 F.3d 864, 874 (9th Cir. 1996) (O'Scannlain, J., concurring) ("[C]ertain aspects of the routine physical examination at issue here would implicate the requisite 'concerns about bodily integrity,'" and thus trigger protection under the Fourth Amendment.).

[82] *Skinner*, 489 U.S. at 613-14; *see Delaware*, 440 U.S. at 648.

[83] *See, e.g., Skinner*, 489 U.S. at 619.

[84] *See id.* (citing Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (citation omitted)).

[85] Dubbs v. Head Start, Inc., 336 F.3d 1194, 1205 n.6 (10th Cir. 2003) (holding that medical exams, including genital exams, were searches for Fourth Amendment purposes because they were to determine whether the children were in compliance with federal Head Start regulations).

[86] *Id.*

[87] *See Skinner*, 489 U.S. at 602.

[88] *Id.* at 616.

[89] 489 U.S. 602.

[90] 489 U.S. 656 (1989).

cases that the federal government could impose suspicionless alcohol and drug tests on employees in the railroad industry and the U.S. Customs Service.[91]

Both cases involved the application of the Fourth Amendment "special needs"[92] analysis, which allows for warrantless searches of property if based upon a "reasonable"[93] level of suspicion.[94] Importantly, *Skinner* and *Von Raab* extended the "special needs"[95] approach beyond searches of property to intrusions into the human body.[96] Further, the cases upheld personal searches even in the absence of any suspicion that the individuals involved were in fact using drugs or alcohol.[97] It is thus arguable that mandatory blood testing of individuals accused of sexual assault is analyzed under the "special needs"[98] doctrine.

Following these decisions, the first case dealing with mandatory HIV testing of an accused or convicted sex offender was *Government of Virgin Islands v. Roberts*.[99] On its own authority, the *Roberts* court ordered a HIV test for an individual merely accused, rather than convicted, of rape.[100] The court allowed testing based on a magistrate's finding of probable cause that the defendant exposed the alleged victim to his sexual fluids.[101] In its ruling, the *Roberts* court identified two important governmental interests supporting mandatory testing that "plainly eclipse[d]" the defendant's interests in preventing the "search": (1) the government's interest in addressing a victim's interest in "fashioning a proper medical regimen"[102] to treat potential virus exposure; and (2) the government's interest in curbing HIV transmission.[103]

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[91] *Id.* at 679; *Skinner*, 489 U.S. at 634.

[92] *Skinner*, 489 U.S. at 602; *Von Raab*, 489 U.S. at 656.

[93] *Id.*

[94] *See, e.g.*, O'Connor v. Ortega, 480 U.S. 709 (1987) (upholding search of government employee's office for papers).

[95] *Skinner*, 489 U.S. at 602; *Von Raab*, 489 U.S. at 656.

[96] *See Skinner*, 489 U.S. at 602; *Von Raab*, 489 U.S. at 656.

[97] *See Skinner*, 489 U.S. at 602; *Von Raab*, 489 U.S. at 656.

[98] *See Skinner*, 489 U.S. at 602; *Von Raab*, 489 U.S. at 656.

[99] Gov't of Virgin Islands v. Roberts, 756 F. Supp. 898 (D.V.I. 1991).

[100] *Id.* at 900 (basing its power to compel testing on FED. R. CIV. P. 41 and V.I. CODE ANN. tit. 5, §§ 3901-02 (1989)).

[101] *Roberts*, 756 F. Supp. at 901.

[102] *Id.* at 903.

[103] *Id.* at 903-04 (citation omitted).

IV. MANDATORY TESTING IN THE UNITED STATES

Congress reacted to the AIDS epidemic by enacting the Crime Control Act in 1990.[104] The Act required states, in order to qualify for federal grants, to provide mandatory HIV testing schemes for *convicted* sex offenders.[105] Because Congress did not proffer specific guidelines regarding pre-conviction mandatory HIV testing schemes,[106] states have increasingly enacted laws allowing for HIV testing of *alleged* sex offenders.[107]

A. Genesis of Mandatory Testing

During the same year that New Jersey enacted the first state-level version of Megan's Law[108]—a series of legislative measures designed to provide information about sex offenders to the public—New Jersey also enacted two statutes allowing victims of sexual assault to demand that their offenders be subject to mandatory HIV and AIDS testing.[109] Significantly, New Jersey Statutes Annotated sections 2C:43-2.2 and 2A:4A-43.1 were the first state statutes to permit testing of those merely *charged* with or *indicted* for sexual assault,[110] as opposed to the existing federal legislation requiring testing of convicted sex offenders.[111]

The New Jersey statutes authorize courts to order HIV testing at the request of a victim and upon the application of the prosecutor when made at the time

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[104] *See* Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (1990) (codified as amended at 42 U.S.C. § 3756 (1994)).

[105] *See id.*

[106] Notably, the 2000 "Victims of Rape Health Protection Act," a congressional bill designed to mandate HIV testing of defendants charged with rape within 48 hours after indictment, died in the Senate Committee on the Judiciary in October of the same year. *See* Victims of Rape Health Protection Act of 2000, S. 3206, 106th Cong. (2000).

[107] *See* NCSL, *supra* note 76.

[108] Katherine Blok, *Megan's Law Spawned by Tragedy and Revulsion*, THE EXPRESS-TIMES, Feb. 26, 2004, *available at* http://www.nj.com/specialprojects/expresstimes/index.ssf?/news/expresstimes/stories/molesters5_lawhistory.html. Nine-year-old Megan Kanka was murdered in 1994 by a twice-convicted sex offender, Jesse Timmendequas, who lived across the street from the Kanka family. *Id.* The Kanka family had no knowledge of Timmendequas' past, nor that he lived with two other convicted sex offenders. *Id.* Public outrage across New Jersey led to demands for new laws that would ensure that the community and proper authorities would be alerted when sex offenders move into residential neighborhoods. *Id.* Prior to the enactment of Megan's Law, the state Department of Corrections needed only to notify the prosecutor (for the county in which the crime was committed) of the sex offender's scheduled release date. *Id.*

[109] *See* N.J. STAT. ANN. §§ 2C:43-2.2, 2A:4A-43.1 (West 2005).

[110] N.J. STAT. ANN. § 2C:14-2 (West 2004).

[111] *See* 42 U.S.C. § 3756(f) (2002) (providing for HIV testing of convicted sex offenders upon the request of victims).

of indictment, charge, conviction, or adjudication.[112] Furthermore, the statutes permit courts to order repeat or confirmatory tests that are deemed medically necessary.[113] Although the New Jersey statutes provide facial protections of confidentiality for the tested individual,[114] the informed victim is conspicuously left unmentioned in the language of the confidentiality provision and appears to be free to reveal the results to the general public.[115]

Public demand for sex offender legislation similar to New Jersey's led then-President Bill Clinton to sign a bill requiring all fifty states to adopt some form of Megan's Law.[116] In 1997, the federal Megan's Law in Hawai'i was codified as Hawai'i Revised Statutes chapter 846E: Sex Offender Registration and Notification.[117] One year later, Hawai'i enacted a statute allowing the mandatory testing of those convicted of sexual assault upon the request of the victim.[118]

In the wake of this nationwide call for sex offender legislation and a dramatic surge in Hawai'i rape cases,[119] Hawai'i broadened its HIV testing scheme in 2002 to allow courts to require individuals merely *accused*, rather than convicted, of sex assault to also undergo HIV testing—again at the victim's request.[120]

B. Judicial Response to Mandatory Testing

Courts across the United States have almost uniformly upheld the validity of statutes authorizing mandatory HIV testing.[121] In *United States v. Ward*,[122] the Court of Appeals for the Third Circuit held that a defendant convicted of an interstate kidnapping involving sexual assault could be ordered to submit to a HIV test.[123] Although it acknowledged that a compelled blood test was

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[112] §§ 2C:43-2.2, 2A:4A-43.1.

[113] *See* §§ 2C:43-2.2, 2A:4A-43.1.

[114] The New Jersey statutes explicitly prohibit those privy to the test results from disclosing the test results unless authorized by law or court order. *See* §§ 2C:43-2.2, 2A:4A-43.1.

[115] *See* §§ 2C:43-2.2, 2A:4A-43.1.

[116] *The Story of Megan's Law*, BBC NEWS (Dec. 12, 2001), *available at* http://news.bbc.co.uk/1/hi/uk/1706396.stm.

[117] *See* HAW. REV. STAT. ch. 846E (2004).

[118] *See* HAW. REV. STAT. § 325-16.5 (1998).

[119] According to the State of Hawai'i Attorney General's office, rapes statewide in 2001 rose 16.8% from the previous year. *See* Nelson Daranciang, *State Crime Rate Up 3.6% in 2001*, HONOLULU STAR-BULL., Sept. 18, 2002, *available at* http://starbulletin.com/2002/09/18/news/story1.html.

[120] *See* HAW. REV. STAT. § 325-16.5 (2002).

[121] Miller, *supra* note 6.

[122] 131 F.3d 335 (3rd Cir. 1997) (ordering defendant to provide a blood sample after defendant pled guilty to one count of kidnapping in violation of 18 U.S.C. § 1201).

[123] *Id.* at 337.

a body intrusion and a "search"[124] under the Fourth Amendment, the court held that such a test did not constitute an unreasonable search and seizure.[125] Indeed, the Fourth Amendment does not prohibit all government intrusions; it only prohibits those that are unjustified, or made in an improper manner.[126]

The *Ward* court observed that a blood test was permissible only in certain limited circumstances.[127] First, the state must charge the subject of the search with a sexual assault posing a risk of HIV transmission.[128] Second, there must be a *probable cause determination* that the subject of the search committed the assault.[129] Third, the victim of the assault must request the test.[130] Finally, the blood test must provide information "necessary for the victim's health."[131]

Under *Ward*, the Third Circuit justified post-conviction compulsory blood testing based on a probable cause determination of the alleged assailant's guilt.[132] Indeed, the court declared that "[e]arly HIV testing of an admitted rapist, or even an accused rapist, provid[ed] necessary information for the prompt and vital treatment and mental well-being of the victim."[133] Weighing the public's interest against the defendant's expectation of privacy, the court observed that the intrusion on the defendant's privacy was minimal, "especially in light of the danger in which he placed the victim's health by his admitted repeated sexual assaults on her."[134]

Similarly, the court in *Roberts* ordered a defendant in a rape prosecution to submit to a HIV test, while also holding that the test itself did not constitute an unreasonable search and seizure under the Fourth Amendment.[135] In support of its holding, the court observed that blood testing was "commonplace and routine in today's society,"[136] and that "for most people the procedure involves virtually no risk, trauma, or pain."[137] The court further held that the government had a substantial interest in curbing transmission of HIV.[138]

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[124] *Id.* at 340.

[125] *Id.*

[126] *See* Schmerber v. California, 384 U.S. 757, 768 (1966).

[127] *Ward*, 131 F.3d at 340 (citation omitted).

[128] *Id.* (citation omitted).

[129] *Id.* at 340-41 (citation omitted).

[130] *Id.* at 341 (citation omitted).

[131] *Id.* (citation omitted).

[132] *See id.* at 335.

[133] *Id.* at 341.

[134] *Id.* at 342.

[135] Gov't of Virgin Islands v. Roberts, 756 F. Supp. 898, 898 (D.V.I. 1991).

[136] *Id.* at 901 (citing Breithaupt v. Abram, 352 U.S. 432, 436 (1957)).

[137] *Id.* (quoting Schmerber v. California, 384 U.S. 757, 771 (1966)) (quotation marks omitted).

[138] *Id.* at 904.

Viewed collectively, these cases seem to imply that the special needs analysis, when weighing overbroad government interests against the privacy rights of just a few individuals, is systematically predisposed toward allowing intrusive testing schemes.[139] Indicative of this is the fact that about half the states had enacted similar legislation by the year 2000, which permitted rape victims to obtain information about their *accused* attackers' HIV status *before* conviction.[140]

C. Same Test, Disparate Results

Strikingly, lower court rulings have been marred by conflicting decisions when employing the special needs analysis. In *In re Janice T.*, after finding that the record was devoid of any evidence that the female defendant had or was suspected of having AIDS, a New York appellate court reversed a lower court order directing an AIDS test for the defendant after she bit a deputy sheriff in a child neglect proceeding.[141] In *Glass v. McGreevy*,[142] a New York Supreme Court disagreed with a county court order requiring that the petitioner undergo a blood test as a condition of his release on bail, when it held that it was improper and an abuse of discretion to require a negative AIDS test as a condition to release on bail.[143] *In re J.G.*[144] ("*J.G. I*") offers the most insightful overview of the competing interests for and against mandatory HIV testing.

In *J.G. I*, a New Jersey trial court determined that the New Jersey statutes,[145] which compelled defendant juveniles charged with sexual assault to undergo blood testing for HIV or AIDS, were unconstitutional because they violated the reasonableness requirement of the Fourth Amendment.[146] After recognizing that the involuntary extraction of blood is a search within the

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[139] Other courts have reached similar conclusions. *See* Johnetta J. v. Municipal Court, 267 Cal. Rptr. 666 (Cal. Ct. App. 1990); Fosman v. State, 664 So. 2d 1163 (Fla. Dist. Ct. App. 1995); State v. Parr, 513 N.W.2d 647 (Wis. Ct. App. 1994).

[140] Andrew Clark, *House Backs HIV Testing for Accused Rapists*, REUTERS NEWMEDIA, Oct. 2, 2000, *available at* http://www.aegis.com/news/re/2000/RE001002.html.

[141] *See In re* Janice T., 137 A.D.2d 527 (N.Y. App. Div. 1988).

[142] 514 N.Y.S.2d 622 (N.Y. Sup. Ct. 1987).

[143] *See id.* at 623. Under *McGreevy*, a county court order imposing as a condition of release on bail that petitioner undergo a blood test to confirm that petitioner is not infected with HIV or AIDS may properly be reviewed in a habeas corpus proceeding in the Supreme Court. *See id.* at 622.

[144] 660 A.2d 1274 (N.J. Super. Ct. Ch. Div. 1995), *rev'd*, 674 A.2d 625 (N.J. Super. Ct. App. Div. 1996), *aff'd*, 701 A.2d 1260 (N.J. 1997).

[145] *See* N.J. STAT. ANN. §§ 2C:43-2.2, 2A:4A-43.1 (West 2005).

[146] *See In re J.G.*, 660 A.2d at 1284.

contemplation of the Fourth Amendment,[147] the court determined that the "special needs"[148] test, rather than the traditional probable cause/warrant analysis, was applicable.[149] In applying the analysis, the court first recognized that the intrusion upon the defendant's expectation of privacy was substantial.[150]

Next, the court recognized that the state has a legitimate and compelling interest in helping and protecting the victims of sexual assault.[151] Finally, the court turned its attention to the final prong of the balancing test to determine "whether the interference with the fundamental right [was] narrowly tailored or necessary to achieve the compelling state interest."[152] Without vacillation, the court stated that these statutes improperly created a "presumption of guilt[,]"[153] even though the defendants were entitled to an "undiminished expectation of privacy."[154]

The *J.G. I* court next considered the medical and psychological "utility of informing the victim of sexual assault of the HIV status of an assailant."[155] Based on the expert medical testimony, the court found that "whether a defendant's HIV test comes out positive or negative is *irrelevant* to the steps that a victim of a sexual assault should take in monitoring her own health care or HIV status."[156] Indeed, the court observed that a negative test result would not mean that the defendant did not have HIV since the defendant could be in a "window period between his contracting the virus and his body producing antibodies against the virus . . . ."[157]

The *J.G. I* court therefore held that the negative results of the defendant's tests should have "absolutely no effect either on the victim's peace of mind or

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[147] *See id.*

[148] *Id.*

[149] *See id.* The trial court rejected the *Schmerber* test for evaluating the reasonableness of court-ordered intrusions into the human body, stating that because the testing was not being sought for law enforcement or evidentiary purposes, the traditional probable cause/warrant analysis was not appropriate. *See id.*

[150] *See id.* at 1285. Observing the same concerns for privacy, the Supreme Court of Washington carefully limited its authorization of such testing to those judged *guilty* of sex offenses. *See In re* Juveniles A, 847 P.2d 455, 457 (Wash. 1993). In its answer to the dissenting opinion supporting the testing of accused offenders, the court emphasized that "decreased expectations of privacy" resulting from conviction was a necessary element of its holding. *Id.* at 462.

[151] *See In re J.G.*, 660 A.2d at 1285.

[152] *Id.*

[153] *See id.*

[154] *See id.*

[155] *See id.* at 1286.

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

[157] *Id.*

health care decisions."[158] The court noted that, to the contrary, a negative result might even give the victim a "false sense of security over her own status, causing her to neglect routine follow up care."[159] In its ruling,[160] the court held that the New Jersey testing scheme was not only unconstitutional, but also failed the special needs test because it did not bear a close and substantial relation to the compelling governmental interest in assisting victims of sexual assault.[161]

Reversing the court's determination in *J.G. I*, the Superior Court of New Jersey, Appellate Division, held that the testing statutes satisfied the reasonableness requirement of the Fourth Amendment.[162] The Appellate Division noted that "the court should be very hesitant to rule that a legislative scheme of mandated testing is medically or psychologically useless to the victim or the treatment community."[163] "Rightly or wrongly,"[164] the Appellate Division believed that the "information may ease a victim's anxiety."[165] Moreover, it held that the test results also served the "state's interest in safeguarding the health and safety of the offender and those with whom he or she came in contact."[166] The Appellate Division found that these interests far outweighed the individual Fourth Amendment interests of sex offenders, and promptly remanded the order requiring the defendants to participate in mandatory HIV testing.[167]

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[158] *Id.*

[159] *Id.*

[160] The trial court was presided by Judge Jose L. Fuentes, who was appointed to the bench in 1993 by then-Governor Jim Florio. *See* Press Release, N.J. Judiciary, Judge Jose L. Fuentes, Hudson County Superior Court, Judge Edith K. Payne, Essex County Superior Court, Elevated to Appellate Division (June 24, 2002), *available at* http://www.judiciary.state.nj.us/pressrel/pr020624a.htm. Judge Fuentes served in both the Criminal and Family Divisions. *Id.*

Judge Fuentes immigrated from Cuba to the United States in 1967 at age eleven, and settled in Union City, Hudson County. *Id.* He graduated from Montclair State College in 1978 and earned his J.D. from Rutgers Law School in 1982. *Id.* Prior to serving as a judge, Judge Fuentes focused his private practice in the areas of tenant/landlord law, municipal land use, matrimonial and family law, general real estate, and civil rights litigation. *Id.* He served as a mediator for the General Equity Division in Hudson County and for the Family Part in Hudson County. *Id.* Judge Fuentes served as a Municipal Court judge in Union City, and as an adjunct lecturer at Seton Hall Law School. *Id.* Lastly, Judge Fuentes also served as a member of the Union City School Board from 1982 to 1988, and as President from 1986 to 1988. *Id.*

[161] *See In re J.G.*, 660 A.2d at 1286.

[162] *See In re* J.G., 674 A.2d 625 (N.J. Super. Ct. App. Div. 1996).

[163] *Id.* at 633.

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *See id.* at 634.

The diametrically opposed holdings of the trial court and the Appellate Division demonstrate the complex struggle that courts face in applying the special needs analysis. A commentator noted that the disparate results are "not surprising"[168] considering that "special needs analysis attempts to encapsulate vast factual differences within a single balancing formula."[169] The disparate results thus tend to suggest that special needs analysis provides overbroad and inadequate standards for the courts to make decisions.

Indeed, the disparate holdings in *Ward*, *Roberts*, and *J.G. I* evince the concern that special needs analysis lacks an objective methodology that allows its criteria to be applied uniformly.[170] The privacy interests at stake are much too substantial to rely on a methodology that designates an inordinate amount of discretion to individual judges.[171] Notably, Hawai'i's current HIV testing policy is equally incongruent with concerns earlier chronicled in its legislative record.[172]

V. THE HAWAI'I HIV STATUTE

Originally enacted in 1998, Hawai'i's HIV testing statute, Hawai'i Revised Statutes section 325-16,[173] provided for the mandatory testing of those convicted of sexual assault upon the order of the court.[174] Fear that thousands of people were being sexually assaulted annually,[175] compounded by the recognition that not all perpetrators charged with sexual assault were

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[168] Sean M. Anderson, Comment, *Individual Privacy Interests and the "Special Needs" Analysis for Involuntary Drug and HIV Tests*, 86 CAL. L. REV. 119, 147 (1998).

[169] *Id.*

[170] *See* Kenneth Nuger, *The Special Needs Rationale: Creating a Chasm in Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 89, 98 (1992) (commenting that claims of individual privacy lose the special needs balancing test because individual behavior is rarely perceived as more important than the burdens forced on the public through the cumulative effect of the individual behavior).

[171] One possible solution to increase uniformity is an alternate analysis allowing mandatory testing of the accused only where the government demonstrates "that grave public harm [is] likely [to] result in the absence of the proposed search and that the particular search scheme [is] the least restrictive possible scheme." *Id.* at 132.

[172] *See infra* Part V.

[173] *See* HAW. REV. STAT. § 325-16 (1998), *amended by* HAW. REV. STAT. § 325-16 (2002).

[174] *See* HAW. REV. STAT. § 325-16(b)(7). Subsection (b)(7) originally read: "[A] person who has been *convicted*, or a juvenile who has been *adjudicated*... shall be tested to determine the person's HIV status upon court order issued pursuant to section 325-16.5. The test shall be performed according to the protocols set forth in section 325-17." *Id.* (emphasis added).

[175] *See* Act of 2002, No. 238, § 1, 21st Leg., Reg. Sess. (2002), *reprinted in* Haw. Sess. Laws 944.

convicted,[176] triggered the need for an amendment to Hawai'i's HIV statute in 2002.[177] The amendment, as enacted, provided for "charged person[s]" to be tested for HIV at the request of the victim in cases of sexual assault.[178]

Legislators considering the amendment were mindful that all victims should have the opportunity to "either gain some measure of peace from knowing that their perpetrator,"[179] whether charged or convicted, "did not carry the HIV virus or learn that their assaulter carried the HIV virus and take actions to address that fact, including self testing and medication to combat the virus."[180] Indeed, in 2002, the Senate Committee on Judiciary found that "the time element for HIV testing gives reason enough to provide an expedited process for the victim to know the results soon after the charge is brought rather than upon conviction."[181] The Committee concluded that the "survivors[']"[182] interest in "early detection and treatment"[183] completely outweighed the accused's right to privacy.[184]

On April 24, 2002, a joint House-Senate conference committee reached agreement on House Bill 1901, clearing the way for the final floor vote by the full House and Senate on the sex-assault HIV bill.[185] House Bill 1901 became law on June 28, 2002,[186] and thereafter required, without informed consent, HIV testing of persons charged with sexual offenses.[187] By chiseling away at the constitutional rights of the accused, the 2002 passage of House Bill 1901

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[176] *See id.* In passing the statute, the Legislature took notice of some alarming statistics. *See id.* First, medical professionals estimated a higher infection rate in assault cases because the "violent nature of sexual assaults increase[d] the chances of transmission." *Id.* Second, the transmission of HIV infection occurred about two times per one thousand sexual contacts. *Id.* After the Legislature considered such daunting information, defendant's rights likely paled in comparison to heightened concerns for survivors and made for easy passage of the amendment.

[177] *See id.*

[178] *See* HAW. REV. STAT. § 325-16(7) (2002).

[179] *See* Act of 2002, No. 238, § 1.

[180] *See id.*

[181] *See* SEN. STAND. COMM. REP. NO. 3263, 21st Leg., Reg. Sess. (Haw. 2002), *reprinted in* 2002 HAW. SEN. J. 1545, 1545.

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *See* Hawai'i State Legislature, HB1901 Measure History (July 23, 2002), *available at* http://www.capitol.hawaii.gov/session2002/status/HB1901.asp; *see also* Lynda Arakawa, *Sex-assault HIV bill goes to final floor vote*, HONOLULU ADVERTISER, Apr. 25, 2002, *available at* http://the.honoluluadvertiser.com/article/2002/Apr/25/ln/ln38a.html.

[186] *See* Act of 2002, No. 238, § 1, 21st Leg., Reg. Sess. (2002), *reprinted in* Haw. Sess. Laws 944.

[187] *See* HAW. REV. STAT. § 325-16 (2002).

implicates many of the same issues and concerns raised by other jurisdictions imposing pre-conviction testing schemes.[188]

The Hawai'i Constitution expressly recognizes "[t]he right of the people to privacy" and asserts that this right "shall not be infringed without the showing of a compelling state interest."[189] The 2002 amendment to Hawai'i's HIV testing statute, which provides for the testing of defendants *accused* of sexual assault, directly harms this constitutionally protected right.[190] The testing scheme further calls into question a basic tenet of a fair trial under American jurisprudence,[191] while failing to offer medical or psychological utility to the alleged victim.[192]

A. Expectation of Privacy

House Bill 1901, as enacted, dispenses with a defendant's constitutionally-guaranteed privacy interests all too easily. The State of Hawai'i has long recognized and expressly protects the right to privacy of its citizens.[193] Recently, the Legislature enacted the 1999 Privacy of Health Care Information Act, ensuring individuals the right to privacy "with respect to their personal health information and records, and with respect to information about their medical care and health status."[194]

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[188] *Compare* Part V, *with* Part IV.

[189] HAW. CONST. art. I, § 6.

[190] *See* HAW. REV. STAT. § 325-16.

[191] *See infra* Part V.B.

[192] *See infra* Part V.D.

[193] Article 1, section 6 of the Hawai'i Constitution provides for an explicit privacy provision that 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." HAW. CONST. art. I, § 6. The Hawai'i Supreme Court has held that article 1, section 6 affords "much greater privacy rights than the federal right to privacy." State v. Kam, 69 Haw. 483, 491, 748 P.2d 372, 377 (1988) (ruling that an individual has a privacy right to view pornographic material in the privacy of the home); *see* State v. Kim, 68 Haw. 286, 290, 711 P.2d 1291, 1294 (1985) (ruling that the Hawai'i Constitution provides a greater right to privacy for searches and seizures); State v. Kaluna, 55 Haw. 361, 369, 520 P.2d 51, 58-59 (1974) (ruling that the Hawai'i Supreme Court can "extend the protections of the Hawai'i Bill of Rights beyond those of textually parallel provisions in the Federal Bill of Rights . . . .").

[194] *See* Act of 1999, No. 87, § 1, 20th Leg., Reg. Sess. (1999), *reprinted in* Haw. Sess. Laws 155. "The purpose of the Act is to implement the right of the people to privacy established under section 6, article I of the Constitution of the State of Hawai'i, which provides that the Legislature shall take affirmative steps to ensure protection of the right to privacy through legislation." *Id.* The Hawai'i state legislature repealed Act 87 after the enactment of the Health Insurance Portability and Accountability Act ("HIPAA"), which is a superseding federal statute. *See* H.R. CONF. COMM. REP. NO. 1498, 21st Leg., Reg. Sess. (2001), *reprinted in* 2001 HAW. HOUSE J. 953, 954.

Suspected sex offenders have a paramount privacy interest in avoiding disclosure of such personal health information should they test positive "because of the stigma, prejudice, and discrimination that affects HIV-positive and AIDS-afflicted individuals in our society."[195] As described in an early New York Supreme Court case, a positive test result carries with it serious social and psychological consequences for the offender[196]:

> A person who has been involuntarily tested for AIDS and receives a positive result may suffer a number of possible injuries. Perhaps first and foremost among these is the danger of stigmatization and *ostracism* which may result. The AMA Board of Trustees has written 'the stigma which accompanies a diagnosis of AIDS, based on fear and society's attitude towards IV drug abusers and homosexuals presents a factor beyond the control of the infected individual or medicine. An [sic] HIV-Seropositive individual who might live five years or much longer with no overt health problems, once identified in a community, may be subject to many and varied *discrimination*, by family and loved ones, neighbors and friends, employers and fellow employees, and other providers of services.' In addition, the psychological impact of learning that one is seropositive has been compared to receiving a death sentence. Sequelae[197] include *severe stress* and *depression*, including possible contemplation of suicide.[198]

In the above passage, the American Medical Association[199] listed stigmatization, discrimination, depression, and suicide as among the numerous possible injuries suffered by persons given positive test results following voluntary HIV testing.[200] In cases where the accused is innocent, the effects of such unwarranted injuries would thus be serious and potentially deadly. The risks of such injury to a defendant's privacy interests is further compounded by a false-positive rate as high as 3.2%, as reported by

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[195] Lisa Simotas, Note, *In Search of a Balance: AIDS, Rape, and the Special Needs Doctrine*, 66 N.Y.U. L. REV. 1881, 1907 (1991) (footnotes omitted).

[196] *See* Doe v. Roe, 526 N.Y.S.2d 718 (N.Y. Gen. Term 1988).

[197] "Sequelae" is defined as the "pathological condition[s] resulting from a disease." AMERICAN HERITAGE COLLEGE DICTIONARY 1243 (3rd ed. 1993).

[198] *Roe*, 526 N.Y.S.2d at 721-22 (citation omitted) (emphasis added).

[199] The American Medical Association ("AMA") is an organization representing roughly half of all practicing physicians in the United States. *See* 2005 BRITANNICA STUDENT ENCYCLOPEDIA, *available at* http://search.eb.com/ebi/article-9316215 (last visited Oct. 17, 2005). Its stated purpose is "'to promote the science and art of medicine and the betterment of public health.'" *Id.* The AMA publishes the Journal of the American Medical Association ("JAMA"). *Id.*

[200] *See Roe*, 526 N.Y.S.2d at 721-22 (citation omitted) (emphasis added).

laboratories processing Food and Drug Administration ("FDA")-approved[201] HIV test kits.[202]

Although the *J.G. I* court illustrated a concern that the victim is not precluded from disclosing the defendant's HIV status to others,[203] a defendant's result is presumably protected from further disclosure under Hawai'i Revised Statutes section 325-101.[204] Such protections are, however, only partially effective. After all, victims testing positive remain free to disclose their own HIV status should they test positive; allowing the community to draw an inference regarding the alleged defendant's HIV status, as well as the alleged defendant's guilt.[205]

Given the serious, and potentially unwarranted, emotional and financial consequences accompanying the disclosure of a defendant's HIV status, the current Hawai'i statute does not adequately safeguard the privacy interests of the accused.[206] A civil penalty of $1000, or even $10,000, cannot come close to accounting for the actual losses of a career, reputation or life ended prematurely.[207]

B. Presumption of Innocence

Certainly, the presumption of innocence remains with the defendant *unless and until* the prosecution has proven and the jury has found the defendant guilty beyond a reasonable doubt.[208] The United States Supreme Court in

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[201] The Food and Drug Administration [hereinafter FDA] is the federal agency responsible for ensuring that medical devices are safe and effective. *See* U.S. Food and Drug Administration, What FDA Regulates (2001), http://www.fda.gov/comments/regs.html.

[202] *See* CDC, Analysis of the Aug. 14, 2001 Perf. Eval. HIV-1 RNA Determinations (Viral Load) Results, http://www.phppo.cdc.gov/MPEP/pdf/rna/0108rnaa.pdf (last visited Apr. 21, 2005) (analyzing results reported to the CDC by laboratories participating in the Model Performance Evaluation Program after 183 laboratories performed HIV tests on plasma obtained from individual donors).

[203] *See In re* J.G., 674 A.2d 625, 632 (N.J. Super. Ct. App. Div. 1996).

[204] HAW. REV. STAT. § 325-101(d) (2002). "Any person who receives or comes into possession of any record or information released or disclosed pursuant to subsection (a) shall be subject to the same obligation of confidentiality as the party from whom the record or information was received." *Id.*

[205] *See id.*

[206] Under Hawai'i Revised Statutes section 325-102, victims who violate the confidentiality provisions regarding the defendant's HIV test results "shall be fined not less than $1,000 nor more than $10,000 for each violation plus reasonable court costs and attorney's fees as determined by the court, which penalty and costs shall be paid to the person or persons whose records were released." HAW. REV. STAT. § 325-102 (2004).

[207] *See id.*

[208] Herrera v. Collins, 506 U.S. 390, 398 (1993) (citing *In re* Winship, 397 U.S. 358 (1970)) ("A person when first charged with a crime is entitled to a presumption of innocence, and may

Coffin v. United States[209] held that "the presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted, unless he is proven to be guilty."[210]

Hawai'i's HIV statute arguably violates this basic presumption by forcing suspected sex offenders to undergo compulsory HIV testing based merely on allegations of rape.[211] Significantly, the employees in *Skinner* and *Von Raab*[212] had a legal alternative to mandatory testing—to cease employment and avoid the testing requirement.[213] The Hawai'i statute, however, does not allow accused individuals any means to opt out of the testing requirement.[214] Thus, even an innocent defendant—in spite of the presumption of innocence —has no choice but to be tested for HIV, and to face the repercussions of a possible positive test result.

Courts nationwide, unfortunately, have not found this concern to be compelling, especially when taking the "urgent needs and rights of a rape victim" into consideration.[215] Rather, courts interpret the presumption of innocence narrowly to function primarily during trial in the courtroom.[216] As such, the presumption of innocence likely does not protect the interests of the accused until the accused's trial has already commenced, and not during the accused's arrest and pre-trial proceedings. In the face of the HIV/AIDS epidemic, this presumption of innocence will almost always be curtailed by the overriding public health interests of the government.

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insist that his guilt be established beyond a reasonable doubt."); Delo v. Lashley, 507 U.S. 272, 278 (1993) ("[T]he presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice.").

[209] 156 U.S. 432, 458-59 (1895).

[210] *Id.*

[211] Convicted sex offenders, on the other hand, "necessarily have reduced expectations of personal privacy," since a defendant "no longer enjoys a presumption of innocence but instead stands at the threshold of incarceration, probation, or other significant curtailment of personal freedom." People v. Adams, 597 N.E.2d 574, 583 (Ill. 1992) (citations omitted).

[212] *See supra* Part III.

[213] *See supra* Part III.

[214] *See* HAW. REV. STAT. § 325-16 (2002).

[215] *See* Kevin A. McGuire, Comment, *AIDS and the Sexual Offender, The Epidemic Now Poses New Threats to the Victim and the Criminal Justice System*, 96 DICK. L. REV. 95, 111-12 (1991).

[216] *See* Estelle v. Williams, 425 U.S. 501, 503 (1976) (noting that defendants are constitutionally entitled to the presumption of innocence principle as a basic component of a fair trial under our system of criminal justice); *see also* Fishbein, *supra* note 35, at 858.

C. Compelling Government Interests

In balancing governmental and individual privacy interests, courts have generally tended to err on the side of government by allowing mandatory and intrusive pre-conviction testing schemes to stand.[217] Historically, courts have upheld statutes designed to safeguard public health provided they further a legitimate public health interest.[218] Statutes enacted in the interests of public health have thus been allowed to interfere with the personal rights of the individual.[219]

Indeed, governmental interests in curbing the spread of the deadly AIDS virus and in protecting victims of sexual assault are generally sufficient to tip the balance of interests in favor of the State.[220] In passing House Bill 1901, the Hawai'i state legislature similarly emphasized its interest in protecting victims of sexual assault from experiencing "more mental anguish and suffering."[221] Given the "large discretion"[222] granted to the legislature in determining just how much personal intrusion is necessary for the public health, courts will likely find Hawai'i's pre-conviction testing scheme to clearly be within the authority of the legislature to ratify.[223]

D. Utility of Testing

The failure of Hawai'i's pre-conviction testing scheme to offer medical or psychological utility to the alleged victim is perhaps the most compelling argument against its continued application. In the original 1998 preamble to Hawai'i Revised Statutes chapter 325, the legislature clearly explained why

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[217] *See supra* Part IV.A.

[218] Eisenstat, *supra* note 15, at 339.

[219] *See id.*

[220] *See id.*

[221] *See* H.R. STAND. COMM. REP. NO. 303, 21st Leg., Reg. Sess. (2002), *reprinted in* 2002 HAW. HOUSE J. 1350, 1350.

> [The] Committee finds that individuals convicted of sexual assault are tested for HIV upon the issuance of a court order. However, court orders are not always issued. Even if a court order is issued after the conviction, it is usually months after the assault took place. [The] Committee finds that victims are often left wondering if they may have been infected with a sexually transmitted disease by their perpetrator, contributing to more mental anguish and suffering.

Id.

[222] The United States Supreme Court has held that "the legislature has large discretion to determine what personal sacrifice the public health, morals and safety require from individuals . . . ." Jacobson v. Massachusetts, 197 U.S. 11, 16 (1905) (affirming a Massachusetts Supreme Court finding that mandatory smallpox vaccination was constitutional, as it had a real and substantial relation to the protection of the public health and safety).

[223] *See id.*

it did not want to require defendants to undergo testing upon indictment or arrest. Lawmakers pointed out that such testing was "*medically useless* to victims and could put victims at risk if they [chose] to wait to be tested until after the offender was tested."[224]

Indeed, the legislature took note of CDC guidelines indicating that the probability of contracting HIV as a result of a sexual assault was very low—at approximately .003%—and that post-exposure treatment was only effective when given no later than twenty-four to thirty-six hours after the attack.[225] Interestingly, the 2002 Committee Reports considering House Bill 1901 make no mention of the fact that the concerns raised in the preamble have not diminished since the enactment of Hawai'i Revised Statutes chapter 325.[226] Certainly, the "window"[227] between infection and detection of the virus poses a continuing threat of returning a false negative result, which gives infected individuals misleading assurance that they are uninfected.[228]

In 2005, the CDC issued a new recommendation that a preventative regimen of drugs[229] should be given to *anyone* exposed to HIV by rape, accidents, or isolated episodes of drug use or unsafe sex.[230] Significantly, this recommendation emphasizes the "medical uselessness"[231] of testing alleged assailants, and essentially obviates any inquiry whatsoever into the defendant's HIV status. Essentially, the CDC recommendation makes clear that there is only one method for significantly minimizing the likelihood of contracting the HIV virus: treating *anyone* exposed to "blood, genital

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[224] Act of 1998, No. 238, § 1, 19th Leg., Reg. Sess. (1998), *reprinted in* Haw. Sess. Laws 817 (emphasis added).

[225] *See id.*

[226] *See* Hawai'i State Legislature, Bill Status, Text, and Committee Reports, http://www.capitol.hawaii.gov/site1/archives/2002/getstatus.asp?qu=HB1901&showstatus=on&showtext=on&showcommrpt=on&press1=docs (last visited Mar. 2, 2005).

[227] *See* Fishbein, *supra* note 35, at 840.

[228] *See supra* Part II.A.2.

[229] People who are accidentally exposed to HIV or the AIDS virus are generally given a three-drug combination that includes 3TC and AZT. *See* Associated Press, *AIDS Drugs Advised for Rape Victims*, Feb. 9, 2005, http://msnbc.msn.com/id/6849237/. According to the new CDC recommendations, "[t]reatment should start no more than 72 hours after the exposure to the virus, and the drugs should be used for 28 days." Dawn K. Smith et al., *Antiretroviral Postexposure Prophylaxis After Sexual, Injection-Drug Use, or Other Nonoccupational Exposure to HIV in the United States*, MORBIDITY & MORTALITY WEEKLY REPORT (2005), *available at* http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5402a1.htm (emphasis added) (setting forth the CDC's recommendations for post-exposure treatment).

[230] *See* Smith et al., *supra* note 229.

[231] Act of July 20, 1998, No. 238, § 1, 19th Leg., Reg. Sess. (1998), *reprinted in* Haw. Sess. Laws 817.

secretions, or other potentially infectious body fluids"[232] with the preventative regimen when that exposure represents a substantial risk for transmission.[233]

VI. RECOMMENDATIONS FOR AMENDING HAWAI'I'S HIV STATUTE

In light of the questionable medical utility of testing defendants and the significant intrusion upon a defendant's privacy interest, Hawai'i's current pre-conviction mandatory HIV testing scheme is both unwarranted and unconstitutional. There are incontrovertible arguments supporting the repeal of pre-conviction mandatory HIV testing.

For example, knowledge of an offender's HIV status cannot further Hawai'i's purported goals and contribute to a victim's recovery and peace of mind unless the defendant is *indeed* guilty. Relying on the test of a defendant who later turns out to be innocent of the crime (e.g., in cases of mistaken identity)[234] might cause more harm than good if the victim relies on such information.[235] In addition, such reliance on the defendant's HIV status could also have profound and dangerous psychological effects, which will prevent the victim from moving beyond the trauma in order to regain control over her life.[236]

The only reliable way a victim can obtain information about her own HIV status is to be regularly tested herself. Legislators must also consider the fact that resources and funds for HIV testing are limited, and perhaps better serve the State's purported goals by increased testing of the alleged victim rather

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[232] *See* Smith et al., *supra* note 229.

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

[234] Kelly & Habermehl, S.C., Sex Offenses Information, http://www.kellyhabermehl.com/Family_2.shtml (last visited Feb. 28, 2005) ("False charges of sexual assault are common, with motives including jealousy, revenge, attention, or cover up."). In the FBI's Behavioral Science Unit's 1983 study of "false allegations" in reports of rape, a total of 220 reports out of 556 rape investigations (about 40%) turned out to be false. Ananda Answers, An Alarming National Trend: Statistics: False Accusations of Sexual Assault (Dec. 7, 2001), http://www.anandaanswers.com/pages/naaStats.html.

[235] Since an individual can infect others for approximately six months without developing detectable antibodies, the victim should not base his or her psychological and medical decisions on the defendant's negative test result during the "window period." *See In re* J.G., 660 A.2d 1274, 1286 (N.J. Super. Ct. Ch. Div. 1995), *rev'd*, 674 A.2d 625 (N.J. Super. Ct. App. Div. 1996), *aff'd*, 701 A.2d 1260 (1997). Indeed, the alleged offender's negative test result during this period could provide the victim with a "false sense of security." *Id.*

[236] *See In re J.G.*, 660 A.2d at 1282-83. Dr. Jill Greenbaum, the Executive Director of New Jersey Coalition Against Sexual Assault, an expert in crisis counseling for survivors of sexual assault, testified that providing information regarding the offender's HIV status to the victim does not assist the victim. *See id.* Such information continues to tie the victim to the offender and is not psychologically healthy. *See id.* at 1283. It further prevents the victim from moving beyond the trauma toward psychological recovery. *See id.*

than of the alleged assailant.[237] This testing is dangerous to the victim because it delays the victim's medical treatment.[238] Unfortunately, a growing majority of court decisions suggest that pre-conviction testing schemes will continue to survive the special needs analysis under the Fourth Amendment.[239] As such, several amendments to the existing statute are needed in order to limit the State's encroachments against the individual's privacy interests.[240]

The statutory language of the current testing scheme, as codified in Hawai'i Revised Statutes section 325-16.5(b)[241] provides inadequate guidance for Hawai'i courts to determine whether HIV testing is warranted in a given case. As discussed below, the considerable potential for abuse and ambiguity requires that the Hawai'i HIV statute be amended to protect against unnecessary intrusions into the privacy interests of those accused of sexual assault.[242]

A. The Probable Cause Requirement

First, legislators must revise the statutory language basing the pre-conviction testing scheme on probable cause. Section 325-16.5(b) currently provides that a "charged person"[243] shall be ordered to submit to a HIV test *subject to a showing of probable cause*, upon request of the victim.[244] This probable cause requirement fails to clearly set forth whether the prosecution must demonstrate probable cause to believe that an assault was committed, that the accused committed the assault, or that the assault was likely to have transmitted the HIV virus.[245]

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[237] The Comprehensive Crime Control Act of 1990, which offers federal funding to states that mandate HIV testing of convicted sex offenders, only guarantees the victim the right to receive *one* HIV test at the expense of the state. *See* Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (1990); *see also* NCSL, *supra* note 76.

[238] *See supra* text accompanying note 235.

[239] *See supra* Part IV.A.

[240] *See infra* Part VI.A-C.

[241] *See* HAW. REV. STAT. § 325-16.5(b) (2004).

[242] *See infra* Part VI.A.

[243] HAW. REV. STAT. § 325-16.5(b).

[244] *See id.* "Notwithstanding any law to the contrary, for purposes of determining probable cause for this order, a court *may* consider all relevant facts indicating whether HIV transmission is demonstrated by the preponderance of the evidence." *Id.* (emphasis added).

[245] For example, the statutory language does not articulate whether the prosecution must demonstrate probable cause to believe that semen or blood was transferred from the assailant to the victim during the assault, or that the survivor experienced traumatic injury with exposure to semen or blood. *See* Peter L. Havens, M.D., *Postexposure Prophylaxis in Children and Adolescents for Nonoccupational Exposure to Human Immunodeficiency Virus*, 111 AM. ACAD. OF PEDIATRICS 1475, 1475-76 (2003) (noting that "[n]ot all body fluids from persons are equally infectious," and that contaminated "[b]lood and fluids . . . should be assumed to contain HIV

As one commentator argues, "probable cause that a person has committed a rape only justifies searches that will shed light on whether he actually did the crime."[246] The HIV test has no bearing on that inquiry, and "justifying it on the basis of such unrelated probable cause simply does not follow."[247] Indeed, it seems equally futile that the accused must be subjected to mandatory testing in cases where there has been no fluid transmission.[248] The statute's current language must be amended to relate the probable cause inquiry to the likelihood that the HIV virus was transmitted to the victim.[249]

B. Significant Exposure

The ambiguous and problematic "probable cause"[250] requirement is further complicated by section 325-16's failure to define the types of exposure and risks of HIV transmission. The Hawai'i statute is "unconstitutionally overbroad"[251] because it permits compulsory HIV testing of sex offenders "whose acts *could not have exposed a victim to the offender's bodily fluids*, and, thus, could not have transmitted HIV."[252] Indeed, section 325-16 is not narrowly tailored to exposure to bodily fluids when it mandates HIV testing for defendants accused of "sexual contact,"[253] as opposed to "sexual

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and are associated with the highest risk of HIV transmission" while "[b]lood-free saliva [is] highly unlikely to transmit HIV").

[246] Anderson, *supra* note 168, at 160.

[247] *Id.*

[248] HIV is passed from one person to another when infected blood, semen, or vaginal secretions come in contact with an uninfected person's broken skin or mucous membranes. *See* CDC, What Is HIV?, http://www.cdc.gov/hiv/pubs/faq/faq1.htm (last visited Apr. 28, 2005).

[249] Ideally, Hawai'i Revised Statutes section 325-16.5(b)(2) should read as follows: "If the victim or parent or guardian of a minor or incapacitated victim requests, in writing, that the charged person be tested for HIV, the court shall order the person to submit to an [sic] HIV test subject to a showing of probable cause *that the virus was transmitted* (proposed addition is italicized)." HAW. REV. STAT. § 325-16.5(b)(2) (2004) (emphasis added).

[250] HAW. REV. STAT. § 325-16.5(b).

[251] *See* State v. County of Maricopa, 930 P.2d 488, 494 (Ariz. Ct. App. 1996).

[252] *Id.* The court opined that Arizona Revised Statutes section 8-241(N) would, for example, permit the involuntary HIV testing of an offender whose only sexual offense was to fondle a female victim's breast. *See id.* at 495 n.6. The statute provided that HIV testing could be ordered when "the act committed against a victim is an act that if committed by an adult would be a sexual offense." ARIZ. REV. STAT. § 8-241(N) (1994) (current version at ARIZ. REV. STAT. § 8-341(O)(2005)).

[253] HAW. REV. STAT. § 707-700 (2004). "'Sexual contact' means any touching, other than acts of 'sexual penetration', of the sexual or other intimate parts of a person not married to the actor, or of the sexual or other intimate parts of the actor by the person, whether directly or through the clothing or other material intended to cover the sexual or other intimate parts." *Id.*

penetration,"[254] of a minor.[255] The "sexual contact"[256] terminology means that testing can be mandated even when there is no possible exchange of bodily fluids, such as in cases where the defendant touches the intimate parts of a victim through the victim's clothing.[257]

Cases such as *State v. Johnson*[258] illustrate the difficulty that courts have in interpreting the vague language sometimes contained in HIV statutes.[259] In *Johnson*, an Idaho court reversed a district court order requiring mandatory HIV testing of a defendant who bit a police officer on the leg, and held that Idaho's HIV testing statute did not authorize the test.[260] The statute permitted HIV testing of persons charged with any crime in which body fluid was "likely"[261] to have been transmitted to another person.[262] The police officer in *Johnson* was wearing duty pants with long johns underneath at the time of the incident.[263]

The *Johnson* court rejected the State's first contention, that it was common knowledge this particular bite would transmit body fluids, and instead observed that although the skin was broken, the officer's pants or long johns were not torn.[264] Given such evidence, the court ultimately concluded that it was *not likely* that body fluids were transmitted when the defendant bit the officer's leg.[265] Without any language or guidance assessing the likelihood of transmission under Hawai'i Revised Statutes section 325-16, a Hawai'i court would have likely mandated testing of the *Johnson* defendant despite the extremely low risk of HIV transmission through saliva.[266]

A clear definition of the types of exposure and risks of HIV transmission would similarly have protected the defendant's privacy rights in the 2002 case of *People v. Hall*.[267] The *Hall* court required that the defendant undergo AIDS

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[254] *See id.*

[255] HAW. REV. STAT. § 707-733.5(1)(b) (2004) criminalizes "three or more acts of sexual penetration or sexual contact with the minor."

[256] HAW. REV. STAT. § 707-700.

[257] *See* HAW. REV. STAT. §§ 325-16(b)(8), 707-700 (2004).

[258] 964 P.2d 675 (Idaho Ct. App. 1998).

[259] *Id.*

[260] *Id.* at 676.

[261] *Id.*; *see* IDAHO CODE § 39-604(4) (1998).

[262] *See* IDAHO CODE § 39-604(4).

[263] *Johnson*, 964 P.2d at 677.

[264] *Id.*

[265] *Id.*

[266] Havens, *supra* note 45, at 1477 (noting that saliva inhibits HIV infectivity and carries of risk of HIV transmission of 0.1% or less).

[267] 124 Cal. Rptr. 2d 806 (Cal. Ct. App. 2002). In *Hall*, a California appellate court permitted the imposition of AIDS testing on the defendant after he committed an assault on a police investigator that involved the transfer of the defendant's sweat to the investigator's skin. *See id.* at 814.

testing, where the alleged exposure involved the defendant's sweat contacting the police investigator's skin in the course of an assault.[268] Curiously, the *Hall* decision was delivered over a decade after researchers ruled out sweat and saliva as agents of HIV transmission and allowed Magic Johnson to return to the National Basketball Association.[269] *Hall* exemplifies the importance of carefully tailoring statutory language to avoid unnecessary violations of individual privacy.

The Hawai'i legislature would be well advised to take a page from Arizona law, which allows mandatory HIV testing only if a "significant exposure"[270] has occurred.[271] "[S]ignificant exposure"[272] is defined as "contact of the victim's ruptured or broken skin or mucous membranes with a person's blood or body fluids, other than tears, saliva or perspiration, of a magnitude that the [CDC] have epidemiologically demonstrated can result in transmission of the human immunodeficiency virus."[273]

The adoption of such a clear definition in Hawai'i would surely stave off further unnecessary intrusions into a defendant's right to privacy. Hawai'i should adopt the "significant exposure"[274] standard because it will protect a defendant's right to privacy, and concomitantly ensure the efficient use of limited government resources. In addition to the "significant exposure"[275] requirement, the statute should include additional procedural safeguards.[276]

C. Additional Procedural Safeguards

Finally, protecting the accused from unnecessary privacy intrusions requires the enactment of additional procedural safeguards offering defendants the opportunity to be heard and limiting follow-up testing. Such safeguards are already built into the testing provision of the Violence Against Women Act

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[268] *See id.* The *Hall* court held that for purposes of the California statute, "bodily fluid" included "sweat," and that the statute did not require that the bodily fluid be capable of transmitting HIV in order to compel the defendant to undergo HIV testing. *Id.* at 815.

[269] Professional and amateur athletic groups have generally allowed HIV-infected individuals, such as Earvin "Magic" Johnson, to participate in athletics since 1991, after researchers ruled out sweat and saliva as agents of transmission. *See* James Brooke, *School Policy Could Bar Athletes With H.I.V.*, N.Y. TIMES, Jan. 16, 1999, at A8.

[270] ARIZ. REV. STAT. § 13-1415 (2005).

[271] *Id.*

[272] *Id.*

[273] *Id.*

[274] *Id.*

[275] *Id.*

[276] *See infra* Part VI.C.

("VAWA") enacted by Congress in 1994 to prevent violence against women.[277]

Under the VAWA, federal district courts may order follow-up HIV tests only if the initial test was negative.[278] More importantly, such follow-up tests are limited to the dates that occur six months and twelve months following the initial test.[279] Adding such a provision to Hawai'i Revised Statutes section 325-16 would prevent unnecessary and potentially unlimited requests for court-ordered testing of a defendant by a victim during the "window period"[280] between initial infection and a positive test result.[281]

Unlike the VAWA, Hawai'i's HIV statute lacks a critical due process hearing for defendants. Under the VAWA, defendants are afforded "an opportunity to be heard"[282] before being subjected to mandatory HIV testing.[283] The Hawai'i HIV statute must be amended to include the "opportunity to be heard"[284] and "significant exposure"[285] language, and to redirect the "probable cause"[286] inquiry to the likelihood that the HIV virus was transmitted to the victim. These amendments represent significant liberty protections that take little, if anything, from the interests of the government and the victim.

VII. CONCLUSION

Since 1981, more than half a million people in the United States have died after developing AIDS, while another one million Americans are currently infected with HIV.[287] Meanwhile, the government interest in assisting victims of sexual assault has continued to trump the individual civil liberties of American citizens from state to state.[288] Unfortunately, in the chaos of fashioning a means to stem the tide of the horrifying epidemic into the Pacific,

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[277] *See* 42 U.S.C. § 14011(b)(1)-(2) (108 Stat. 1946, § 40503(b)(1)-(2)) (2005) (providing for the "[l]imited testing of defendants").

[278] *See id.* § 14011(b)(3).

[279] *Id.*

[280] *See* Fishbein, *supra* note 35, at 840.

[281] *See supra* Part II.A.2.

[282] *See* 42 U.S.C. § 14011(b)(1).

[283] *Id.*

[284] *Id.*

[285] *See* IOWA CODE § 915.42(3)(a) (2005).

[286] *See* HAW. REV. STAT. § 325-16.5(b)(2) (2002).

[287] AVERT, United States HIV & AIDS Statistics Summary, http://www.avert.org/statsum.htm (last visited Mar. 3, 2005).

[288] U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE POPULATION FOR THE U.S. AND STATES, AND FOR P.R.: APRIL 1, 2000 TO JULY 1, 2004 (2004), *available at* http://www.census.gov/popest/states/tables/NST-EST2004-01.pdf.

Hawai'i lawmakers sacrificed more of their citizens' civil liberties than necessary.

This article encourages lawmakers to reconsider the dangerous expense to individual privacy interests posed by a pre-conviction testing scheme fraught with deficiencies.[289] It proposes three concrete and pragmatic amendments that will tailor the Hawai'i HIV statute to minimize invasive searches while safeguarding the interests of the victim and the community. First, it proposes an amendment to Hawai'i Revised Statutes section 325-16.5(b)'s "probable cause"[290] requirement that focuses the inquiry on the likelihood of HIV transmission.[291] Second, this article suggests a "significant exposure" standard to stave off unnecessary intrusions into a defendant's right to privacy. Finally, it recommends additional procedural safeguards offering defendants the opportunity to be heard and limiting follow-up testing. Perhaps most importantly, this article seeks to remind readers of the steps necessary to prevent further dilution of the Fourth Amendment—each citizen's protection from unwarranted government intrusion.[292]

Jeff A. Lau[293]

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[289] *See supra* Parts I-V.

[290] HAW. REV. STAT. § 325-16.5(b)(2).

[291] *See supra* Part VI.A.

[292] *See supra* Part VI.

[293] J.D. Candidate 2006, William S. Richardson School of Law, University of Hawai`i at Mânoa. Mahalo to Professor Carla Caratto for her guidance during my Second Year Seminar writing course; the U.H. Law Review Editorial Board and Staff; my glorious tech edit crew (Zachary Antalis, Bradley Davis, Candice Freed, Christopher Goodin, Sarah Love, Holly McPherson, Ross Shinyama); and especially Erika Lewis, Damon Schmidt, Larissa Schwartz, William Tanaka, and Editors-in-Chief Brandon Ito and Nathan Okubo for dedicating so much of their time to this article.

Tenet v. Doe: Balancing National Security and Contracts to Spy

I. INTRODUCTION

In 1876, the United States Supreme Court held that bringing a claim against the government for breach of a spy contract could potentially jeopardize national security and was in and of itself a breach of the secrecy of the agreement.[1] This holding quickly became known as the *Totten* doctrine.[2] Since this decision 129 years ago, the Central Intelligence Agency ("CIA" or "Agency") has breached numerous agreements for espionage services leaving many plaintiffs without recourse.[3] Some of these plaintiffs claimed not only simple breaches of contract, but also due process violations.[4] The due process doctrine has developed significantly in the past century, and often now includes some type of "fair procedure, secret or open, judicial or administrative,"[5] before a plaintiff can be "deprived of liberty or property."[6]

In 2000, John and Jane Doe (the "Does") argued before the District Court for the Western District of Washington that they had strong constitutional claims against the CIA relating to an agreement they entered into with the Agency during the Cold War.[7] The court held that the alleged conduct by the CIA could prove to contravene the Does' due process rights, regardless of the existence of a secret spy contract.[8] The Court of Appeals for the Ninth Circuit agreed that the *Totten* doctrine[9] did not apply to John and Jane Doe's constitutional claims, and that the CIA should invoke the state secrets privilege to allow the court to determine if proceeding with the Does' claim would jeopardize national security.[10] The Supreme Court granted certiorari

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[1] Totten Adm'r v. United States, 92 U.S. 105, 107 (1876).

[2] *See, e.g.*, De Arnaud v. United States, 151 U.S. 483, 493 (1894).

[3] *See* Doe v. Tenet, 99 F. Supp. 2d 1284, 1287 (W.D. Wash. 2000), *aff'd*, 329 F.3d 1135, 1138 (9th Cir. 2003), *rev'd*, ___ U.S. ___, 125 S. Ct. 1230 (2005); Guong v. United States, 860 F.2d 1063 (Fed. Cir. 1988); Mackowski v. United States, 228 Ct. Cl. 717 (Ct. Cl. 1981); Simrick, 224 Ct. Cl. 724 (Ct. Cl. 1980); De Arnaud v. United States, 26 Ct. Cl. 370 (Ct. Cl. 1891).

[4] *See Tenet*, 329 F.3d at 1142; Tucson Airport Auth. v. Gen. Dynamics Corp., 136 F.3d 641, 647 (9th Cir. 1998). The constitutional claims were denied in *Tucson Airport* as being primarily contractually based. 136 F.3d at 647.

[5] *Tenet*, 329 F.3d at 1146.

[6] *Id.*

[7] *Tenet*, 99 F. Supp. 2d 1284, 1285 (W.D. Wash. 2000).

[8] *Id.* at 1289-90.

[9] Totten Adm'r v. United States, 92 U.S. 105 (1876).

[10] *Tenet*, 329 F.3d at 1146.

in June 2004.[11] The Supreme Court expanded the *Totten* doctrine holding that the doctrine categorically bars "lawsuits premised on alleged espionage agreements."[12] A former spy now has no chance to prove that his due process claims go beyond a secret contract.[13]

Part II of this comment explores the expansion of the *Totten* doctrine and analyzes John and Jane Does' lives in the context of their relationship with the CIA, along with the administrative and judicial struggle they endured from 1997 through 2005. Part III explores the state secrets privilege and the impact it could have on cases involving secret information. Part IV examines post-*Tenet* implications involving the balance of power between the Executive Branch and the judiciary when materials sensitive to national security are involved. Additionally, this Part proposes alternatives to abrupt dismissal that would have been appropriate for the Does. Part V concludes the paper.

II. THE *TOTTEN* DOCTRINE

A. Totten v. United States

Spies have been used throughout history. In the Bible, Joshua "secretly sent two spies"[14] to "look over the land."[15] Queen Elizabeth I had "an army of men working in secret to protect"[16] her during her reign in the sixteenth century.[17] The use of spies by the Commander-in-Chief, and later the Executive Branch in general, began early in American history.[18] George Washington agreed to pay Nathaniel Sackett fifty dollars per month in 1777 to set up a spy network in the New York region presumably to protect the struggling new country against insurgencies.[19] President Lincoln also agreed to pay a spy, William A. Lloyd ("Lloyd"), during the Civil War.[20]

In 1861, Lloyd entered into a contract with President Lincoln to go south to spy on the Confederacy.[21] Lincoln wanted Lloyd to "ascertain the number

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[11] Tenet v. Doe, 542 U.S. 936 (2004).

[12] Tenet v. Doe, ___ U.S. ___, 125 S. Ct. 1230, 1236 (2005).

[13] *Id.*; *see* Transohio Sav. Bank v. Dir., Office of Thrift Supervision, 967 F.2d 598, 610-11 (D.C. Cir. 1992); Sharp v. Weinberger, 798 F.2d 1521, 1523-24 (D.C. Cir. 1986).

[14] *Joshua* 2:1.

[15] *Id.*

[16] Alexandra Briscoe, Monarchs and Leaders: Elizabeth's Spy Networks (2001), http://www.bbc.co.uk/history/state/monarchs_leaders/spying_01.shtml.

[17] *Id.*

[18] *See* Jacqueline Trescott, *Smoking Gun Surfaces in Washington Spy Scandal: 1777 Letter Finds Home at New Spy Museum*, WASH. POST, June 20, 2002, at C1.

[19] *Id.*

[20] Totten Adm'r v. United States, 92 U.S. 105 (1876).

[21] *Id.*

of troops stationed at different points in the insurrectionary States, procure plans of forts and fortifications, and gain such other information as might be beneficial"[22] to the United States, which was to be reported to the President.[23] President Lincoln agreed that the government would pay Lloyd a $200 monthly salary.[24]

Lloyd remained in the South until the end of the war in 1865, sending President Lincoln information "from time to time."[25] Yet Lloyd eventually was compensated only for his expenses.[26] To recover the money owed Lloyd, the administrator of Lloyd's estate, Enoch Totten, filed suit in the United States Court of Claims.[27]

The Court of Claims dismissed Totten's suit on the basis that the President did not have authority to bind the United States to this type of contract.[28] The Supreme Court disagreed and held that the President does have authority to contract for espionage services during war.[29] The Court added, however, that a contract for espionage is by its very nature secret.[30] Both parties "must have understood that the lips of the other were to be for ever [sic] sealed . . . ."[31] The Court wrote:

> It may be stated as a general principle, that public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.[32]

The Court then affirmed dismissal of the case, thus promulgating the *Totten* doctrine.[33]

B. Post-Totten

Since the doctrine's enactment in 1876, courts have cited to *Totten* numerous times to explain why suits filed against the government should be

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[22] *Id.*
[23] *Id.* at 105-06.
[24] *Id.* at 106.
[25] *Id.*
[26] *Id.*
[27] *Id.* at 105.
[28] *Id.* at 106.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.* at 107.
[33] *Id.* at 106.

dismissed.[34] The government's ability to use the *Totten* doctrine for summary judgment has created the belief that the government is immune to judicial scrutiny when constitutional rights of former spies are violated. For example, in 1985, the CIA recruited Andrzej Kielczynski, a citizen and resident of Israel, as a spy because he was a "member of several political committees."[35] He signed a contract stating that he would reveal classified information about Israel to the CIA.[36] In return, the CIA agreed to pay Kielczynski $3,000 per month, to reimburse his costs and expenses, and to give him United States citizenship, health care insurance, and retirement benefits.[37] Kielczynski neither received a copy of the signed contract, nor was he informed of its duration.[38]

Kielczynski spied for the CIA until 1991 when, at least according to his complaint, the Agency "fraudulently terminated [its] contract"[39] after a CIA physician diagnosed him with diabetes.[40] Kielczynski tried for seven years to make the Agency review his claim for compensation based on the supposed spy contract he had with the CIA.[41] After numerous attempts to contact the CIA to obtain an internal review, Kielczynski filed suit.[42] The United States moved to dismiss based in part on the *Totten* doctrine.[43]

Kielczynski argued that *Totten* did not apply because his claims were constitutionally based.[44] Judge I. Leo Glasser of the United States District Court for the Eastern District of New York disagreed.[45] Judge Glasser first held that Kielczynski did not have a procedural due process claim because the CIA never represented to him that there was a procedural process for

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[34] *See, e.g.*, Sean C. Flynn, Note, *The Totten Doctrine and Its Poisoned Progeny*, 25 VT. L. REV. 793, 814 nn.5-6 (2001) (citing cases invoking the *Totten* doctrine between 1875 to 2001). "[C]ourts invoked the *Totten* doctrine [] six times between 1875 and 1951" and cited it "more than sixty-five times" from 1951 to 2001. *Id.* at 793.

Cases citing the *Totten* doctrine in favor of the government after 2001 include: Tenet v. Doe, ___ U.S. ___, 125 S. Ct. 1230, 1233 (2005); Sterling v. Tenet, 416 F.3d 338, 343 (4th Cir. 2005); Tenenbaum v. Simonini, 372 F.3d 776, 777 (6th Cir. 2004); Doe v. Tenet, 353 F.3d 1141, 1142 (9th Cir. 2004); Kielczynski v. U.S. CIA, 128 F. Supp. 2d 151, 162 (E.D.N.Y. 2001).

[35] *Kielczynski*, 128 F. Supp. 2d at 153.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* at 154.

[42] *Id.* at 153-54.

[43] *Id.* at 155.

[44] *Id.* at 163.

[45] *Id.* at 151, 163.

administrative hearings and reviews;[46] therefore, Kielczynski could not have placed any reliance on having a specific procedure to follow.[47] Kielczynski also argued that *Totten* did not apply because "adjudication of his due process claim would not require the revelation of any information which would compromise national security . . . ."[48] Again, Judge Glasser disagreed because Kielczynski neither proceeded as a Doe plaintiff, nor kept potentially confidential information or records out of his previous submissions.[49] Judge Glasser noted that it is up to the United States to determine whether information is secret or not.[50] The court then dismissed Kielczynski's claim.[51]

Kielczynski was a breach of contract claim.[52] *Totten* is not limited to breaches of contract, however.[53] In *Guong v. United States*,[54] for example, the scope of the *Totten* doctrine was broadened to apply to a "failure to rescue"[55] claim.[56]

Vu Duc Guong, a Vietnamese national, claimed the CIA recruited him in 1962 to be a part of a "covert military operation[] against North Vietnam."[57] He was to be compensated for his services, and the United States would rescue him if he were caught or captured behind enemy lines.[58] If the rescue attempt proved unsuccessful, Guong's wife would continue to receive his compensation during his internment.[59] Guong was captured by North Vietnamese forces on March 15, 1964, while on a sabotage mission.[60] By 1964, the United States Department of Defense had taken over the CIA mission against North Vietnam.[61] The Department of Defense did not rescue Guong: it instead terminated payment of Guong's monthly salary to his wife in March 1965.[62] After spending nearly sixteen years in a North Vietnamese

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[46] *Id.* at 163.

[47] *See id.*

[48] *Id.*

[49] *Id.*

[50] *Id.* at 164.

[51] *Id.* at 166.

[52] *Id.* at 168.

[53] Tenet v. Doe, ___ U.S. ___, 125 S. Ct. 1230 (2005); *see* Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139 (1981); Kasza v. Browner, 133 F.3d 1159 (9th Cir. 1998); Fitzgerald v. Penthouse Int'l, Ltd., 776 F.2d 1236 (4th Cir. 1985).

[54] 860 F.2d 1063 (Fed. Cir. 1988).

[55] *Id.* at 1065.

[56] *Id.*; Doe v. Tenet, 329 F.3d 1135, 1160-61 (9th Cir. 2003).

[57] *Guong*, 860 F.2d at 1064.

[58] *Id.*

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Id.*

prison, Guong escaped.[63] He left Vietnam in 1980 after reuniting with his family, and ultimately came to the United States.[64]

Guong filed suit against the United States in 1986 seeking monetary damages for the failure to "repatriate him from prison in North Vietnam."[65] The United States moved to dismiss, based on *Totten*.[66] The Claims Court granted the United States' motion holding that the "secrecy principles set forth in *Totten v. United States* are applicable to bar plaintiff's monetary claim."[67] On appeal, Guong first claimed his actions were not secret because his role as a saboteur included blowing up ships, which is, by its nature, not secret.[68] Second, he argued that because of the passage of time, no current government secrets would be revealed.[69] Last, Guong maintained that the operation he was involved in had already been made public by former CIA and military members who had published their accounts of the same operation.[70] The United States Court of Appeals for the Federal Circuit rejected each of these arguments and applied *Totten*.[71] Because Guong could not "prevail without revealing or compromising government secrets,"[72] Chief Judge Re held that the nature of Guong's agreement with the CIA was secret; therefore, *Totten* applied.[73]

C. Tenet v. Doe

Guong is not the only instance in which the *Totten* doctrine's scope has been broadened far beyond its initial holding.[74] The Supreme Court expanded the *Totten* doctrine again in March 2005, in the case of *Tenet v. Doe*.[75] The holding in Tenet left the two claimants, John and Jane Doe, without any recourse for alleged constitutional violations by the government, and left the

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[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.* at 1065.
[69] *Id.*
[70] *Id.*
[71] *Id.* at 1065-67.
[72] *Id.* at 1066.
[73] *Id.* at 1065-66.
[74] *See* Weinberger v. Catholic Action of Haw./Peace Educ. Project, 454 U.S. 139 (1981); Kasza v. Browner, 133 F.3d 1159 (9th Cir. 1998); Fitzgerald v. Penthouse Int'l, Ltd., 776 F.2d 1236 (4th Cir. 1985).
[75] ___ U.S. ___, 125 S. Ct. 1230 (2005).

government with a reemphasized belief that it is shielded from judicial inquiry any time it mentions national security.[76]

During the Cold War, John and Jane Doe were leading diplomats for a Communist Eastern bloc country.[77] They were successful and well-educated members of their country but were "disenchanted with Communism."[78] While working on a diplomatic mission in a another country, the Does sought help to defect to the United States.[79] The CIA became involved when the Does approached a person "associated with the United States embassy."[80] The CIA took the Does from their home at their country's embassy compound, a place where the Does were under constant surveillance, to a "safe house."[81] For twelve hours, the CIA used intimidation tactics and coercion to encourage the Does to remain in the Communist country and conduct espionage services for the United States.[82] The CIA agents told the Does that if they agreed to spy they would later be moved to the United States and would be given lifelong personal and financial security.[83] After CIA agents told the Does that this type of support was "required by law"[84] and approved of by the Agency's highest authority, the Does reluctantly agreed to spy for the United States.[85]

Once the Does completed their initial spy agreement, they requested that the CIA honor the contract.[86] The CIA, however, "pressured the Does into undertaking [further] espionage"[87] potentially exposing the Does to greater danger and "putting them at lifelong risk of retaliation, including assassination."[88] The Does eventually relocated to the United States under the CIA's

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[76] *Id.*; *see also* Tania Cruz, Article, *Civil Liberties Post-September 11: Judicial Scrutiny of National Security: Executive Restrictions of Civil Liberties When "Fears and Prejudices are Aroused,"* 2 SEATTLE J. SOC. JUST. 129 (2004).

[77] Doe v. Tenet, 329 F.3d 1135, 1138 (9th Cir. 2003). "John" and "Jane Doe" are false names used for the purposes of litigation to avoid disclosing secret or classified information. *See* Brief for the Respondents at 1, Tenet v. Doe, ___ U.S. ___, 125 S. Ct. 1230 (2005) (No. 03-1395). The Central Intelligence Agency ("CIA") contends it is unable to confirm or deny the Does' allegations because classified information could be revealed. *Tenet*, 329 F.3d at 1138. The facts as alleged by the Does are assumed true in this Comment for purposes of analysis.

[78] Brief for the Respondents, *supra* note 77, at 2.

[79] *Tenet*, 329 F.3d at 1138.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.* at 1139.

[84] *Id.*; Brief for the Respondents, *supra* note 77, at 2.

[85] Brief for the Respondents, *supra* note 77, at 2.

[86] *Id.*

[87] *Id.*

[88] *Id.*

PL-110 program.[89] The Does were given false identities and backgrounds, and were offered retiree status, which included health and financial benefits.[90] The Does wanted to be a part of American culture, however, and John Doe decided to work.[91] The CIA provided necessary assistance, including false identities, resumes, and references so that John Doe could begin working with a bank in Seattle, Washington in 1987.[92] The CIA thereafter continued to provide the Does with benefits, which included housing and a stipend.[93] The stipend eventually decreased as John Doe's salary increased, until it was terminated in 1989 once John Doe's salary reached $27,000.[94] The CIA assured the Does that the stipend would be reinstated if John Doe ever lost his job, and the CIA would "always be there"[95] for them.[96]

In 1997, John Doe lost his job due to a corporate merger.[97] He was unable to find further employment because of his false background and the restrictions the CIA placed on the type of work he could perform.[98] The Agency also refused to help him find new employment even though it had done so in the past.[99] The Does contacted the CIA for assistance.[100] The

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[89] *Id.* at 3. The PL-110 program refers to 50 U.S.C. § 403h (2005), which allows the CIA to bring a certain number of aliens into the United States per year and provide them with assistance and security. *See also* Tenet v. Doe, ___ U.S. ___, 125 S. Ct. 1230, 1233 n.2 (2005). 50 U.S.C. § 403h states:

> Whenever the Director [of the CIA], the Attorney General, and the Commissioner of Immigration shall determine that the admission of a particular alien into the United States for permanent residence is in the interest of national security or essential to the furtherance of the national intelligence mission, such alien and his immediate family shall be admitted to the United States for permanent residence without regard to their inadmissibility under the immigration or any other laws and regulations, or to the failure to comply with such laws and regulations pertaining to admissibility: *Provided*, That the number of aliens and members of their immediate families admitted to the United States under the authority of this section shall in no case exceed one hundred persons in any one fiscal year.

[90] Doe v. Tenet, 329 F.3d 1135, 1139 (9th Cir. 2003); Brief for the Respondents, *supra* note 77, at 3.

[91] Brief for the Respondents, *supra* note 77, at 3.

[92] *Tenet*, 329 F.3d at 1139; Brief for the Respondents, *supra* note 77, at 3; Charles Lane, *Court Hears Espionage Compensation Case; Justices Appear Skeptical of Soviet Bloc Defectors' Lawsuit Against the CIA*, WASH. POST, Jan. 12, 2005, at A02.

[93] *Tenet*, 329 F.3d at 1139.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] Brief for the Respondents, *supra* note 77, at 4 ("John Doe's efforts to find new employment were restricted by his security arrangements with the Agency to a certain segment of the employment marketplace, and this segment was in general contraction nationwide.").

[99] *Id.*

[100] *Id.* at 3.

Agency took four months to respond with a letter thanking the Does for their service to the United States but stating that the CIA could no longer help the Does due to "budget constraints."[101] John Doe's problems were exacerbated by advancing age and poor health.[102] Due to financial impediments, the Does "temporarily left the United States to live with a [] relative in a former Eastern Bloc country . . . ."[103] While there, John Doe was spotted by a person from his former country's state security force.[104] The Does were extremely concerned for their safety because their former country had administered death or life imprisonment sentences against the Does.[105] As a result of fear for their security and John Doe's worsening health, they returned to the United States and began to live off their retirement savings.[106]

After being rebuffed by the CIA, the Does sought legal help.[107] A lawyer from the CIA's Office of General Counsel informed the Does' pro bono legal representatives that the reason the Agency would no longer provide any type of benefits to the Does was because it felt the Does had already been adequately compensated for their services.[108] Their discussion included no mention of budget constraints.[109] The Does were advised by the same Agency lawyer that this decision could be administratively appealed to the Director of Central Intelligence ("DCI").[110] All of the Does' repeated requests to the CIA

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[101] *Id.* The CIA's letter states in part:

> 5 June 1997
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> Dear ***
>
> Thank you for your letter and resume. We are very sorry that it has taken this long to respond to your telephone calls and letter, but we have been in a state of transition and have been unable to give your problem our fullest attention until recently. . . . [W]e sympathize with the situation you find yourself in but regret that due to our budget constraints, we are unable to provide you with additional assistance. . . .
>
> We want you to know that this office has great respect for the people we serve and we remain grateful for your past service to this country. We continue to be concerned for your security and welfare and would hope to be flexible should you require assistance in the future. Again, we wish you and your family every success.
>
> Sincerely,
>
> /s/***

Id. at 3-4.

[102] *Id.* at 4.

[103] *Id.*

[104] *Id.* at 5.

[105] *Id.* at 4-5.

[106] *Id.* at 5.

[107] *Id.*

[108] *Id.*; Doe v. Tenet, 329 F.3d 1135, 1140 (9th Cir. 2003). The Does' lawyers, Steven W. Hale and Elizabeth A. Alaniz, were given security clearance by the CIA in order to represent the Does' interests. *See* Brief for the Respondents, *supra* note 77, at 5 n.4.

[109] Brief for the Respondents, *supra* note 77, at 5.

[110] *Tenet*, 329 F.3d at 1140; Brief for the Respondents, *supra* note 77, at 5.

for appeals procedure guidelines, relevant records and documents, regulations governing alien status, and information on pertinent individuals either were denied or ignored.[111] Concurrent with the appeal to the DCI, the Does asked for a review by the CIA's Inspector General ("IG").[112] The Does received no response from the IG.[113] Eventually, the Does' appeal to the DCI was denied by the Deputy Director of Operations ("DDO"), not the DCI.[114] Again, an Agency lawyer advised the Does that they could further appeal the DDO's decision to "a panel chaired by former DCI Richard Helms,"[115] the Helms Panel, which they did.[116] Without giving the Does or their attorneys a chance to appear, and after continuing to deny or ignore their requests for access to guidelines, records, and other material, the Helms Panel recommended to the DCI that the Does receive limited benefits for no more than a year conditioned upon the Does signing a complete release.[117]

The Does were never given a written copy of the DCI's decision,[118] but one of their lawyers was allowed to read the decision at a secure location.[119] The Does' lawyer read testimony from what appeared to be minutes of the Helms Panel action, in which "three persons involved in the recruitment, handling, and resettlement of [the Does] had testified."[120] One witness testified that the Does were told that their "PL-110 status represented a life-long commitment for personal and financial security"[121] by the United States government.[122] The Does opted not to sign the Helms Panel's recommended release and therefore forfeited the year's worth of benefits.[123] After nearly three and a half years of trying to work within the CIA to resolve the Agency's breach of contract, the Does filed suit in the United States District Court for the Western District of Washington.[124]

In the federal district court, the Does alleged that their substantive and procedural due process rights were violated and sought a "constitutionally

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[111] *Tenet*, 329 F.3d at 1140; Brief for the Respondents, *supra* note 77, at 5.

[112] Brief for the Respondents, *supra* note 77, at 6.

[113] *Id.*

[114] *Tenet*, 329 F.3d at 1140; Brief for the Respondents, *supra* note 77, at 5.

[115] Doe v. Tenet, 99 F. Supp. 2d 1284, 1288 (W.D. Wash. 2000).

[116] *Tenet*, 329 F.3d at 1140; *Tenet*, 99 F. Supp. 2d at 1288; Brief for the Respondents, *supra* note 77, at 6. The Helms Panel reviewing the Does' claim was made up of former CIA officials. *Tenet*, 329 F.3d at 1140.

[117] *Tenet*, 329 F.3d at 1140; Brief for the Respondents, *supra* note 77, at 7.

[118] Brief for the Respondents, *supra* note 77, at 7.

[119] *Tenet*, 99 F. Supp. 2d at 1288; Brief for the Respondents, *supra* note 77, at 7.

[120] *Tenet*, 99 F. Supp. 2d at 1288-89.

[121] *Id.* at 1289.

[122] *Id.*

[123] Doe v. Tenet, 329 F.3d 1135, 1140 (9th Cir. 2003); Brief for the Respondents, *supra* note 77, at 8.

[124] *Tenet*, 329 F.3d at 1140; *see Tenet*, 99 F. Supp. 2d at 1289.

adequate internal CIA process,"[125] as well as payments of the CIA's previously promised benefits to the Does.[126] The Does' claim to liberty and property due process rights was anchored in several allegations: (1) the CIA placed the Does in danger when the Agency coerced the Does into spying for the United States; (2) the CIA gave the Does new, false backgrounds and identities on which the Does relied for employment; and (3) the CIA promised the Does protection under the PL-110 program.[127] The CIA moved to dismiss the claim.[128] According to the CIA, the Does' claim should have been dismissed immediately pursuant to the holding in *Totten*, because bringing the contract between the CIA and the Does to light would be likely to reveal classified information.[129] Furthermore, the Agency claimed the suit was a contract suit against the United States, and thus should have been brought in the United States Court of Federal Claims, pursuant to the Tucker Act.[130] The

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[125] Brief for the Respondents, *supra* note 77, at 8.

[126] *Tenet*, 329 F.3d at 1140; *Tenet*, 99 F. Supp. 2d at 1285; Brief for the Respondents, *supra* note 77, at 8.

[127] *Tenet*, 329 F.3d at 1153. Chief Justice Rehnquist held that nothing in 50 U.S.C. § 403h (2005), the PL-110 program, "represents an enforceable legal commitment by the CIA to provide support to spies that may be admitted into the United States under" the statute. Tenet v. Doe, ___ U.S. ___, 125 S. Ct. 1230, 1233 n.2 (2005).

[128] *Tenet*, 99 F. Supp. 2d at 1285.

[129] Brief for the Petitioners at 4, Tenet v. Doe, ___ U.S. ___, 125 S. Ct. 1230 (2005) (No. 03-1395).

[130] 28 U.S.C. § 1346 (2005); *Tenet*, 329 F.3d at 1140. The relevant part of the Tucker Act states:

> § 1346. United States as defendant
>
> (a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court [United States Court of Federal Claims], of:
>
> . . . .
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978 [41 USCS §§ 607(g)(1), 609(a)(1)]. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

28 U.S.C. § 1346.

The CIA did not seek review after the district court and the Ninth Circuit rejected the CIA's argument that the Tucker Act required the Does' to bring their case in the Court of Federal Claims. *Tenet*, 329 F.3d at 1141-42; *Tenet*, 99 F. Supp. 2d at 1290-91. The Supreme Court,

court disagreed with the Agency's positions and held that the Does had "stated claims for violation of their substantive and procedural due process rights, and for injunctive, declaratory, and mandamus relief."[131] The Ninth Circuit granted an interlocutory appeal after the district court denied the CIA's renewed motions to dismiss and for summary judgment.[132]

The Ninth Circuit affirmed in part, reversed in part, and remanded the case to the district court.[133] Judge Marsha S. Berzon's opinion, written for a two to one panel, held that part but not all of the Does claims were controlled by the Tucker Act.[134] The district court properly took jurisdiction over their non-contractual claims.[135] The Ninth Circuit also held that Totten does not necessarily bar the Does suit because the Does are neither simply seeking enforcement of a secret contract, nor have they revealed any classified information.[136] Indeed, they carefully divulged only those materials approved of by the CIA for "public filing."[137] Instead, Judge Berzon stated that the state secrets privilege governs the Does' case, and noted that "since Totten, the constitutional protection of the right to due process of law has developed into an assurance in most instances of some fair procedure, secret or open, judicial or administrative, before governmental deprivation of liberty or property becomes final."[138] The Ninth Circuit later denied the CIA's motion for rehearing or alternatively for rehearing by the full court.[139] The Supreme Court granted certiorari on June 28, 2004.[140]

By the time certiorari was granted, the Does had spent seven years seeking assistance from the CIA, and their pro bono attorneys had spent over $1.9 million handling their claim.[141] On March 2, 2005, however, the Does' legal

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however, addressed this issue in a footnote in *Tenet*. ___ U.S. ___, 125 S. Ct. at 1235 n.4. Chief Justice Rehnquist noted that in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1988), the Court held that before addressing the merits of a case a court must address issues of jurisdiction. *Tenet*, ___ U.S. ___, 125 S. Ct. at 1235 n.4 (citing *Steel Co.*, 523 U.S. at 94-95). Chief Justice Rehnquist further stated that *Steel Co.* directs that "the Tucker Act question is the kind of jurisdictional issue . . . that must be resolved before addressing the merits of a claim." *Tenet*, ___ U.S. ___, 125 S. Ct. at 1235 n.4. Chief Justice Rehnquist clarified that the *Totten* doctrine is a threshold question that can be addressed before a jurisdictional question. *Id.*

[131] *Tenet*, 99 F. Supp. at 1294.

[132] *Tenet*, 329 F.3d at 1141.

[133] *Id.* at 1155.

[134] *Id.* at 1152, 1155.

[135] *Id.* at 1152.

[136] *Tenet*, 329 F.3d at 1148; *see, e.g.*, Brief for the Respondents, *supra* note 77, at 3.

[137] Brief for the Respondents, *supra* note 77, at 3.

[138] *Tenet*, 329 F.3d at 1146.

[139] Doe v. Tenet, 353 F.3d 1141 (9th Cir. 2004).

[140] Tenet v. Doe, 542 U.S. 936 (2004).

[141] Brief for the Respondents, *supra* note 77, at 12 n.6.

battle with the CIA came to an abrupt halt with the Supreme Court's opinion in the Does' case.[142] Writing for a unanimous Court, Chief Justice Rehnquist reversed the Ninth Circuit's decision and stated that the *Totten* doctrine continues to prohibit "suits against the Government based on covert espionage agreements."[143]

Rehnquist rejected the assertion that *Totten* is limited to "prohibiting breach of contract claims seeking to enforce the terms of espionage agreements but not barring claims based on due process or estoppel theories."[144] Instead, he emphasized the broad language in *Totten*: "'Public policy forbids the maintenance of *any suit* in a court of justice'"[145] that could reveal confidential, sensitive information.[146] Judicial review is precluded in cases premised on a "secret espionage relationship with the Government,"[147] even if a claimant has a colorable constitutional claim.[148] Instead of weighing any of the Does' assertions about CIA treatment or lack of constitutionally adequate procedures within the Agency for former spies, the Court stated that the *Totten* doctrine is applicable and it provides "absolute protection"[149] from disclosure of any secret associated with an alleged spy agreement.[150] With the Court citing the need for "absolute protection"[151] from divulgence of any secret information, Rehnquist reinforced the government's belief that it is immune to judicial scrutiny.[152]

That the Does had constitutional claims that went beyond mere enforcement of a secret contract, as in *Kielczynski* and *Guong*, is not a valid *Totten* defense since Rehnquist emphasized that "any suit in a court of justice"[153] involving a secret contract is prohibited.[154] Contradicting himself, however, Rehnquist

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[142] Tenet v. Doe, ___ U.S. ___, 125 S. Ct. 1230 (2005).

[143] *Id.* at ___, 125 S. Ct. at 1233.

[144] *Id.* at ___, 125 S. Ct. at 1236.

[145] *Id.* (quoting Totten Adm'r v. United States, 92 U.S. 105, 107 (1876)).

[146] *Id.*

[147] *Id.*

[148] *Id.* at ___, 125 S. Ct. at 1237.

[149] *Id.* at ___, 125 S. Ct. at 1238.

[150] *Id.*

[151] *Id.*

[152] For example, when the Does' attorneys told Agency lawyers that the Does were left with no alternative other than going to court, the Agency lawyer responded with a confident, "[H]ow are you going to get around *Totten*?" Brief for the Respondents, *supra* note 77, at 8. This left the Does' attorneys "with the clear implication that the Agency considered itself immune from judicial scrutiny." *Id.*

[153] *Tenet*, ___ U.S. ___, 125 S. Ct. at 1236.

[154] *Id.* Beyond the issues raised in this paper are other concerns about the holding in *Tenet*, such as what, if any, constitutional protections outweigh suppressing government secrets. *See, e.g.*, N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (per curiam). *New York Times Co.*, also known as the "Pentagon Papers," involved the government seeking to prevent publication

attempted to distinguish *Webster v. Doe*,[155] a case in which Rehnquist also wrote for the Court and held that a CIA employee had a valid constitutional claim against the Agency.[156]

Webster v. Doe involved a covert electronics technician ("Respondent") who consistently received excellent or outstanding ratings after joining the CIA in 1973.[157] In 1982, Respondent volunteered to another CIA worker that he was a homosexual.[158] Shortly thereafter, "the Agency placed respondent on paid administrative leave pending an investigation of his sexual orientation and conduct."[159] Twice, Respondent passed polygraph tests indicating he neither had sexual relations with foreign nationals, nor disclosed classified information to his sexual partners.[160] Nevertheless, Respondent was asked to resign because the Agency "determined that Respondent's homosexuality posed a threat to security."[161] When Respondent refused to resign, the DCI terminated Respondent's employment.[162]

Respondent filed a complaint that alleged several CIA violations, which included procedural due process and equal protection violations.[163] In its motion to dismiss, the government argued that section 102(c) of the National Security Act[164] precluded judicial review of the DCI's termination decisions.[165] Writing for a majority, Rehnquist held that section 102(c) of the National Security Act does not exclude judicial review of constitutional claims.[166] Rehnquist further noted the importance of addressing constitutional issues when he insisted that Congressional intent precluding judicial review must be clear in a statute in order to avoid the "'serious constitutional

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of a classified study about the Vietnam War. *Id.* at 714. The Supreme Court held that prior restraints on speech had a "heavy presumption against" constitutionality. *Id.* (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)) (quotation marks omitted). Post-*Tenet* the government may attempt to extend *Tenet's* holding to suppress freedom of speech or other constitutional guarantees.

[155] 486 U.S. 592 (1988).

[156] *Tenet*, ___ U.S. ___, 125 S. Ct. at 1237.

[157] *Webster*, 486 U.S. at 594-95. The Agency technician filed suit as a John Doe plaintiff. *Id.* To avoid confusion with "John Doe" in *Tenet*, however, the plaintiff in *Webster* will be referred to as "Respondent."

[158] *Id.* at 595.

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.* at 596.

[164] National Security Act of 1947, Pub. L. No. 80-253, § 102(c), 61 Stat. 495, 498 (codified as amended at 50 U.S.C. § 403 (2005)).

[165] *Webster*, 486 U.S. at 597.

[166] *Id.* at 603.

questions' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim."[167]

Although the CIA in *Tenet v. Doe* was not seeking to avoid judicial review through use of a statute as it was in Webster, the Agency succeeded in avoiding judicial review through precedent.[168] Even though the Does asserted constitutional claims, Rehnquist attempted to distinguish the holdings in *Webster* and *Tenet* when he stated that Respondent in Webster was an "acknowledged"[169] CIA employee.[170] Rehnquist stated:

> [T]here is an obvious difference, for purposes of *Totten*, between a suit brought by an acknowledged (though covert) employee of the CIA and one filed by an alleged former spy. Only in the latter scenario is *Totten*'s core concern implicated: preventing the existence of the plaintiff's relationship with the Government from being revealed.[171]

Rehnquist's analysis is faulty for several reasons. First, the late Chief Justice failed to note that the CIA acknowledged the Does' employment with the Agency through the letter it sent the Does prior to the commencement of the Does' suit.[172] Post-*Tenet*, a plaintiff similarly situated to either the Does or Respondent will have a much more difficult time convincing a court that he is an "acknowledged"[173] employee of the Agency. Second, Rehnquist conceded in a footnote that Respondent in *Webster*, like the Does, had to proceed using a pseudonym "because 'his status as a CIA employee cannot be publicly acknowledged.'"[174] The Chief Justice then attempted to justify why the Does' constitutional claims were dismissed, but Respondents were not. He argued that keeping Respondent's "*identity*"[175] secret "did not mean that the employment '*relationship*' between him and the CIA was not known and admitted by the CIA."[176] This reasoning is flawed for a reason similar to what was stated above. Courts now must grapple with the meaning of "known and admitted"[177] for plaintiffs, whether covert spies or covert electricians, who have constitutional claims against the CIA.

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[167] *Id.* (citing Bowen v. Mich. Acad. of Family Physicians, 476 U.S. 667, 681 n.12 (1986)).

[168] Tenet v. Doe, ___ U.S. ___, 125 S. Ct. 1230 (2005).

[169] *Id.* at ___, 125 S. Ct. at 1237.

[170] *Id.*

[171] *Id.*

[172] *See supra* note 101.

[173] *Tenet*, ___ U.S. ___, 125 S. Ct. at 1237.

[174] *Id.* at ___, 125 S. Ct. at 1237 n.5 (quoting Brief for United States at 3 n.1, Webster v. Doe, 486 U.S. 592 (1988) (No. 86-1294)).

[175] *Id.*

[176] *Id.*

[177] *Id.*

Rehnquist also failed to define "court of justice."[178] The Does merely sought an internal hearing, not necessarily a hearing in a public courtroom.[179] As the Ninth Circuit pointed out, the "Agency is accustomed to conducting its affairs in secret;"[180] therefore, "a fair internal process could presumably proceed in accordance with the secrecy implicit in an agreement to engage in espionage."[181] Per Rehnquist's decision, however, an internal hearing within the Agency now seemingly may be considered a court of justice where secrets could not be maintained.[182] Consequently, the CIA now does not have to give any type of internal procedure to a former spy.[183]

Although covert spies appear to have no recourse for mistreatment by the CIA after the *Tenet* decision, adjudication of claims is highly important. In order to provide a minimum of protection for plaintiffs seeking classified, secret information, the state secrets privilege exists under certain circumstances. Although the Does' case may have been eventually dismissed in order to protect national security, invocation of the state secrets privilege would have compelled some type of judicial review of the Does' claim.

III. STATE SECRETS PRIVILEGE

In *Tenet v. Doe*, the Ninth Circuit held that the CIA needed to assert the state secrets privilege in an effort to compel the CIA to face a minimum of judicial oversight.[184] The state secrets privilege is an evidentiary privilege based on the common law "that allows the [federal] executive branch to withhold information from discovery if disclosure would prejudice the national security of the United States or foreign policy."[185] It allows the executive branch to prevent complete discovery in a case, sometimes leading to inequitable outcomes.[186] Initially, the privilege was to protect military

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[178] *Id.* at ___, 125 S. Ct. at 1236.

[179] Brief for the Respondents, *supra* note 77, at 12.

[180] Doe v. Tenet, 329 F.3d 1135, 1147 (9th Cir. 2003).

[181] *Id.*

[182] *See, e.g., Tenet*, ___ U.S. ___, 125 S. Ct. at 1237 (noting that the CIA regularly hears Title VII claims from employees but failing to note that the CIA could also hear breach of contract claims from alleged former spies while maintaining absolute secrecy).

[183] *Id.* at 1237-38. The Court noted that even examining claims on a case-by-case basis would risk the "perception that [the government] is either confirming or denying relationships" with the plaintiffs. *Id.* at 1238. Furthermore, in an effort to avoid situations in which the CIA would be forced to settle a case out of fear of classified information being revealed, the Court held that the government could not be forced to contend with claims by alleged spies. *Id.*

[184] *Tenet*, 329 F.3d at 1146.

[185] J. Steven Gardner, Comment, *The State Secret Privilege Invoked in Civil Litigation: A Proposal for Statutory Relief*, 29 WAKE FOREST L. REV. 567, 568 (1994).

[186] *Id.*

secrets; however, it has been expanded to prevent discovery of such things as "an FBI file of a sixth grader."[187] The Supreme Court explained the privilege in *United States v. Reynolds*[188]—*Totten*'s "distant relative."[189]

A. Reynolds v. United States

In October 1948, the United States Air Force was testing "secret electronic equipment"[190] aboard an in-flight B-29 bomber in Waycross, Georgia.[191] Of the thirteen passengers aboard the flight, four were civilian observers.[192] A fire in one of the engines caused the plane to crash, which killed six of the crew members and three of the civilians.[193] The widows of the three civilians filed suit against the United States.[194] When the widows sought production of the Air Force's official accident report and the statements of the surviving crew members, the government claimed these matters were privileged and moved to quash the motion for production.[195] The federal district court rejected the government's claim of privilege and denied the motion to quash.[196]

The Secretary of the Air Force then wrote a letter to the court stating, "[I]t has been determined that it would not be in the public interest to furnish [the] report."[197] The district judge granted a rehearing at which the Secretary of the Air Force "filed a formal 'Claim of Privilege'"[198] based on the assertion that the aircraft and personnel on board were involved in a "highly secret mission of the Air Force."[199] The Air Force also filed an affidavit that said the documents the widows requested could not be "furnished 'without seriously hampering national security, flying safety and the development of highly technical and secret military equipment.'"[200] The Air Force was willing to

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[187] *Id.* at 569 (citing Patterson v. FBI, 893 F.2d 595 (3d Cir. 1990)).

[188] 345 U.S. 1 (1953).

[189] Flynn, *supra* note 34, at 793. "Although the exact origins of the [state secrets] privilege are not certain, . . . the privilege in this country has its initial roots in Aaron Burr's trial for treason[.]" *In re* United States, 872 F.2d 472, 474-75 (D.C. Cir. 1989) (citing United States v. Burr, 25 F.Cas. 30 (C.C.D. Va. 1807)).

[190] *Reynolds*, 345 U.S. at 3.

[191] *Id.* at 2-3.

[192] *Id.* at 3.

[193] *Id.*

[194] *Id.*

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

[196] *Id.*

[197] *Id.* at 4.

[198] *Id.*

[199] *Id.*

[200] *Id.* at 5 (citation omitted).

produce the surviving crew members for interviews, however.[201] The court ordered the government to produce the documents so the it could determine whether the documents contained confidential matter.[202] The government refused and final judgment was entered for the widows.[203] The Court of Appeals for the Third Circuit affirmed.[204]

The Supreme Court stated that a valid state secrets privilege exists with the law of evidence.[205] Chief Justice Vinson noted that experience with the privilege was limited in the United States and England, but that "the principles which control the application of the privilege emerge quite clearly from the available precedents."[206] The privilege cannot be claimed or waived by a private party.[207] It belongs only to the government.[208] The Court set up a two part standard for invoking the privilege.[209] First, the head of the department, after giving personal consideration to the matter, must lodge a formal claim of privilege.[210] A court then determines whether the claim of privilege is appropriate without disclosing the thing that is being protected.[211] Chief Justice Vinson noted that:

> Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case.[212]

Vinson then applied these standards to *Reynolds*. The United States was in a period of building up its national defenses during the heart of the Cold War.[213] Air power was "the most potent weapon[]"[214] during World War II, and developing electronic devices to enhance air power "must be kept secret if their full military advantage is to be exploited in the national interests."[215] Because the plane that crashed was testing secret electronic devices, it was

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[201] *Id.* at 4.

[202] *Id.* at 5.

[203] *Id.*

[204] *Id.*

[205] *Id.* at 6-7 (citing Totten Adm'r v. United States, 92 U.S. 105, 107 (1876); Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 F. 353 (E.D. Pa. 1912); Pollen v. Ford Instrument Co., 26 F. Supp. 583 (E.D.N.Y. 1939); Cresmer v. United States, 9 F.R.D. 203 (E.D.N.Y. 1949)).

[206] *Id.*

[207] *Id.*

[208] *Id.*

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

[210] *Id.*

[211] *Id.* at 8.

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

[213] *Id.* at 10.

[214] *Id.*

[215] *Id.*

likely the accident report would refer to this equipment.[216] A formal claim of privilege still had to be invoked before the trial judge could decide that the accident report was privileged.[217] When the Secretary of the Air Force lodged the formal claim of privilege, however, there was a showing of necessity sufficient to deny the production of the report to protect military secrets.[218] Finally, the Court spoke to necessity:

> [T]he showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake.[219]

The widows could not show a great necessity to obtain the report because the Air Force offered to make available for examination the surviving crew members, from whom the widows might be able to obtain facts as to causation.[220] The Supreme Court, therefore, reversed and remanded to the federal district court by a vote of six to three.[221]

B. Consequences of Invoking the State Secrets Privilege

As the Ninth Circuit noted that *Totten* does not apply to all of the Does' claims, Judge Berzon mentioned that the CIA could validly invoke the state secrets privilege, holding that a case can be dismissed based on Totten only "*after* complying"[222] with the state secrets privilege doctrine.[223] The Ninth Circuit argued that, by analogy, *Totten* was only applicable to the Does' case "as applied through the prism of current state secrets doctrine."[224] Rehnquist cited *Weinberger v. Catholic Action of Hawaii/Peace Education Project*,[225] however, in holding that *Totten* is its own doctrine, not meshed into or replaced by the state secrets privilege.[226] Although Rehnquist rejected

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[216] *Id.*

[217] *Id.*

[218] *Id.* at 4, 6-7, 10-11.

[219] *Id.* at 11.

[220] *Id.*

[221] *Id.* at 12.

[222] Doe v. Tenet, 329 F.3d 1135, 1150 (9th Cir. 2003).

[223] *Id.* at 1150-51.

[224] *Id.* at 1151; 5 U.S.C. § 552 (1994).

[225] 454 U.S. 139 (1981).

[226] *Tenet*, 329 F.3d at 1150. *Weinberger* dealt with the Freedom of Information Act ("FOIA"), which is governed by different standards than the state secrets privilege. 454 U.S. at 142-43.

Berzon's holding,[227] the state secrets privilege offers more protection to a plaintiff in certain instances than *Totten*'s categorical bar.[228] It also subjects the government to at least minimal judicial scrutiny.[229] The difference between the *Totten* doctrine and the state secrets privilege is that "invoking *Totten* causes a suit to be dismissed, where invoking the state secrets privilege"[230] may cause any one of three different further effects as discussed in *Kasza v. Browner*.[231]

In *Kasza*, suit was filed against the United States Air Force and the Environmental Protection Agency by former workers at a classified research facility.[232] The suit alleged Resource Conservation and Recovery Act violations and sought "to compel compliance with hazardous waste inventory, inspection, and disclosure responsibilities."[233] The Secretary of the Air Force invoked the state secrets privilege.[234] Determining that the privilege was properly invoked, the district court granted the Air Force's request for summary judgment because the plaintiff could not prove, at first glance, a case based entirely on the non-classified evidence.[235]

In affirming the court's decision, the Ninth Circuit stated that one of the effects of applying the state secrets privilege is to remove from the case completely the particular evidence over which the privilege has been invoked.[236] The plaintiff then may attempt to establish a case on the evidence not covered by the privilege.[237] On the other hand, "'if the privilege deprives the *defendant* of information that would otherwise give the defendant a valid defense to the claim, then the court may grant summary judgment to the defendant'"[238] to avoid an erroneous outcome.[239] Finally, properly invoking

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[227] Tenet v. Doe, ___ U.S. ___, 125 S. Ct. 1230, 1236 (2005).

[228] *See, e.g.*, Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998); Flynn, *supra* note 34, at 796 n.22.

[229] *See* United States v. Reynolds, 345 U.S. 1 (1953).

[230] Flynn, *supra* note 34, at 814 n.22.

[231] *Tenet*, 329 F.3d at 1149 (quoting *Kasza*, 133 F.3d at 1166).

[232] *Kasza*, 133 F.3d at 1162-63.

[233] *Id.*; *see* Resource Conservation and Recovery Act of 1976, Pub. L. No. 94-580, § 2, 90 Stat. 2795, 2825 (codified as amended at 42 U.S.C. § 6972 (2005)).

[234] *Kasza*, 133 F.3d at 1163, 1165.

[235] *Id.* at 1163.

[236] *Id.* at 1166.

[237] *Id.* The government is rarely a plaintiff asserting the state secrets privilege. When the government initiates an action, it waives its claim of privilege. *See* Gardner, *supra* note 185, at 576 n.93.

[238] *Kasza*, 133 F.3d at 1166 (quoting Bareford v. Gen. Dynamics Corp., 973 F.2d 1138, 1141 (5th Cir. 1992)).

[239] *Id.*

the state secrets privilege can cause a case to be dismissed on summary judgment if the "'very subject matter of the action' is a state secret."[240]

More than fifty-five years after the decision, courts continue to adhere strictly to the principles set forth in Reynolds and later expounded upon in *Kasza*. *Sterling v. Tenet*,[241] for example, applied the state secrets privilege to a Title VII racial discrimination claim brought against the Director of the CIA by an African-American CIA covert agent.[242] After a formal claim of state secrets privilege by the CIA, Judge Wilkins reviewed both unclassified and classified declarations prepared by the CIA with only the CIA present in *in camera*[243] proceedings to determine that the state secrets doctrine "barred the evidence that would be necessary to state a prima facie claim."[244] To proceed, Sterling would need to disclose the type of employment he had with the CIA, and the employment of those similarly situated much of which was classified information that could not be divulged.[245] Therefore, proof of discrimination was impossible, and Sterling's racial discrimination claim was consequently dismissed.[246]

As evidenced in *Sterling*, courts continue to be reluctant to divulge military or national secrets.[247] Judges look to the individual circumstances of each case when a claim of state secrets privilege is lodged.[248] Quoting *Reynolds*, Judge Wilkins stated that a "plaintiff's 'showing of necessity' for the privileged evidence 'will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate.'"[249] National security is the overriding concern, however, and will overcome the most compelling showing of necessity by a plaintiff.[250]

Sterling is an example of one possible effect when the state secrets privilege is claimed. Considering the possible effects of invoking the state secrets privilege for a plaintiff similarly situated to the Does, notwithstanding the present holding in *Tenet*, if a court is satisfied that "there is a 'reasonable danger' that military or national secrets will be revealed[,]"[251] the court simply

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[240] *Id.* (quoting United States v. Reynolds, 345 U.S. 1, 11 n.26 (1953)).

[241] 416 F.3d 338 (4th Cir. 2005).

[242] *Id.* at 345-47.

[243] *See infra* Part IV.B.1 (discussing *in camera* proceedings).

[244] *Sterling*, 416 F.3d at 342.

[245] *Id.*

[246] *Id.*

[247] *See id.*

[248] *Id.* at 343.

[249] *Id.* (quoting United States v. Reynolds, 345 U.S. 1, 11 (1953)).

[250] *Id.*

[251] Doe v. Tenet, 329 F.3d 1135, 1152 (9th Cir. 2003) (quoting *Reynolds*, 345 U.S. at 10-11).

can dismiss a plaintiff's case, as in *Sterling*.[252] The plaintiff would have a minimum of judicial review, however, to determine whether a reasonable danger actually exists.[253] The government would be subject to some judicial scrutiny, as well.[254] Furthermore, a plaintiff may be able to present his case without revealing secrets that would threaten the United States.[255] For example, the Does requested an internal review within the CIA.[256] Though Rehnquist did not note this in his opinion, an internal review would not have required the Does to develop the "details underlying the dispute"[257] for the court.[258] On the other hand, if a plaintiff is required to develop his case factually, many alternatives to strict dismissal, other than the state secrets privilege, would allow a plaintiff's constitutional issues to proceed, in turn avoiding an unnecessary power struggle between the Executive and Judicial Branches.

IV. POST-*TENET*

The Executive Branch has used both the *Totten* doctrine and the state secrets privilege numerous times to have suits against the government dismissed.[259] In fact, "[t]he availability of the Totten Doctrine . . . causes the CIA to believe not just that it is beyond judicial scrutiny, but that it need [sic] to provide only those internal procedures that suit [its] purposes."[260] Rehnquist's *Tenet* decision will likely strengthen this view for both the Executive and Judicial branches. The problem lies not only with the Executive Branch, but also with judges who allow the Executive Branch to act with unrestrained authority in areas involving national security.[261]

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[252] *Sterling*, 416 F.3d at 347; *Tenet*, 329 F.3d at 1152.

[253] *Reynolds*, 345 U.S. at 8; *Sterling*, 416 F.3d at 343; *Tenet*, 329 F.3d at 1152-53.

[254] *Sterling*, 416 F.3d at 343.

[255] *Tenet*, 329 F.3d at 1153.

[256] Brief for the Respondents, *supra* note 77, at 12.

[257] *Tenet*, 329 F.3d at 1154.

[258] *Id.*

[259] *See* Flynn, *supra* note 34, at 793 nn.5, 6.

[260] Kielczynski v. United States CIA, 128 F. Supp. 2d 151, 164 (E.D.N.Y. 2001) (quoting plaintiff's amended complaint).

[261] Flynn, *supra* note 34, at 807-08 (citing Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?*, 91 YALE L.J. 570, 582 (1982)); *see also* Cruz, *supra* note 76.

The need to protect the nation's security is undisputed. Maintaining a system of checks and balances and zealously adjudicating claims with serious constitutional questions, however, is also important and can be conducted without the threat of "graymail" or the risk of the perception that the government is confirming or denying espionage relationships with plaintiffs. *See* Tenet v. Doe, ___ U.S. ___, 125 S. Ct. 1230, 1238 (2005). "Graymail" is the term used to describe defendants who threaten to disclose classified information in an effort to induce the

A. Implications for the Judiciary

Both the judiciary and the Executive Branch recognize the need to safeguard the nation's secrets to protect the country from its enemies.[262] In *Department of the Navy v. Egan*,[263] the Supreme Court noted its recognition of the "Government's 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business."[264] Espionage and clandestine affairs are necessary for an informed domestic and foreign defense system.[265] However, executive offices, such as the CIA, are allowed to coerce individuals into spying for the United States, and even to promise to always be there for them, only to renege without allowing some form of relief.[266] In the *Kielczynski* opinion, Judge Glasser noted a "persuasive argument for why the [*Totten*] doctrine is unfair or outdated,"[267] which quoted plaintiff's amended complaint:

> The CIA regularly makes promises to and agreements with spies, agents and/or defectors, and others who rely on such promises and agreements, ignoring its obligations whenever it chooses to do so. To facilitate this wrongful conduct, the Agency utilizes the so-called Totten Doctrine . . . to block judicial enforcement of its lawful obligations.[268]

The CIA is not alone in believing that it specifically, and the Executive Branch more generally, is beyond judicial scrutiny when state secrets are involved.[269] The Supreme Court's decision in *Tenet v. Doe* has strengthened this belief by outlining the need for absolute secrecy,[270]—a standard that is

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government to settle a case or prevent its filing out of fear of harming national security. Rachel S. Holzer, Note, *National Security Versus Defense Counsel's "Need to Know": An Objective Standard for Resolving the Tension*, 73 FORDHAM L. REV. 1941, 1954 (2005) (discussing Classified Information Procedures Act § 3, 18 U.S.C.A. App. 3 § 3 (West 2005). The Classified Information Procedures Act was initially designed to protect the government from the problem of graymail. *Id.*

[262] *See* CIA v. Sims, 471 U.S. 159 (1985).

[263] 484 U.S. 518 (1988).

[264] *Id.* at 527 (quoting Snepp v. United States, 444 U.S. 507, 509 n.3 (1980)).

[265] Brief for the Petitioners, *supra* note 129, at 11.

[266] Doe v. Tenet, 329 F.3d 1135 (9th Cir. 2003).

[267] Kielczynski v. United States CIA, 128 F. Supp. 2d 151, 164 (E.D.N.Y. 2001).

[268] *Id.* (quoting plaintiff's amended complaint).

[269] *See* Dep't of the Navy v. Egan, 484 U.S. 518, 527 (1988); Korematsu v. United States, 323 U.S. 214 (1944).

[270] Tenet v. Doe, ___ U.S. ___, 125 S. Ct. 1230, 1237-38 (2005).

nearly impossible to meet.[271] Courts will now likely be more reluctant to review Executive Branch decisions regarding secret information.

Three reasons exist as to why the courts are reluctant to review decisions of the Executive Branch concerning classified information relating to national security.[272] First, the President and Congress are primarily responsible with providing for the national defense under the United States Constitution.[273] The President, as Commander-in-Chief, has the authority to control access to classified information.[274] Second, "the political branches are generally thought to be in the best position to make such policy determinations."[275] For example, in *Halkin v. Helms*,[276] the opinion for the Court of Appeals for the District of Columbia Circuit stated, "[c]ourts should accord the 'utmost deference' to executive assertions of privilege upon grounds of military or diplomatic secrets."[277] Finally, "in the national security area courts have fewer standards upon which they can base a decision."[278] Nevertheless, judges had started moving away from this mode of thinking prior to *Tenet*.

In *United States v. Ehrlichman*,[279] for example, defendants violated a psychiatrist's Fourth Amendment rights when they entered his office without a warrant in order to obtain records relating to one of the psychiatrist's patients. The government claimed the need to conduct broad pretrial discovery in order to establish two claims: (1) the President had authorized the break-in without a warrant for national security; and (2) even if the President did not authorize the entry, the defendants had a good-faith belief that the entry was "legal and justified in the national interest."[280] Judge Gesell rejected these arguments as well as the assertion that the "indictment must be dismissed because the judiciary has no right to risk the public disclosure of the sensitive national security information required"[281] to adjudicate the case.[282] Gesell further noted that "courts have broad authority to inquire into national

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[271] As noted in Rehnquist's *Tenet* opinion, if even a slight possibility exists that a covert relationship could be revealed, a case may not proceed. *Id.* at 1237-38.

[272] Patrick J. DeSouza, Note, *Regulating Fraud in Military Procurement: A Legal Process Model*, 95 YALE L.J. 390, 413 n.40 (1985).

[273] *Id.*; *see* U.S. CONST. art. II, § 2; *id.* art. I, § 8; *see, e.g.*, Concerned About Trident v. Schlesinger, 400 F. Supp. 454, 482 (D.D.C. 1975).

[274] *Egan*, 484 U.S. at 527.

[275] DeSouza, *supra* note 272, at 413 n.40.

[276] 598 F.2d 1 (D.C. Cir. 1978).

[277] *Id.* at 9 (quoting United States v. Nixon, 418 U.S. 683, 710 (1974)).

[278] DeSouza, *supra* note 272, at 413 n.40.

[279] 376 F. Supp. 29 (D.D.C. 1974).

[280] *Id.* at 31.

[281] *Id.* at 32 n.1.

[282] *Id.*

security matters so long as proper safeguards are applied to avoid unwarranted disclosures."[283]

B. Alternatives

Although Rehnquist's holding that "absolute protection"[284] must be maintained could have a chilling effect on judges in Gesell's position, secret information can be safeguarded in a variety of ways.[285] The Does struggled to maintain the secret nature of the relationship they had with the CIA.[286] This is evidenced by their use of fictitious names, getting CIA approval before filing certain documents, and asking for an internal review of their claim as opposed to a review in open court.[287] Even though the Supreme Court applied the *Totten* doctrine to the Does' case, many less extreme options would be advisable to avoid similar unjust dismissals of claims by future plaintiffs. Concerned about the possible inability to adjudicate important causes of action such as the Does', the Ninth Circuit stated:

> [T]he net result of refusing to adjudicate the Does' claims is to sacrifice their asserted constitutional interests to the security of the nation as a whole, both the government and the courts need to consider discretely, rather than by formula, whether this is a case in which there is simply no acceptable alternative to that sacrifice.[288]

A judge is unable to determine what is in the best interest of the individual versus the best interest of the nation if he formulaically dismisses cases upon a claim of state secrets privilege or the *Totten* doctrine without specific and careful review.[289] Alternatives to strict dismissal that would allow a court to adjudicate sensitive claims discretely include reviewing documents and conducting trials *in camera*, "requiring security clearances for court personnel and attorneys,"[290] congressional relief, or waiver of the *Totten* defense.[291]

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[283] *Id.* (citing Nixon v. Sirica, 487 F.2d 700, 713 (D.C. Cir. 1973)).

[284] Tenet v. Doe, ___ U.S. ___, 125 S. Ct. 1230, 1237 (2005).

[285] *See, e.g.*, Gardner, *supra* note 185, at 591-609.

[286] *See* Brief for the Respondents, *supra* note 77, at 12.

[287] Brief for the Respondents, *supra* note 77, at 1, 3, 8, 12.

[288] Doe v. Tenet, 329 F.3d 1135, 1146 (9th Cir. 2003).

[289] Gardner, *supra* note 185, at 589.

[290] *Tenet*, 329 F.3d at 1148.

[291] Flynn, *supra* note 34, at 807-09; Gardner, *supra* note 185, at 591-95; Andrew R. Sommer, Casenote, *The State Secrets Privilege in Prepublication Review: Proposing a Solution to Avoid a Seemingly Inevitable Tragedy*, 12 GEO. MASON L. REV. 211, 229-31 (2003).

1. In camera review

Confidential *in camera* review takes place in a judge's chamber or other private area.[292] Rehnquist dismissed the use of *in camera* review when an espionage relationship is present by stating that conducting trials *in camera* cannot offer absolute protection from disclosure of secret information.[293] This procedure, however, can be conducted so as to avoid exposure of sensitive information, and it may be done on an "item-by-item"[294] basis, as discussed in *In re United States*.[295]

In *In re United States*, the Court of Appeals for the District of Columbia Circuit had to decide whether dismissal was required when a United States Attorney General formally claimed the state secrets privilege before answering a complaint or filing any other documents.[296] Lillie Albertson filed a claim in 1984 against the United States for alleged injuries she and her husband received due to personal investigations by the Federal Bureau of Investigation ("FBI").[297] The United States did not answer the complaint but moved to dismiss; however, the district court denied the motion.[298] The government then sought more time to file an answer and to conduct discovery.[299] Instead of answering, however, the government filed another motion to dismiss, now formally claiming the state secrets privilege and arguing that, if the case went forward, state secrets would be jeopardized.[300] The government submitted a classified affidavit written by the assistant director of the FBI's Intelligence Division, James H. Geer, for *in camera* review.[301] After reviewing the documents, the district court again denied the motion.[302] The court of appeals stated that the district court was justified in its decision and affirmed the use of *in camera* review as a means to determine when the privilege will apply.[303]

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[292] BLACK'S LAW DICTIONARY 337 (2d Pocket ed. 2001).

[293] Tenet v. Doe, ___ U.S. ___, 125 S. Ct. 1230, 1237-38 (2005).

[294] *In re* United States, 872 F.2d 472, 478 (D.C. Cir. 1989).

[295] *Id.*

[296] *Id.*

[297] *Id.* Lillie and William Albertson, Lillie's husband, were investigated by the FBI from 1950 to 1964, because of his membership in the Communist Party. *Id.* at 474.

[298] *Id.* at 473.

[299] *Id.*

[300] *Id.* at 473-74.

[301] *Id.* at 474.

[302] *Id.*

[303] *Id.* at 478; *see* Linder v. Dep't of Defense, 133 F.3d 17, 23 (D.C. Cir. 1998); Halkin v. Helms, 598 F.2d 1, 9 (D.C. Cir. 1979); Edmonds v. U.S. Dep't of Justice, 323 F. Supp. 2d 65, 68 (D.D.C. 2004).

In *Tenet*, Rehnquist failed to address that a district court judge is competent to review sensitive material *in camera*.[304] If necessary, a judge could separate sensitive from non-sensitive documents if a case involving critical material were to proceed to trial.[305] If a judge reviewed materials *in camera* and decided that the CIA or other executive agency should be compelled to give a constitutionally adequate internal hearing, the process would likely "proceed in accordance with the secrecy implicit in an agreement to engage in espionage."[306]

2. Security clearance for courtroom personnel

Another option for courts faced with a claim of state secrets privilege or a plaintiff hoping to avoid the harshness of the *Totten* doctrine is to have judges, attorneys, and other court members who have high level security clearance adjudicate these claims.[307] The Executive Branch's concern with divulging protected secrets would be tempered by the fact that cleared officials would be screening the documents and facts of the case.[308] Because the Executive Branch has the authority to grant or revoke security clearance as part of its responsibility to national defense, it would control which judges and attorneys could be trusted with sensitive information.[309]

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[304] *See* Doe v. Tenet, 329 F.3d 1135, 1149 n.8 (9th Cir. 2003); Gardner, *supra* note 185, at 589.

[305] Kasza v. Browner, 133 F.3d 1159, 1166 (9th Cir. 1998).

[306] Doe v. Tenet, 329 F.3d 1135, 1147 (9th Cir. 2003).

[307] *Id.* at 1148; Gardner, *supra* note 185, at 593-96.

[308] William H. Miller, Article, *A Position of Trust: Security Clearance Decisions After September 11, 2001*, 14 GEO. MASON U. CIV. RTS. L.J. 229, 231-32 (2004).

[309] *Id.*

> Comprehensive guidelines for eligibility for access to classified information were first established through Executive Order 10,865, which required that in order to have access to classified information a person must be (1) a United States citizen, (2) of sound judgment and character, (3) trustworthy, and (4) free from potential foreign allegiances and coercion.

Miller, *supra* note 308, at 231 n.10. These guidelines have evolved. *See* Exec. Order 10,865 3.1, 3 C.F.R. 398 (1959-1963), *reprinted in* 50 U.S.C. § 435 (1995); Miller, *supra* note 308, at 231 n.10. That the CIA granted the Does' two lawyers security clearance to investigate the claim demonstrates that affording security clearance for selected individuals is a viable option for the government to use in civilian trials. *See* Brief for the Respondents, *supra* note 77, at 5.

3. Congressional relief

A third option when the *Totten* doctrine claim is raised would be Congressional modification of the rule.[310] Justice Stevens, joined by Justice Ginsburg, wrote a short concurrence to Rehnquist's *Tenet* opinion discussing the agreement made by William A. Lloyd and President Lincoln in *Totten*.[311] Stevens stated, "[t]here may be situations in which the national interest would be well served by a rule that permitted similar commitments made by less senior officers to be enforced in court, subject to procedures designed to protect sensitive information."[312] Stevens then advocated Congressional modification in order to change the *Totten* rule.[313]

A proposed Congressional change to the *Totten* doctrine or state secrets privilege might undertake Freedom of Information Act ("FOIA")-style review of cases involving former spies or classified information.[314] Litigation proceeding under FOIA requires, among other things, "a detailed affidavit, known as a Vaughn Index,"[315] that describes the information the government wishes to keep from being disclosed.[316] The Vaughn Index allows the court to determine if the documents and information being withheld are part of the FOIA listed exemptions, and it gives the party opposing the non-disclosure a glimpse at what the government is withholding.[317] Allowing this type of review would "meet two often conflicting goals[:] protecting national security while assuring that the state secret privilege does not unnecessarily prohibit valid claimants from the judicial system."[318]

4. Waiving the Totten *doctrine defense*

Finally, the government could be held to have waived its *Totten* defense in certain instances. For example, *Tenet* and *Guong* raised issues that the Supreme Court failed to address in *Tenet*. Guong's third argument was that the operation in which he was involved was no longer secret because

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[310] Tenet v. Doe, ___ U.S. ___, 125 S. Ct. 1230, 1238 (2005) (Stevens, J., concurring) (advocating congressional modification of the *Totten* doctrine in certain instances); Flynn, *supra* note 34, at 809-11.

[311] *Tenet*, ___ U.S. ___, 125 S. Ct. at 1238; Totten Adm'r v. United States, 92 U.S. 105 (1876).

[312] *Tenet*, ___ U.S. ___, 125 S. Ct. at 1238.

[313] *Id.*

[314] 5 U.S.C. § 552 (1994); *see also* Flynn, *supra* note 34, at 809-11; Gardner, *supra* note 185, at 595-96.

[315] Sommer, *supra* note 291, at 230.

[316] *Id.* at 229-30.

[317] *Id.* at 230.

[318] Gardner, *supra* note 185, at 596.

information about it had been published.[319] The Does raised a similar argument. The Does contended that when the CIA wrote them a letter their relationship was acknowledged.[320] It was therefore made public. Although this is a tenable argument, it failed in *Guong* and was not addressed in *Tenet*.[321]

The *Guong* court stated that the government has a need to protect secret information, and subsequent publications do not change that fact.[322] Similarly, when the CIA moved to dismiss a claim for unpaid monies owed for the services of a spy in Cuba in *Mackowski v. United States*,[323] Mackowski asserted that the CIA had waived its *Totten* defense because a then-Senator persuaded Cuban officials to release Mackowski from prison.[324] The Court of Claims wrote, "such action cannot be construed as a public confirmation or publication that plaintiff performed espionage services for the United States."[325]

Neither Guong nor Mackowski received a direct acknowledgment of any type of relationship from the CIA.[326] The difference for the Does was that the CIA itself wrote the Does a letter making their relationship public.[327] Arguably, if the CIA acknowledges a covert relationship via letter or other published documentation, as it did with the Does, absolute secrecy has already been violated because the relationship has been acknowledged. This being the case, the CIA or other agency should be held to have waived its *Totten* defense. One of two results should then occur. Either a plaintiff should be allowed to move forward with his claim, or the CIA should be required to assert the state secrets privilege. Either result would allow a plaintiff to avoid the severity of the *Totten* doctrine.

V. CONCLUSION

Cases following *Totten* "paint a disturbing picture"[328] of the CIA's treatment of its former spies.[329] The *Totten* doctrine is an inflexible and outdated policy that has been extended beyond its initial holding and now

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[319] Guong v. United States, 860 F.2d 1063, 1065 (Fed. Cir. 1988).

[320] Brief for the Respondents, *supra* note 77, at 4; *see supra* note 101.

[321] *Guong*, 860 F.2d at 1065-66.

[322] *Id.* at 1066.

[323] 228 Ct. Cl. 717, 718-19 (1981).

[324] *Id.*

[325] *Id.* at 719.

[326] *Guong*, 860 F.2d 1063; *Mackowski*, 228 Ct. Cl. 717.

[327] Brief for the Respondents, *supra* note 77, at 4; *see supra* note 101.

[328] Kielczynski v. United States, 128 F. Supp. 2d 151, 164 (E.D.N.Y. 2001).

[329] *Id.*

jeopardizes basic constitutional protections.[330] When adjudicating claims involving classified information or covert workers, courts should take into account various options they could use when reviewing sensitive material to protect national security interests.[331] As Ninth Circuit Judge Kleinfeld noted in his dissenting opinion in *Doe v. Tenet*, "[i]f what the Does allege is true, a serious injustice has been done to them, and the injustice to them is seriously harmful to the long-term security interests of the United States."[332]

Holly L. McPherson[333]

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[330] *See supra* Part II.

[331] Doe v. Tenet, 329 F.3d 1135, 1146 (9th Cir. 2003).

[332] 353 F.3d 1141, 1146 (9th Cir. 2004) (Kleinfeld, J., dissenting).

[333] J.D. December 2005, William S. Richardson School of Law, University of Hawai`i at Manoa.

Knievel v. ESPN: Demonstrating the Need for a Common-Sense Subjective Standard for Meaning in Defamation Law

I. INTRODUCTION

"The limits of my language mean the limits of my world."
Ludwig Wittgenstein[1]

Language is a powerful and nebulous tool. Constantly shifting and growing, efforts to define and constrain it are often futile. It is also continually used imprecisely, at least as measured by the rules that can be generally agreed upon for its use. Liquidity and crudeness of use, however, do not make language a less valuable commodity. Freedom to express oneself through language, in all its amoebic glory, has long been a right jealously guarded in the United States. When rights were being assigned essential status during this country's constitutional infancy, freedom of expression was a favored child—lavished with indulgent attention. One wonders if young free speech sometimes looked over its shoulder and snickered at double jeopardy and the takings clause as it stood at the front of the line with its chums—religion, press, and peaceable assembly.

However, free speech can sometimes be knocked off its high horse. Falsehoods, particularly those that are knowingly used to injure the reputation of others, are "no essential part of any exposition of ideas"[2] and do not possess the constitutional value ascribed to most utterances.[3] The law of defamation provides a remedy for individuals harmed by such hurtful speech. A person may therefore be held liable in tort simply for communicating with another person—freedom of expression notwithstanding. This casenote examines a defamation case in which the language at issue exists at the line where dictionaries end and real communication begins.

In *Knievel v. ESPN*,[4] plaintiffs Evel and Krystal Knievel sued ESPN for publishing a photograph and accompanying caption that allegedly "falsely and maliciously defamed" them.[5] The Knievels argued that the photograph and caption effectively charged them with "criminal activity and immoral and

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[1] LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS 115 (A. J. Ayer ed., Routledge & Kegan Paul 1961) (1921).

[2] Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

[3] *Id.*

[4] 393 F.3d 1068 (9th Cir. 2005).

[5] Appellants' Brief at 3, Knievel v. ESPN, 393 F.3d 1068 (9th Cir. 2005) (No. 02-36120) [hereinafter Appellants' Brief].

improper behavior"[6] by implying that Krystal was a prostitute and that Evel was her pimp.[7] The Ninth Circuit disagreed and affirmed the district court's dismissal of Knievel's complaint.[8] The Ninth Circuit held that the material alleged to be defamatory was not capable of sustaining a defamatory meaning and could not reasonably be interpreted as making a factual assertion.[9]

The Knievels' suit was prompted by a photo of Evel with Krystal and another woman. The photo was published on an "extreme sports" website operated by ESPN, with a caption reading, "Evel Knievel proves that you're never too old to be a pimp."[10] The court held that the type of language used throughout the website would indicate to the average reader that the term "pimp" was being used in a figurative manner and a literal interpretation was, therefore, not reasonable.[11] Accordingly, the court determined that ESPN did not actually make the defamatory assertion that Knievel engaged in illegal promotion of prostitution.[12] Furthermore, the material in question could not be reasonably viewed as making a factual allegation at all.[13]

This casenote asserts that although the Ninth Circuit accurately expressed the binding strictures of Supreme Court defamation decisions, *Knievel* was not correctly decided under those standards nor the standards articulated for defamatory meaning.[14] This casenote further contends that the Supreme Court's articulation of defamation law under the First Amendment is incomplete, and that the plaintiff in a defamation action should be required to prove that the defendant acted with knowledge of the defamatory meaning attributable to her statement.[15] Under this standard, the Ninth Circuit in *Knievel* would have been able to reach its just conclusion without skipping a step in its analysis.[16] This standard would enforce the notion that speakers should not be punished for unintended interpretations of their words.[17] It would also provide greater notice and clarity as to what is actionable as defamation, especially where slang and other ambiguous language are concerned.[18]

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[6] *Id.* at 4.
[7] *Id.*
[8] *Knievel*, 393 F.3d at 1079.
[9] *Id.* at 1077-79.
[10] *Id.* at 1070.
[11] *Id.* at 1078.
[12] *Id.* at 1074-78.
[13] *Id.*
[14] *See infra* Part III.B.
[15] *See infra* Part IV.A.
[16] *See infra* Part IV.A-B.
[17] *See infra* Part IV.A-B.
[18] *See infra* Part IV.B.

Part II provides an overview of modern defamation law, and examines its current treatment by the Supreme Court. Part III examines the Ninth Circuit's constitutional framework for defamation law and its application in *Knievel*, and concludes that while the Ninth Circuit's framework properly expressed the Supreme Court's mandates, *Knievel* was not properly decided under those standards or under the standard articulated for defamatory meaning. Next, Part IV takes a closer look at the policies and principles underlying defamation law. This Part asserts that the majority's reasoning in *Knievel* was flawed in its reliance on inappropriate assumptions regarding defamation and communication generally. These flaws were chiefly evident in its failure to address the speaker's subjective intent and to accurately determine the meaning of the terms used. This Part draws upon several proposals for reform which variously affirm the need for greater notice and clarity in defamation law and support the introduction of a subjective fault requirement for defamatory meaning. I argue in this part for a constitutional standard requiring a defamation plaintiff to prove knowing conduct by the defendant with regard to the defamatory meaning attributed to the defendant's statement. I further assert that this standard would fill a critical gap in the Supreme Court's current defamation doctrine and, if applied in *Knievel*, would have enabled the Ninth Circuit to reach its correct conclusion without analytical omissions.

II. A REVIEW OF DEFAMATION LAW

"[F]acts quite often, I fear to confess, like lawyers, put me to sleep at noon."
Ray Bradbury"[19]

"Facts are stupid things."
Ronald Reagan[20]

It is the unanimous and utterly unassailable opinion of every person who has encountered modern defamation law that it is frustratingly complex and that trying to make sense of it is a terrific way to achieve a massive headache.[21] I will not argue to the contrary in this casenote. However,

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[19] Ray Bradbury, *Foreword* to RAY BRADBURY ET. AL., MARS AND THE MIND OF MAN (Harper & Row 1973).

[20] President Ronald Reagan, Address at the 1988 Republican National Convention (Aug. 15, 1988), *available at* http://www.reagan.utexas.edu/archives/speeches/1988/081588b.htm. This transcription reflects the written speech, not the words as spoken by Reagan. *Id.* Reagan misspoke during his speech, intending to recite the John Adams quotation, "facts are stubborn things." *See* Quotation #279 from Michael Moncur's (Cynical) Quotations, The Quotations Page, http://www.quotationspage.com/quote/279.html (last visited Nov. 30, 2005).

[21] This comment typifies the category of expressively magnified but factual-sounding statements that the Supreme Court has termed "rhetorical hyperbole." See discussion *infra* Parts

maintaining a proper perspective on the main forces at work in this area of the law alleviates some of the trauma. Most simply, defamation represents the legal battleground where freedom of expression clashes with the right to protect one's reputation from harm. In examining defamation law generally and its application in *Knievel* and beyond, it is helpful to keep these interests in mind, as the most difficult issues often arise in trying to determine and achieve the proper balance between these interests.[22]

A. In the Beginning

Since the 16th Century, the law of defamation[23] has provided a remedy for persons whose reputations have been damaged by the publication of certain types of harmful statements.[24] In the 17th Century, efforts in England to suppress political sedition and other forces shaped defamation law, resulting in a body of strange and complex rules that have never been fully untangled.[25] In the United States, a common law defamation claim initially required only that the speech harmed the plaintiff's reputation and was untrue.[26] It is notable that the requirement of truth was the only real restriction on the type of harmful speech that was actionable.[27] The primacy of falseness as a threshold concern in defamation law continues today.[28]

II.C and III.B for this type of speech. For examples of analytical exasperation caused by defamation law, see Rodney A. Smolla, *Dun and Bradstreet, Hepps, and Liberty Lobby: A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519, 1522-23 (1987), and RODNEY A. SMOLLA, LAW OF DEFAMATION §§ 1.1, 1.13 (2d ed. 2005) (citing Baron Pollock, Prosser, and Keeton as notable figures who shared the view that defamation law is often perplexing and nonsensical).

[22] *See* Cass R. Sunstein, *Hard Defamation Cases*, 25 WM. & MARY L. REV. 891, 891-93 (1984) (arguing that the guiding principles from *New York Times v. Sullivan*, 376 U.S. 254 (1964), are inadequate to contend with "hard" cases in which the reputational interests tend to be more compelling than the free speech interests).

[23] Defamation is composed of the conjoined twin torts of "libel" and "slander" which can be loosely described as defamation through written and nonwritten methods of publication, respectively. LAW OF DEFAMATION, *supra* note 21, §§ 1.10, 1.11. While this was a key distinction as defamation law developed, today it is much less so. *Id.* § 1.13. The common law assumption that libel is more lasting and damaging than slander has been rendered mostly meaningless by modern communication and broadcasting methods and technology. *Id.* The distinction between these torts is irrelevant for the purposes of this casenote and will not be addressed in this survey of defamation law.

[24] Milkovich v. Lorain Journal Co., 497 U.S. 1, 11 (1990).

[25] LAW OF DEFAMATION, *supra* note 21, §§ 1.1, 1.3.

[26] *Milkovich*, 497 U.S. at 12-13.

[27] *Id.*

[28] *See infra* Part IV.C.

Despite the lack of restrictions that existed in early American defamation law,[29] what could have been a plaintiff's market was not exploited as such.[30] Defamation was not looked upon favorably by Americans, who largely did not seek to restore their reputations through litigation.[31] Eventually, however, courts were compelled to ameliorate the broad reach of these laws.[32] Among other things, courts insulated expressions of opinion from being actionable as defamation in certain circumstances.[33]

Modern defamation law was born in 1964 when the Supreme Court first incorporated constitutional protections for allegedly defamatory speech under the First Amendment.[34] While constitutional doctrines are often recognizable as reformulations of policies addressed in defamation common law,[35] the new law has nonetheless tended to perpetuate and exacerbate existing inconsistency and incoherence.[36] Taking a step back from today's defamation regime reveals a patchwork of constitutional, common law, and statutory doctrine.[37] Increasingly, the constitutional component has expanded to dominate defamation jurisprudence, although the Constitution's grip on defamation has lessened somewhat in recent years.[38] Understanding the current state of the law requires a considered review of the Supreme Court's application of the First Amendment to defamation, which was a form of speech that was never held to merit constitutional security before 1964.[39]

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[29] *Milkovich*, 497 U.S. at 12-13.

[30] LAW OF DEFAMATION, *supra* note 21, § 1.4.

[31] *Id.*

[32] *Milkovich*, 497 U.S. at 13-14.

[33] *Id.*

[34] *Id.* at 14 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 259 (1964)).

[35] *See* LAW OF DEFAMATION, *supra* note 21, §§ 6.3, 6.7, 6.8, 6.9 (describing the common law defamation defense of "fair comment," which was effectively constitutionalized in *New York Times*, and which evolved into the opinion privilege before being restricted by *Milkovich*); *see also* Jeffrey E. Thomas, *A Pragmatic Approach to Meaning in Defamation Law*, 34 WAKE FOREST L. REV. 333, 365-66 (1999) (noting that privileges accorded to broad categories of speech without regard to meaning predated *New York Times*).

[36] *See* LAW OF DEFAMATION, *supra* note 21, §§ 1.1, 1.6; *see also* Eric Scott Fulcher, *Rhetorical Hyperbole and the Reasonable Person Standard: Drawing the Line Between Figurative Expression and Factual Defamation*, 38 GA. L. REV. 717, 744 (2004) (arguing that the current constitutional privilege accorded to "rhetorical hyperbole" needs to by systematized as it is inconsistently applied—resulting in disjointed, ineffective law nationwide).

[37] LAW OF DEFAMATION, *supra* note 21, § 1.6.

[38] *See id.* § 1.1.

[39] *See id.* §§ 1.1, 1.7.

B. Here Comes the First Amendment: New York Times v. Sullivan

It is impossible to discuss modern defamation law without addressing the landmark case, *New York Times Co. v. Sullivan*,[40] which set the stage for all subsequent constitutional defamation jurisprudence. Proposals for reform in defamation law often focus squarely on fulfilling the perceived promise of this case,[41] which took the first step in constitutionalizing defamation law.[42] *New York Times* required a public official asserting a claim for defamation to prove that the "defamatory falsehood"[43] at issue was made with knowledge of or reckless disregard for its falsity—the "actual malice" standard.[44]

New York Times concerned a defamation action in which the plaintiff, a Commissioner in charge of the Montgomery, Alabama police, took issue with an advertisement taken out in the Times by civil rights activists.[45] The plaintiff alleged that the advertisement defamed him when it described purported police action at Alabama State University.[46]

Under the trial judge's instructions to the jury, malice and falsity with regard to the statements at issue were presumed from their mere publication —the jury was not required to make a factual determination on malice and falsity to hold the defendant liable.[47] The judge also appeared to reduce the actual malice threshold for punitive damages below the requirements of Alabama law—although he instructed that negligence or carelessness was not enough to award punitive damages, he did not require the jury to be "convinced"[48] of intent, recklessness, or even gross negligence.[49]

With regard to falsity, the U.S. Supreme Court acknowledged that the record showed that this element was fulfilled in airtight fashion, as several of the statements in the advertisement contained plainly inaccurate details of

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[40] 376 U.S. 254 (1964).

[41] *See, e.g.*, C. Thomas Dienes & Lee Levine, *Implied Libel, Defamatory Meaning, and State of Mind: The Promise of New York Times Co. v. Sullivan*, 78 IOWA L. REV. 237 (1993) (arguing that *Milkovich* and *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), articulate and develop the substantive purposes of *New York Times* and indicate that the Court is prepared to apply a fault requirement to defamatory meaning); Marc A. Franklin & Daniel J. Bussel, *The Plaintiff's Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825 (1984) (arguing that the rulings in *New York Times* and *Gertz v. Robert Welch*, 418 U.S. 323 (1974), logically require applying the actual malice standard to defamatory meaning).

[42] *See N.Y. Times*, 376 U.S. 254.

[43] *Id.* at 279.

[44] *Id.* at 279-80.

[45] *Id.* at 256-57.

[46] *Id.* at 257.

[47] *Id.* at 262.

[48] *Id.*

[49] *Id.*

events in Montgomery.[50] At trial, the plaintiff was awarded $500,000, and this judgment was affirmed by the Alabama Supreme Court.[51]

The key issue addressed in *New York Times* was the constitutionality of the Alabama common law rule that a publication which tends to injure a person's reputation is defamation *per se*.[52] The Supreme Court answered this question by bringing the First Amendment to bear upon defamation law for the first time: "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[53] Within this context, the Court articulated the "actual malice" standard, and held that the plaintiff did not prove that any defendant had knowledge of, or recklessly disregarded, the falseness of the statements at issue.[54]

The notion that the First Amendment had no bearing on defamatory statements was thus obliterated by this decision. However, many questions remained. Some of the answers to these questions are beyond the scope of this casenote, such as discerning the contours of who can be considered a public official or figure[55] for defamation purposes. Other concerns relating to the *content* of defamatory statements are critical to this discussion and will be examined more thoroughly in the following section.

C. Filling in the Blanks: From New York Times *to* Milkovich

After *New York Times*, the Supreme Court further expanded the reach of the First Amendment into defamation law. The Court expanded the actual malice standard to cover nongovernmental public figures.[56] The Court later closed

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[50] *Id.* at 258-59.

[51] *Id.* at 256.

[52] *Id.* at 267. In this instance, "defamation *per se*" refers to the lack of a fault element. *Id.* Compare this to "defamation *per se*" as it applies to a presumption of damages. *See infra* note 195.

[53] *Id.* at 270 (citing Terminello v. Chicago, 337 U.S. 1, 4 (1949); De Jonge v. Oregon, 299 U.S. 353, 365 (1937)).

[54] *Id.* at 285-89.

[55] *See infra* Part II.B (describing the expansion of the actual malice standard to cover "public figures" as well as "public officials").

[56] *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967); Associated Press v. Walker, 389 U.S. 889 (1967). Chief Justice Warren's concurring opinion in these companion cases became the accepted basis for applying the actual malice standard to nongovernmental public figures. *See* LAW OF DEFAMATION, *supra* note 21, § 2.6 (citing *Butts*, 388 U.S. at 163-64).

the door on *per se* defamation for all defendants in *Gertz v. Robert Welch*,[57] mandating that states require some level of fault—at least negligence—for defamation actions brought by private individuals.[58] The *Gertz* decision also required plaintiffs to prove fault against both public and private defendants by the "clear and convincing" standard.[59] After *Gertz*, the Court added to the burden on plaintiffs by requiring them to prove the falseness of the alleged defamatory speech.[60] The Supreme Court also addressed the type of speech that is actionable, invoking strong protections for colorful, nonliteral speech it termed "rhetorical hyperbole,"[61] and generally protecting speech that "could not reasonably have been interpreted as stating actual facts."[62]

The Court's efforts to characterize the types of speech that are protected by the First Amendment eventually led to the flourishing in the lower courts of explicit protections for expressions of "opinion."[63] The Supreme Court's own words were used to support an opinion privilege, as dicta from *Gertz* had seemingly become the "opening salvo"[64] for every argument in support of such a privilege:

> Under the First Amendment there is no such thing as a false idea. However pernicious an *opinion* may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.[65]

The Supreme Court addressed this situation in *Milkovich v. Lorain Journal Co.*,[66] authored by Chief Justice Rehnquist. The *Milkovich* case involved a sports column which accused a high school wrestling coach of perjuring himself regarding his involvement in a brawl at a wrestling match.[67] The column stated in part, "anyone who attended the meet . . . knows in his heart that Milkovich . . . lied at the hearing after . . . having given his solemn oath to tell the truth."[68] The Supreme Court sought to clear up some of the

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[57] 418 U.S. 323 (1974). "Defamation *per se*" refers to the lack of a fault element. *See supra* note 52.

[58] *Gertz*, 418 U.S. at 347-48.

[59] *Id.* at 342.

[60] Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986).

[61] Greenbelt Coop. Publ'g Ass'n, Inc. v. Bresler, 398 U.S. 6, 14 (1970).

[62] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50 (1988).

[63] LAW OF DEFAMATION, *supra* note 21, §§ 6.3, 6.7, 6.8, 6.9; *see Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 13-14 (1990); *see also* Thomas, *supra* note 35, at 373-76 (describing the categorical approach to classifying speech as privileged opinion, including the widely-adopted test expressed in *Ollman v. Evans*, 713 F.2d 838 (D.C. Cir. 1983)).

[64] Cianci v. New Times Publ'g Co., 639 F.2d 54, 61 (2d Cir. 1980).

[65] Gertz v. Robert Welch, 418 U.S. 323, 339-40 (1974) (emphasis added).

[66] 497 U.S. 1.

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

[68] *Id.* at 5 n.2.

confusion in the lower courts by expressly rejecting the notion that a separate First Amendment-based privilege, or a "wholesale defamation exemption,"[69] existed for "opinion."[70]

The Court soundly refuted the reading of *Gertz* that led to the "opinion" explosion.[71] It first affirmed Judge Friendly's observation that *Gertz* "did not remotely concern the [opinion privilege] question."[72] Chief Justice Rehnquist then dismissed the idea that the word "opinion" in that paragraph deserved any special treatment.[73] Instead, he argued that "opinion" actually meant "idea,"[74] reflecting the "marketplace of ideas"[75] concept invoked by Justice Holmes many years previously in promoting protected speech.[76] Accordingly, no precedent required opinion to be treated as a category of speech specifically protected under First Amendment doctrine.

The Court then expressed its substantive concerns with the purported opinion privilege. According to Chief Justice Rehnquist, the most critical problem with categorizing a statement as opinion was that an opinion could contain both factual and nonfactual elements.[77] This could be highly misleading in defamation cases when the "opinion" in question strongly implied a claim of objective fact.[78] Accordingly, the Court found that the appropriate question in a defamation case is whether a statement asserts actual facts about the plaintiff.[79]

Applying these rules, the Court concluded that the sports columnist's assertion that Milkovich committed perjury was sufficiently factual to be proved true or false.[80] The Court further found that Milkovich's statements were not expressed in figurative, hyperbolic language that would militate against a literal interpretation.[81] The Court stated that the general tone of the article did not contradict the author's explicit assertion that Milkovich engaged in conduct which constituted perjury.[82]

The majority in *Milkovich* iterated the Supreme Court's current interpretation of the constitutional limitations on defamation actions. Despite

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[69] *Id.* at 18.
[70] *Id.* at 18-21.
[71] *Id.*
[72] *Id.* at 18 (citing Cianci v. New Times Publ'g Co., 639 F.2d 54, 61 (2d Cir. 1980)).
[73] *Id.*
[74] *Id.*
[75] *Id.* (citing Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.* at 21.
[80] *Id.*
[81] *Id.*
[82] *Id.*

the Court's clarity in addressing the *Gertz* dictum, the opinion privilege persists in some lower courts.[83] Although some courts maintain this separate privilege under state law,[84] others proceed as if *Milkovich* merely preserved the opinion privilege under new terminology[85]-an interpretation shared by commentators as well.[86] Although Chief Justice Rehnquist's analysis can be viewed, from a certain perspective, as more semantic than substantive, this is a limited reading of the case. Admittedly, the decision may at first seem overly concerned with wordplay. Its vehemence in rejecting the opinion privilege is based largely on the fact that even the most direct statement of fact can be couched as an opinion.[87] For instance, "I believe that John murdered his wife because I saw him do it" carries no less defamatory impact than "John murdered his wife."

The Court, however, was not merely fascinated with linguistic legerdemain. It rejected a shallow investigation into whether a statement was an opinion in favor of an inquiry into the statement's susceptibility to being proven true or false.[88] But this inquiry is not satisfied by a literal reading of the passage in question. The Court required more rigor—one must scrape away the apprentice's crude rendering of opinion to find the masterwork of fact concealed underneath. Recall the most damning language from *Milkovich*, which stated, "anyone who attended the meet . . . knows in his heart that Milkovich . . . lied at the hearing after . . . having given his solemn oath to tell

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[83] Thomas, *supra* note 35, at 395 (citations omitted).

[84] *Id.* at 395 (citing Lapkoff v. Wilks, 969 F.2d 78, 81-82 (4th Cir. 1992); Lyons v. Globe Newspaper Co., 612 N.E.2d 1158, 1164 (Mass. 1993); Immuno AG v. Moor-Janowski, 567 N.E.2d 1270, 1278-80 (N.Y. 1991); Vail v. Plain Dealer Publ'g Co., 649 N.E.2d 182, 185 (Ohio 1995); West v. Thomson Newspapers, 872 P.2d 999, 1017-18 (Utah 1994)).

[85] Thomas, *supra* note 35, at 395 (citations omitted); *see, e.g.*, Burch v. Coca Cola Co., 119 F.3d 305, 325 (5th Cir. 1997) (holding that *Milkovich* is consistent with Texas cases establishing an "opinion" privilege); NBC Subsidiary (KCNC-TV), Inc., v. Living Will Ctr., 879 P.2d 6, 9-10 (Colo. 1994) (holding that the factors used in Colorado cases to determine whether a statement is one of opinion are consistent with *Milkovich*).

[86] Thomas, *supra* note 35, at 395 (citations omitted); *see, e.g.*, Wallis Mizell Hampton, *Milkovich v. Lorain Journal Co.: The Supreme Court's Failed Attempt to Eliminate the Opinion Defense in Libel Law*, 11 REV. LITIG. 569, 587-88 (1991) (arguing that courts since *Milkovich* have avoided or ignored the supposed elimination of the "opinion" defense); Nat Stern, *Defamation, Epistemology, and the Erosion (But Not Destruction) of the Opinion Privilege*, 57 TENN. L. REV. 595, 612-14 (1990) (arguing that adopting different terminology has not aided in the analysis of "opinion" in defamation cases); *The Supreme Court, 1989 Term-Leading Cases*, 104 HARV. L. REV. 219, 227 (1990) (arguing that *Milkovich* would be ineffectual in changing the way many lower courts determined whether a statement was one of fact or opinion, and that *Milkovich* did not provide effective guidance to eliminate uncertainty regarding "opinion" and the possible resultant chilling effect on the media).

[87] *Milkovich*, 497 U.S. at 15-19.

[88] *Id.* at 18.

the truth."[89] On the surface, this statement is purely subjective. There is no way to prove as true or false what anyone at the meet knew in their hearts. However, the article provided enough detail, based on the author's personal knowledge of what occurred at the wrestling meet, to strongly imply as a matter of objective fact that Milkovich perjured himself.[90]

The linguistic and conceptual fallacy of the opinion privilege that is unmasked in *Milkovich* is that fact is not the direct inverse of opinion. Accordingly, the requirement that a statement be sufficiently factual to be proved true or false does not, by way of inversion, give rise to a categorical protection for opinion. Even if most courts recognized this distinction, and were not generally falling prey to the fact/opinion fallacy, *Milkovich* still made an important statement. Simplistic inquiries into the nature of allegedly defamatory statements are not sufficient.

III. ASSESSING THE APPLICATION OF DEFAMATION LAW IN *KNIEVEL V. ESPN*

"Slang is a language which rolls up its sleeves, spits on its hands and goes to work."
Carl Sandburg[91]

The facts of *Knievel* are not complicated. In April 2001, ESPN held the Action Sports and Music Awards ceremony which involved famous musicians and athletes.[92] Many photographs of attendees were published on ESPN's "EXPN" extreme sports website.[93] Included among a gallery of photographs from the event was a picture of Evel Knievel, whose fame as a legendary motorcycle daredevil was so well established, the court noted, that his achievements were honored in an exhibit at the Smithsonian Institute.[94] The picture depicted Knievel with his unidentified wife and an anonymous young woman, and included a caption stating, "Evel Knievel proves that you're never too old to be a pimp."[95] The picture was part of a series of photographs from the event, and could not be viewed without first viewing several other pictures.[96] The other pictures in the gallery also had captions that identified the celebrities and included captions replete with slang.[97]

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[89] *Id.* at 17.
[90] *Id.* at 21.
[91] *Minstrel of America*, N.Y. TIMES, Feb. 13, 1959, at 21 (quoting Carl Sandburg).
[92] Knievel v. ESPN, 393 F.3d 1068, 1071 (9th Cir. 2005).
[93] *Id.*
[94] *Id.* at 1070.
[95] *Id.* at 1071.
[96] *Id.*
[97] *Id.* at 1071.

Knievel argued that the picture and caption together defamed him and his wife by insinuating that he was a pimp (in the literal criminal sense), and that his wife, by extension, was a prostitute.[98] The U.S. District Court for the District of Montana granted summary judgment in favor of ESPN, holding that the picture and caption were not defamatory as a matter of law, and Knievel appealed to the Ninth Circuit.[99]

A. Analytical Framework

In *Knievel*, the Ninth Circuit applied a two-pronged test for defamation. First, the majority held that the photograph and caption in question must be "reasonably capable of sustaining a defamatory meaning,"[100] which was to be interpreted "from the standpoint of the average reader, judging the statement not in isolation, but within the context in which it is made."[101] In other words, the allegedly defamatory material must express a meaning that would be understood by a reasonable person to be harmful to the plaintiff's reputation, within the context in which the statement was made.

This part of the analysis encompassed a key element of defamation law that has not been directly addressed by the Supreme Court. Although the Court has made fault relating to falsity a matter of constitutional import, it has left lower courts to fend for themselves regarding any fault requirement for defamatory meaning.[102] This could have been a purposeful omission, leaving the issue of defamatory meaning to be addressed on a state-by-state basis. The Court's careful language indicates that falseness, rather than defamatory meaning, was at the center of its constitutional analysis.[103] But it is also possible that the Court believed that its analysis encompassed the defamatory meaning determination, or that it simply had no occasion to tackle that element of defamation. In any event, the Ninth Circuit applied an objective, contextual standard for defamatory meaning.[104]

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[98] Appellants' Brief, *supra* note 5, at 4.

[99] Knievel v. ESPN, 393 F.3d 1068, 1071 (9th Cir. 2005).

[100] *Id.* at 1073 (quoting Cochran v. NYP Holdings, Inc., 58 F. Supp. 2d 1113, 1121 (C.D. Cal. 1998)).

[101] *Id.* at 1074 (quoting Norse v. Henry Holt & Co., 991 F.2d 563, 567 (9th Cir. 1993)) (quotation marks omitted).

[102] RESTATEMENT (SECOND) OF TORTS § 580A cmt. d (1977); *see also* Milkovich v. Lorain Journal Co., 497 U.S. 1, 11-17 (1990). The Court's survey of its defamation decisions recites the general common law requirement that defamatory speech be harmful to the plaintiff's reputation. *Id.* However, fault with regard to defamatory meaning, and defamatory meaning generally, played no part in the Court's constitutionalization of defamation law. *Id.*

[103] *See infra* Part IV.C (arguing that the Supreme Court limited its fault analysis under the First Amendment to the issue of falsity, despite hopeful commentary to the contrary).

[104] *Knievel*, 393 F.3d at 1073-74.

The second prong of the analysis covered the constitutional limitations expressed by the Supreme Court. The Ninth Circuit's analysis required plaintiffs to show that the statement at issue could be reasonably interpreted as a factual assertion within the "totality of the circumstances in which it was made."[105] The statement was to be viewed within its broad context, which included the tone of the work as a whole, as well as its setting, subject, and format.[106] The statement was also to be viewed within its specific context, including the use of figurative and hyperbolic language, and the reasonable expectations of the audience.[107] Finally, the statement itself was required to be sufficiently factual in nature to be proved true or false.[108]

This analysis correctly synthesized the Supreme Court's articulation of its defamation doctrine in *Milkovich*. The Ninth Circuit recognized that a key element of the constitutional analysis of defamation is the issue of falsity.[109] This is logical, because the common law, from its earliest days, has only provided a remedy for statements that are untrue.[110] The central role of falsity has been endorsed by the Supreme Court, which provided protections for statements that are incapable of being understood as conveying objective facts[111] and which, therefore, cannot be proven false (or true). This "provability" requirement also underlies the specific protections articulated for rhetorical hyperbole.

Rhetorical hyperbole is a form of speech that, properly understood, is not to be interpreted literally, and cannot, therefore, readily be proven as true or false.[112] The Supreme Court stated in *Milkovich* that context was critical in assessing the "provability" of a statement, and addressed both the language used (finding it to be neither hyperbolic nor figurative), and the broader context of the work itself.[113] Accordingly, all of the factors articulated by the Ninth Circuit in this prong of its framework were accurate adaptations of the standards articulated in *Milkovich*.

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[105] *Id.* at 1074-75 (quoting Underwager v. Channel 9 Austl., 69 F.3d 361, 366 (9th Cir. 1995)) (quotation marks omitted).

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] Milkovich v. Lorain Journal Co., 497 U.S. 1, 11 (1990).

[111] *Id.* at 17 (citing Letter Carriers v. Austin, 418 U.S. 264, 284-86 (1974)).

[112] *Id.* (citing Greenbelt Coop. Publ'g Ass'n, Inc., v. Bresler, 398 U.S. 6, 13-14 (1970)).

[113] *Id.* at 21.

B. Deconstructing "Pimp": Applying the Analysis

The *Knievel* decision effectively encapsulated the requirements governing the type of speech that is protected by the First Amendment. However, one prominent element in Supreme Court defamation case law is notably missing from the Ninth Circuit's analysis. The majority never mentions the "actual malice" test that applies to public figures,[114] despite demonstrating amply that Mr. Knievel is one of the most famous and celebrated athletes in the world,[115] and would therefore certainly qualify as a public figure.[116] The "actual malice" requirement is premised on the belief that public figures have generally voluntarily exposed themselves to publicity, and have more resources to counteract defamation than the average person.[117] Nonetheless, the absence of this element was not an oversight by the court. Because the court ruled as a matter of law that the picture and caption were not factual, it had no reason to address the issue of fault.[118]

The majority erred, however, in its application of the framework it articulated. The majority first loosely concluded that the term "pimp" could not reasonably be interpreted in its literal, criminal sense,[119] and therefore was not susceptible of a defamatory meaning.[120] The majority then stated that it did not need to definitively answer this question because the plaintiff failed under the second prong of the analysis, in that the assertion that Knievel is a "pimp" cannot reasonably be interpreted as a statement of fact.[121] Judge Bea, dissenting, disagreed with this analysis.[122] Judge Bea argued that the statement of fact prong of the argument *assumed* in circular fashion that the term "pimp" was not to be interpreted literally (in its defamatory sense), and was therefore not sufficiently factual.[123]

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[114] *Id.* at 14-15 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-280 (1964); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967)).

[115] Knievel v. ESPN, 393 F.3d 1068, 1070 (9th Cir. 2005).

[116] Although determining whether a defamation plaintiff is a "public figure" can be sometimes be difficult, in the case of extremely famous entertainers such as Knievel, the point is hardly worth arguing. *See* LAW OF DEFAMATION, *supra* note 21, § 2.60.

[117] *Milkovich*, 497 U.S. at 15 (citing Gertz v. Robert Welch, 418 U.S. 323, 344-45 (1974)).

[118] *See, e.g.*, Flowers v. Carville, 112 F. Supp. 2d 1202, 1212 (D. Nev. 2000) ("Since . . . the statements at issue are not actionable, the Court need not consider at this stage whether Flowers' claims fail for the additional reason that she will be unable to show that [the statements were made] with 'actual malice.'").

[119] The assertion that one is, literally, a "pimp" is defamatory if false. *See, e.g.*, Hughes v. Hughes, 122 Cal. App. 4th 931, 935 (Cal. Ct. App. 2004).

[120] *Knievel*, 393 F.3d at 1074.

[121] *Id.*

[122] *Id.* at 1080 (Bea, J., dissenting).

[123] *Id.* at 1084-85.

This part of Judge Bea's argument is structurally incorrect, although it touches upon the majority's mistakes. The dissent confuses and merges the defamatory meaning analysis and the analysis of whether a statement constitutes or implies a factual assertion.[124] In actuality, the determination of whether a statement is factual is independent from whether the statement is defamatory, although these analyses may rely on the same contextual clues and may often appear to merge together. A statement can convey an unambiguously defamatory meaning that no context can erase, but not be properly taken as a statement of fact. This is the very situation the "rhetorical hyperbole" privilege is intended to address.[125] The statement "John stabbed an innocent child in the head with a knife," if false, is incapable of anything but a defamatory meaning and appears to be a statement of fact. The situation would be different if this same statement was included within a series of wildly improbable accusations, such as "John juggled seven flaming children for several minutes without dropping one," and "John strapped children to his feet and used them as skis." While the context would not shed light on a different non-defamatory meanings for "stab," "head," or "knife," it would certainly indicate that the statement could not be reasonably understood as one of fact.

Accordingly, the majority was entitled to determine that the picture and caption in *Knievel* were simply incapable of being read as a statement of fact, regardless of their possibly defamatory connotations. However, the second error asserted by the dissent was valid. Judge Bea challenged the substance of the majority's argument that the term "pimp" would not be interpreted literally by a reasonable factfinder.[126] This touches both prongs of the argument, because a reader who interpreted "pimp" literally would be implicitly endorsing both a defamatory meaning and a factual interpretation. The majority was not guilty of circularity—it was actually incorrect twice.

The problem with the majority's decision in this case is directly related to the reasonableness standard that it purported to apply. The majority's conclusion that a factfinder could not have reasonably interpreted "pimp" in its literal, factual sense[127] seems impermissibly presumptuous, considering the

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[124] *Id.* at 1080-81. The dissent's confusion appears to be founded upon a basic misunderstanding of the structure of the defamation analysis. Judge Bea's articulation of the factors used to analyze *defamatory meaning* is incorrect: the factors cited by Judge Bea were correctly applied by the majority to the *fact/non-fact* analysis, in accordance with First Amendment principles established in U.S. Supreme Court decisions. *See supra* Part II.B.

[125] Milkovich v. Lorain Journal Co., 497 U.S. 1, 17 (1990) (citing Greenbelt Coop. Publ'g Ass'n, Inc. v. Bresler, 398 U.S. 6, 13-14 (1970)).

[126] *Knievel*, 393 F.3d at 1080-81 (Bea, J., dissenting).

[127] *Id.* at 1078 (majority opinion).

breadth of individuals this implicates. In light of the importance of context[128] in relevant Supreme Court decisions, it is an overstatement by the dissent that the case must go to the jury when the *language* of a statement is capable of both a defamatory and non-defamatory meaning.[129] Nonetheless, it is difficult to justify the majority's implicit assertion that no reader, even one unfamiliar with the slang connotations of "pimp," would interpret the term literally.[130]

The majority's conclusion that ESPN's statement is not sufficiently factual, while founded largely upon contextual cues,[131] is actually undermined by context. The captioned picture was of Mr. Knievel with his arm around two young women, apparently with no indication that one of them was his wife—a scene that would be congruous with Knievel being a manager of prostitutes. It is conceivable that some readers might believe that actual pimps and prostitutes attended a wild event like the Action Sports and Music Awards. It could even be argued that a reader unfamiliar with the slang that permeated the extreme sports website would seize upon "pimp" as one of the few terms on the page that was remotely comprehensible. Furthermore, a reader unfamiliar with the slang usage of "pimp" would be less likely to understand the humor and jocular tone of the other captions, and might not be on notice that it was not to be taken as a factual statement.

In sum, the majority should have accounted for the large number of "reasonable factfinders" who would not be familiar with the slang connotations of the word "pimp" and would likely interpret the term literally. Therefore, under the standard articulated by the majority, the decision in *Knievel* was incorrect, and the dismissal of the complaint should have been reversed. However, the majority's decision was actually correct as a matter of general justice.

IV. MOVING FORWARD WITH MEANING: A NEW STANDARD FOR DEFAMATION LAW

"Half the truth is often a great lie."
Benjamin Franklin[132]

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[128] *See supra* Part III.A (discussing rhetorical hyperbole, generally); *see supra* Part III.B (explaining how the rhetorical hyperbole privilege protects statements that cannot be interpreted as factual in light of contextual cues).

[129] *Knievel*, 393 F.3d at 1081 (Bea, J., dissenting).

[130] *See id.* at 1078 (majority opinion).

[131] *Id.* at 1077-79 (citing the pervasive use of slang on the EXPN website to support the contention that "pimp" could not reasonably be interpreted in its literal sense).

[132] Benjamin Franklin, *Poor Richard's Almanack*, *in* A BENJAMIN FRANKLIN READER 272, 284 (Nathan G. Goodman ed., Thomas Y. Crowell Company 1945).

Although the majority in *Knievel* did not correctly apply its own rules, it arrived at a just conclusion in upholding the dismissal of Knievel's suit. It would be absurd to suggest that the operators of the EXPN website *intended* to assert that Evel Knievel was a pimp and that his wife and companion were his prostitutes. The law, however, under a properly-applied, reasonable person standard, has no sympathy for ESPN and does not care what it meant by "pimp." The state-of-mind standard for falsity currently imposed by the Supreme Court[133] is also inadequate and does not rectify this situation. Even if the Ninth Circuit had applied the "actual malice" standard in *Knievel*,[134] it would have surely found that ESPN knew it had "lied," in that Knievel was not actually a pimp.

Two central points regarding defamation emerge from a careful reading of the Knievel decision. First, as a matter of general policy, it is unjust that an individual may be held liable for a statement regardless of its intended meaning. Second, defamation law needs to be able to effectively address ambiguity in meaning. The law should be capable of weeding out defamatory accusations that rest upon an incorrect interpretation of someone's words.

A. You Know What I Mean? Arguing for a Subjective Standard

The argument for applying a fault standard to defamatory meaning is, admittedly, not new. The Restatement (Second) of Torts, for instance, requires knowing, reckless, or negligent conduct for private defendants, and knowing or reckless conduct for public defendants.[135] However, the Supreme Court has not yet found it necessary to make defamatory meaning analysis a matter of constitutional doctrine.[136]

In the absence of a constitutional standard, the Ninth Circuit applied an objective reasonableness standard.[137] The use of a reasonable person standard to assess defamatory meaning makes a clear policy statement. The unavoidable conclusion, where such an objective standard is applied, is that the *effect* of a statement is what is truly being measured. The implicit rule is

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[133] *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 14-16 (1990) (describing the development of the "actual malice" standard, which applies in defamation cases to the defendant's state of mind with regard to the falseness of the allegedly defamatory speech).

[134] *Knievel*, 393 F.3d at 1073-79. The court ruled as a threshold matter that the statement at issue was not sufficiently factual to be proved true or false—making a determination of fault as to falseness unnecessary. *Id.* If the court had reached the issue, the "actual malice" standard certainly would have applied to someone as well-known as Knievel.

[135] RESTATEMENT (SECOND) OF TORTS § 580A-B (1977). These fault standards mirror the actual malice falseness standards. *See supra* Parts II.A-B.

[136] RESTATEMENT (SECOND) OF TORTS, *supra* note 135, § 580A cmt. d.

[137] *Knievel*, 393 F.3d at 1074 (citing Norse v. Henry Holt & Co., 991 F.2d 563, 567 (9th Cir. 1993)).

that the subjective intent of the speaker is completely irrelevant or, at best, secondary to the effect that speech has on its audience.

The argument apparently underlying this approach is that a speaker should bear the responsibility for the effects her speech may have on the reputation of another. This perspective was at the heart of early defamation law, and was once aptly and succinctly summarized by Lord Mansfield: "Whatever a man publishes, he publishes at his peril."[138] Although Lord Mansfield's adage may have resonated with the legal community in 1774, much has changed since then. The United States, no longer a colony of Mansfield's kingdom, has used its newfound freedom to make certain adjustments to the law of defamation. In particular, it has brought its peculiar written constitution to bear upon the law—thereby limiting defamation actions to speech not protected by the First Amendment.[139]

An objective standard, in other words, effectively turns back the clock on defamation law in favor of a view of the law that has long since passed. Besides being anachronistic, such a standard is also entirely inadequate for interpreting defamatory meaning and defies common sense. A counter-argument to the "publish at [your] peril"[140] policy is that it is unreasonable to hold someone responsible for speech that had an effect that was not within her contemplation. In other words, the true, actionable meaning of a statement should account for the speaker's intent if defamation law is to be an instrument of sanity and justice.

Failing to account for knowledge of defamatory meaning is thus pernicious, in that it places faultless statements at risk of being actionable. In addition to being directly harmful, an objective standard can be ineffective by allowing a speaker to make a highly derogatory or insulting statement in an obscure way.[141] Liability is conveniently avoided because the "reasonable" reader would not interpret the statement as defamatory. In sum, defamation law simply does not care what a speaker really means to say. This is a mistake.

Several commentators have also expressed this opinion, finding the lack of a subjective standard for defamatory meaning to be particularly incongruous in light of the fault standards that are applied to falsity.[142] Professors C.

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[138] Peck v. Tribune Co., 214 U.S. 185, 189 (1909) (quoting The King v. Woodfall, 98 Eng. Rep. 914, 916 (K.B. 1909)).

[139] *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 11-17 (1990).

[140] *Peck*, 214 U.S. at 189 (quoting *Woodfall*, 98 Eng. Rep. at 916).

[141] Factual statements that nonetheless possess false, defamatory implications pose similar difficulties for defamation law. *See infra* Part IV.B.

[142] *See* Dienes & Levine, *supra* note 41; Franklin & Bussel, *supra* note 41; *see also* Thomas, *supra* note 35, at 334; Peter Meijes Tiersma, *The Language of Defamation*, 66 TEX. L. REV. 303 (1987).

Thomas Dienes and Lee Levine[143] and Professors Mark A. Frankin and Daniel J. Bussel[144] argue for a fault requirement for both public and private defendants with regard to defamatory meaning.[145] Both of these teams see a subjective standard for defamatory meaning as a necessary and logical outgrowth of the constitutional standards established in *New York Times* and developed in subsequent opinions.[146]

As stated by Dienes and Levine, "the subjective state of mind mandated by the actual malice standard cannot be predicated on defamatory statements that the defendant should reasonably anticipate might be implied; only subjective awareness of the defamatory implication can properly provide the premise for a finding of actual malice."[147] Franklin and Bussel make an even more forceful argument for a subjective fault standard to defamatory meaning that is consistent with "actual malice":

> To ensure that liability is not imposed upon a faultless defendant, courts must require the plaintiff to establish with convincing clarity that the defendant was aware of, or blinded himself to, the allegedly defamatory meaning of the statement that he was making. The Supreme Court's concern with self-censorship cannot justifiably protect a defendant who utters a statement that he knows will hurt another's reputation, yet fail to protect a person who does not realize that his statement can be interpreted to damage another's reputation.[148]

A subjective fault standard for defamatory meaning, therefore, is critical both as a matter of general logic as well as consistency with existing constitutional doctrine.

In addition to these more traditional legal arguments, some scholars have brought their expertise in particular theories and disciplines to bear on this issue. Professor Jeffrey Thomas argues that a "pragmatics paradigm"[149] should be applied to defamation law to bring the law into greater harmony with the true nature of communication.[150] Thomas claims that meaning should

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[143] Dienes & Levine, *supra* note 41.

[144] Franklin & Bussel, *supra* note 41.

[145] *See supra* note 41.

[146] Dienes & Levine, *supra* note 41, at 280; Franklin & Bussel, *supra* note 41, at 834 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964)).

[147] Dienes & Levine, *supra* note 41, at 313 & n.372 (citing Saenz v. Playboy Enters., Inc., 841 F.2d 1309 (7th Cir. 1988)) ("If a plaintiff official must establish by clear and convincing evidence that the defendants acted with actual knowledge of or in reckless disregard for the falsity of their accusations, it follows that where the plaintiff is claiming defamation by innuendo, he also must show with clear and convincing evidence that the defendants intended or knew of the implications that the plaintiff is attempting to draw from the allegedly defamatory material.").

[148] Franklin & Bussel, *supra* note 41, at 836-37.

[149] Thomas, *supra* note 35, at 334.

[150] *Id.*

be central to any assessment of an allegedly defamatory statement, and that a speaker's point should always be considered as a vital and requisite factor in this determination.[151] He decries categorical defamation rulings that place statements within a particular category rather than seeking to discover their "meaning."[152] In sum, Thomas argues that a speaker's *intended meaning* should be determined via a thorough, non-mechanical inquiry, and should serve as the central means of determining whether a statement is actionable.[153]

Peter Tiersma, in *The Language of Defamation*,[154] also supports what is, essentially, a subjective standard for defamation, which he bases on speech-act theory.[155] Tiersma argues that, according to speech-act theory, every utterance is composed of an illocutionary act and a perlocutionary act.[156] The illocutionary act is the intended force of the utterance, and the perlocutionary act is the effect that the utterance has on another.[157] Tiersma asserts that defamation law would be more precisely and effectively delineated if it were defined in terms of the illocutionary force of a statement, which is roughly equivalent to the subjective intent of the speaker.[158] More specifically, Tiersma would define defamation in terms of the illocutionary act of "accusing,"[159] which is an utterance that "attributes responsibility to someone for an act or state of affairs."[160]

Thomas and Tiersma both provide valuable insight into the basic process of communication that underlies defamation law. Their works show that various disciplines support a subjective methodology as the most meaningful way of assessing human expression.[161] Their proposals, however, though laudable, are grounded in discrete theories with unique purposes and vocabularies that may not translate directly into the language of the law. In the pragmatics paradigm and speech-act theory, they have found support for what this casenote argues is a logical truism—a person cannot reasonably be held responsible for communicating that which she never intended to express.

This argument seems self-evident in the post-*New York Times* era, even without the support of a particular paradigm or theory. It has been made increasingly clear since that landmark case in 1964 that the First Amendment

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[151] *Id.*

[152] *Id.* at 354-55.

[153] *Id.* at 334, 354-55.

[154] Tiersma, *supra* note 142.

[155] *Id.*

[156] *Id.* at 305.

[157] *Id.*

[158] *Id.*

[159] *Id.* at 314.

[160] *Id.*

[161] Thomas, *supra* note 35, at 334; Tiersma, *supra* note 142, at 305.

constitutes a formidable barrier to any defamation claim.[162] According to the Supreme Court, erecting constitutional protections for even harmful self-expression was necessary to maintain the vibrancy of the American "free trade in ideas."[163] But "self-expression" is a meaningless term when the intended meaning of such an expression is ignored. It eviscerates common sense and logic to claim that the First Amendment protects an individual's right to express herself, only to turn around and ask somebody else to decide what they think she was talking about.

Arguing for the concept of a subjective fault standard for defamatory meaning is useless, however, without fleshing out the standard somewhat. As existing proposals demonstrate, there are diverse possibilities for such a standard. The Restatement (Second) of Torts simply mirrors the "actual malice" criteria, demanding knowing or reckless conduct for public plaintiffs and knowing, reckless, or negligent conduct for private plaintiffs.[164] Professors Franklin and Bussel similarly call for a standard which requires a plaintiff to show that the defendant "was aware of or blinded himself to"[165] the defamatory meaning of the statement at issue.[166]

But defamatory meaning is a different creature from falseness, and cannot be treated identically. The veracity and implications of facts are often in question. Varied gradations of certainty and fault can therefore reasonably be imputed to factual assertions. Meaning is much different. Recklessness and negligence are nearly meaningless concepts when applied to meaning. A person either knows or does not know the various meanings of her words. Consequently, only knowledge, and not recklessness or negligence, can serve as a reasonable fault standard for defamatory meaning. Professors Dienes and Levine came to the same conclusion, rejecting the vagueness of recklessness and any other standards that are less stringent than knowledge.[167]

One possible counterargument to the contention that recklessness or negligence are inapplicable to defamatory meaning should, however, be addressed. It could be asserted that recklessness or negligence apply to defamatory meaning when an individual acts hastily in publishing material and overlooks an obviously defamatory connotation of her words. A knowing conduct standard would appear to immunize such careless publishers from liability. This is not a correct assessment. The recklessness or negligence at issue in this hypothetical scenario relates only to the publishing process and not meaning. However unintentional the defamatory expression may have

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[162] *See supra* Part II.

[163] Abrams v. United States, 250 U.S. 616, 630 (1919).

[164] RESTATEMENT (SECOND) OF TORTS, *supra* note 135, § 580A-B.

[165] Franklin & Bussel, *supra* note 41, at 837.

[166] *Id.*

[167] Dienes & Levine, *supra* note 41, at 321-22.

been, it cannot be said that the speaker did not know the defamatory implication of her words at the time of publishing. She simply failed to adequately review what she actually published. In sum, the proposed knowledge standard for defamatory meaning applies to the words published, and not to the care taken in publishing those words. It would not, therefore, allow a defamation defendant to hide behind the excuse that she didn't realize what she published.

However, the proposed standard suffers from one notable flaw, which is readily apparent when applied to the facts of *Knievel*. Although ESPN did not intend to convey a defamatory assertion, it could not reasonably be argued that ESPN did not *know* the literal, defamatory meaning of "pimp."[168] The problem exposed is that, when the language of a statement has multiple meanings, the statement can give rise to multiple communicative acts, each with a different corresponding level of fault. In other words, a speaker can be aware of many meanings attributable to her words although she only intends to convey one of those meanings.

This situation should be resolved in favor of the speaker. The logical addendum to the proposed knowing conduct standard, therefore, is as follows: Where the *language* of an utterance conveys both a defamatory and non-defamatory meaning, the utterance is not actionable although the speaker had *knowledge* of the defamatory meaning, if the speaker *intended* to convey the non-defamatory meaning. This situation is to be distinguished from one in which an alternative, and defamatory, meaning arises not from the language of a statement but from inferences drawn from the statement as a whole. In that circumstance, the knowing conduct standard would apply as usual.

This variation on the general standard comports with the one of the main policies underlying the First Amendment protections embodied in defamation law—it ensures that public discussion remains "robust, and wide open"[169] by encouraging the use of vibrant and expressive language, without fear that one will be held liable for unintended connotations of that language.

B. What's That Supposed to Mean? Ambiguity in Defamation

Besides being a generally unjust and irrational method of assigning liability in defamation actions, an objective, faultless standard for defamatory meaning suffers from serious and specific problems in application. Foremost among these problems is that an objective standard becomes particularly pernicious where ambiguous language is involved. Any speaker who makes a statement

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[168] Knievel v. ESPN, 393 F.3d 1068, 1070 (9th Cir. 2005).

[169] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

that can be "reasonably" interpreted in more than one way is subject to the palpable risk that someone will discern in her words a harmful meaning.

This effect was precisely at issue in *Knievel*. Although ESPN was attempting to convey that "Evel Knievel is cool,"[170] Knievel instead heard "Evel Knievel is a criminal and his wife is a whore."[171] Even accounting for the context of ESPN's statement, Knievel's interpretation could be considered reasonable under an objective standard.[172] ESPN would therefore be subject to liability for the defamatory impact of its statement. By contrast, a subjective standard would have focused attention on ESPN's intended meaning, which was entirely harmless.

Nowhere is the problem of ambiguity more evident than where slang is concerned. The use of slang is at the very heart of the *Knievel* decision, where the majority held that "pimp" was used in a figurative manner, and cited many other examples of slang used on the website as contextual evidence.[173] The court's clumsy efforts to objectively define terms such as "kickin' it," "rollin' deep," "scope," and "hottie" provide entertainment as well as insight into the difficulties defamation law has with slang.[174] The court's definition of

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[170] *Knievel*, 393 F.3d at 1077-79 (holding that "pimp" could not be interpreted in its literal, criminal sense). The majority also notes that "pimp" can be a complimentary term roughly equivalent to calling somebody "cool." *Id.* n.3.

[171] Appellants' Brief, *supra* note 5, at 4 (arguing that the picture and caption implied that Evel Knievel was a pimp, in the criminal sense, and that Krystal Knievel was one of his prostitutes).

[172] *See supra* Part III.B.

[173] *Knievel*, 393 F.3d at 1077 nn. 3-8.

[174] *Id.* The court defined "rollin' deep" as "[d]riving along in a cool car." *Id.* at 1077 n.3. This definition was obtained from a high school computer science teacher's website, www.voxcommunications.com. *Id.* According to the website, the teacher, Mr. Frey, originally obtained the definition from his students, who were probably the most reliable source for this information (although not usually cited by United States Courts of Appeals). *See* www.voxcommunications.com/aboutvox.htm (last visited Nov. 19, 2005). However, the EXPN website used the term "[d]udes rollin' deep" as a heading for a set of pictures depicting men standing on stage and other locations with no cars in sight. *See* EXPN, TEASMA-Dudes Rollin' Deep, http://expn.go.com/teasma/2001/s/010411_ bestdressed_male.html (last visited Nov. 19, 2005). Mr. Frey's students' definition obviously did not fit the term's use by ESPN and, therefore, did not actually help the court to meaningfully decipher "rollin' deep." Similar confusion swirled around the phrase "kickin' it with much flavor," which was the heading for another set of photographs of people standing around. *See* EXPN, TEASMA-Action Sports & Music Galleries, http://expn.go.com/ teasma/2001/gallery/# (last visited Nov. 19, 2005). To clarify this puzzling euphemism, the court sought definitions for "kick it" and "kick flavor." *Knievel*, 393 F.3d at 1077 n.4. "Kick it" was defined as "to give to (someone) or let (someone) have it," while "kick flavor" meant "to perform; to be entertaining." *Id.* These definitions again obviously do not match the term's use by ESPN. In sum, the court's attempts to wrestle with these terms "kicked flavor." The EXPN website that spawned this case, http://expn.go.com/teasma/2001/gallery/#, was last viewed on Nov. 19, 2005. The website

"hottie," for instance, is "an attractive or sexually promiscuous person of the opposite sex, usually a woman."[175] This comes as a surprise to me, as I have never known "hottie" to have anything to do with sexual promiscuity. I have also observed the term to be used more commonly by women to refer to men. Of course, my experience with "hottie" is not universally-shared, and my understanding of the term is certainly not definitive. It does, however, demonstrate that slang can be difficult to pin down, and a dangerous tool in the hands of a "reasonable" reader.

The difficulty in accommodating slippery language is compounded when a court is constrained by a reasonable person standard. Although the Ninth Circuit did not actually follow its own rules in *Knievel*, it should have taken into account the numerous reasonable readers who did not know the slang meaning of "pimp" and likely would have assumed that the term carried a literal, defamatory meaning. However, under a standard that accounted for ESPN's subjective intent, no such difficulty would have been encountered. Through largely the same contextual observations that the court actually made,[176] the court could have easily held that ESPN intended to use "pimp" in a figurative manner, consistent with the use of language on the rest of the website. The court then would have been able to arrive at the correct decision in dismissing Knievel's complaint without analytical detours.

Professors Dienes and Levine agree that contending effectively with ambiguity is essential to defamation law, and that a subjective standard must apply to defamatory meaning.[177] They tackle the tricky situation of "implied" defamation, in which factually correct and non-defamatory statements nonetheless convey a defamatory meaning.[178] Discerning a false, defamatory implication in an utterance can be accomplished in several ways. Commonly, general inferences or the "gestalt" of a set of statements, as well as strategically omitted or extraneous facts, are the genesis of an implied defamation case.[179]

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precisely matches the descriptions in the *Knievel* decision and the parties' briefs—except that the picture of Mr. and Mrs. Knievel has been removed for some reason.

[175] *Knievel*, 393 F.3d at 1077 n.7.

[176] *Id.* at 1077-78.

[177] Dienes & Levine, *supra* note 41, at 311-13.

[178] Although implied defamation cases often involve ambiguous language, Dienes and Levine's definition of this category of defamation does not fit *Knievel*, which concerned a statement that conveyed an unintended alternative meaning that was clear as day and false; no implication or inference was required, only miscommunication. *Id.*

[179] *Id.* at 238 (citations omitted); *see, e.g.*, Cianci v. New Times Publ'g Co., 639 F.2d 54, 60 (2d Cir. 1980) (holding that a defamatory inference could be assumed from statements of fact relating to the plaintiff); Sharon v. Time, Inc., 575 F. Supp. 1162, 1165-66 (S.D.N.Y. 1983) (holding that an article, taken as a whole, conveyed the defamatory suggestion that the plaintiff had encouraged violence); Penry v. Dozier, 49 So. 909, 912-13 (Ala. 1909) (holding that

These types of cases use context in precisely the opposite manner as in *Knievel*. Whereas implied defamation cases use context to smoke out the false or defamatory nature of a statement, *Knievel* required context to shed light on the innocent nature of ESPN's intended meaning.[180] However, the need for a subjective standard for defamatory meaning is just as critical in implied defamation cases. Take, for instance, a case in which important facts are omitted that would have eliminated the defamatory impact of a statement. An ambiguity exists in determining whether the statements should be read as factually true in isolation or as a collective falsehood by means of the omitted critical facts. A subjective standard is far more precise for determining which of these is appropriate, as it allows the court to target the speaker directly, rather than acting through "reasonable" proxies.

In sum, a subjective fault standard is essential, whether a case involves ambiguous language or implied defamation. Most importantly, speakers should be assured that their statements, however confusing, slang-ridden, or ambiguous, will not be subject to the whimsical defamatory interpretations of a "reasonable person," and will instead be interpreted to mean what they intend.

C. Where are We Going? The Direction of Defamation Law

Arguing for a subjective standard for defamatory meaning is, ironically, a complicated exercise. This standard is so intimately and logically connected to existing constitutional doctrine that it is initially difficult to grasp that it is not already settled law. In particular, the Court's emphasis on context leads to the mistaken impression that meaning is central to its application of the First Amendment to defamation cases.[181] This is not the case. Context is unquestionably a very important element in accurately interpreting any statement, whether harmless or defamatory. However, although the Supreme Court has emphasized context in its rulings, it has done so only with regard to

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reciting additional facts can cast a defamatory light on an innocent situation by "giv[ing] point and direction to what otherwise would seem innocuous"); Memphis Pub. Co. v. Nichols, 569 S.W.2d 412, 420 (Tenn. 1978) (holding that although the facts published were true, defamatory meaning was conveyed by omitting facts).

[180] *See supra* Part III.B. Contextual cues arguably provided some support for both an innocent and defamatory *objective* interpretation of pimp. *See supra* Part III.B. However, under a subjective analysis, context demonstrates clearly that ESPN did not *intend* the literal meaning of "pimp."

[181] *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 11-17 (1990) (reciting a history of its defamation decisions); *see supra* Part II.C.

determining if an utterance can be reasonably interpreted as a statement of fact.[182] This is chiefly evident in its treatment of "rhetorical hyperbole."[183]

The Supreme Court has left a door dangerously open by failing to follow through on its emphasis on contextual cues and by asserting a subjective fault standard for defamatory meaning. Although the Ninth Circuit in *Knievel* accurately absorbed the Supreme Court's use of context, it applied these principles to an objective, rather than subjective standard, interpreting an allegedly defamatory statement "'from the standpoint of the average reader . . . within the context in which it is made.'"[184] In doing so, the Ninth Circuit established the wrong framework for defamatory meaning inquiries. The question should not be what a reasonable person might interpret a statement to mean considering the statement's broad and specific context, but what the speaker *intended to convey* in light of the broad and specific context.[185] That there is a difference in many defamation cases between the answers to these questions is precisely why the Supreme Court should consider adopting a subjective standard for defamatory meaning.

In addition to its treatment of context, the Supreme Court has given other hints that falsely seem to indicate that it favors a subjective standard for defamatory meaning. Specifically, the Court tantalized most cruelly when it required proof of specific levels of fault with regard to the falsity of an allegedly defamatory statement (knowing or reckless conduct for public figures and negligent conduct for private individuals).[186] These minimum standards appear to prevent a speaker from being held liable where no fault is present. "Actual malice," however, only applies to the falseness of a statement. This is not the same as requiring a plaintiff to prove fault with regard to defamatory meaning. The Supreme Court has actually fashioned *no* standard for defamatory meaning,[187] instead leaving that aspect of defamation law to be addressed jurisdiction-by-jurisdiction.

Despite this void, Dienes and Levine demonstrate remarkable optimism in asserting that the actual malice standard and subsequent case law, taken together, indicate that the Supreme Court is leaning toward adopting a subjective standard for defamatory meaning.[188] Their optimism has not been

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[182] *Milkovich*, 497 U.S. at 11-17.

[183] *See id.* at 16-17; *see supra* Part III.A (discussing rhetorical hyperbole, generally); *see supra* Part III.B (explaining how the rhetorical hyperbole privilege protects statements that cannot be interpreted as factual in light of contextual cues).

[184] Knievel v. ESPN, 393 F.3d 1068, 1074 (9th Cir. 2005) (quoting Norse v. Henry Holt & Co., 991 F.2d 563, 567 (9th Cir. 1993)).

[185] *See supra* Part IV.A.

[186] *Milkovich*, 497 U.S. at 14-15 (citing N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964); Curtis Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967)).

[187] RESTATEMENT (SECOND) OF TORTS, *supra* note 135, § 580A cmt. d.

[188] Dienes & Levine, *supra* note 41, at 280.

vindicated through court action.[189] From the beginning, in *New York Times*, the Court explicitly limited its fault standards to the issue of falsity.[190] Furthermore, it is simply not true that *Milkovich* and *Masson*, viewed together, constitutionalized a defamatory meaning requirement.[191]

It is true that in striking down the categorical protections afforded to opinion, the *Milkovich* court demanded more rigor from judges in assessing the nature of an allegedly defamatory statement.[192] However, this rigor was intended to be applied to the consistent target of constitutional defamation jurisprudence—whether or not a statement can be proven false.[193] The Court's main conclusions in *Milkovich* illustrate this point precisely:

> The dispositive question in the present case then becomes whether a reasonable factfinder could conclude that the statements in the . . . column imply an assertion that petitioner Milkovich perjured himself in a judicial proceeding. We think this question must be answered in the affirmative. . . . This is not the sort of loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining that petitioner committed the crime of perjury. Nor does the general tenor of the article negate this impression.[194]

The Court demonstrated no interest in whether or not the assertion that Milkovich perjured himself was defamatory because an accusation of perjury is *clearly* defamatory.[195] It had no reason to address that issue. The question the Court answered was whether the column could be read to assert actual facts about Milkovich despite being couched in the language of opinion.[196]

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[189] Franklin and Bussel argued for this standard in 1984, and Dienes and Levine published their predictions in 1993. Dienes & Levine, *supra* note 41; Franklin & Bussel, *supra* note 41. Both teams still await the Court's action.

[190] *N.Y. Times*, 376 U.S. at 279-80.

[191] Dienes & Levine, *supra* note 41, at 281.

> [W]hen coupled with its decision the following Term in *Masson*, the Court's threshold requirement of a false, defamatory meaning in *Milkovich* appears to be less an isolated response to the dilemma posed by a specific case and more a significant explication of the substantive, constitutional barriers envisioned by *New York Times* . . . .

Id. at 280; *see also supra* Part II.C (analyzing *Milkovich*).

[192] Milkovich v. Lorain Journal Co., 497 U.S. 1, 21 (1990).

[193] *See id.*

[194] *Id.*

[195] Allegations of criminal activity, particularly conduct involving moral turpitude, traditionally have been considered defamation *per se*, in that damage to reputation is presumed, and need not be proven. *See* LAW OF DEFAMATION, *supra* note 21, §§ 7.12, 7.13, 7.14. Perjury fits squarely into this category of asserted conduct, making a discussion of defamatory meaning superfluous. *Id.* Compare this to "defamation *per se*" in *New York Times*, which related to the lack of a fault element. *See supra* note 52.

[196] *Milkovich*, 497 U.S. at 21. "The dispositive question in the present case then becomes whether a reasonable factfinder could conclude that the statements in the . . . column imply an assertion that petitioner Milkovicch perjured himself in a judicial proceeding." *Id.*

This question, answered in the affirmative, was directly connected to whether the statements in the column were provable as true or false.[197] Chief Justice Rehnquist's assessment of the language and tenor of the piece further demonstrate this point.[198] He simply applied contextual cues to determine whether the defamatory implications of the article were sufficiently factual, and, therefore, actionable.[199] In sum, contrary to Dienes and Levine's assertions, *Milkovich* gave no indication that the Supreme Court was looking to get into the business of analyzing defamatory meaning.

Masson v. New Yorker Magazine, Inc.,[200] authored by Justice Kennedy, is likewise not a demonstration of judicial ambition to enter the defamatory meaning arena. In *Masson*, the case hinged upon a published interview that was not faithful to the speaker's exact words.[201] Inaccuracies appeared in the article in several instances in quotation marks.[202] The Court's central holding was that "a deliberate alteration of the words uttered by a plaintiff does not equate with knowledge of falsity . . . unless the alteration results in a material change in the meaning conveyed by the statement."[203] The Court elaborated on this holding, with more teasing references to "meaning" and "defamatory character":

> The use of quotations to attribute words not in fact spoken bears in a most important way on that inquiry, but it is not dispositive in every case.
>
> Deliberate or reckless falsification that comprises actual malice turns upon words and punctuation only because *words and punctuation express meaning. Meaning is the life of language*. And, for the reasons we have given, quotations may be a devastating instrument for conveying false meaning. . . . And if the alterations of petitioner's words *gave a different meaning to the statements, bearing upon their defamatory character*, then the device of quotations might well be critical in finding the words actionable.[204]

Dienes and Levine see these statements as strong indicators that the Court finds defamatory meaning to be an essential part of constitutional defamation doctrine.[205] This view is too optimistic. That words and punctuation express meaning is unquestionably true. It is equally true that the Court held that altering a speaker's words for publication can constitute defamation if the

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[197] *Id.* at 21-22.
[198] *Id.*
[199] *Id.*
[200] Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991).
[201] *Id.* at 499-509.
[202] *Id.*
[203] *Id.* at 517.
[204] *Id.* at 517-18 (emphases added).
[205] Dienes & Levine, *supra* note 41, at 281.

alteration has a bearing upon the words' defamatory character.[206] Does this mean that that the Court was incorporating defamatory meaning into its First Amendment analysis? No, it does not.

The Court had only pragmatic reasons for mentioning "meaning" and "defamatory character."[207] It would be ludicrous to permit a defamation tort action to arise from an alteration in a quotation that has no bearing on a speaker's meaning. It would be equally absurd to allow meaningful alterations to be actionable when they have no effect on a statement's tendency to harm the reputation of the plaintiff. For instance, if a defamation plaintiff had said to a reporter, "I didn't stab anybody," there would be no defamatory impact if he were misquoted to say "I never stabbed anyone." With no change in the meaning of the statement, there is simply nothing for the plaintiff to reasonably complain about. It would be equally harmless to quote the plaintiff as saying, "I didn't shoot anybody." Although this misquotation clearly changes the meaning of the actual statement, the change does not produce a defamatory result. However, if the plaintiff had been quoted to say, "I didn't mean to stab them," the defamatory impact of this mistake would be clear. It is this type of misquotation that is not protected by the First Amendment under *Masson*.[208]

The holding in *Masson* must be viewed in light of the facts of the case. The key issue was that the words in question were under quotation marks, which conveyed that the author was presenting a verbatim transcription.[209] Prudence, however, demanded a cautious approach to recognizing that quotation marks and other punctuation can alter meaning enough to make a statement actionable. Only alterations that transform a harmless statement into a defamatory assertion bear a logical connection to defamation law. Accordingly, the Court's central holding ensured that only *relevant* alterations to a speaker's words would be brought to bear on the judicial analysis.[210] To put it another way, the Court ensured that misquotations would not be held to constitute defamation merely by virtue of being misquotations.

Optimistic analyses of *Milkovich* and *Masson* notwithstanding, the Supreme Court has not yet budged from its reticence to squarely address the First Amendment's impact on defamatory meaning. Because the decision in *Knievel* did not inflict a great injustice, the danger inherent in the majority's purported standard for defamatory meaning is likely not immediately apparent. The Supreme Court will probably need to face a case like *Knievel*, but with

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[206] *Masson*, 501 U.S. at 517-18.

[207] *Id.*

[208] *Id.*

[209] *Id.* at 500, 511.

[210] *Id.* at 517-18.

opposite and unjust results, before it will consider adopting the subjective standard proposed in this casenote.

V. CONCLUSION

Defamation law represents a fundamental First Amendment battleground, lying directly on the fine line separating protected speech from speech that impermissibly harms the reputation of another. The Ninth Circuit's treatment of defamation in *Knievel* was a reasonable synthesis of the Supreme Court's various constitutional mandates.[211] However, the court did not apply its own rules accurately. Its decision to uphold the lower court's dismissal of Knievel's suit did not actually comport with its "reasonable factfinder" standard.[212]

Whether the Knievel ruling was intentionally obtuse or fortuitously erroneous, it actually arrived at a just conclusion. In the absence of action by the Supreme Court, defamation law allows states to hold a speaker liable for the interpretations of the public at large rather than for the speaker's intended meaning as determined through a thorough contextual inquiry.[213] This is unfair and makes it impossible to provide meaningful notice to a speaker of what speech will be considered defamatory.[214] This problem is particularly acute where meaning is ambiguous or where slang or figurative speech is used.[215]

The use of a subjective fault standard for meaning in defamation law would conform this branch of the law to the way people express themselves and promote fair outcomes.[216] Under such a standard, *Knievel* still would have been decided in favor of ESPN, but it would have been a decision founded upon a proper understanding of communication and a belief that speakers should not be discouraged from using speech simply because some people might not understand it.[217]

Aaron Dunn[218]

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[211] *See supra* Part III.B.

[212] *See supra* Part III.B.

[213] *See supra* Part IV.A.

[214] *See supra* Parts IV.A-B.

[215] *See supra* Parts IV.A-B.

[216] *See supra* Parts IV.A-B.

[217] *See supra* Parts IV.A-B.

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Gonzales v. Raich: How the Medical Marijuana Debate Invoked Commerce Clause Confusion

I. INTRODUCTION

The United States Supreme Court's Commerce Clause jurisprudence has undergone significant shifts since the Constitution was ratified more than two hundred years ago.[1] For nearly sixty years, between 1937 and 1995, there was consistency as the Court permitted Congress to undertake a wide range of regulations targeted at a host of social problems that had little relation to interstate commerce.[2] At first, it appeared that the Court was ushering in a new era for the Commerce Clause when it decided *United States v. Lopez*[3] in 1995, and *United States v. Morrison*[4] in 2000.[5] Both decisions severely limited Congress' power to legislate, and it appeared the Court was signaling that power over traditional state matters, such as crime, family, and education, was going to be kept out of Congress' reach.[6]

But in 2005, the Court swerved from its path when it announced its decision in *Gonzales v. Raich*,[7] upholding Congressional regulation of a purely intrastate activity—the cultivation of marijuana[8] for medical purposes pursuant to state law.[9] This decision left two groups in limbo. It was a crushing blow to patients who depended on marijuana to alleviate serious suffering and left them with the difficult decision of whether to violate federal law or endure excruciating pain. The legal community, on the other hand, was left wondering what this decision meant for the Commerce Clause.[10] Suddenly, instead of following its decisions in *Lopez* and *Morrison* and limiting Congressional power, the *Raich* Court reverted to its pre-*Lopez* jurisprudence.

The Supreme Court's decision in *Raich* is inconsistent with the Court's decisions in *Lopez* and *Morrison*. Under the principle of *stare decisis*, the

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[1] *See* discussion *infra* Part II.

[2] *See* discussion *infra* Part II.B.

[3] 514 U.S. 549 (1995).

[4] 529 U.S. 598 (2000).

[5] *See* discussion *infra* Part II.C.

[6] *See Lopez*, 514 U.S. at 564.

[7] Gonzales v. Raich, 545 U.S. ___, 125 S. Ct. 2195 (2005).

[8] This casenote will use the most common spelling of "marijuana." An alternative spelling is "marihuana." *See* 21 U.S.C. § 812 (2000).

[9] *Raich*, 545 U.S. ___, 125 S. Ct. 2195.

[10] *See* discussion *infra* Part VI.A.

Raich court should have followed *Lopez* and *Morrison* and held that Congress had overstepped its bounds in regulating medical marijuana use. Justices Kennedy and Scalia, however, did an about-face in *Raich*, joining their opponents in *Lopez* and *Morrison*; and thus, perhaps inadvertently, invoking inconsistency and confusion regarding the Commerce Clause.

Part II of this casenote examines the history of Commerce Clause jurisprudence in the United States. Part III scans the current federal and state drug laws relating to medical marijuana use. Part IV details the legal proceedings that culminated with the Supreme Court *Raich* decision. Part V examines the Supreme Court's opinion in *Raich*, including the concurring and dissenting opinions. Finally, Part VI analyzes the opinion and argues that it was inconsistent with the Court's most recent pronouncements about the Commerce Clause in *Lopez* and *Morrison*. This casenote concludes that in the short term, the decision will probably lead to confusion and broad legislating, but in the long term, the precedential value of *Raich* will likely be minimal.

II. HISTORICAL BACKGROUND OF THE COMMERCE CLAUSE

A. The Birth and Adolescence of the Commerce Clause

Although the founding fathers envisioned a limited role for the federal government, the power to regulate interstate commerce was considered a critical component of federal authority.[11] After the American Revolution, serious trade infighting between states and a depressed economy plagued the young nation under the Articles of Confederation.[12] The central government under the Articles was weak and did not have the authority to prevent the states from enacting trade barriers and taxes or to establish commercial regulations.[13] Thus, during the Constitutional Convention, the role of the federal government in regulating commerce received tremendous attention.[14] As a result, the founders included in Article I, Section 8 of the Constitution a clause granting Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[15]

Despite its prominence and importance during these early years, the Commerce Clause was not examined by the Supreme Court for several

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[11] Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress's Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL'Y 849, 858-59 (2002).

[12] *Id.* at 855.

[13] *Id.* at 855-57.

[14] *Id.* at 858.

[15] U.S. CONST. art. I, § 8, cl. 3.

decades.[16] In 1824, in *Gibbons v. Ogden*,[17] Chief Justice Marshall provided guidance about the scope of Congress' power to regulate commerce that was relied upon for decades, and continues to be relied upon today.[18] His opinion granted Congress expansive powers under the Commerce Clause by broadly defining "commerce."[19] Chief Justice Marshall explained that "[c]ommerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, the parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."[20] However, there were also limits to these powers, including that the "completely internal commerce of a State . . . may be considered as reserved for the State itself."[21]

At issue in *Gibbons* was a decision by the New York legislature to grant two men exclusive navigational rights in the state.[22] Aaron Ogden obtained an injunction to stop Thomas Gibbons from violating the exclusive privilege by running his boats in New York waters.[23] Gibbons challenged the injunction, arguing that the actions of the New York legislature were unconstitutional since they were repugnant to federal acts created by Congress in regulating interstate commerce.[24]

The Court agreed, holding that "commerce" as contemplated by the Constitution was much broader than mere "buying and selling," and included navigation.[25] But the Court also recognized limits on Congress' Commerce Clause power: The *Gibbons* Court determined that a regulation of commerce that was "completely internal" would exceed Congress' authority.[26]

Despite the broad interpretation of commerce in *Gibbons*, the Supreme Court subsequently found several occasions where Congress exceeded those limits.[27] Between the late 1800s and the mid-1930s, the Court employed a

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[16] Bork & Troy, *supra* note 11, at 860.

[17] 22 U.S. 1 (1824).

[18] *See, e.g.*, United States v. Morrison, 529 U.S. 598, 648-49 (2000) (Souter, J., dissenting); United States v. Lopez, 514 U.S. 549, 553 (1995); Perez v. United States, 402 U.S. 146, 150-51 (1971); Wickard v. Filburn, 317 U.S. 111, 120-21 (1942); Carter v. Carter Coal Co., 298 U.S. 238, 298 (1936); Hammer v. Dagenhart, 247 U.S. 251, 269 (1918); Employers' Liab. Cases, 207 U.S. 463, 492 (1908); The Lottery Cases, 188 U.S. 321, 346-48 (1903).

[19] *Gibbons*, 22 U.S. at 189-90.

[20] *Id.*

[21] *Id.* at 195.

[22] *Id.* at 1.

[23] *Id.* at 1-2.

[24] *Id.* at 2-3.

[25] *Id.* at 189-90.

[26] *Id.* at 194.

[27] *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936) (declaring unconstitutional a federal act creating employment regulations and taxes on the bituminous coal industry); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (striking down employment

direct/indirect effects test to determine what matters affected commerce in a manner that permitted federal regulation.[28] While the Court never seemed to be able to precisely define a "direct" or "indirect" effect, it indicated that an intent to affect interstate commerce might be required before Congress could regulate.[29] Therefore, the extent of the activity's impact on interstate commerce was ostensibly irrelevant.[30] Instead, the Court instructed that the Commerce Clause analysis should focus on "the manner in which the effect has been brought about."[31] The test was designed to reflect the constitutional limitations on the activities Congress could regulate.[32] Indirect effects were beyond the limits because otherwise "the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government."[33]

During this period, the Supreme Court used the direct/indirect effects test to find a number of federal statutes unconstitutional. For example, in the *Employers' Liability Cases*,[34] the Court invalidated a federal act providing that

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regulations for the poultry industry); R.R. Ret. Bd. v. Alton R.R. Co., 295 U.S. 330 (1935) (finding an act creating a retirement and pension system for railroad workers unconstitutional); Hammer v. Dagenhart, 247 U.S. 251 (1918) (invalidating child labor laws); Employers' Liab. Cases, 207 U.S. 463 (1908) (striking down a federal act holding employers liable for injuries to employees hurt on the job); Trade-Mark Cases, 100 U.S. 82 (1879) (declaring unconstitutional a federal criminal statute punishing trademark counterfeiting); United States v. Dewitt, 76 U.S. (9 Wall.) 41 (1869) (invalidating a federal statute that prohibited the sale of a certain mixture of oils); *but see* Stafford v. Wallace, 258 U.S. 495 (1922) (upholding a federal act that prohibited unfair, discriminatory and deceptive trade practices by packers involved in interstate commerce).

[28] *See, e.g., Carter*, 298 U.S. at 308 ("The distinction between a direct and indirect effect turns, not upon the magnitude of either the cause or the effect, but entirely upon the manner in which the effect has been brought about."); *Schechter*, 295 U.S. at 546 ("[W]here the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power."); Hopkins v. United States, 171 U.S. 578, 592 (1898) ("There must be some direct and immediate effect upon interstate commerce in order to come within the act."); United States v. E. C. Knight Co., 156 U.S. 1, 12 (1895) ("Doubtless the power to control the manufacture of a given thing involves in a certain sense the control of its disposition, but this is a secondary and not the primary sense; and although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly.").

[29] *Schechter*, 295 U.S. at 546-47 ("[W]here . . . intent is absent, and the objectives are limited to intrastate activities, the fact that there may be an indirect effect upon interstate commerce does not subject the parties to [federal regulation].").

[30] *Carter*, 298 U.S. at 307-08.

[31] *Id.* at 308.

[32] *See Schechter*, 295 U.S. at 546.

[33] *Id.*

[34] 207 U.S. 463 (1908).

common carriers engaged in interstate commerce were liable to employees who were injured or killed due to the negligence of the companies' officers or employees.[35] In *Hammer v. Dagenhart*,[36] the Court rejected a statute prohibiting the shipment and delivery in interstate commerce of goods produced by young children.[37] The Railroad Retirement Act, which created a pension system for employees of common carriers involved in interstate commerce, was struck down in *Railroad Retirement Board v. Alton Railroad Co.*[38] Similarly, the Live Poultry Code, which required slaughterhouse operators to abide by certain labor provisions, was found unconstitutional in *A.L.A. Schechter Poultry Corp. v. United States*.[39] Finally, in *Carter v. Carter Coal Co.*,[40] the Court struck down the Bituminous Coal Conservation Act of 1935, which, among other things, fixed the minimum price for coal and established labor provisions for coal mines.[41]

However, the Court also upheld some federal statutes facing Commerce Clause challenges. The Court held that a regulation on carrying lottery tickets across state lines was constitutional in the *Lottery Case*.[42] In *Hipolite Egg Co. v. United States*,[43] the Court upheld a prohibition on shipping adulterated food interstate.[44] The Court also upheld the Mann Act,[45] which created criminal penalties for transporting women and girls across state lines for "immoral purposes."[46]

B. Expansion—The "Anything Goes" Era of the Commerce Clause

A major shift in Commerce Clause jurisprudence began in 1937, with the Court's decision in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*[47] Although it was decided less than a year after *Carter* by an identical

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[35] *Id.*

[36] 247 U.S. 251 (1918).

[37] *Id.*

[38] 295 U.S. 330 (1935).

[39] 295 U.S. 495 (1935).

[40] 298 U.S. 238 (1936).

[41] *Id.*

[42] 188 U.S. 321 (1903).

[43] 220 U.S. 45 (1911).

[44] *Id.*

[45] White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. § 2421 (2000)).

[46] *Id.*; *see also* Caminetti v. United States, 242 U.S. 470 (1917); Hoke v. United States, 227 U.S. 308 (1913).

[47] 301 U.S. 1 (1937); *see also* United States v. Lopez, 514 U.S. 549, 556 (1995) ("*Jones & Laughlin Steel*, *Darby*, and *Wickard* ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause.").

Court,[48] *Jones & Laughlin* departed from the direct/indirect effects test and set in motion a significant expansion of Congress' Commerce Clause power.[49] The *Jones & Laughlin* Court upheld the constitutionality of the National Labor Relations Act because the labor practices it regulated had a "close and substantial relation to interstate commerce."[50] The Court counseled that the analysis must focus on "the effect upon commerce, not the source of the injury."[51]

Over the next couple of years, the composition of the Court changed significantly and the more expansive nature of the Commerce Clause became firmly implanted in the Court's jurisprudence.[52] By 1942, when the Court decided *Wickard v. Filburn*,[53] only two of the nine justices who decided *Carter* remained on the bench.[54] The 1940s ushered in an "anything goes" attitude toward Congress' power under the Commerce Clause that lasted until 1995.[55] The Court openly recognized and accepted that Congress was using the Commerce Clause to advance social policies by finding creative ways to connect their regulations to commerce.[56]

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[48] The *Carter* court held that the Bituminous Coal Conservation Act of 1935, which among other things, imposed a tax on the sale of all bituminous coal and established requirements for working conditions and wages of coal manufacturers, exceeded Congress' power under the Commerce Clause because the effect the manufacture of coal has upon commerce "however extensive it may be, is secondary and indirect." Carter v. Carter Coal Co., 298 U.S. 238, 309 (1936).

[49] *Jones & Laughlin Steel Corp.*, 301 U.S. at 37 (adopting the "close and substantial relation" test).

[50] *Id.*

[51] *Id.* at 32 (citing Second Employers' Liab. Cases, 223 U.S. 1, 51 (1912)).

[52] *See infra* notes 54-87 and accompanying text.

[53] 317 U.S. 111 (1942).

[54] The Justices deciding *Carter* were: Hughes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Stone, Roberts, and Cardozo. *See* Carter v. Carter Coal Co., 298 U.S. 238 (1936). The Justices deciding *Wickard* were: Stone, Roberts, Black, Reed, Frankfurter, Douglas, Murphy, Byrnes, and Jackson. *See Wickard*, 317 U.S. 111.

[55] In *United States v. Lopez*, 514 U.S. 549 (1995), the Court significantly shifted Commerce Clause jurisprudence when it struck down a federal gun law as beyond Congress' power under the Commerce Clause. *See* discussion *infra* Part II.C.

[56] *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 257 (1964) (upholding the Civil Rights Act of 1964 and its prohibition on discrimination in hotels even though "Congress was legislating against moral wrongs" because "that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse"); Cleveland v. United States, 329 U.S. 14, 19 (1946) ("The power of Congress over the instrumentalities of interstate commerce is plenary; it may be used to defeat what are deemed to be immoral practices; and the fact that the means used may have 'the quality of police regulations' is not consequential." (citations omitted)); United States v. Darby, 312 U.S. 100, 113-14 (1941) (upholding a labor statute even though the Court recognized that it was enacted "under the guise of a regulation of interstate commerce" simply so that the federal government could regulate in an area reserved for the states).

In *Wickard*, the Court analyzed the effect of the Agricultural Adjustment Act of 1938 ("AAA"), which permitted the establishment of an annual wheat acreage allotment.[57] Farmers who harvested more than allowed were subject to penalties for each bushel in excess of the allotment.[58] In 1941, the allotment was set at 11.1 acres; however, Filburn, who owned a small farm in Ohio, sowed twenty-three acres.[59] Filburn refused to pay the fine, choosing instead to file suit against the Secretary of Agriculture to enjoin the enforcement of the penalty.[60]

Much of the wheat that Filburn harvested was not going to be sold in interstate commerce or otherwise.[61] While he did sell some of his crop, the rest was for his own consumption—for his family to eat, for feeding livestock and poultry, and for seeding the following year's crop.[62] Filburn argued that Congress had no authority to regulate his production and consumption of wheat "since [these activities] are local in character, and their effects upon interstate commerce are at most 'indirect.'"[63]

The Court, however, looked at the effect of the regulation on the wheat market as a whole.[64] The Court noted that the United States' wheat industry had faced serious challenges and that the AAA was managing fluctuating market prices for the benefit of farmers.[65] Additionally, the record provided evidence of the significant impact of home-grown wheat on the overall national market, leaving the Court with "no doubt that Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices."[66] Therefore, the Court determined that even though Filburn's crop may not have, by itself, had a significant impact on interstate commerce, that "is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial."[67]

Wickard is often recognized as the real metamorphosis of Commerce Clause jurisprudence[68] because it clearly pronounced that a broad interpretation of

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[57] 317 U.S. at 113-14.
[58] *Id.* at 114-15.
[59] *Id.* at 114.
[60] *Id.* at 113-15.
[61] *Id.* at 114.
[62] *Id.*
[63] *Id.* at 119.
[64] *Id.* at 125.
[65] *Id.* at 125-26.
[66] *Id.* at 128-29.
[67] *Id.* at 127-28 (citations omitted).
[68] Bork & Troy, *supra* note 11, at 881.

Congress' power under the Commerce Clause was required such that even activities that were "local" and not "regarded as commerce" could be regulated.[69] Chief Justice Rehnquist has described *Wickard* as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity."[70] Nevertheless, the Court followed *Wickard*'s broad interpretation of commerce to uphold statutes pertaining to criminal activity,[71] civil rights,[72] labor relations/employment,[73] and environmental regulation.[74] Since the statute at issue in *Raich* was criminal, the cases from this era that contemplated the constitutionality of criminal statutes are particularly instructive.

In *Cleveland v. United States*,[75] members of a Mormon sect were charged with violating the Mann Act,[76] which instituted criminal penalties for transporting women across state lines for any "immoral purpose."[77] The petitioners, who each had multiple wives, sought to invalidate the Mann Act

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[69] *Wickard*, 317 U.S. at 125 ("But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'"). The Court has subsequently upheld several federal acts without discussion based solely upon *Wickard*. *See, e.g.*, United States v. Ohio, 385 U.S. 9 (1966); United States v. Haley, 358 U.S. 644 (1959); Bender v. Wickard, 319 U.S. 731 (1943); Beckman v. Mall, 317 U.S. 597 (1942).

[70] United States v. Lopez, 514 U.S. 549, 560 (1995).

[71] *See, e.g.*, Perez v. United States, 402 U.S. 146 (1971) (holding that Congress can prescribe criminal penalties for "loan sharking"); Cleveland v. United States, 329 U.S. 14 (1946) (upholding convictions for transporting women across state lines for "immoral purposes").

[72] *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (holding that the Civil Rights Act of 1964's prohibitions on discrimination in hotels were constitutional); Katzenbach v. McClung, 379 U.S. 294 (1964) (finding that discrimination in restaurants could also be prohibited by Congress).

[73] *See, e.g.*, Maryland v. Wirtz, 392 U.S. 183 (1968) (finding it within Congress' power under the Commerce Clause to require states to comply with minimum wage requirements); United States v. Darby, 312 U.S. 100 (1941) (upholding a federal statute regulating wages and work hours for lumber manufacturers); Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (holding that the National Labor Relations Act, which prevented employers from denying employees the right to organize, was valid).

[74] *See, e.g.*, Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) (holding that the Surface Mining Act, which was enacted to protect the environment from surface coal mining operations, was constitutional).

[75] 329 U.S. 14 (1946).

[76] In earlier cases, the Mann Act is referred to under its original name, the White-Slave Traffic Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. § 2421 (2000)). *See* Caminetti v. United States, 242 U.S. 470 (1917); Hoke v. United States, 227 U.S. 308 (1913). Later, the Supreme Court began calling it the Mann Act, a reference to the bill's author, Representative Mann. *See* Mortensen v. United States, 322 U.S. 369, 370 (1944); *Caminetti*, 242 U.S. at 497 (McKenna, J., dissenting).

[77] *Cleveland*, 329 U.S. at 16.

after they were arrested for bringing their wives across state lines to live.[78] The Court noted that the Mann Act had primarily been used to quell the interstate market for prostitution, but determined that the regulation could go further to include prosecuting polygamy.[79] The Court also recognized that the statute's expansive scope evidenced Congress' intent to regulate non-commercial acts.[80] The Court concluded that such regulation was constitutionally permissible.[81] The Court explained that:

> The fact that the regulation of marriage is a state matter does not, of course, make the Mann Act an unconstitutional interference by Congress with the police powers of the States. The power of Congress over the instrumentalities of interstate commerce is plenary; it may be used to defeat what are deemed to be immoral practices; and the fact that the means used may have "the quality of police regulations" is not consequential.[82]

In *Perez v. United States*,[83] the Court held that a federal statute targeting organized crime was constitutional as applied to the petitioner, who was a "loan shark."[84] The petitioner was arrested following a lengthy extortion scheme in which he loaned money to a business owner and then rapidly increased the required payments and threatened bodily harm if payments were not made.[85] Since these loan sharking operations were purely intrastate, the petitioner argued that the federal government had no power to prosecute.[86] The Court acknowledged that loan sharking was "a traditionally local activity," but concluded that Congress properly found it was integral to the financing of organized crime and thus, permissibly regulated under the Commerce Clause.[87]

C. Contraction of Congress' Commerce Clause Power

The "Anything Goes" Era of Commerce Clause jurisprudence ended abruptly with the Court's decision in 1995 in *Lopez*. The *Lopez* Court declared that the Gun-Free School Zones Act of 1990 ("GFSZA")[88] was

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[78] *Id.*

[79] *Id.* at 18.

[80] *Id.* at 19.

[81] *Id.*

[82] *Id.* (quoting Hoke v. United States, 227 U.S. 308, 323 (1913)) (other citations omitted).

[83] 402 U.S. 146 (1971).

[84] *Id.* at 146-47.

[85] *Id.*

[86] *Id.* at 149.

[87] *Id.* at 155-57.

[88] 18 U.S.C. § 922(q) (Supp. V. 1988), *invalidated by* United States v. Lopez, 514 U.S. 549 (1995).

unconstitutional because it exceeded Congress' authority under the Commerce Clause.[89] The GFSZA was a criminal statute providing federal penalties for possession of a firearm in a school zone.[90] Alfonso Lopez, Jr., a high school senior, was charged with violating the GFSZA after he brought a .38 caliber handgun to his Texas high school.[91] He argued that Congress had no authority to enact the GFSZA.[92]

Writing for the five-to-four majority, Chief Justice Rehnquist noted that the Commerce Clause granted Congress the authority to regulate three broad categories of activities: (1) "the use of the channels of interstate commerce";[93] (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities";[94] and (3) "activities having a substantial relation to interstate commerce."[95] The Court determined that the activity must "substantially affect" interstate commerce in order for Congress to have the authority to regulate it under the third category.[96] Because the GFSZA did not fall within either of the first two categories, the issue was whether the federal statute "substantially affected" interstate commerce such that it fell within the third category of permissible regulations.[97]

Justice Rehnquist, who was joined by Justices O'Connor, Thomas, Kennedy, and Scalia, distinguished *Lopez* from *Wickard* and determined that the GFSZA did not substantially affect interstate commerce for three reasons.[98] First, the GFSZA was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[99] Second, the statute did not have a "jurisdictional element"—something ensuring that the regulated activity in question (here, possession of a gun by a student at a school) affected interstate commerce.[100] Third, the GFSZA did not contain legislative findings regarding

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[89] *Lopez*, 514 U.S. 549.

[90] *Id.* at 551 (citing 18 U.S.C. § 922(q)(1)(A) (Supp. V. 1988)).

[91] *Id.*

[92] *Id.*

[93] *Id.* at 558 (citing United States v. Darby, 312 U.S. 100, 114 (1941); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 256 (1964)).

[94] *Id.* (citing Shreveport Rate Cases, 234 U.S. 342 (1914); Southern Ry. Co. v. United States, 222 U.S. 20 (1911); Perez v. United States, 402 U.S. 146, 150 (1971)).

[95] *Id.* at 558-59 (citing Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37 (1937); Maryland v. Wirtz, 392 U.S. 183, 196 n.27 (1968)).

[96] *Id.* at 559.

[97] *Id.*

[98] *Id.* at 559-68.

[99] *Id.* at 561.

[100] *Id.*

the regulation's effect on interstate commerce.[101] The Court acknowledged that legislative findings were not required, but noted that if those findings existed, they could help to unearth a link to interstate commerce that was not "visible to the naked eye."[102]

The *Lopez* Court sought to establish clear limits to Congress' power under the Commerce Clause partly because of an underlying fear that expansion over the past several decades was creating a federal police power.[103] The majority admitted three possible connections between gun regulation and interstate commerce.[104] First, gun violence drives up insurance costs, which are distributed among all Americans.[105] Second, people who fear gun violence could limit their interstate travel.[106] Third, student learning is disrupted by gun violence, and this impacts the country's productivity and ability to compete globally.[107] But Justice Rehnquist was concerned that these connections to interstate commerce were too tenuous, especially because those reasons could be used to justify federal regulation in all three core areas generally reserved for state control: family law, criminal law, and education.[108]

In a concurring opinion, Justice Kennedy described the importance of limitations on federal power to protect the balance between federal and state authority that is at the heart of our political system.[109] Justice Kennedy did not doubt that keeping guns out of our schools was important, but since there was disagreement regarding how to attain that goal, "the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."[110] Additionally, he noted that more than forty states had already enacted criminal penalties for carrying firearms near schools.[111] Justice Kennedy was concerned that the GFSZA "foreclose[d] the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and [the GFSZA did] so by

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[101] *Id.* at 562.

[102] *Id.* at 562-63.

[103] *Id.* at 564-65.

[104] *Id.* at 563-64.

[105] *Id.* (citing United States v. Evans, 928 F.2d 858, 862 (9th Cir. 1991)).

[106] *Id.* at 564 (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 253 (1964)).

[107] *Id.*

[108] *Id.*

[109] *Id.* at 575-80 (Kennedy, J., concurring).

[110] *Id.* at 581 (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49-50 (1973); New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

[111] *Id.* (citations omitted).

regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term."[112]

Justices Stevens, Souter, Breyer, and Ginsburg dissented. Justice Breyer maintained that the majority's decision was inconsistent with nearly six decades of Commerce Clause precedent.[113] He also reminded that the Court was required to engage in judicial restraint, striking down federal acts only where Congress did not have a "rational basis" for concluding that its regulation sufficiently affected interstate commerce.[114] Justice Breyer was satisfied that the rational basis for Congress' determination existed because legislative findings showed that "guns in schools significantly undermine the quality of education in our Nation's classrooms"[115] and "[e]ducation, although far more than a matter of economics, has long been inextricably intertwined with the Nation's economy."[116] Finally, he warned that the majority's decision "threaten[ed] legal uncertainty in an area of law that, until this case, seemed reasonably well settled."[117]

Although some may have believed or hoped that *Lopez* was merely an anomaly,[118] the Court's shift in Commerce Clause jurisprudence was confirmed five years later when it decided *Morrison*. The vote in *Morrison* was exactly the same as in *Lopez*—a five-to-four decision to strike down a section of the Violence Against Women Act of 1994 ("VAWA").[119] That section provided a civil remedy for victims of gender-motivated violence.[120]

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[112] *Id.* at 583.

[113] *Id.* at 625 (Breyer, J., dissenting) (positing that one of the serious legal problems created by the *Lopez* decision was that "the majority's holding runs contrary to modern Supreme Court cases that have upheld congressional actions despite connections to interstate or foreign commerce that are less significant than the effect of school violence").

[114] *Id.* at 616-17 ("Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce—both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy.").

[115] *Id.* at 620.

[116] *Id.*

[117] *Id.* at 630.

[118] *See id.* at 614-15 (Souter, J., dissenting) ("[T]oday's decision may be seen as only a misstep, its reasoning and its suggestions not quite in gear with the prevailing standard, but hardly an epochal case."); *see also* Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After Lopez*, 46 CASE W. RES. L. REV. 801, 839 (1996) (predicting that the significance of *Lopez* was merely symbolic); Alex Kreit, *Why Is Congress Still Regulating Noncommercial Activity?*, 28 HARV. J.L. & PUB. POL'Y 169, 179 (2004) (maintaining that even *Morrison* did not confirm *Lopez* to be more than an anomaly); Deborah Jones Merritt, *Reflections on United States v. Lopez: COMMERCE!*, 94 MICH. L. REV. 674, 729 (1995) (arguing that *Lopez* was "unlikely to herald a new era of Commerce Clause jurisprudence").

[119] 529 U.S. 598 (2000).

[120] *Id.* at 605 (citing 42 U.S.C. § 13981(c)).

Again writing for the majority, Chief Justice Rehnquist more clearly established that the test for whether a federal regulation substantially affected interstate commerce involved four prongs: (1) whether the statute regulated commerce or any sort of economic enterprise;[121] (2) whether the statute contained an "express jurisdictional element which might limit its reach to a discrete set" of situations;[122] (3) whether the statute or legislative history contained "express congressional findings regarding the effects upon interstate commerce" of the regulated activity;[123] and (4) whether the link between the regulated activity and a substantial effect on interstate commerce was "attenuated."[124]

The majority determined that *Morrison* was analogous to *Lopez* on the first two prongs because gender-motivated violence was not "in any sense of the phrase, economic activity,"[125] and that the VAWA did not contain any jurisdictional element.[126] However, regarding the third prong, Chief Justice Rehnquist acknowledged that *Morrison* was distinguishable from *Lopez* in that the VAWA was "supported by numerous [congressional] findings regarding the serious impact that gender-motivated violence has on victims and their families."[127] He then downplayed the importance of this third prong, declaring that "the existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation."[128] As a result, the Chief Justice rejected "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[129]

Justices Souter, Stevens, Ginsburg, and Breyer again allied in dissent. Justice Souter outlined many of the same criticisms levied by Justice Breyer in *Lopez*, particularly that the decision ignored Commerce Clause precedent since the 1940s.[130] Justice Souter's dissent also focused on the significant distinguishing feature of *Morrison*—"the mountain of data assembled by

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[121] *Id.* at 610.

[122] *Id.* at 611.

[123] *Id.* at 612.

[124] *Id.*

[125] *Id.* at 613.

[126] *Id.*

[127] *Id.* at 614.

[128] *Id.*

[129] *Id.* at 617. "The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States." *Id.* at 618.

[130] *Id.* at 628.

Congress . . . showing the effects of violence against women on interstate commerce."[131]

III. FEDERAL AND STATE DRUG LAWS

President Richard Nixon declared a "war on drugs" soon after he took office in 1969.[132] Congress then enacted the Comprehensive Drug Abuse Prevention and Control Act of 1970.[133] Title II of that Act is the Controlled Substances Act ("CSA"),[134] which constructed a comprehensive regime for fighting international and interstate drug trafficking and use.[135] Congress determined that federal regulation was needed since "[a] major portion of the traffic in controlled substances flows through interstate and foreign commerce."[136] The CSA made it unlawful "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."[137] It also established five schedules of controlled substances.[138] Marijuana was classified as a schedule I drug,[139] meaning that it has "a high potential for abuse" and "no currently accepted medical use."[140]

In 1996, California legalized the use of marijuana for medical purposes.[141] The Compassionate Use Act of 1996 ("CUA") allowed "seriously ill Californians," who have a doctor's recommendation, to obtain and use marijuana to alleviate their pain.[142] The CUA additionally provided specific

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[131] *Id.* at 628-29; *see also id.* at 635 ("[T]he legislative record here is far more voluminous than the record compiled by Congress and found sufficient in two prior cases [*Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964)] upholding Title II of the Civil Rights Act of 1964 against Commerce Clause challenges.").

[132] Gonzales v. Raich, 545 U.S. ___, ___, 125 S. Ct. 2195, 2201 (2005).

[133] Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C.A. §§ 801-890, 901-904, 951-971 (West 2005)).

[134] The Controlled Substances Act of 1970, Pub. L. No. 91-513, 84 Stat. 1242 (codified as amended at 21 U.S.C.A. §§ 801-890 (West 2005)).

[135] *Raich*, 545 U.S. at ___, 125 S. Ct. at 2203.

[136] 21 U.S.C § 801(3) (2000).

[137] *Id.* § 841(a).

[138] *Id.* § 812(a).

[139] *Id.* § 812 Schedule I(c)(10).

[140] *Id.* § 812(b)(1).

[141] California voters adopted Proposition 215, later codified as the Compassionate Use Act of 1996, which became effective November 6, 1996. *See* CAL. HEALTH & SAFETY CODE § 11362.5 (2005).

[142] *Id.* Specifically, the Compassionate Use Act of 1996 provides that:

> (b)(1) The people of the State of California hereby find and declare that the purposes of the Compassionate Use Act of 1996 are as follows:
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> (A) To ensure that seriously ill Californians have the right to obtain and use marijuana

protection for doctors who recommend marijuana to their patients.[143] Since that time, at least eight other states, including Hawai'i,[144] have enacted similar medical marijuana statutes.[145]

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for medical purposes where that medical use is deemed appropriate and has been recommended by a physician who has determined that the person's health would benefit from the use of marijuana in the treatment of cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana provides relief.

(B) To ensure that patients and their primary caregivers who obtain and use marijuana for medical purposes upon the recommendation of a physician are not subject to criminal prosecution or sanction.

(C) To encourage the federal and state governments to implement a plan to provide for the safe and affordable distribution of marijuana to all patients in medical need of marijuana.

(2) Nothing in this section shall be construed to supersede legislation prohibiting persons from engaging in conduct that endangers others, nor to condone the diversion of marijuana for nonmedical purposes.

(c) Notwithstanding any other provision of law, no physician in this state shall be punished, or denied any right or privilege, for having recommended marijuana to a patient for medical purposes.

(d) Section 11357, relating to the possession of marijuana, and Section 11358, relating to the cultivation of marijuana, shall not apply to a patient, or to a patient's primary caregiver, who possesses or cultivates marijuana for the personal medical purposes of the patient upon the written or oral recommendation or approval of a physician.

(e) For the purposes of this section, "primary caregiver" means the individual designated by the person exempted under this section who has consistently assumed responsibility for the housing, health, or safety of that person.

Id.

[143] *Id.* § 11362.5(c).

[144] Hawai'i's medical marijuana law, which was passed in 2000, provides that:

(a) Notwithstanding any law to the contrary, the medical use of marijuana by a qualifying patient shall be permitted only if:

(1) The qualifying patient has been diagnosed by a physician as having a debilitating medical condition;

(2) The qualifying patient's physician has certified in writing that, in the physician's professional opinion, the potential benefits of the medical use of marijuana would likely outweigh the health risks for the particular qualifying patient; and

(3) The amount of marijuana does not exceed an adequate supply.

HAW. REV. STAT. § 329-122(a) (2004); *see also id.* § 329-121 (defining terms); *id.* § 329-123 (requiring registration); *id.* § 329-124 (explaining that insurers are not required to provide coverage for medical marijuana); *id.* § 329-125 (providing protections from prosecution for qualifying patients and primary caregivers); *id.* § 329-126 (providing protection from prosecution for doctors who recommend marijuana); *id.* § 329-127 (requiring that marijuana plants seized from medical marijuana users be returned); *id.* § 329-128 (providing penalties for fraudulent misrepresentation).

[145] Gonzales v. Raich, 545 U.S. ___, ___, 125 S. Ct. 2195, 2199 n.1 (listing the statutes of nine states that allow marijuana use for medical purposes).

States have also taken other steps towards legitimizing medical marijuana use.[146] Alaska, Iowa, Montana, Tennessee, and the District of Columbia have rescheduled marijuana[147] to recognize that it has therapeutic use.[148] Legislators in California, Michigan, Missouri, New Hampshire, New Mexico, and Washington have passed non-binding resolutions asking the federal government to permit doctors to prescribe marijuana.[149] Maryland recognizes a medical necessity defense for medical marijuana, which means that patients can only be fined and not jailed.[150] Several states allow marijuana to be used for research purposes, although in many of these states, the programs have never been operational.[151] Additionally, a number of states have considered legalizing or removing criminal penalties for medical marijuana.[152]

In the states where medical use has been legalized, the available data indicates that few people are taking advantage of the programs.[153] In a November 2002 report to Congress, the General Accounting Office explained that "[r]elatively few people had registered to use marijuana for medical purposes in Oregon, Hawai['Ji and Alaska."[154] In all three states, less than one

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[146] *See* MARIJUANA POLICY PROJECT, STATE-BY-STATE MEDICAL MARIJUANA LAWS: HOW TO REMOVE THE THREAT OF ARREST 1 (2004) [hereinafter MARIJUANA POLICY PROJECT], *available at* http://www.mpp.org/pdf/sbs_report_2004.pdf.

[147] *Id.* at 11. Most states follow the federal government's lead in scheduling drugs. *See id.* At the federal level, marijuana is classified as a schedule I drug, which means that (1) it has "a high potential for abuse"; (2) it "has no currently accepted medical use in treatment in the United States"; and (3) "there is a lack of accepted safety for use of the drug or other substance under medical supervision." 21 U.S.C. § 812(b)(1) (2000). Despite an intense effort to reschedule marijuana, the Attorney General, who has authority under the CSA to reclassify drugs, has refused. *Raich*, 545 U.S. at ___, 125 S. Ct. at 2204. An Administrative Law Judge concluded in 1988 that marijuana should be reclassified as a schedule III drug, but that was not persuasive. *Id.* at ___, 125 S. Ct. at 2204 n.23. A schedule III drug is one that (1) "has a potential for abuse less than the drugs or other substances in schedules I and II"; (2) "has a currently accepted medical use in treatment in the United States"; and (3) "may lead to moderate or low physical dependence or high psychological dependence" when abused. 21 U.S.C. § 812(b)(3) (2000).

[148] MARIJUANA POLICY PROJECT, *supra* note 146, at 11.

[149] *Id.*

[150] *Id.* at 10.

[151] *Id.* at A-7 to -10.

[152] *Id.* at 15.

[153] U.S. GEN. ACCOUNTING OFFICE, GAO-03-189, MARIJUANA: EARLY EXPERIENCES WITH FOUR STATES' LAWS THAT ALLOW USE FOR MEDICAL PURPOSES 21 (2002) [hereinafter GAO REPORT], *available at* http://www.gao.gov/new.items/d03189.pdf.

[154] *Id.* at 3. Oregon, Hawai'i, and Alaska were the only states examined in which statewide data was available. *Id.* at 8.

percent of the state population had registered.[155] The report also noted that few physicians were recommending marijuana to their patients.[156]

IV. *GONZALES V. RAICH* FACTS AND PROCEDURAL HISTORY

Angel Raich and Diane Monson, the petitioners in *Raich*, are both California residents whose doctors recommended marijuana to treat their medical conditions.[157] Raich suffers from several ailments,[158] and marijuana appears to be the only effective treatment.[159] The Supreme Court acknowledged that discontinuing the prescribed use of marijuana "would certainly cause Raich excruciating pain and could very well prove fatal."[160] Monson suffers from a degenerative disease of the spine, which causes "severe chronic back pain and constant, painful muscle spasms."[161] Her doctor explained that marijuana appeared to be the only available treatment of Monson's condition.[162] While Monson cultivated her own marijuana, Raich relied on two caregivers to supply her with the drug,[163] in accordance with California law.[164] Neither the marijuana used by Raich and Monson, nor the supplies

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[155] *Id.* at 22. In Oregon, .05 percent or 1,691 people had registered to use medical marijuana as of February 2002; in Hawai'i, .04 percent or 573 people had registered as of April 2002; and in Alaska, .03 percent or 190 people had registered as of April 2002. *Id.*

[156] *Id.* at 26. Less than one percent of Hawai'i physicians and three percent of Oregon physicians had reported recommending marijuana to their patients. *Id.*

[157] Gonzales v. Raich, 545 U.S. ___, ___, 125 S. Ct. 2195, 2199-2200 (2005).

[158] Raich's medical conditions include:

> life-threatening weight loss, nausea, severe chronic pain (from scoliosis, temporomandibular joint dysfunction and bruxism, endometriosis, headache, rotator cuff syndrome, uterine fibroid tumor causing severe dysmenorrheal, chronic pain combined with an episode of paralysis that confined her to a wheelchair), post-traumatic stress disorder, non-epileptic seizures, fibromyalgia, inoperable brain tumor (probable meningioma or Schwannoma), paralysis on at least one occasion (the diagnosis of multiple sclerosis has been considered), multiple chemical sensitivities, allergies, and asthma.

Brief for Respondents at *4, *Raich*, 545 U.S. ___, 125 S. Ct. 2195 (No. 03-1454) (quoting Decl. of Frank Henry Lucido, M.D.).

[159] *Raich*, 545 U.S. at ___, 125 S. Ct. at 2200.

[160] *Id.*

[161] Raich v. Ashcroft, 352 F.3d 1222, 1225 (9th Cir. 2003), *rev'd sub nom. Raich*, 545 U.S. ___, 125 S. Ct. 2195.

[162] *Id.*

[163] *Raich*, 545 U.S. at ___, 125 S. Ct. at 2200.

[164] The Compassionate Use Act of 1996 also protects primary caregivers from criminal prosecution for obtaining marijuana for patients who have a doctor's recommendation. *See* CAL. HEALTH & SAFETY CODE § 11362.5(d) (West Supp. 2005).

needed for growing it ever entered the stream of commerce or crossed state lines.[165]

In August 2002, county and federal law enforcement agents went to Monson's home and investigated her for marijuana possession.[166] After a three-hour stand-off, law enforcement officials determined that Monson was not in violation of any state law, but federal Drug Enforcement Agency ("DEA") agents nevertheless confiscated her marijuana plants[167] because her possession of them violated the federal CSA.[168] Monson, Raich, and Raich's two caregivers subsequently filed suit in federal court seeking injunctive and declaratory relief to stop the Attorney General and the administrator of the DEA from enforcing the CSA against them.[169]

In March 2003, a federal district court judge denied their motion for a preliminary injunction.[170] Even though the court recognized that Raich and Monson would "suffer severe harm and hardship if denied use of" marijuana and that the voter-approved CUA clearly articulated the interest of Californians in allowing patients to use marijuana, the court concluded that a preliminary injunction could not be granted since it was not likely that Raich and Monson would succeed on the merits of their case.[171] The district court examined the constitutionality of the CSA as applied to Raich and Monson in light of *Lopez* and *Morrison*, but it determined that neither decision provided clear guidance for judging the constitutionality of the CSA, and did not undermine existing Ninth Circuit precedent upholding the validity of the CSA in the face of Commerce Clause challenges.[172] However, none of the three Ninth Circuit cases cited and discussed by the district court dealt specifically with the constitutionality of the CSA as applied to *medical* marijuana users who possessed the drug legally under state law.[173] Instead, the court relied on

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[165] *Raich*, 545 U.S. at ___, 125 S. Ct. at 2225 (O'Connor, J., dissenting).

[166] *Id.* at ___, 125 S. Ct. at 2200.

[167] *Id.*

[168] 21 U.S.C. § 801 (2000).

[169] *Raich*, 545 U.S. at ___, 125 S. Ct. at 2200.

[170] Raich v. Ashcroft, 248 F. Supp. 2d 918, 931 (N.D. Cal. 2003), *rev'd*, 352 F.3d 1222 (9th Cir. 2003), *rev'd sub nom. Raich*, 545 U.S. ___, 125 S. Ct. 2195.

[171] *Id.* at 930-31.

[172] *Id.* at 922-26 (citing and discussing United States v. Kim, 94 F.3d 1247 (9th Cir. 1996); United States v. Visman, 919 F.2d 1390 (9th Cir. 1990); United States v. Tisor, 96 F.3d 370 (9th Cir. 1996)).

[173] *See id.* at 924 (citing and discussing *Kim*, 94 F.3d 1247; *Visman*, 919 F.2d 1390; *Tisor*, 96 F.3d 370). In *Kim*, the defendant argued that possession of methamphetamine was not a commercial activity, and thus, not within Congress' Commerce Clause power. 94 F.3d at 1249. In *Visman*, the defendant argued that Congress did not have the power to regulate cultivation because "plants rooted in the soil [did not] affect interstate commerce." 919 F.2d at 1392. The defendant in *Tisor* argued that intrastate drug trafficking did not substantially affect interstate commerce. 96 F.3d at 373. None of these defendants' activities was lawful under state law nor

United States v. Oakland Cannabis Buyers' Cooperative,[174] and held that the medical necessity defense did not exist for violations of the CSA, even for patients using marijuana to treat life-threatening medical conditions.[175]

The Ninth Circuit, however, disagreed and ordered the district court to issue the preliminary injunction.[176] The court recognized its prior decisions upholding the constitutionality of the CSA under Commerce Clause challenges,[177] but distinguished them since none of those cases examined the application of the CSA to medical marijuana users.[178] The court first determined that Raich and Monson's marijuana use fell within a "*separate and distinct class of activities*: the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law."[179] The court then used the four factors established in *Morrison* to examine whether this class of activities had a substantial effect on interstate commerce.[180] First, the court determined that since medical marijuana was not sold or exchanged, it did not constitute commerce or "any sort of economic enterprise."[181] Second, the court found that the CSA contained no "jurisdictional hook" limiting it to activities that did substantially affect commerce.[182] Third, the court noted that while Congress had provided findings about how local distribution and possession of controlled substances affected interstate commerce, these findings did not address how cultivation of marijuana for medical use affected interstate commerce.[183] Finally, the court concluded that the link between medical marijuana use and interstate commerce was too "attenuated."[184] The Ninth Circuit additionally determined that not granting the injunction would result in "significant hardship" to Raich and Monson and would be contrary

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did any defendant claim medical uses for the drugs.

[174] 532 U.S. 483 (2001). The Court held that the medical necessity defense was not available for manufacturers and distributors of medical marijuana who were charged with violating the CSA. *Id.*

[175] *Raich*, 248 F. Supp. 2d at 928-31 (expanding the holding of *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483).

[176] Raich v. Ashcroft, 352 F.3d 1222, 1235 (9th Cir. 2003), *rev'd sub nom.* Gonzales v. Raich, 545 U.S. ___, 125 S. Ct. 2195 (2005).

[177] *Id.* at 1227 (citing United States v. Bramble, 103 F.3d 1475, 1479-80 (9th Cir. 1996); *Tisor*, 96 F.3d at 375; *Kim*, 94 F.3d at 1249-50; *Visman*, 919 F.2d at 1393; United States v. Montes-Zarate, 552 F.2d 1330, 1331 (9th Cir. 1977); United States v. Rodriquez-Camacho, 468 F.2d 1220, 1222 (9th Cir. 1972)).

[178] *Id.*

[179] *Id.* at 1228.

[180] *Id.* at 1229 (citing United States v. Morrison, 529 U.S. 598, 610-12 (2000)).

[181] *Id.* at 1229-31.

[182] *Id.* at 1231.

[183] *Id.* at 1231-32.

[184] *Id.* at 1233.

to the public interest.[185] As a result, the court reversed the district court, holding that Raich and Monson were likely to succeed on the merits of their claim that the CSA was unconstitutional as applied to them.[186] Because of this finding, the court did not examine the district court's rejection of the medical necessity defense.[187]

V. THE SUPREME COURT'S OPINION IN *RAICH*—*STARE DECISIS* IGNORED

Given the holdings in *Lopez* and *Morrison*, one might have expected the Supreme Court to invalidate the CSA, at least as applied to medical marijuana users like Raich and Monson. In fact, after *Lopez* and *Morrison*, some legal scholars hinted that a challenge to federal medical marijuana prohibitions would be successful.[188] However, in a six-to-three vote,[189] the *Raich* Court held that the federal prohibition of state-permitted marijuana cultivation was a constitutional exercise of Congress' power under the Commerce Clause.[190]

Raich and Monson conceded that the CSA was valid on its face, but maintained that it was unconstitutional as applied to them.[191] They argued that because their cultivation and use of marijuana was entirely intrastate and legal

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[185] *Id.* at 1234-35.

[186] *Id.* One of the judges on the three-judge panel hearing the case dissented, arguing that the instant case was indistinguishable from *Wickard*, and thus the CSA was a constitutional exercise of Congress' Commerce Clause power. *Id.* at 1237-38 (Beam, J., dissenting).

[187] *Id.* at 1227 (majority opinion).

[188] *See* Jesse H. Choper, *Taming Congress's Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 ARK. L. REV. 731, 738 (2003) ("[A]fter *Lopez* and *Morrison*, . . . Congress may not be able to prohibit possession or use of a certain product (e.g., drugs), but it could outlaw any transaction or exchange that involved that product."); Grant S. Nelson, *A Commerce Clause Standard for the New Millennium: "Yes" to Broad Congressional Control over Commercial Transactions; "No" to Federal Legislation on Social and Cultural Issues*, 55 ARK. L. REV. 1213, 1227 (2003) ("[L]eaving to the states prosecution of simple drug possession while requiring federal law enforcement to focus on drug trafficking seems to be an appropriate balance between local and national interests."); Alistair E. Newbern, *Good Cop, Bad Cop: Federal Prosecution of State-Legalized Medical Marijuana Use After United States v. Lopez*, 88 CAL. L. REV. 1575, 1633 (2000) (arguing that based on *Lopez* and *Morrison*, Congress may not have the authority to regulate medical marijuana use); Marcia Tiersky, *Medical Marijuana: Putting the Power Where It Belongs*, 93 NW. U. L. REV. 547, 593-94 (1999) (arguing that the CSA "suffers from the same defect" as the GFSZA struck down in *Lopez* and that "[t]he idea that the Court might be willing to strike down federal involvement in medical marijuana seems even more plausible when one considers Justice Thomas' position on the Commerce Clause").

[189] Justices Stevens, Kennedy, Souter, Ginsburg, Breyer, and Scalia formed the majority. Gonzales v. Raich, 545 U.S. ___, 125 S. Ct. 2195 (2005). Justices O'Connor, Thomas and Chief Justice Rehnquist dissented. *Id.*

[190] *Id.*

[191] *Id.* at ___, 125 S. Ct. at 2204-05.

under state law, the CSA unconstitutionally conferred criminal penalties on them.[192]

Writing for the majority, Justice Stevens analogized *Raich* with *Wickard*, another as-applied challenge to Congress' Commerce Clause power.[193] In both situations, the federal regulation impacted individuals who were producing a marketable commodity that was being consumed solely at home, never entering the stream of commerce.[194] *Wickard* had established that "Congress can regulate purely intrastate activity that is not itself 'commercial,' in that it is not produced for sale, if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity."[195] In *Wickard*, the Court determined that the record showed Congress was regulating this intrastate use because in the aggregate, home consumption substantially impacted the national wheat market.[196] Likewise, Justice Stevens found that "Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect price and market conditions."[197]

Justice Stevens found it more difficult to distinguish *Raich* from *Lopez* and *Morrison*, both in which he had dissented. First, he posited that the *Lopez* and *Morrison* holdings were very narrow and thus provided little assistance in deciding *Raich*.[198] Second, he pointed out that *Lopez* and *Morrison* were facial challenges, whereas Raich and Monson were arguing that the CSA was unconstitutional as applied, a distinction he described as "pivotal."[199] Third, Justice Stevens explained that the activities being regulated in *Lopez* and *Morrison* (gun possession and violence, respectively) were not economic, whereas "the activities regulated by the CSA are quintessentially economic."[200]

The majority then examined the arguments that the Ninth Circuit had found persuasive—that Raich and Monson's activities were part of a "separate and

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[192] *Id.*

[193] *Id.* at ___, 125 S. Ct. at 2205-09.

[194] *Id.* at ___, 125 S. Ct. at 2206.

[195] *Id.*

[196] *Id.* at ___, 125 S. Ct. at 2207; *see also* discussion *supra* Part II.B.

[197] *Raich*, 545 U.S. at ___, 125 S. Ct. at 2207.

[198] *Id.* at ___, 125 S. Ct. at 2209. Countering Raich and Monson's argument that *Lopez* and *Morrison* were analogous, Justice Stevens commented that "[i]n their myopic focus, they overlook the larger context of modern-era Commerce Clause jurisprudence preserved by those cases. Moreover, even in the narrow prism of respondents' creation, they read those cases far too broadly." *Id.*

[199] *Id.*

[200] *Id.* at ___, 125 S. Ct. at 2209-11 (noting that marijuana is a commodity "for which there is an established, and lucrative, interstate market").

distinct class" that was beyond the reach of Congress.[201] The Court disagreed with the Ninth Circuit decision, instead finding that Congress had a rational basis for concluding that medical marijuana users should not be exempted from the CSA.[202] The majority's rationale was that neither a doctor's recommendation for medical use, nor state legalization could create a "separate and distinct class" of medical marijuana users because neither distinction could prevent marijuana from affecting the interstate market.[203] The majority first explained that doctor-prescribed marijuana could not be considered separately because the CSA forbade marijuana use "for *any* purpose."[204] Not regulating medical use would impact supply and, in turn, the interstate market, which is within federal purview.[205] Next, Justice Stevens reasoned that because federal law trumps state law under the Supremacy Clause, a state law permitting marijuana use could not create a separate class of legal marijuana users.[206] State efforts to legalize medical marijuana use could not prevent the drug from entering or affecting the interstate market.[207] In fact, the majority opined, "[t]he exemption for cultivation by patients and caregivers can only increase the supply of marijuana in the California market."[208] According to the Court, while Raich and Monson's activities were intrastate and noncommercial, they sufficiently paralleled the farmer's wheat-growing activities in *Wickard*, and thus, were subject to federal regulation.[209] Finally, the Court refused to address Raich and Monson's due process and medical necessity defense claims.[210] Even though those issues were raised in their complaint, ruled on by the district court, and briefed by the parties for the Supreme Court, the majority decided not to examine those issues since they were not reached by the Ninth Circuit.[211]

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[201] *Id.* at ___, 125 S. Ct. at 2211.

[202] *Id.*

[203] *Id.* at ___, 125 S. Ct. at 2211-15.

[204] *Id.* at ___, 125 S. Ct. at 2211.

[205] *Id.* at ___, 125 S. Ct. at 2212. The Court explained that:

> [o]ne need not have a degree in economics to understand why a nationwide exemption for the vast quantity of marijuana (or other drugs) locally cultivated for personal use (which presumably would include use by friends, neighbors, and family members) may have a substantial impact on the interstate market for this extraordinarily popular substance.

Id.

[206] *Id.* at ___, 125 S. Ct. at 2212 ("The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail.").

[207] *Id.* at ___, 125 S. Ct. at 2213.

[208] *Id.* at ___, 125 S. Ct. at 2214.

[209] *Id.* at ___, 125 S. Ct. at 2215.

[210] *Id.*

[211] *Id.*; *see also* Brief for Respondents, *supra* note 158, at 45-50; Reply Brief for the Petitioners at 19, *Raich*, 545 U.S. ___, 125 S. Ct. 2195 (No. 03-1454).

Justice Scalia, who voted with the majority in *Lopez* and *Morrison*, wrote a separate concurrence in *Raich*. Attempting to draw a distinction between *Raich* and *Lopez/Morrison*, he explained that his "understanding of the doctrinal foundation on which [the Court's] holding rests is, if not inconsistent with that of the Court, at least more nuanced."[212]

Justice Scalia thought it important that the regulation in question was of the third type permitted[213]—a regulation of an activity that substantially affected interstate commerce.[214] As a result, he posited that Congress' power had to come not only from the Commerce Clause, but also from the Necessary and Proper Clause.[215] Congress' ability to regulate an activity that was not in itself interstate commerce could only be constitutional if that regulation was *necessary* in carrying out its efforts in regulating interstate commerce.[216]

Justice Scalia indicated that it was the Necessary and Proper Clause that gave the federal government such broad regulatory powers.[217] He explained that the lesson from *Lopez* and *Morrison* was that Congress' power still had limits and that a "remote chain of inferences" could not be used to sustain regulation of local activities.[218] Thus, Justice Scalia downplayed Justice Stevens' inquiry into whether the regulation was economic or non-economic, explaining instead that "[t]he relevant question is simply whether the means chosen are 'reasonably adapted' to the attainment of a legitimate end under the commerce power."[219]

Therefore, in applying his analysis to the *Raich* facts, Justice Scalia found it significant that home-grown marijuana is "never more than an instant from the interstate market—and this is so whether or not the possession is for medicinal use or lawful use under the laws of a particular State."[220] It made sense then, to Justice Scalia, to permit Congress to regulate medical use because otherwise, its efforts to regulate interstate traffic of the drug would

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[212] *Raich*, 545 U.S. at ___, 125 S. Ct. at 2215 (Scalia, J., concurring).

[213] For a discussion of the three types of regulations permissible under the Commerce Clause, see *supra* Part II.C.

[214] *Raich*, 545 U.S. at ___, 125 S. Ct. at 2215-16 (Scalia, J., concurring).

[215] *Id.* The Necessary and Proper Clause empowers Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. CONST. art. I, § 8, cl. 18.

[216] *Raich*, 545 U.S. at ___, 125 S. Ct. at 2216 (Scalia, J., concurring) ("Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.").

[217] *Id.*

[218] *Id.* at ___, 125 S. Ct. at 2216-17.

[219] *Id.* at ___, 125 S. Ct. at 2217 (quoting United States v. Darby, 312 U.S. 100, 121 (1941)).

[220] *Id.* at ___, 125 S. Ct. at 2219.

be crippled.[221] But beyond explaining that the regulations in *Lopez* and *Morrison* were connected to interstate commerce only through a "remote chain of inferences,"[222] Justice Scalia failed to distinguish *Raich*, which arguably presented an equally remote connection to interstate commerce.

Justice O'Connor dissented, joined by Chief Justice Rehnquist and Justice Thomas. Justice O'Connor leveled a number of criticisms at the majority's opinion, including that *Raich* was indistinguishable from *Lopez* and *Morrison*,[223] the decision encouraged Congress to write broad, all-encompassing legislation,[224] medical marijuana users did create a distinct class,[225] medical marijuana use was non-economic and there was no showing of how it affected interstate commerce,[226] and *Raich* was distinguishable from *Wickard*.[227] Echoing Justice Kennedy's concurrence in *Lopez*,[228] Justice O'Connor emphasized that one of "federalism's chief virtues" was "that it

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[221] *Id.* at ___, 125 S. Ct. at 2219-20.

[222] *Id.* at ___, 125 S. Ct. at 2217.

[223] *Id.* at ___, 125 S. Ct. at 2220-29 (O'Connor, J., dissenting). Justice O'Connor argued that the majority opinion was inconsistent with *Lopez* and *Morrison* in its definition of commerce because "*Lopez* ma[de] clear that possession is not itself commercial activity." *Id.* at ___, 125 S. Ct. at 2225. She also argued there were inconsistencies regarding the scope of the Court's power to review Congress' determination that an activity substantially affects interstate commerce and the extent to which the Court will permit tenuous connections between a regulation and its effects on interstate commerce. *Id.* at ___, 125 S. Ct. at 2220-29.

[224] *Id.* at ___, 125 S. Ct. at 2222-23. Justice O'Connor argued that the majority's emphasis on the necessity of regulating medical marijuana use in order to facilitate drug trafficking eradication goals will enable Congress to hereafter regulate local activities simply by folding them into broad statutes. *Id.* Thus, the trilogy of decisions (*Lopez*, *Morrison* and *Raich*) created "nothing more than a drafting guide." *Id.* at ___, 125 S. Ct. at 2223.

[225] *Id.* at ___, 125 S. Ct. at 2224.

> A number of objective markers are available to confine the scope of constitutional review here. Both federal and state legislation—including the CSA itself, the California Compassionate Use Act, and other state medical marijuana legislation—recognize that medical and nonmedical (*i.e.*, recreational) uses of drugs are realistically distinct and can be segregated, and regulate them differently.

Id.

[226] *Id.* at ___, 125 S. Ct. at 2224-29. Justice O'Connor argued that the majority's definition of "economic activity" is so broad that it "threatens to sweep all of productive human activity into federal regulatory reach." *Id.* at ___, 125 S. Ct. at 2224.

[227] *Id.* at ___, 125 S. Ct. at 2225-27. Justice O'Connor explained that in *Wickard*, there were findings to indicate how home-consumption of wheat affected the national market; whereas "the CSA's introductory declarations are too vague and unspecific to demonstrate that the federal statutory scheme will be undermined if Congress cannot exert power over individuals like [Raich and Monson]." *Id.* at ___, 125 S. Ct. at 2227-28. In addition, Justice O'Connor noted that because "California, like other States, has carved out a limited class of activity for distinct regulation, the inadequacy of the CSA's findings is especially glaring." *Id.* at ___, 125 S. Ct. at 2228.

[228] *See* discussion *supra* Part II.C.

promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'"[229] She criticized the majority for "extinguish[ing] that experiment."[230]

Although he joined Justice O'Connor's dissent, Justice Thomas also wrote a separate dissenting opinion. Justice Thomas' criticism of the majority opinion concentrated on the fact that Raich and Monson's marijuana use was neither economic nor interstate in scope.[231] He pointed out that "Monson and Raich neither buy nor sell the marijuana that they consume. They cultivate their cannabis entirely in the State of California—it never crosses state lines, much less as part of a commercial transaction."[232]

Justice Thomas also argued that Raich and Monson's activities were set apart from other producers and users of marijuana because the California government had instituted controls.[233] These controls, he maintained, prevented medical marijuana from substantially affecting the interstate market or impeding federal efforts to stop drug trafficking.[234] Therefore, Raich and Monson constituted a distinguishable class with a valid challenge that the CSA was unconstitutional as applied to their group.[235]

Justice Thomas warned that the majority's opinion essentially gives the federal government general police power by approving of Congress' invasion "on States' traditional police powers to define the criminal law and to protect the health, safety, and welfare of their citizens."[236] The problem, in part, he maintained, is that the "substantial effects" test is too "malleable," and thus, should be abandoned.[237] The majority's manipulation of this test, Justice Thomas warned, will create inconsistency in Commerce Clause jurisprudence.[238]

Finally, Justice Thomas criticized the majority opinion for distinguishing *Lopez* and *Morrison* based on the fact that those cases involved facial

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[229] *Raich*, 545 U.S. at ___, 125 S. Ct. at 2220 (O'Connor, J., dissenting) (quoting New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)).

[230] *Id.* at ___, 125 S. Ct. at 2221.

[231] *Id.* at ___, 125 S. Ct. at 2229-30 (Thomas, J., dissenting).

[232] *Id.* at ___, 125 S. Ct. at 2230.

[233] *Id.* at ___, 125 S. Ct. at 2232.

[234] *Id.*

[235] *Id.* at ___, 125 S. Ct. at 2231-33.

[236] *Id.* at ___, 125 S. Ct. at 2233-34.

[237] *Id.* at ___, 125 S. Ct. at 2235 (citing United States v. Morrison, 529 U.S. 598, 627 (2000) (Thomas, J., concurring)). Justice Thomas also made this argument in his concurring opinions in *Lopez* and *Morrison*. *See* United States v. Lopez, 514 U.S. 549, 584-602 (1995) (Thomas, J., concurring); *Morrison*, 529 U.S. at 627 (Thomas, J., concurring).

[238] *Raich*, 545 U.S. at ___, 125 S. Ct. at 2235-37 (Thomas, J., dissenting).

challenges as opposed to applied challenges.[239] In addition to the fact that medical marijuana users as a class could easily be "excis[ed]" from the CSA's coverage, Justice Thomas pointed to several cases in which the Court entertained as-applied challenges.[240]

VI. ANALYSIS OF THE DECISION

A. Inconsistency With Lopez *and* Morrison *Will Likely Lead to Confusion and Broad Legislating*

The *Raich* decision was inconsistent with the Court's shift toward contracted Commerce Clause powers articulated in *Lopez* and *Morrison*. The *Raich* majority's attempt to distinguish *Lopez* and *Morrison* will likely have two troublesome consequences. First, courts will be confused about proper Commerce Clause analysis, particularly regarding as-applied challenges, which may lead to courts refusing to hear as-applied challenges entirely. Second, Congress will write broad, all-encompassing legislation to protect it from judicial Commerce Clause review.

The similarities between *Raich* and *Lopez* are striking, especially when utilizing *Morrison*'s four-factor Commerce Clause analysis.[241] Since *Raich* was an as-applied challenge, this analysis will focus on whether the CSA's regulation of *medical marijuana use* was constitutional. The first prong of the *Morrison* analysis requires looking at whether the statute regulates an economic enterprise. Both *Raich* and *Lopez* involved criminal statutes that regulated possession—an activity that, by itself, is not economic. While it is true that marijuana is a commodity that is often trafficked between states, the same is true of guns. In each case, however, the issue was whether simple possession of that commodity could be federally regulated. The answer in *Lopez* was that it could not. Arguably, marijuana is even less of a commodity than a gun since the CSA has prevented any *legal* market for marijuana from ever forming.

Neither the CSA nor the statute in question in *Lopez* (the GFSZA) contained a jurisdictional element to ensure that the cases to which the regulation applied actually affected interstate commerce. Thus, *Raich* fails under the second part of the *Morrison* analysis, as *Lopez* did. *Raich* and *Lopez* are also similar in that neither of the statutes involved contained express legislative findings regarding how the regulated activity affected interstate

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[239] *Id.* at ___, 125 S. Ct. at 2237-38.

[240] *Id.* (citing United States v. Raines, 362 U.S. 17, 20-21 (1960); Katzenbach v. McClung, 379 U.S. 294, 295 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 249 (1964); Wickard v. Filburn, 317 U.S. 111, 113-14 (1942)).

[241] See discussion *supra* of the four-factor test articulated in *Morrison* in Part II.C.

commerce. While it is true that the CSA did contain findings about general interstate traffic of controlled substances, the statute contained nothing indicating how medical marijuana use affected interstate commerce.[242] Again, since *Raich* was an as-applied challenge, the Court was required to look at whether the CSA was constitutional as applied to Raich and Monson as medical marijuana users. Without specific findings about medical marijuana, the *Raich* outcome should have mirrored *Lopez* since there was nothing to enable the Court "to evaluate the legislative judgment that *the activity in question* substantially affected interstate commerce."[243]

The final step in the *Morrison* test requires examining the link between the regulated activity and its effect on interstate commerce. There are arguments that can be made regarding how medical marijuana use could affect the national supply of the drug. Justice Stevens expected that "the high demand in the interstate market will draw [marijuana cultivated for medical purposes] into [the national] market."[244] However, proponents of the GFSZA made similar arguments in *Lopez* to connect gun possession with interstate commerce.[245] In that case, Chief Justice Rehnquist instructed that connections that are too tenuous will fail because otherwise "it [would be] difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign."[246] The connection between the medical marijuana supply and the vast interstate market is tenuous in part because there were no findings regarding how it impacts interstate commerce. Perhaps even more significant is that the available evidence suggests that the number of medical marijuana users is so small[247] that any spillover of their supply into the national market could hardly be substantial. And, since the states that do permit medical marijuana require a doctor's recommendation and in some cases, registration, there are controls in place to prevent medical marijuana from entering the illicit drug market. As a result, law enforcement officials have reported that "the introduction of medical marijuana laws has had little impact on their operations."[248]

Because *Raich* and *Lopez* seem indistinguishable using *Morrison*'s four-factor test, confusion is inevitable. *Raich* guides us to the conclusion that the distinguishing factor was its status as an as-applied, rather than a facial

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[242] *See Raich*, 545 U.S. at ___, 125 S. Ct. at 2208.

[243] *See* United States v. Lopez, 514 U.S. 549, 563 (1995) (emphasis added).

[244] *Raich*, 545 U.S. at ___, 125 S. Ct. at 2207.

[245] *Lopez*, 514 U.S. at 563-64.

[246] *Id.* at 564.

[247] *See supra* note 155.

[248] GAO REPORT, *supra* note 153, at 32.

challenge.[249] It follows that some courts might erroneously decide that as-applied challenges to the Commerce Clause are without merit. In fact, the Ninth Circuit has already leaned in this direction.[250] In an unpublished opinion filed two months after *Raich*, the Ninth Circuit noted "[t]here is also a serious question as to whether as applied challenges to the constitutionality of statutes brought under the Commerce Clause are still valid after the Supreme Court's recent decision in *Gonzales v. Raich*."[251]

Justice Stevens likely did not intend such a result. The confusion was created through Justice Stevens' struggle to distinguish precedent that he disagreed with. The Court has never held that as-applied challenges to the Commerce Clause cannot be heard. As Justice Thomas pointed out, the Court has considered as-applied challenges to Congress' Commerce Clause power on a number of occasions without questioning their propriety.[252]

The second concern about *Raich* is that it will encourage Congress to write broad legislation.[253] Justice Stevens pointed out that the statute in *Lopez* "was a brief, single-subject statute" whereas the CSA "was a lengthy and detailed statute creating a comprehensive framework."[254] Thus, Justice Stevens opined that medical marijuana use could be regulated since it was an essential part of a comprehensive regulatory scheme.[255] This distinction may signal to Congress that it can regulate intrastate commerce by folding regulated activities into broad statutes that have valid interstate commerce components.

B. Raich*'s Precedential Value Will Likely Be Short-Lived*

The impact of *Raich* should not be overstated since its value as precedent will likely be short-lived. The curious outcome (and resulting confusion) can be attributed to Justices Kennedy and Scalia's dramatic shift in Commerce Clause application. Justice Kennedy's concurring opinion in *Lopez* made

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[249] *Raich*, 545 U.S. at ___, 125 S. Ct. at 2209. Justice Stevens explained that:

> [T]he statutory challenges at issue in [*Lopez* and *Morrison*] were markedly different from the challenge [Raich and Monson] pursue in the case at hand. Here, respondents ask us to excise individual applications of a concededly valid statutory scheme. In contrast, in both *Lopez* and *Morrison*, the parties asserted that a particular statute or provision fell outside Congress' commerce power in its entirety. This distinction is pivotal . . . .

Id.

[250] *See* United States v. Tashbook, 144 F. App'x. 610, 614 n.2 (9th Cir. 2005).

[251] *Id.*

[252] *Raich*, 545 U.S. at ___, 125 S. Ct. at 2238 (Thomas, J., dissenting) (citing Katzenbach v. McClung, 379 U.S. 294, 295 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 249 (1964); Wickard v. Filburn, 317 U.S. 111, 113-14 (1942)).

[253] *See id.* at ___, 125 S. Ct. at 2222-23 (O'Connor, J., dissenting).

[254] *Id.* at ___, 125 S. Ct. at 2209-10 (majority opinion).

[255] *Id.* at ___, 125 S. Ct. at 2210.

clear that a state's experimentation with social issues was important, and that states should be allowed to use their own judgment and expertise in regulating criminal behavior.[256] But this same argument failed when applied to medical marijuana use. It seems probable that Justices Kennedy and Scalia will revert back to their *Lopez* and *Morrison* mindsets given a different set of facts. Therefore, *Raich* could represent an anomaly based on strongly-held biases against marijuana, and *Raich*'s precedential value could soon expire.

However, there are already signs that *Raich* was successful in damaging the *Lopez/Morrison* shift toward contracted Commerce Clause power.[257] In *United States v. Maxwell*,[258] the defendant was charged with violating federal law for possessing child pornography after police recovered pornographic images on computer disks owned by the defendant.[259] In a pre-*Raich* decision, the Eleventh Circuit used *Morrison*'s four-factor analysis to vacate the defendant's conviction since the only connection with interstate commerce was that the disks were manufactured out-of-state.[260] However, the post-*Raich* Supreme Court vacated the Eleventh Circuit decision and remanded "for further consideration in light of *Gonzales v. Raich*."[261]

Similarly, in *United States v. Jeronimo-Bautista*,[262] a Utah district court dismissed federal charges for possession of child pornography.[263] In its pre-*Raich* decision, the district court found it "difficult to conceive of an activity any less commercial that [sic] the 'simple local possession of a good produced for personal use only.'"[264] After *Raich*, however, the Tenth Circuit reversed, citing *Raich*'s expansive definition of "economics" as including "production, distribution, and consumption of commodities."[265]

The *Maxwell* and *Jeronomo-Bautista* decisions are not surprising. Child pornography falls within that same category as marijuana—illicit behavior that judges do not want to be tagged with condoning. *Raich* will not truly be tested until the Court is presented with a statute that does not elicit such strong reactions based on deeply held beliefs.

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[256] United States v. Lopez, 514 U.S. 549, 581-83 (1995) (Kennedy, J., concurring).

[257] *See* United States v. Maxwell, ___ U.S. ___, 126 S. Ct. 321 (2005); United States v. Jeronimo-Bautista, 425 F.3d 1266 (10th Cir. 2005).

[258] 386 F.3d 1042 (11th Cir. 2004), *vacated*, ___ U.S. ___, 126 S. Ct. 321.

[259] *Id.* at 1045.

[260] *Id.* at 1055.

[261] *Maxwell*, ___ U.S. ___, 126 S. Ct. 321.

[262] 319 F. Supp. 2d 1272 (C.D. Utah 2004), *rev'd*, 425 F.3d 1266 (10th Cir. 2005).

[263] *Id.*

[264] *Id.* at 1279 (quoting United States v. Kallestad, 236 F.3d 225, 231 (5th Cir. 2000) (Jolly, J., dissenting)).

[265] United States v. Jeronimo-Bautista, 425 F.3d 1266, 1271, 1273 (10th Cir. 2005) (quoting Gonzales v. Raich, 545 U.S. ___, ___, 125 S. Ct. 2195, 2211 (2005)) (internal quotation marks omitted).

C. Why Justice Stevens Ignored the Medical Necessity and Due Process Claims

Justice Stevens was not pleased with the ramifications for medical marijuana users, like Raich and Monson, who depend on the pain-relieving qualities of cannabis to get through the day.[266] In a speech at a bar association meeting in August 2005, Justice Stevens described the outcome of *Raich* as "unwise."[267] Justice Stevens made it clear that his personal feelings about the federal government's crackdown on medical marijuana users had to be trumped by his "duty to uphold the application of the federal statute."[268] Those comments fail to explain why he chose to ignore Raich and Monson's due process and medical necessity defense claims.

Justice Stevens had previously indicated that he would recognize a medical necessity defense for medical marijuana users prosecuted for violating the CSA.[269] He concurred in *Oakland Cannabis Buyers' Cooperative*, in which the Court held that the medical necessity defense was not available to medical marijuana manufacturers and distributors.[270] Justice Stevens wrote separately to clarify that the Court's holding was limited to a denial of the medical necessity defense for *manufacturers and distributors* of medical marijuana.[271] Thus, the question of whether the defense was available to medical marijuana *users* remained unanswered.[272] In fact, Justice Stevens counseled that "precedent has expressed no doubt about the viability of the common-law defense, even in the context of federal criminal statutes that do not provide for it in so many words."[273]

So why did Justice Stevens not jump at the chance to answer that question in *Raich*? The simple answer is that he would have lost his opportunity to limit the holdings of *Lopez* and *Morrison*. While *Oakland Cannabis Buyers' Cooperative* provides hints about Justice Stevens' opinion on the medical necessity defense for medical marijuana users, the opinion is even more revealing of his colleagues' thoughts. Justice Thomas delivered the opinion of the Court, joined by Chief Justice Rehnquist and Justices O'Connor, Scalia,

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[266] Linda Greenhouse, *Justice Weighs Desire v. Duty (Duty Prevails)*, N.Y. TIMES, Aug. 25, 2005, at A1.

[267] *Id.*

[268] *Id.*

[269] *See* United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 499-503 (2001) (Stevens, J., concurring).

[270] *Id.* at 494 (majority opinion).

[271] *Id.* at 499-501 (Stevens, J., concurring).

[272] *Id.* at 501.

[273] *Id.* (citing United States v. Bailey, 444 U.S. 394, 415 (1980)).

and Kennedy. While the holding was narrow, "that medical necessity is not a defense to manufacturing and distributing marijuana,"[274] the dictum was clear that those five justices intended to extend the holding to medical marijuana users.[275] In a footnote, Justice Thomas

> clarif[ied] that nothing in our analysis, or the [CSA], suggests that a distinction should be drawn between the prohibitions on manufacturing and distributing and the other prohibitions in the Controlled Substances Act. Furthermore, the very point of our holding is that there is no medical necessity exception to the prohibitions at issue, even when the patient is "seriously ill" and lacks alternative avenues for relief. . . . We reject the argument that these factors warrant a medical necessity exception.[276]

If Justice Stevens had affirmed the Ninth Circuit's decision in *Raich* on medical necessity grounds, he would no longer have been in the majority and would have lost his opportunity to do damage to the *Lopez* and *Morrison* holdings.

The same problem would have arisen if Justice Stevens sought to affirm based on Raich and Monson's substantive due process claims, even though precedent exists to support them.[277] The Fifth Amendment proclaims that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law."[278] Raich argued that, at least in her case, where forgoing marijuana use could result in death, the CSA deprived her of the right to life.[279] And for patients who are not necessarily facing death, the CSA also arguably denies a liberty interest—freedom from severe pain.[280]

The notion that freedom from pain implicates a constitutionally-protected liberty interest is not that far-fetched. In *Cruzan v. Director, Missouri Department of Health*,[281] the Court recognized a liberty interest in refusing medical treatment.[282] In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[283] the Court proclaimed that "[a]t the heart of liberty is the right to define one's own concept of existence," including a woman's decision of whether or not to undergo the pain, anxiety, and physical constraints of con-

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[274] *Id.* at 494 (majority opinion).

[275] *Id.* at 495 n.7.

[276] *Id.*

[277] *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702 (1997); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261 (1990).

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

[279] Brief for Respondents, *supra* note 158, at 48.

[280] *Id.*

[281] 497 U.S. 261.

[282] *Id.* at 278-79.

[283] 505 U.S. 833 (1992).

tinuing a pregnancy.[284] And in *Washington v. Glucksberg*,[285] the concurring opinions indicated that individuals suffering from severe pain may have a liberty interest in alleviating their suffering.[286] These cases recognized that the Due Process Clause protects fundamental individual rights, which include a person's right to make decisions that would prevent suffering. It follows that a statute prohibiting an individual from accessing medication that relieves profound pain infringes on that constitutionally-protected liberty interest.

V. CONCLUSION

Without a doubt, the *Raich* decision will have a serious impact on critically ill patients in this country—people whose quality of life is tied directly and substantially to the use of marijuana as prescribed by their doctors. For these people, the Supreme Court's decision in *Raich* presents them with two unenviable choices—break the law or suffer excruciating pain. After the Supreme Court's ruling, Angel Raich reported that she would continue to use marijuana, saying, "[i]f I stopped using cannabis I would die. I am not going to stop."[287] Her lawyers indicated that they would continue fighting the legal battle by urging the lower courts to grant the injunction based on Raich and Monson's substantive due process claims.[288]

However, *Raich*'s impact on Commerce Clause jurisprudence likely will not be as significant. Although *Raich* may appear to limit the Court's restrictions on Congress' power imposed in *Lopez* and *Morrison*, its value as precedent is small since Justices Scalia and Kennedy are likely to jump back to the other side of the fence given a different set of facts.[289] *Lopez* and *Morrison* represent a significant shift in Commerce Clause jurisprudence, which was tempered only slightly by *Raich*.[290]

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[284] *Id.* at 852.

[285] 521 U.S. 702 (1997).

[286] *Id.* at 745 (Stevens, J., concurring) (quoting *Casey*, 505 U.S. at 851) ("Avoiding intolerable pain . . . and . . . agony is certainly 'at the heart of [the] liberty . . . to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.'"); *id.* at 790-92 (Breyer, J., concurring) (suggesting that a law preventing a patient from receiving medication to alleviate pain would violate the patient's fundamental rights); *id.* at 777 (Souter, J., concurring) (quoting Schloendorff v. Soc'y of New York Hosp., 105 N.E. 92, 93 (N.Y. 1914)) ("This liberty interest in bodily integrity [includes that] 'every human being of adult years and sound mind has a right to determine what shall be done with his own body' in relation to his medical needs.").

[287] CBS5: Bay City News Wire, Update: Raich Vows to Continue Medical Marijuana Battle, http://cbs5.com/localwire/localfsnews/bcn/2005/06/06/n/HeadlineNews/MEDICAL-MARIJUANA/resources_bcn_html (last visited Nov. 13, 2005).

[288] *Id.*

[289] *See supra* Part VI.B.

[290] *See supra* Part VI.A.

Justice Stevens ignored meritorious legal arguments that could have changed the outcome for Raich and Monson—an outcome he admits was unwise.[291] Because he would not have succeeded in establishing new precedent regarding the medical necessity defense, he instead advantageously used Justices Scalia and Kennedy's fence-jumping to try to limit the scopes of *Lopez* and *Morrison*.[292]

Amanda M. Jones[293]

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[291] *See supra* Part VI.C.

[292] *See supra* Part VI.C.

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Hawai'i's Patients' Bill of Rights: Saving the Right to External Review

I. INTRODUCTION

When doctors discovered a large, pre-cancerous polyp in Edwin Jouxson's colon, everyone hoped for the best but feared the worst.[1] At the time, there was only one way to find out whether such a growth was malignant: invasive surgery requiring up to a week in the hospital and six weeks of recovery.[2] Edwin was relieved to discover that, thanks to modern medicine, a non-invasive Positron Emission Tomography ("PET") scan could determine whether the polyp was cancerous and required further intervention.[3] PET scan technology was heralded as a means of reducing patient risk and cost, but Edwin's insurance company wouldn't cover the procedure, maintaining that evidence did not support the use of a PET scan for Edwin's purpose.[4]

Edwin lived in Hawai'i where state law allows him to take his coverage denial to the Insurance Commissioner for review.[5] In Edwin's case, the Commissioner decided Edwin's doctor was right and the insurance company should have paid for the procedure, and the insurance company's decision to deny treatment was reversed.[6] Although the PET scan would have cost the insurance company approximately $2500, the Commissioner ordered the insurer not only to reimburse Edwin $1667, but also to pay an additional $40,000 in legal fees.[7]

Most of us are not as fortunate as Edwin. The same statute that helped Edwin get his PET scan does not apply to the majority of people. Plans that are governed by the federal Employee Retirement Income Security Act of

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[1] *See* Helen Altonn, *HMSA's Rejection of Claim Results in $41,667 Payout*, HONOLULU STAR-BULL., Apr. 29, 2002, at A1, *available at* http://starbulletin.com/2002/04/29/news/story2.html.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *See* Patients' Bill of Rights and Responsibilities Act, HAW. REV. STAT. § 432E-6 (2004).

[6] Altonn, *supra* note 1, at A1.

[7] *Id.*

1974 ("ERISA") are excluded from state-enacted protections.[8] This includes most employer-sponsored health care plans.[9]

Employer-sponsored health care programs are the predominant form of health care in the United States, covering two out of three Americans.[10] Most employer-sponsored plans are administered by managed health care organizations.[11] Approximately 160 million Americans are enrolled in managed health care organizations such as health maintenance organizations ("HMOs") and preferred provider organizations ("PPOs").[12] As a result of this phenomenon, doctors fear "there is a significant risk that medical treatment decisions will be made, not by a patient's physician, but by an HMO employee who may subordinate proper patient care to cost considerations."[13] The integrity of medical treatment decisions becomes an issue when insurer and health-care provider functions are commingled.[14] The fifty states have responded to this issue with a cascade of legislation, passing over nine hundred laws on the subject in the past eight years.[15] Hawai'i rejoined this response in 1998, passing its own Patients' Bill of Rights.[16]

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[8] *See* Employee Retirement Income Security Act (ERISA) § 4(a), 29 U.S.C. § 1003(a) (2000). ERISA provides, *inter alia*, that the provisions of ERISA "shall apply to any employee benefit plan if it is established or maintained . . . by any employer engaged in commerce or in any industry or activity affecting commerce" and is not subject to any exemptions enumerated in 29 U.S.C. § 1003(b) (2000) (excluding, among other things, governmental and church plans from ERISA coverage). *Id.* For the definitions of "employee benefit plan," "employee," and other key terms, see *id.* § 1002.

[9] *See id.* § 1003(a).

[10] *See Health Ins. Coverage in Am.*, 2003 DATA UPDATE, (Kaiser Comm'n on Medicaid and the Uninsured, D.C.), Nov. 2004, at 22, *available at* http://www.kff.org/uninsured/7153.cfm.

[11] AMERICAN ASS'N OF HEALTH PLANS, HEALTH PLANS AND EMPLOYER-SPONSORED PLANS 1 (Oct. 1999), *available at* http://www.ahip.org/content/default.aspx?bc=41|331|366.

[12] National Conference of State Legislatures, Managed Care & States [hereinafter National Conference], http://www.ncsl.org/programs/health/managed.htm (last visited Sept. 11, 2005).

[13] Brief for AMA & Texas Medical Ass'n as Amici Curiae Supporting Petitioners at 2, Roark v. Humana, Inc., 539 U.S. 986 (2003) (No. 02-1826), 2003 WL 22428310.

[14] *Id.* The struggle to maintain autonomous medical judgment uncorrupted by profit motives is not new, dating back to the nineteenth century's doctrine prohibiting "the corporate practice of medicine." Andre Hampton, *Resurrection of the Prohibition on the Corporate Practice Of Medicine: Teaching Old Dogma New Tricks*, 66 U. CIN. L. REV. 489, 491 (1998) (arguing that monetary incentives cloud medical judgment); *see also* Christine E. Brasel, Comment, *Managed Care Liability: State Legislation May Arm Angry Members with Legal Ammo to Fire at Their MCOs for Cost Containment Tactics . . . But Could it Backfire?*, 27 CAP. U. L. REV. 449, 467-69 (1999) (positing that HMO medical practices are corrupted by profit motives).

[15] National Conference, *supra* note 12.

[16] Patients' Bill of Rights and Responsibilities Act, HAW. REV. STAT. § 432E (2004).

State laws attempting to preserve autonomous medical judgment in the face of increasing HMO enrollment have taken different forms.[17] Most states require managed care organizations to maintain some form of internal appeals process.[18] Some state statutes apply only to HMOs but not to other forms of managed care.[19] External review at the state level is provided in about half of the states, although the external review decisions are not always binding on the managed care organization.[20] In Hawai'i, binding external review through the Insurance Commissioner has been available under the Patients' Bill of Rights[21] until recently, but after the 2005 Hawai'i Supreme Court decision in *Hawai'i Management Alliance Ass'n v. Commissioner* ("HMAA"),[22] patients with health plans governed by ERISA can no longer appeal through the Commissioner.[23]

This Comment focuses on the external review procedures currently available in Hawai'i for health care plan enrollees to appeal denials of claims, and examines the recent Hawai'i Supreme Court *HMAA* decision which held that ERISA preempts those procedures. Part II explores the present status of ERISA and pre-emption of state attempts to provide appeal processes for citizens denied medical treatment. Part III discusses the current Hawai'i external review statute and the decision in *HMAA*. Part IV briefly analyzes existing proposals and pending Hawai'i legislation dealing with grievance procedures. Finally, Part V proposes a statutory scheme designed to satisfy the Hawai'i Supreme Court and stand up to future scrutiny.

II. ERISA OVERVIEW

Widespread mismanagement of employee pension funds in the 1960s and 1970s heightened workplace anxiety, eventually prompting Congressional action.[24] The "Studebaker Incident"[25] focused national attention on the

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[17] *See* Joyce Krutick Craig, *Managed Care Grievance Procedures: The Dilemma and the Cure*, 21 J. NAT'L ASS'N ADMIN. L. JUDGES 336, 350-51 (Fall 2001) (summarizing the provisions of each state's statutes).

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] HAW. REV. STAT. § 432E-6.5 (2004).

[22] 106 Hawai'i 21, 100 P.3d 952 (2004), *cert. denied*, ___ U.S. ___, 125 S. Ct. 2524 (2005).

[23] *Id.* at 35-36, 100 P.3d at 966-67.

[24] Stephanie Reinhart, Note, *Rush Prudential HMO, Inc. v. Moran: 21 Or Bust! Does ERISA Preemption Give HMOs the Power to Gamble with Our Health?*, 19 AKRON TAX J. 99, 101 (2004); *see generally* James A. Wooten, *"The Most Glorious Story of Failure in the Business": The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFFALO L. REV. 683 (2001) (detailing the origins of ERISA as prompted by Studebaker's actions).

[25] *See* Reinhart, *supra* note 24, at 101.

mismanagement of pension funds when the Studebaker automobile manufacturer closed a South Bend, Indiana plant in 1963, leaving seven thousand workers unemployed and without their anticipated pension benefits.[26] Enter ERISA, a federal law governing certain employee benefit plans.[27] ERISA was intended to "protect . . . the interests of participants in employee benefit plans and their beneficiaries . . . ."[28] Congressional discussion and debate preceding adoption of ERISA focused heavily on protecting the pensions of American workers.[29] The result was a complex and comprehensive statutory regime with three basic provisions that are crucial to understanding the Hawai'i Supreme Court *HMAA* decision: the preemption provision, the saving clause, and the civil enforcement scheme.[30]

A. The Preemption Provision

ERISA includes an express preemption provision.[31] This provision provides that ERISA "shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . . ."[32] The provision was intended to "provide a uniform regulatory regime over employee benefit plans."[33] Nonetheless, ERISA left some wiggle room in which to debate what is "relate[d] to"[34] employee benefit plans.[35] The U.S. Supreme Court answered the question broadly: a law "relates to" an employee benefit plan when it "has a connection with or reference to such a plan."[36] The Court added that ERISA's uniform scheme "would be completely

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[26] *See generally* Wooten, *supra* note 24; *see also* Dennis K. Schaeffer, Comment, *Insuring the Protection of ERISA Plan Participants: ERISA Preemption and the Federal Government's Duty To Regulate Self-Insured Health Plans*, 47 BUFF. L. REV. 1085, 1089 (1999) (citing Michael Allen, Memorandum, *The Studebaker Incident and Its Influence on the Private Pension Plan Reform Movement, in* PENSION AND EMPLOYEE BENEFIT LAW 62-65 (John H. Langbein & Bruce A. Wolk eds., 1995)).

[27] *See generally* Wooten, *supra* note 24; *see also* Schaeffer, *supra* note 26.

[28] 29 U.S.C. § 1001(b) (2000).

[29] Brief for Senator Edward M. Kennedy et al. as Amici Curiae Supporting Respondent at 2, Aetna Health Inc. v. Davila, 542 U.S. 200 (2004) (Nos. 02-1845, 03-83), 2004 WL 177027.

[30] *See* Reinhart, *supra* note 24, at 103; *see generally* Haw. Mgmt. Alliance Ass'n v. Ins. Comm'r, 106 Hawai'i 21, 27-31, 100 P.3d 952, 958-62 (2004), *cert. denied*, ___ U.S. ___, 125 S. Ct. 2524 (2005) (the Hawai'i Supreme Court structures it's discussion and analysis around these provisions).

[31] 29 U.S.C. § 1144(a) (2000).

[32] *Id.*

[33] Aetna Health Inc. v. Davila, 542 U.S. 200, 208 (2004); *see* 29 U.S.C. § 1144 (2000).

[34] 29 U.S.C. § 1144(a).

[35] Reinhart, *supra* note 24, at 104.

[36] *Id.* at 105; Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47 (1987).

undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law."[37]

B. The Saving Clause

ERISA's saving clause "reclaims" ground that would otherwise be preempted: "nothing in this title shall be construed to exempt or relieve any person from any law of any State which regulates insurance . . . ."[38] If a state law "regulates insurance"[39] it is not expressly preempted by ERISA.[40] This contradiction with the preemption provision has perplexed courts and has prompted a call for Congressional clarification.[41] Absent Congressional guidance, courts have devised various tests to decide whether a state law "regulates insurance" for the purposes of the saving clause, which are discussed *infra*.[42]

C. Civil Enforcement of ERISA

ERISA also provided for an enforcement scheme that dictates the remedies available to participants under ERISA-governed plans.[43] This scheme is said

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[37] *Pilot Life Ins. Co.*, 481 U.S. at 54.

[38] 29 U.S.C. § 1144(b)(2)(A) (2000).

[39] *Id.*

[40] *Id.*

[41] Reinhart, *supra* note 24, at 106 & n.32 (illustrating courts' struggle with ERISA preemption and citing *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002), where the Court complains "[t]he 'unhelpful' drafting of these antiphonal clauses . . . occupies a substantial share of this Court's time." *Id.* at 364-65 (quoting New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 656 (1995) (internal citations omitted))). In an earlier case, the Court openly criticized the ERISA preemption clauses, noting that "commentators have recommended that Congress amend the preemption provisions to clarify its intentions." *Id.* at 106 n.32 (citing Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739-40 & n.16 (1985)).

[42] *See infra* Part III.B.1.

[43] The pertinent statutory provision provides:

(a) Persons empowered to bring a civil action. A civil action may be brought—(1) by a participant or beneficiary—(A) for the relief provided for in subsection (c) of this section, or (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan; (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under [section 1109 of this title, breach of fiduciary duty]; (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan; (4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of [1025(c) of this title, information to be furnished to participants];

to represent "a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans."[44] When a state law does not fall squarely under the preemption clause or the saving clause, the law is preempted if it supplants or supplements the civil enforcement provision.[45] Consequently, even laws that regulate insurance will be preempted if they provide remedies outside of those allowed under ERISA's civil enforcement provision.[46]

D. U.S. Supreme Court Interpretation of ERISA

The Supreme Court's interpretation and application of ERISA's preemption provision, saving clause, and remedial scheme has vacillated widely over the past twenty years. In the following sections, three representative cases illustrate the Court's shifting analysis.

1. Implied preemption

In 1987, in *Pilot Life Insurance Co. v. Dedeaux*,[47] the U.S. Supreme Court examined ERISA preemption of state law claims for bad faith breach of an insurance contract.[48] After Pilot Life had denied Dedeaux's disability claim, Dedeaux sued Pilot Life under state law for enforcement of the insurance

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(5) except as otherwise provided in subsection (b) by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title . . . .

29 U.S.C. § 1132(a) (2000).

[44] Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54 (1987).

[45] Reinhart, *supra* note 24, at 107 & n.40.

The petitioners in *Rush* argued that [the Illinois external review statute] was preempted from creating a sort of 'alternative remedy' to that which is allowed in ERISA's civil enforcement provision, . . . but the Court in *Rush* did not find [the Illinois external review statute] to be creating a new remedy. *See* [Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 376-81 (2002)]; Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990) (finding that Texas's tort of wrongful discharge, turning on an employer's motivation to avoid paying pension benefits, conflicted with ERISA enforcement); Metro. Life Ins. Co. v. Taylor, 481 U.S. 58, 64 (1987) (holding that Congress had so completely preempted the field of benefits law that an ostensibly state cause of action for benefits was necessarily a creature of federal law removable to federal court); Mass. Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 148 (1985) (concluding that Congress had not intended causes of action under ERISA itself beyond those specified in 1132(a)).

Id. at 107 n.40.

[46] *Id.* at 108; *see also Pilot Life Ins. Co.*, 481 U.S. at 54.

[47] 481 U.S. 41.

[48] *Id.* at 51-57.

contract, plus consequential and punitive damages under state common law.[49] Pilot Life asserted ERISA preemption as an affirmative defense to the state law claims.[50]

Dedeaux argued ERISA's saving clause expressly saved his state remedy from preemption because the state law "regulated insurance."[51] But Pilot Life contended that ERISA's saving clause did not apply because the state law at issue was not aimed *solely* at the insurance industry but could apply to other industries as well.[52] In an amicus brief, the Solicitor General focused on Congressional intent, and suggested that ERISA impliedly preempted state law claims because Congress intended that ERISA's civil enforcement provision provide exclusive recourse for a beneficiary whose employee benefit claim was mishandled.[53]

The United States Supreme Court agreed with the Solicitor General, and held that the bad faith state law remedy did not fit within ERISA's saving clause exception to preemption.[54] The Court applied a "common-sense understanding of the phrase 'regulate insurance.'"[55] In even more far-reaching dicta, the *Pilot Life* Court adopted the Solicitor General's interpretation that Congress intended to preempt *all* state law remedies arising from a plan participant's challenge to an adverse benefits determination.[56] For over a decade following *Pilot Life*, lower courts uniformly held that ERISA preempted all plan participant state law bad faith claims, even statutory claims that expressly applied only against the insurance industry.[57] Then the Court appeared to retreat from this expansive view of ERISA preemption.

2. A shift in analysis

In 1995, with *New York Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*,[58] the U.S. Supreme Court re-examined its broad

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[49] *Id.* at 43.

[50] *Id.* at 44.

[51] Donald T. Bogan, *ERISA: State Regulation of Insured Plans After Davila*, 38 J. MARSHALL L. REV 693, 702 (2005).

[52] *Id.*

[53] *Id.* at 703.

[54] *Pilot Life Ins. Co.*, 481 U.S. at 41, 50.

[55] *Id.*

[56] *Id.* at 52.

[57] *See, e.g.*, Anschultz v. Conn. Gen. Life Ins. Co., 850 F.2d 1467, 1468-69 (11th Cir. 1988) (per curiam) (illustrating that state laws did not regulate insurance within the meaning of ERISA's express savings clause); Kanne v. Conn. Gen. Life Ins. Co., 867 F.2d 489, 492 (9th Cir. 1988) (ERISA impliedly preempted the bad faith remedy); *see also* Bogan, *supra* note 51, at 703 (discussing ERISA preemption of state bad faith laws).

[58] 514 U.S. 645 (1995).

approach to ERISA preemption, and recognized that the phrase "relate to" in the ERISA saving clause preemption provision could be stretched indeterminately, forever foreclosing whatever meaning and purpose was captured in the saving clause.[59] The Court grounded its holding in the "'assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"[60]

The shift away from *Pilot Life*'s categorical preemption continued in 2003, when the U.S. Supreme Court, in *Kentucky Ass'n of Health Plans, Inc. v. Miller*,[61] abandoned the basis for the *Pilot Life* approach to the saving clause.[62] In *Miller*, the Court applied a two-prong analysis, asking first whether the state law was "specifically directed toward entities engaged in insurance,"[63] and second, whether the law "substantially affects the risk pooling arrangement between the insurer and the insured."[64] The broader saving clause test under *Miller* supported a narrow construction of *Pilot Life*, and advanced the rationale that ERISA does not always preempt state law remedies.[65]

In a further shift from *Pilot Life*'s absolute preemption, the Court in *Rush Prudential HMO, Inc. v. Moran*[66] ruled that ERISA does not preempt state external review laws that require insurers who deny physician-recommended medical treatment to submit to binding independent review of the claim denial.[67] Rush Prudential HMO argued that ERISA preempted Illinois' external review law because it provided an alternative remedy to the remedies provided in ERISA.[68] In a five-to-four decision, the U.S. Supreme Court rejected Rush Prudential HMO's argument.[69] The Court determined that, although the state external review law dictated the result of the claims dispute, in order to enforce the claim for benefits, the plan participant still had to sue under ERISA to recover benefits.[70]

The Court, however, did not end its opinion there, but "declared that the inference of preemption of state law remedies arising from ERISA's civil

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[59] *Id.* at 655.

[60] *Id.* at 654-55 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)) (citations omitted).

[61] 538 U.S. 329 (2003).

[62] Bogan, *supra* note 51, at 708 (citing *Miller*, 538 U.S. at 341-42).

[63] *Miller*, 538 U.S. at 341-42.

[64] *Id.* at 342.

[65] Bogan, *supra* note 51, at 708 (footnote omitted).

[66] 536 U.S. 355 (2002), *overruled on other grounds by Miller*, 538 U.S. at 341.

[67] *Id.* at 362.

[68] Bogan, *supra* note 51, at 709.

[69] *Rush*, 536 U.S. at 380.

[70] *Id.*

enforcement scheme was so strong that it trumped even the express language of the statute that would have otherwise saved the state insurance law remedies from preemption."[71] Commentators noted that the Court's dicta was "a gratuitous aside that would subsequently be relied upon in [*Aetna Health Inc. v. Davila*[72]] to shut the door on plan participant state law claims for extra-contractual damages."[73]

3. The current state of ERISA preemption

In 2004, *Davila* held that ERISA preempted a Texas state law that provided a remedy to improper health insurance claim denials.[74] The Texas Health Care Liability Act ("THCLA")[75] created a remedy in tort for individuals whose health insurers failed to exercise ordinary care in denying payment for recommended medical treatment.[76] Entities such as HMOs, which make medical judgments in the context of insurance coverage determinations, were the targets of the Texas statute.[77]

The Supreme Court found that the Texas state law remedies conflicted with the exclusive remedies provided in ERISA's civil enforcement provision, thereby nullifying negligence claims against health insurers.[78] ERISA's civil enforcement provision was found to supersede more than just state law remedies that duplicate the relief afforded by ERISA's civil enforcement scheme.[79] In a unanimous opinion, Associate Justice Clarence Thomas made clear the Court's holding that "any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted."[80] Following this decision it is difficult to imagine a state-law remedy that is not preempted.

The scope of ERISA preemption is actively changing: having expanded to a "categorical preemption"[81] in *Pilot Life*,[82] ERISA contracted to allow the

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[71] Bogan, *supra* note 51, at 709-10 (footnote omitted).

[72] 542 U.S. 200 (2004).

[73] Bogan, *supra* note 51, at 709-10 (footnote omitted).

[74] *Davila*, 542 U.S. at 204.

[75] TEX. CIV. PRAC. & REM. CODE ANN. §§ 88.001-.003 (Vernon Supp. 2004).

[76] *Id.*; *see also* Bogan, *supra* note 51, at 710-11.

[77] TEX. CIV. PRAC. & REM. CODE ANN. § 88.002(d); *see also* Bogan, *supra* note 51, at 710-11.

[78] *Davila*, 542 U.S. at 207-16.

[79] *Id.*

[80] *Id.* at 209 (citations omitted).

[81] Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 380 (2002) (describing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987)).

[82] *See supra* Part II.D.1.

Illinois state law to survive the preemption analysis in *Rush*,[83] and most recently, expanded again in *Davila*.[84] Amidst this state of flux, state legislators have laboriously attempted to afford their constituents the necessary protections to avoid the ERISA preemption axe.[85]

III. EXTERNAL REVIEW IN HAWAI'I

A. The Hawai'i Patients' Bill of Rights and Responsibilities Act

Since 1998, Hawai'i's Patients' Bill of Rights has provided health plan enrollees with an external review procedure for a managed care plan's final internal coverage determination.[86] The review is conducted by a three-member panel, appointed by the Insurance Commissioner, consisting of "a representative from a managed care plan not involved in the complaint, a provider licensed to practice and practicing medicine in Hawai'i not involved in the complaint, and the commissioner or the commissioner's designee."[87] The external review procedures may be triggered only after an enrollee, her treating provider, or her appointed representative has exhausted all internal complaint and appeal procedures.[88]

The review panel must determine whether the managed care plan "acted reasonably"[89] in making its final coverage assessment.[90] The review panel weighs many factors,[91] including whether medical necessity was properly

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[83] *See supra* Part II.D.2.

[84] *See supra* Part II.D.3.

[85] *See supra* text accompanying note 15.

[86] The Patients' Bill of Rights and Responsibilities Act, HAW. REV. STAT. § 432E-6 (2004).

[87] *Id.* § 432E-6(a).

[88] *Id.*

[89] *Id.* § 432E-6(a)(7).

[90] *Id.*

[91] HAW. REV. STAT. section 432E-6(a)(7) provides that:

The review panel and the commissioner or the commissioner's designee shall consider:

(A) The terms of the agreement of the enrollee's insurance policy, evidence of coverage, or similar document;

(B) Whether the medical director properly applied the medical necessity criteria in section 432E-1.4 in making the final internal determination;

(C) All relevant medical records;

(D) The clinical standards of the plan;

(E) The information provided;

(F) The attending physician's recommendations; and

(G) Generally accepted practice guidelines.

Id.

determined by the managed care plan under the statute.[92] Notably, the Insurance Commissioner and the external review panel do not determine medical necessity, but rather, consider only whether the managed care plan made the proper necessity determination.[93]

The statute imposes deadlines for both the enrollee who engages the process as well as the managed care plan that is implicated.[94] The request for review must be submitted to the Insurance Commissioner by the enrollee within sixty days of the managed care plan's final determination.[95] The managed care plan has seven days after the receipt of a request for external review to provide certain documents to the Commissioner or the reviewing organization.[96] A hearing must be held within sixty days of receipt of a request for hearing.[97] When medically necessary, an enrollee may request an expedited appeal which, if approved by the managed care plan or the Insurance Commissioner, must be completed within seventy-two hours.[98] Expedited appeals requested

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[92] HAW. REV. STAT. section 432E-1.4 provides that:

(b) A health intervention is medically necessary if it is recommended by the treating physician or treating licensed health care provider, is approved by the health plan's medical director or physician designee, and is:

(1) For the purpose of treating a medical condition;

(2) The most appropriate delivery or level of service, considering potential benefits and harms to the patient;

(3) Known to be effective in improving health outcomes; provided that:

(A) Effectiveness is determined first by scientific evidence;

(B) If no scientific evidence exists, then by professional standards of care; and

(C) If no professional standards of care exist or if they exist but are outdated or contradictory, then by expert opinion; and

(4) Cost-effective for the medical condition being treated compared to alternative health interventions, including no intervention. For purposes of this paragraph, cost-effective shall not necessarily mean the lowest price.

Id. § 432E-1.4.

[93] Lori K. Amano, Note, *Erisa and Federal Preemption Following Rush Prudential HMO, Inc. v. Moran: Preemptive Effects Felt in Hawai'i*, 25 U. HAW. L. REV. 593, 608 (2003).

[94] HAW. REV. STAT. §§ 432E-6(a)(1), (a)(3), (a)(5)(B) (2004).

[95] *Id.* § 432E-6(a)(1).

[96] *Id.* § 432E-6(a)(3). These documents include:

(A) Any documents or information used in making the final internal determination including the enrollee's medical records;

(B) Any documentation or written information submitted to the managed care plan in support of the enrollee's initial complaint; and

(C) A list of the names, addresses, and telephone numbers of each licensed health care provider who cared for the enrollee and who may have medical records relevant to the external review . . . .

Id.

[97] *Id.*

[98] *Id.* § 432E-6.5(a)(2). Under section 432E-6.5(b):

An expedited appeal shall be authorized if the application of the sixty day standard review

by licensed health care providers with knowledge of the claimant's medical conditions do not require further approval.[99] Finally, the statute further provides the enrollee with reasonable attorney's fees and costs incurred in connection with the external review, so long as the Commissioner has not deemed the appeal "unreasonable, fraudulent, excessive, or frivolous."[100] The Hawai'i Supreme Court recently had the opportunity to review this law.

B. HMAA

In *HMAA*, a unanimous Hawai'i Supreme Court held that Hawai'i's external review statute was impliedly preempted by ERISA.[101] Claimant-enrollee Kevin Baldado had been diagnosed with metastatic renal carcinoma in September 2000.[102] Baldado's physician requested authorization from the Hawai'i Management Alliance Association ("HMAA") to treat Baldado's cancer with a stem cell transplant.[103] HMAA denied coverage.[104] Baldado followed HMAA internal appeal procedures without success, receiving a final denial by letter in January of 2001.[105]

Baldado exercised his right to an expedited external review under Hawai'i's external review law.[106] HMAA was informed of the expedited appeal on that same day and, the following day, responded to the Commissioner's request for documentation related to HMAA's final internal determination.[107] HMAA timely fulfilled the request, but contested the procedure as preempted by ERISA, thereby rendering the external review unenforceable as to Baldado's

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time frame may:

(1) Seriously jeopardize the life or health of the enrollee;

(2) Seriously jeopardize the enrollee's ability to gain maximum functioning; or

(3) Subject the enrollee to severe pain that cannot be adequately managed without the care or treatment that is the subject of the expedited appeal.

Id. § 432E-6.5(b).

[99] *Id.* § 432E-6.5(c).

[100] *Id.* § 432E-6(e).

[101] Haw. Mgmt. Alliance Ass'n v. Comm'r, 106 Hawai'i 21, 100 P.3d 952 (2004), *cert. denied*, ___ U.S. ___, 125 S. Ct. 2524 (2005).

[102] *Id.* at 23, 100 P.3d at 954.

[103] *Id.*

[104] *Id.*

[105] *Id.* HMAA explained it denied Baldado's request because:

(1) Baldado's plan did not cover "investigational/ experimental procedure[s]"; (2) the service was not a covered benefit under federal government health plans; and (3) the service was not medically necessary.

Id.

[106] *Id.* at 24, 100 P.3d at 955.

[107] *Id.* at 25, 100 P.3d at 956. These documents also included any documents submitted by Baldado, and a list of all individuals who provided health care to Baldado. *Id.*

ERISA covered plan.[108] The Insurance Commissioner upheld HMAA's denial of coverage but disagreed with HMAA's ERISA preemption arguments: "[a] managed care plan's final internal determination is subject to external review, pursuant to HRS chapter 432E. As such, the review panel has jurisdiction over the subject external appeal."[109] The Commissioner then informed Baldado of his statutory right to apply for attorney fees and costs,[110] and eventually ordered HMAA to pay Baldado $12,462.99 in attorney fees and expert medical consultant services.[111] HMAA contested the Commissioner's order to pay fees, arguing that Baldado should pay their attorney fees since HMAA was the prevailing party.[112] Reconsideration was denied and HMAA appealed to the state circuit court, which found that the Commissioner did not err: Hawai'i's external review process, spelled out in the Hawai'i Patients' Bill of Rights statute, was not preempted by ERISA and the award of attorney fees and costs was proper.[113] HMAA appealed to the Hawai'i Supreme Court.[114]

1. The Hawai'i Supreme Court's analysis

HMAA had advanced two arguments to the circuit court: that the Hawai'i Patients' Bill of Rights was preempted by ERISA, and that HMAA should receive attorney fees and costs from Baldado.[115] On appeal, the Hawai'i Supreme Court focused its analysis on ERISA preemption.[116] Both Baldado and the Commissioner argued that the Hawai'i Supreme Court was not permitted to reach the question of ERISA preemption because the coverage order, which was favorable to HMAA, was never appealed.[117] But the Hawai'i Supreme Court saw preemption as a question of the Commissioner's and circuit court's subject matter jurisdiction, an issue which can be raised at any time.[118] The Hawai'i Supreme Court then applied a two-prong analysis, first focusing on whether the external review process within the Hawai'i

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[108] *Id.*

[109] *Id.*

[110] *Id.*; *see* HAW. REV. STAT. § 432E-6(e) (2004).

[111] *HMAA*, 106 Hawai'i at 25, 100 P.3d at 956.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.*

[116] *Id.* at 36, 100 P.3d at 967. Since the court ruled that the Hawai'i statute was indeed preempted, the attorney fees argument was rendered moot. *Id.*

[117] *Id.* at 26, 100 P.3d at 957. The Commissioner conceded that section 432E-6(3), which concerned attorney fees, was contested and HMAA was permitted to argue ERISA preemption concerning that section of the statute only. *Id.*

[118] *Id.* at 27, 100 P.3d at 958.

Patients' Bill of Rights was "expressly"[119] preempted by ERISA, and second, on whether the statute was "impliedly"[120] preempted.[121]

In its evaluation of whether the external review process of the Hawai'i Patients' Bill of Rights was expressly preempted, the Hawai'i Supreme Court weighed ERISA's express preemption clause against its saving clause.[122] Because Baldado's health plan was maintained by Baldado's employer, it was an employee benefit plan governed by ERISA.[123] ERISA expressly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[124] While at first glance, ERISA appears to preempt the Hawai'i Patients' Rights statute, the court found that the Patients' Rights statute was not directly preempted because it "regulates insurance" under the ERISA saving clause, as interpreted by *Rush* and *Miller*.[125]

In determining that the Patients' Rights statute was rescued by ERISA's saving clause, the court applied the two-part test articulated in *Miller*.[126] First, the state law must be specifically directed toward entities engaged in insurance.[127] Second, the state law must substantially affect the risk pooling arrangement between the insurer and the insured.[128] The first part of the *Miller* test was satisfied because the Hawai'i external review law was specifically directed toward entities engaged in insurance, and it imposed conditions on the right to engage in the business of insurance in Hawai'i.[129] The Hawai'i Supreme Court noted that "[a]ny insurer who wishes to provide health insurance must submit to an external review of its internal coverage or benefits determinations; if an insurer fails to comply with this requirement, the Commissioner may take away the insurer's license to conduct business in the state."[130] Because the right to do business in Hawai'i was conditioned upon the insurer's submission to the external review procedure, the statute regulated insurance, satisfying the first prong of the *Miller* test.[131]

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[119] *Id.*

[120] *Id.* at 29, 100 P.3d at 960.

[121] *Id.* at 27-31, 100 P.3d at 958-62.

[122] *Id.* at 27-29, 100 P.3d at 958-60.

[123] *Id.* at 27, 100 P.3d at 958 (citing 29 U.S.C. § 1003(a) (2000)).

[124] *Id.* (citing 29 U.S.C. § 1144(a) (2000)).

[125] *Id.* at 28, 100 P.3d at 959 (citing 29 U.S.C. § 1144(b)(2)(A) (2000)); Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355 (2002); Kentucky Ass'n of Health Plans, Inc. v. Miller, 538 U.S. 329 (2003)).

[126] *Id.* at 28-29, 100 P.3d at 959-60 (citing *Miller*, 538 U.S. at 341-42).

[127] *Id.* at 28, 100 P.3d at 959 (citing *Miller*, 538 U.S. at 338).

[128] *Id.*

[129] *Id.* *Miller* requires that a state law "impos[e] conditions on the right to engage in the business of insurance" to deserve the protections of the saving clause. 538 U.S. at 338.

[130] *HMAA*, 106 Hawai'i at 28, 100 P.3d at 959.

[131] *Id.*

Hawai'i's external review law also satisfied the second prong of the *Miller* test because it altered the terms of insurance policies.[132] Relying on *Miller* and *Rush*, the Hawai'i Supreme Court explained that the law need not "alter or control the actual terms of insurance policies"[133] so long as the state law "'substantially affect[ed] the risk pooling arrangement between insurer and insured'"[134] or "'altered the scope of permissible bargains between insurers and insureds.'"[135] An additional review process under the Hawai'i statute was created for an insurer's denial of coverage which "dictates to the insurance company the conditions under which it must pay for the risk that it has assumed."[136] If the insurer declines to follow the law, it risks losing its license to do business in Hawai'i.[137]

The Hawai'i Supreme Court was not persuaded by HMAA's arguments that the external review statute fell outside ERISA's saving clause, finding HMAA's position akin to those rejected by the Supreme Court in *Rush*.[138] HMAA argued that it was not an "insurance company" regulated under Hawai'i's insurance code.[139] However, the Hawai'i Supreme Court disagreed: "[n]othing in the saving clause requires an either-or choice between health care and insurance in deciding a preemption question, and as long as providing insurance fairly accounts for the application of state law, the saving clause may apply."[140] HMAA then contended that the saving clause did not apply because the Hawai'i statute regulates health care as well as insurance.[141] On this point, again, the Hawai'i Supreme Court relied on *Rush*, holding that where a state statute may affect non-insurers, the law is not removed from the "category of insurance regulation saved from preemption."[142]

Although the external review portion of the Hawai'i Patients' Bill of Rights survived the Hawai'i Supreme Court's express preemption analysis, the court ruled the law was "impliedly" preempted because it conflicted with ERISA's

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[132] *Id.*

[133] *Id.*

[134] *Id.* at 29, 100 P.3d at 960 (citing *Miller*, 538 U.S. at 338).

[135] *Id.* (citing *Miller*, 538 U.S. at 330).

[136] *Id.* (quoting *Miller*, 538 U.S. at 339 n.3).

[137] *Id.* (citing HAW. REV. STAT. § 431:2-203(c) (Supp. 2003) (providing that if an insurance licensee "persistently or substantially violates . . . an order of the commissioner . . . the commissioner may . . . in whole or in part, suspend, place on probation, limit or refuse to renew the license or certificate of authority")).

[138] *Id.* (citing Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 366-70 (2002)).

[139] *Id.* at 28, 100 P.3d at 959; HAW. REV. STAT. §§ 431:1-100 to :30-124 (Supp. 2003).

[140] *HMAA*, 106 Hawai'i at 28, 100 P.3d at 959 (quoting *Rush*, 536 U.S. at 367).

[141] *Id.*

[142] *Id.* (quoting *Rush*, 536 U.S. at 372).

civil enforcement scheme.[143] The court analyzed two types of implied preemption: "field" preemption and "conflict" preemption.[144]

Implied field preemption would apply if "Congress intended ERISA to occupy the entire field of HMO regulation."[145] ERISA's express preemption clause and saving clause together demonstrate congressional intent that the entire field of HMO regulation should not be occupied exclusively by ERISA. This intent was given effect by the U.S. Supreme Court in *Rush*, which upheld a state law regulating the insurance features of an HMO providing services under an ERISA-covered employee welfare benefit plan.[146] The Hawai'i Supreme Court explained that it required "clear and manifest"[147] congressional intent to supersede state laws in order to infer field preemption in an area such as health care, which is traditionally occupied by the state.[148] According to the Hawai'i Supreme Court, no such clear and manifest congressional intent was present in ERISA.[149]

The Hawai'i Supreme Court then examined the concept of implied conflict preemption as it applied to ERISA and the Hawai'i external review law.[150] After the U.S. Supreme Court's unanimous holding in *Davila*, "any state law that create[d] a claim for relief relating to an ERISA-regulated employee benefit plan necessarily conflict[ed] with § 1132(a) [ERISA's enforcement scheme] and [was] therefore preempted."[151] However, the Hawai'i Supreme Court found it necessary to reconcile this broad language with the earlier five-to-four U.S. Supreme Court ruling in *Rush*, where the Illinois external review law survived ERISA's preemptive scope because, instead of creating a new claim for relief, it rather resembled "'a practice (having nothing to do with

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[143] *Id.* at 29, 100 P.3d at 960; *see* 29 U.S.C. § 1132(a) (2000) ("A civil action may be brought by a participant or beneficiary to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.").

[144] *HMAA*, 106 Hawai'i at 30, 100 P.3d at 961.

[145] *Id.*

[146] *Id.*; *Rush*, 536 U.S. at 359.

[147] *HMAA*, 106 Hawai'i at 31, 100 P.3d at 962.

[148] *Id.* at 30-31, 100 P.3d at 961-62; *Rush*, 536 U.S. at 387; Pegram v. Herdrich, 530 U.S. 211, 237 (2000); *see* English v. General Electric Co., 496 U.S. 72, 79 (1990).

[149] *HMAA*, 106 Hawai'i at 31, 100 P.3d at 962.

[150] *Id.* at 31-36, 100 P.3d at 962-67.

[151] *Id.* at 31, 100 P.3d at 962. *Davila* held that "any state-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." Aetna Health Inc. v. Davila, 542 U.S. 200, 209 (2004). The Court further held that "[u]nder ordinary principles of conflict pre-emption, . . . even a state law that can arguably be characterized as 'regulating insurance' will be pre-empted if it provides a separate vehicle to assert a claim for benefits outside of, or in addition to, ERISA's remedial scheme." *Id.* at 217-18.

arbitration) of obtaining another medical opinion.'"[152] Justice Thomas, who later wrote the *Davila* opinion, dissented from the majority's holding in *Rush*.[153] Though he admitted that ERISA's saving clause allowed for some lack of uniformity, Justice Thomas felt that allowing state external review was "wholly destructive of Congress' expressly stated goal of uniformity in this area."[154]

The Hawai'i Supreme Court held that *Davila* was not intended to overrule *Rush* or *Miller*, and that under those U.S. Supreme Court decisions "the Hawai'i legislature may continue to 'regulate[] insurance' so long as the legislature does not create a 'cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy.'"[155] The distinction to be made is between "state laws that (1) create a state law claim for relief against an employee benefit plan and (2) require insurers to provide certain procedural protections to insureds (even if the insurance is provided as part of an ERISA-covered employee benefit plan)."[156] The Hawai'i Supreme Court concluded that "both *Rush* and [*Davila*] hold that a state may not create a new 'cause of action.' Both cases preserve the states' right to regulate insurance so long as those insurance regulations do not conflict with ERISA's civil enforcement scheme."[157]

In the final section of its analysis, the Hawai'i Supreme Court examined the text of Hawai'i's external review statute[158] to determine if it conflicts with ERISA's civil enforcement scheme by comparing it to the Illinois statute[159] examined in *Rush*.[160]

> [B]oth statutes provide for an independent review of an insurer's denial of benefits; both statutes require the reviewing individual(s) to consider the medical necessity of the procedure at issue; and both statutes allow the reviewing individual(s) to overturn the insurer's denial of coverage. Both statutes allow the

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[152] *HMAA*, 106 Hawai'i at 32, 100 P.3d at 962 (quoting *Rush*, 536 U.S. at 382-83). In *Rush*, the Supreme Court considered an Illinois statute that required an HMO to conduct an independent medical review of the patient's claim by "'a physician holding the same class of license as the primary care physician, who is unaffiliated with the [HMO], jointly selected by the patient . . . , primary care physician and the [HMO] . . . .'" *Rush*, 536 U.S. at 359-61 (quoting 215 ILL. COMP. STAT. 125/4-10 (2000)). The statute provided that the HMO was required to follow the reviewing physician's determination whether the covered service is medically necessary. *Id.*

[153] *HMAA*, 106 Hawai'i at 33, 100 P.3d at 964.

[154] *Id.* (citing *Rush*, 536 U.S. at 400-01).

[155] *Id.* (citing *Davila*, 542 U.S. at 200).

[156] *Id.*

[157] *Id.* at 34, 100 P.3d at 965 (footnote omitted).

[158] HAW. REV. STAT. § 432E-6 (2004).

[159] 215 ILL. COMP. STAT. 125/4-10 (2004).

[160] *HMAA*, 106 Hawai'i at 35, 100 P.3d at 966.

> reviewing individual(s) limited authority to interpret the terms of the insurance contract. Neither statute creates a claim for relief upon which an aggrieved beneficiary or participant can file a lawsuit, and neither statute enlarges a beneficiary's or participant's claim for benefits beyond what she or he could obtain pursuant to § 1132(a) [ERISA's enforcement scheme].[161]

But despite the similarities, the Hawai'i Supreme Court noted several important differences between the Hawai'i and Illinois statutes.[162] First, Hawai'i's statute incorporated chapter 91 of the Hawai'i Administrative Procedure Act,[163] which provides for judicial review of contested cases.[164] Another significant difference was that under the Illinois statute, a single physician determined whether a procedure was "medically necessary,"[165] whereas under the Hawai'i statute a three-member panel (including one physician) determined whether the HMO's actions were "reasonable."[166] The Hawai'i Supreme Court held that these differences were enough to distinguish the Hawai'i law from that which survived preemption in *Rush* because the Hawai'i law more closely resembled "contract interpretation or evidentiary litigation before a neutral arbiter than a practice (having nothing to do with arbitration) of obtaining another medical opinion."[167] Moreover, the right to judicial review of a claimant's entitlement was contrary to ERISA's civil enforcement scheme, which was the "exclusive vehicle for actions by ERISA-plan participants and beneficiaries asserting improper processing of a claim for benefits."[168] Hawai'i's external review statute "too closely resemble[d] adjudication and therefore [it was] preempted by [ERISA's civil enforcement scheme]."[169] In sum, the Hawai'i Supreme Court concluded:

> Because Hawaii's external review law is preempted, the Commissioner did not have jurisdiction to consider Baldado's claim. Correspondingly, the Commissioner did not have jurisdiction to award attorneys' fees and costs to Baldado, and the Commissioner's . . . orders are void.[170]

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[161] *Id.* (citations omitted).

[162] *Id.*

[163] HAW. REV. STAT. §§ 91-1 to 91-18 (2004); *see id.* § 432E-6(a)(4) ("[T]he commissioner shall . . . conduct a review hearing pursuant to chapter 91."). Chapter 91 provides "[a]ny person aggrieved by a final decision and order in a contested case . . . is entitled to judicial review thereof under this chapter[.]" *Id.* § 91-14 (1993).

[164] *HMAA*, 106 Hawai'i at 35, 100 P.3d at 966; HAW. REV. STAT. § 432E-6(a)(4).

[165] *HMAA*, 106 Hawai'i at 35, 100 P.3d at 966.

[166] *Id.*; HAW. REV. STAT. § 432E-6(a) (2004).

[167] *HMAA*, 106 Hawai'i at 35, 100 P.3d at 966 (internal quotation marks omitted).

[168] *Id.* (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 52 (1987)).

[169] *Id.* at 35, 100 P.3d at 967 (footnote omitted).

[170] *Id.* (citation omitted).

As a result, the Hawai'i legislature has been handed the task to see what, if any, part of the external review law can be salvaged.

IV. THE HAWAI'I LEGISLATURE TO THE RESCUE

A. Proposed Legislation in the Wake of Preemption

In response to the Hawai'i Supreme Court's ruling in HMAA, several bills have been introduced in the Hawai'i State House and Senate during the 2005 regular legislative session.[171] These bills recognize that enrollees who are denied coverage under health plans subject to ERISA are restricted to expensive, time-consuming challenges via arbitration or judicial review.[172] As a result, patients may be unwilling or unable to challenge a health plan's final internal denial of coverage.[173] Most of these bills propose to replace most of the external review provisions or even repeal it in its entirety.[174] The following sections provide a brief look at two of the introduced bills, which will be carried over into the 2006 regular legislative session.[175] Part V will then discuss what the law should look like in order to best protect the rights captured in the original Patients' Bill of Rights.

1. House Bill 395: distinguishing between "lack of coverage" and "medical necessity" denials

The bill that has made the most progress thus far is House Bill 395 ("Bill 395"), which has passed both readings in the House.[176] Bill 395 doubles the text of the original external review statute, dividing it into two tracks: (1) concerning questions of coverage under the plan,[177] and (2) concerning

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[171] *See, e.g.*, H.R. 382, 395, 663, 848, 870, 1340, 23d Leg., Reg. Sess. (Haw. 2005); S. 772, 23d Leg., Reg. Sess. (Haw. 2005).

[172] SEN. STAND. COMM. REP. NO. 1282, 23d Leg., Reg. Sess. (Haw. 2005), *available at* http://www.capitol.hawaii.gov/session2005/commreports/HB395_SD1_SSCR1282_.htm; *see also* Altonn, *supra* note 1, at A1. Edwin Jouxson had incurred $40,000 in pre-litigation attorneys fees during his appeal of a coverage denial of a $2,500 procedure. *Id.*

[173] SEN. STAND. COMM. REP. NO. 1282.

[174] *See, e.g.*, H.R. 382, 395, 663, 848, 870, 1340; S. 772.

[175] HAW. CONST. art. III, § 15.

> Any bill pending at the final adjournment of a regular session in an odd-numbered year shall carry over with the same status to the next regular session. Before the carried-over bill is enacted, it shall pass at least one reading in the house in which the bill originated.

Id.

[176] H.R. 395.

[177] *Id.* § 432E-A.

questions of "medical necessity."[178] Questions of coverage will be decided by the Commissioner, while questions of medical necessity will be reviewed by an independent organization selected through a bidding process.[179] Ostensibly missing is the provision for a hearing where the aggrieved party may present his case to the reviewer.[180]

These revisions are supported by HMAA but opposed by the Hawai'i Medical Service Association ("HMSA")[181] and patient advocate groups including the Hawai'i Department of Commerce and Consumer Affairs, the Hawai'i Coalition for Health,[182] the Hawai'i Disability Rights Center,[183] and the Kokua Council.[184] Kaiser Permanente[185] submitted comments neither in support nor in opposition of the bill.[186]

Opponents to the measure complained that the vast majority of coverage disputes will not fall under the independent review organization ("IRO") process measure because managed care plans usually deny coverage based on a lack of coverage and not on lack of medical necessity.[187] Other opponents were concerned that the interests of the enrollee were not sufficiently

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[178] *Id.* § 432E-B. "Medical necessity" is defined by HAW. REV. STAT. § 432E-1.4 (2004).

[179] H.R. 395 §§ 432E-A, 432E-B.

[180] *Id.*

[181] HMSA is the largest provider of healthcare coverage in Hawai'i, and is an independent licensee of the Blue Cross and Blue Shield Association. *See* Welcome to HMSA.com, http://www.hmsa.com/ (last visited Oct. 29, 2005).

[182] Hawai'i Coalition for Health, http://www.hawaiicoalition4health.com/welcome.htm (last visited Oct. 29, 2005). "The Coalition's goal is to secure a health care environment for Hawai[']i that ensures the availability and adequacy of the services that are essential to the health and well-being of all of Hawai[']i's people, in times of good health and bad, and in times of catastrophe." *Id.*

[183] Hawai'i Disability Rights Center, Services Overview, http://www.hawaiidisabilityrights.org/Services_Overview.aspx (last visited Oct. 16, 2005).

> HDRC is the designated Client Assistance Program (CAP) and Protection and Advocacy (P&A) System for Hawai[']i's estimated 180,000 residents with disabilities. [HDRC] strive[s] to serve as many individuals with disabilities with as many different legal rights issues as . . . resources will allow . . . to advance the human, civil and legal rights of people with disabilities[.]

Id.

[184] SEN. STAND. COMM. REP. NO. 1282, 23d Leg., Reg. Sess. (Haw. 2005), *available at* http://www.capitol.hawaii.gov/session2005/commreports/HB395_SD1_SSCR1282_.htm; *see also* Kokua Council, http://kokuacouncil.org/ (last visited Oct. 16, 2005). The "Kokua Council seeks to empower seniors and other concerned citizens to be effective advocates in shaping the future and well-being of our community, with particular attention to those needing help in advocating for themselves." *Id.*

[185] Kaiser Permanente is the largest HMO in Hawai'i with 235,192 participants. Kaiser Permanente, National Stats, https://newsmedia.kaiserpermanente.org/kpweb/fastfactsmedia (follow "Hawaii" hyperlink) (last visited Oct. 16, 2005).

[186] H.R. 395 §§ 432E-A, 432E-B, 23d Leg., Reg. Sess. (Haw. 2005).

[187] SEN. STAND. COMM. REP. NO. 1282.

protected.[188] The Commissioner submitted a proposal for the Committee's consideration.

2. Different review for different plans: ERISA or non-ERISA?

A second bill, House Bill 1340 ("Bill 1340"), also provides multiple procedures for external review, based principally on whether the health plan under review is subject to ERISA.[189] If a health plan is ERISA-governed, a minimal level of review applies. For non-ERISA governed plans, review is substantially similar to that embodied in the current external review statute. A unique feature of Bill 1340 is that it requires the Insurance Commissioner to retain an organization to serve as the State's health consumer advocate to assist in carrying out the Patients' Bill of Rights and Responsibilities Act.[190] While this measure was supported by one patients' advocate group, the Hawai'i Coalition for Health, most health plan providers opposed the measure.[191] Based on the progress of Bill 395, Bill 1340's prospects of becoming law appear slim even though Bill 1340 better preserves patients' rights as intended under the Patients' Bill of Rights.

V. WHAT THE LAW SHOULD LOOK LIKE: A LAYERED APPROACH

There is a tension that must be balanced between the desires of the legislature to provide procedural recourse for patients who may be denied medically necessary treatment, and the outer limits of a seemingly all-encompassing, categorical federal preemption. Hawai'i's external review statute should therefore be constructed like an onion: in layers. Although the outer layers of an onion can be peeled away one at a time, a smaller version of the onion remains intact. Each layer of the external review onion represents a provision of the statute. While ERISA may preempt some provisions of external review, a baseline of independent review will be sure to persist. At the core of the statutory onion are those provisions that are the most certain to survive an ERISA preemption challenge in light of the Hawai'i Supreme Court's ruling in *HMAA*. The outermost layers are those provisions that are more likely than not to be ERISA-preempted. Each provision of the statute should be independently drafted to stand alone. The outermost layers

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[188] *Id.*

[189] H.R. 1340, 23d Leg., Reg. Sess. (Haw. 2005).

[190] *Id.*

[191] H.R. STAND. COMM. REP. NO. 217, 23d Leg., Reg. Sess. (Haw. 2005), *available at* http://www.capitol.hawaii.gov/session2005/commreports/hb1340_hd1_hscr217_.htm. The Bill was opposed by Kaiser Permanente, and Hawai'i Medical Service Association as well as the Department of Commerce and Consumer Affairs. *Id.*

of the statute will best protect patients rights, but at the expense of increasing the likelihood that the law will fall within ERISA's reach.[192]

A. The Core of the External Review Onion: Independent Physician Review of Medical Necessity

According to Rush, a mechanism that looks more like an additional medical opinion, and less like an alternative remedy to ERISA, will pass muster and survive ERISA preemption.[193] The Illinois law upheld in Rush is thus a model for the core of an external review statute.[194] Although this model provides only minimal patient protection compared with the current Hawai'i external review statute, it has withstood U.S. Supreme Court scrutiny (albeit in a narrow five to four ruling).[195]

The Illinois statute is short and concise, providing for review by an independent physician selected jointly by the patient, primary care physician, and HMO.[196] The patient benefits by having a physician who is an expert in his field give an educated opinion as to the treatment needed within the accepted standard of care. Additionally, administrative procedures and affiliated administrative costs are left to the insurer to define, reducing the burden on the Insurance Commissioner and her agency.[197] The Hawai'i legislature is not deaf to these requirements, as evidenced by the introduction of House Bill 382 early in 2005, which proposes to replace Hawai'i's external review statute with one identical to the Illinois statute.[198]

Hawai'i's adoption of the Illinois external review statute may provide some protection to ERISA-governed health plan beneficiaries where there is none

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[192] Recall that an ERISA-preempted statute is only rendered ineffective as to ERISA-governed health plans. *See supra* note 8. Plans that do not fall under ERISA are unaffected. *See id.*

[193] Rush Prudential HMO, Inc. v. Moran, 536 U.S. 355, 383 (2002).

[194] *See* 215 ILL. COMP. STAT. 125/4-10 (2000). The statute provides in relevant part:

> Each Health Maintenance Organization shall provide a mechanism for the timely review by a physician holding the same class of license as the primary care physician, who is unaffiliated with the Health Maintenance Organization, jointly selected by the patient . . . , primary care physician and the Health Maintenance Organization in the event of a dispute between the primary care physician and the Health Maintenance Organization regarding the medical necessity of a covered service proposed by a primary care physician. In the event that the reviewing physician determines the covered service to be medically necessary, the Health Maintenance Organization shall provide the covered service.

Id.

[195] *Rush*, 536 U.S. at 359.

[196] *See* 215 ILL. COMP. STAT. 125/4-10.

[197] *Id.* ("Each Health Maintenance Organization shall provide a mechanism for the timely review by a physician[.]").

[198] H.R. 382, 23d Leg., Reg. Sess. (Haw. 2005).

today, but it is a far cry from the protections offered by the original Hawai'i statute as interpreted and applied pre-*HMAA*.[199] Indeed, the U.S. Supreme Court acknowledged in *Rush* that the Illinois statute "purports to make the independent reviewer's judgment dispositive as to what is 'medically necessary.'"[200] The statute asks a physician to interpret the contract between the enrollee and the managed care plan by determining what procedures are covered as "medically necessary."[201] The doctor, therefore, must be provided with a copy of the applicable law defining medical necessity when making decisions.

In Illinois, "medical necessity" is not defined by law.[202] In *Rush*, for instance, "medical necessity" was defined in the terms of coverage.[203] There, the independent physician's interpretation of "medical necessity" was based on the terms of the policy and his own medical judgment.[204] While granting the discretion to determine "medical necessity" was permissible in *Rush*, the U.S. Supreme Court noted that insurance contracts do not necessarily have to guarantee medically necessary services to plan participants, and noted that some plans exclude experimental procedures from coverage.[205]

In Hawai'i, "medical necessity" is defined by statute.[206] The Hawai'i definition of medical necessity alone is six times as voluminous as the entire Illinois external review statute.[207] The expansive definition, however, is superfluous as applied to ERISA-governed plans. While the Hawai'i statutory definition of "medical necessity" was likely intended to apply to health coverage contractual obligations, the first sentence of the definition swallows the provision: "[f]or contractual purposes, a health intervention shall be

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[199] *Compare* HAW. REV. STAT. § 432E-6 (2004), *with* 215 ILL. COMP. STAT. 125/4-10; *see also* Haw. Mgmt. Alliance Ass'n v. Comm'r, 106 Hawai'i 21, 35, 100 P.3d 952, 966 (2004), *cert. denied*, ___ U.S. ___, 125 S. Ct. 2524 (2005) (for a direct comparison of the statutes).

[200] *See Rush*, 536 U.S. at 380 n.9.

[201] *Id.* at 380.

[202] *See id.* at 359.

[203] *Id.*

> The certificate specifies that a service is covered as "medically necessary" if Rush finds: (a) [The service] is furnished or authorized by a Participating Doctor for the diagnosis or the treatment of a Sickness or Injury or for the maintenance of a person's good health. (b) The prevailing opinion within the appropriate specialty of the United States medical profession is that [the service] is safe and effective for its intended use, and that its omission would adversely affect the person's medical condition. (c) It is furnished by a provider with appropriate training, experience, staff and facilities to furnish that particular service or supply.

Id.

[204] *Id.* at 362.

[205] *Id.* at 380 n.10 (citation omitted).

[206] HAW. REV. STAT. § 432E-1.4 (2004).

[207] *Compare id.*, *with* 215 ILL. COMP. STAT. 125/4-10 (2000).

covered if it is . . . not specifically excluded . . . . A health intervention may be medically indicated and not qualify as a covered benefit or meet the definition of medical necessity."[208] Insurers are free to exploit such loopholes. As the *Rush* court indicated, "[s]ome [health plans] guarantee medically necessary care, but then modify that obligation by excluding experimental procedures from coverage."[209] This very concern was brought to the attention of the Hawai'i legislature.[210] Questions of "medical necessity" often turn on whether experimental treatments are covered by the particular plan. Furthermore, the reviewing physician should be limited to making decisions that she is qualified to make—namely, whether or not a treatment or procedure is medically warranted. Though the Hawai'i Supreme Court did not emphasize the necessity of physician review, it is nonetheless the heart of a viable preemption-avoiding external review statute. This requirement that allows an aggrieved party to present its case to an independent medical expert is all but lost in Bill 395, which permits an insurer to classify a procedure as "experimental" and therefore not covered.[211] Under Bill 395, such a classification would fail to trigger external review by a professional with medical expertise.[212] Bill 1340 much better addresses these concerns by allowing the Commissioner to appoint a medical expert or independent review organization in all cases.[213] However, even Bill 1340 doesn't require physician review.[214] The simple text of the Illinois statute providing for independent physician review is the better solution.

B. Layer One: The Commissioner Shall Ensure Independent Review

The reviewing physician or organization must be free of all potential conflicts of interest. The fact that the managed health organization will likely pay reviewing physicians or organizations increases the potential for abuse: if a physician finds against an insurer too many times, the insurer may react by declining to hire the physician for future reviews. For this reason, the physician should be either appointed by the Insurance Commissioner or selected by mutual agreement of the enrollee, the referring physician, and the health care plan. The Commissioner should be charged with maintaining a list of available physicians or review organizations as suggested in Bill 1340. Bill

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[208] HAW. REV. STAT. § 432E-1.4(a) (2004) (emphasis added).

[209] 536 U.S. at 380 n.10.

[210] SEN. STAND. COMM. REP. NO. 1282, 23d Leg., Reg. Sess. (Haw. 2005), *available at* http://www.capitol.hawaii.gov/session2005/commreports/HB395_SD1_SSCR1282_.htm.

[211] *See* H.R. 395 § 432E-A, 23d Leg., Reg. Sess. (Haw. 2005).

[212] *See id.*

[213] *See* H.R. 1340 § 432E-6(a)(2), 23d Leg., Reg. Sess. (Haw. 2005).

[214] *Id.*

395's suggested bidding process for selection of an independent review organization may also be acceptable—but Bill 395's restriction limiting the use of independent review organizations to "medical necessity" cases only undermines this scheme. A benefit denial may too easily be classified as "medically necessary but not covered" or simply "experimental" in order to avoid independent medical review.

C. Layer Two: No State-Level Judicial Review

In the *HMAA* case, the Hawai'i Supreme Court plainly spelled out that judicial review was fatal to the current external review statute.[215] This was evident from *Davila*'s mandate that state laws cannot give rise to a cause of action separate from ERISA.[216] Rather, the sole cause of action is federal litigation under ERISA,[217] and post-*Davila* state law claims have been dismissed by courts for failure to state a cause of action.[218] Clearly, the Hawai'i external review law as it pertains to ERISA governed plans cannot follow the Hawai'i Administrative Procedure Act as it specifically provides for judicial recourse.[219] One could argue, however, that administrative review external to the insurer's final determination is itself a form of external adjudication or remedy. Thus, the safest path for future legislation would be for the legislature to require insurers to conduct the final independent review prior to announcing a final determination.[220] This approach would, in effect, eliminate "external review" per se, but would provide for an additional layer of independent review that would benefit the enrollee. An additional advantage to this approach is that any findings of the reviewer would become part of the administrative record and would be considered under a subsequent

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[215] Haw. Mgmt. Alliance Ass'n v. Comm'r, 106 Hawai'i 21, 35, 100 P.3d 952, 966 (2004), *cert. denied*, ___ U.S. ___, 125 S. Ct. 2524 (2005) ("More damaging [to the external review law], however, is the right of either party to seek judicial review.").

[216] Aetna Health Inc. v. Davila, 542 U.S. 200, 217-18 (2004). "Under ordinary principles of conflict pre-emption . . . even a state law that can arguably be characterized as 'regulating insurance' will be pre-empted if it provides a separate vehicle to assert a claim for benefits outside of, or in addition to, ERISA's remedial scheme." *Id.*

[217] *Id.* at 217.

[218] *See, e.g.*, Cleghorn v. Blue Shield, 408 F.3d 1222 (9th Cir. 2005) (insured's sole recourse was under ERISA where health insurer refused payment for emergency medical treatment under ERISA governed plan); *see also* DaPonte v. Manfredi Motors, Inc., 335 F. Supp. 2d 352 (E.D.N.Y. 2004), *aff'd*, DaPonte v. Manfredi Motors Inc., 2005 U.S. App. LEXIS 19948 (2d Cir. Sept. 15, 2005).

[219] *HMAA*, 106 Hawai'i at 35, 100 P.3d at 966.

[220] This is essentially the procedure in the Illinois statute. *See* 215 ILL. COMP. STAT. 125/4-10 (2000).

appeal under ERISA.[221] However, the independent judgment of the final reviewer should be guaranteed legislatively, lest this final review become nothing more than an additional bureaucratic hurdle. Neither Bill 1340 nor Bill 395 capture independent review as a required component of a coverage denial. Again, the structure of the Illinois statute is superior.

D. Layer Three: Accessibility to Aggrieved Parties

Under the current Hawai'i statute, the ability of an aggrieved party to file an appeal under the statute is greatly enhanced by the clause that awards attorney fees and expenses for non-frivolous filings.[222] However, there is little chance that this clause, if examined independently, would survive preemption. Attorney fees will arguably be considered an enhanced remedy or form of civil enforcement in addition to ERISA's civil enforcement scheme under *Davila*.[223] Attorney fees, in effect, can penalize the insurer even when benefits are appropriately denied. Although attorney fees can be awarded under ERISA, the attorney assumes a substantially higher risk by relying on ERISA's fee-shifting provisions,[224] thereby reducing the attorney's willingness to accept a case when the patient is unable to pay.

A viable proposal to remedy this problem was presented as part of Bill 1340, introduced before the Hawai'i State House of Representatives. Bill 1340 proposed free counseling to enrollees who are considering an appeal, which includes assistance in filing the appeal.[225] Under Bill 1340, this counseling function would be funded by managed care organizations through a nominal per capita levy on each insured.[226] This provision speaks to the spirit of the Patients' Bill of Rights and should be adopted.

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[221] This was explicitly provided for in Bill 1340:

> In cases in which the enrollee retains a right or is exercising the concurrent right to a civil action under [ERISA] 29 U.S.C. 1132, any evidence considered in a review . . . shall be deemed to have been reviewed by the plan administrator during the administration process, and the decision in the review shall provide a statement to that effect.

H.R. 1340 § 432E-6(a)(5)(d), 23d Leg., Reg. Sess. (Haw. 2005).

[222] *See* HAW. REV. STAT. § 432E-6(e) (2004).

[223] "[S]tate-law cause of action that duplicates, supplements, or supplants the ERISA civil enforcement remedy conflicts with the clear congressional intent to make the ERISA remedy exclusive and is therefore pre-empted." Aetna Health Inc. v. Davila, 542 U.S. 200, 209 (2004) (citing Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 54-56 (1987)).

[224] *See* 29 U.S.C. § 1132(g) (2000).

[225] *See* H.R. 1340 § 432E-6(1)(g) (Haw. 2005).

[226] *Id.* The Bill suggests an annual levy of twenty cents per member enrolled. *Id.*

E. The Outermost Layer: Maintain Protections for Non-ERISA Beneficiaries

Although it has been preempted by ERISA, the Hawai'i external review statute still is in full effect with respect to health insurance that is not governed by ERISA. While some proposed amendments seek to completely eliminate current protections in Hawai'i for both ERISA and non-ERISA governed plans,[227] others aim to safeguard the original protections still afforded to non-ERISA governed plans while proscribing an alternate review process for ERISA governed plans.[228] The latter approach more accurately reflects the intent of the legislature to provide a means of external review for Hawai'i's patients.

With ERISA governance being the most prominent factor in determining the level of state law protection, an enrollee who desires to appeal a health coverage denial may find herself asking why she is denied the full protection of the state law. To someone who has never heard of ERISA, such a distinction would seem arbitrary. Nevertheless, the fact remains that protections intended for everyone can only be applied to the minority of health care plan enrollees—and it would be a step backward to do away with the remaining protections, especially since the distinction between ERISA governed and non-ERISA governed plans is not always clear.[229] For this reason, Bill 1340's distinction is appropriate, whereas Bill 395's "medical necessity" distinction serves to extinguish existing rights.

VI. CONCLUSION

Hawai'i's external review procedure, like that of other states, has an uncertain path ahead. In the face of *Davila*, which, despite appearances, can still be reconciled with *Rush*, states face a choice: legislate and risk once again being preempted or do nothing, thereby leaving it to the federal government to solve the problem of inadequate and untimely remedies for healthcare coverage denials. In *HMAA*, the Hawai'i Supreme Court offered guidelines for legislative action: eliminate judicial review and do not duplicate, supplement, or supplant ERISA remedies. Change is in the pipeline as Bill 395 and Bill 1340 make their way through the legislative process.

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[227] *See* H.R. 382, 23d Leg., Reg. Sess. (Haw. 2005).

[228] *See, e.g.*, H.R. 1340.

[229] Indeed, recent litigation surrounding Hawai'i's external review statute revolves around whether a health care plan is subject to ERISA. *See, e.g.*, Haw. Med. Serv. Ass'n v. Ins. Comm'r, 108 Hawai'i 88, 117 P.3d 119 (2005) (unpublished disposition) (remanding due to insufficient facts in the record to draw a legal conclusion whether enrollees managed care plan was or was not covered by ERISA, 29 U.S.C. §§ 1002-1003 (2000)).

However, neither proposal preserves necessary patient rights while remaining flexible enough to accommodate the ebb and flow of ERISA preemption.

A layered approach to legislative action would be flexible enough to withstand attack under ERISA. Preemption could peel away the outer layers of the external review onion, but at a minimum, a core of protection based on the Illinois statute in *Rush* would remain intact to defend the ERISA plan enrollee. Thus, while the legal protections afforded by the original Hawai'i Patients' Bill of Rights are foreclosed, state legislative measures can still protect health plan enrollees.

Zachary Antalis[230]

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